

OBTAINING EVIDENCE FOR USE IN A FOREIGN JURISDICTION

Thailand

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I. Introduction

Thailand is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, although it does maintain treaties addressing such issues with certain nations.

Thailand also does not yet have any formal body of law dedicated to the taking of evidence for use in foreign jurisdictions.

As such, any requests for evidence must originate from the foreign jurisdiction and pass through diplomatic channels for enforcement in Thailand. The Thai Ministry of Foreign Affairs and Office of the Judiciary are the official authorities who would receive any such requests and oversee the transmission of same to the appropriate courts.

II. Witness Testimony

A. Depositions

Depositions or examinations upon oral questions cannot be effected in Thailand without the mutual agreement of the witness being deposed. Upon consent of the witness, sworn testimony would normally be taken by audio and/or video recording as there are no stenographers for such purposes as exist in the United States and other western nations. Where needed, however, qualified interpreters are available to attend. The testimony itself can be conducted in any mutually agreeable location and need not be conducted within the courthouse.

B. Letters Rogatory

In situations where the witness will not voluntarily consent to give evidence, parties must proceed by examination upon written questions (also known as interrogatories or “Letters Rogatory”).

Letters Rogatory would take the form of written questions posed to the witness sought to be examined. These questions should be detailed and clear, and afford little opportunity for the witness to avoid giving a complete response. Said Letters Rogatory should thereafter be translated into Thai by a certified translator.

Once drafted, foreign counsel would make application to the appropriate court in its foreign jurisdiction for an order dictating that (a) such testimony is required in a pending proceeding within the foreign jurisdiction and (b) formally requesting that the Thai Judiciary serve and proceed to collect such testimony from the subject witness. The order should also identify the name and location of the witness whose testimony is sought as well as annex the particular Letters Rogatory with the Thai translation to be posed to such witness.

Such order and attachments should then be delivered to the appropriate foreign diplomatic agency within the foreign jurisdiction for transmission to said foreign jurisdiction's national embassy/consulate here in Thailand. The foreign embassy/consulate would, in turn, forward same to the Thai Ministry of Foreign Affairs, which in turn would forward same to the Office of the Judiciary. The Office of the Judiciary would then direct the matter to the appropriate court in the jurisdiction wherein the witness is located.

Upon receipt, the local court will review same and determine if same is in proper order and conforms with Thai law. (The court has the discretion to reject same, but normally cooperates.) Thereafter, the court will schedule a hearing and summons the witness to attend. At such hearing, the judge will ask the questions of the witness and transcribe the witness' answers onto a tape recorder and subsequently in writing. Note that Thai Courts will not normally record the testimony verbatim. Instead, the judge summarizes the testimony according to his understanding of the important issues. Consequently, it is recommended that the foreign client retain local Thai counsel to attend the hearing. It is equally important that such Thai counsel be well informed of the issues, so that he can assist the Court and ensure that evasive answers are addressed appropriately. In addition, the Thai counsel will explain the need for the judge to prepare a more comprehensive record of the testimony than is normal practice in Thailand. Finally, it is possible that the Court would permit the hearing to be videotaped if the Letters Rogatory and accompanying foreign court order so requested.

III. Documentary Evidence

In order to compel the production of documentary evidence, a foreign party must again obtain a court-ordered request for same ("Request") following the same guidelines provided above for Letters Rogatory. Such order should identify the evidence sought in detail and provide the name and location of the party having possession of same in Thailand, and, as before, contain a certified Thai translation of the evidence sought.

IV. Personal/Real Property Inspection

Section 99 of the Thailand Civil Procedure Code authorizes the Thai Courts to direct an inspection of property upon application of a party. Following the same procedure described above, a foreign court would issue an order requesting the Thai Judiciary to effect such an inspection, identify in detail the subject of such inspection and the purpose

therefor, the party to effect such inspection in Thailand (an expert or Thai counsel), and annex a certified Thai translation of said request.

V. Objections

Notwithstanding the authorization of the foreign court, any Letters Rogatory, requests for documentary evidence, or inspections of property must conform to Thai law and be approved by the Thai Court of competent jurisdiction. Moreover, any effort to obtain evidence of any nature as described above will also entitle the witness or party required to produce the evidence an opportunity to object to such request. Such objections can be based not only on Thai law, but also potentially under the laws of the foreign jurisdiction for which such evidence is destined to be utilized. Efforts to obtain evidence which are either themselves contrary to the morals or public policy of Thailand, or relate to cases the subject matter of which are contrary to Thai morals and/or public policy, will normally be denied.

VI. Time

Experience suggests that the entire process of moving such evidence requests through diplomatic channels, and scheduling/conducting the appropriate hearing, can easily take from six to twelve months, although it is oftentimes possible for local Thai counsel to shave several months off the process by tracking the evidence requests through the various governmental agencies and courts here in Thailand. In addition, there are ample opportunities for delay, in the event the witness refuses to cooperate and takes steps to obstruct the process.

VII. Conclusion

The above is merely a summary of the legal framework for obtaining evidence in Thailand for foreign use. The best strategy for collecting such evidence will, of course, vary from case to case based upon the factual circumstances, parties involved, subject matter sought, etc. It is therefore recommended that in every instance local Thai counsel be consulted before proceeding in Thailand and even before proceeding to request such relief in the foreign country's tribunal in order to avoid errors/delays caused by miscommunication or misunderstanding, to ensure coordination on both sides, and to follow the requests through the judicial process in order to clear any obstacles that may present themselves.

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