

# **A PRIMER ON THE THAI DRAFT LAW ON CLASS ACTION**

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## **1. ORIGINS OF THE LAW ON CLASS ACTION**

A class action proceeding is one way of initiating a lawsuit on behalf of a large number of injured parties. It is also one of the most longstanding mechanisms in the Anglo-Saxon legal tradition. One could travel back in time to the middle ages in England and discover that such procedures were applied in equity courts. However, the evolution of class action in England reached a blind alley after a court judgment in 1910 ruled that there was a lack of mutual benefit among class members, a prerequisite for courts to hear a class suit, due to possible variations in the rights of each individual party to receive compensation

Nonetheless, in due course, there were other suggestions of allowing private parties to come together in order to bring a lawsuit to seek redress for damages suffered by individuals, hence the origins of class action. This procedure was especially successful in the United States of America. Provisions on class action procedures may be found in Rule 23 of the US Civil Procedure Laws, the gist of which allows parties to bring class actions for damage claims and injunction proceedings. These rules were amended once in 1966 and has spread out to other common law jurisdictions such as Canada, Australia and even some civil law jurisdictions such as Brazil, Quebec (Canada) and other

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\* With the assistance of the Secretariat of the Civil Procedure Code Revision Committee and Mr. Yordchatr Tasarika for the English translation

countries in Asia, i.e. China and Indonesia. France has also attempted to introduce draft legislation in this regard but to no avail.

## **2. DEVELOPMENT OF THE THAI DRAFT LAW ON CLASS ACTION**

In Thailand, the first draft law on class action originated from a Bill on Class Action for Securities Proceedings B.E. .... This bill was introduced by the Securities and Exchange Commission (SEC) as an extension of its current powers under the Securities and Exchange Act B.E. 2535 (1992) to file a lawsuit on behalf of debenture holders. Success in the exercise of such power in the past had been modest due to several reasons. (1) Firstly, the provisions that empower the SEC to file a lawsuit on behalf of debenture holders are rather brief and imprecise, rendering it uncertain as to whether other injured parties are also entitled to file individual suits once a lawsuit has been filed by the SEC. (2) Secondly, the SEC does not usually enjoy the cooperation of the injured party when filing a lawsuit. Nonetheless, investors in the capital market continue to incur losses from the purchase or sale of securities as a result of offences under the law on securities and exchange market such as inaccurate or incomplete disclosure of information pertaining to the offer for sale of securities or the manipulation of securities prices. Therefore, in order to protect investors in the capital market and seek indemnification for losses resulting from offences under the law on securities and exchange without having to bring costly individual lawsuit accompanied by long delays, the Securities and Exchange Commission (SEC) deemed it necessary to draft a specific law to address this issue.

The initial draft law on Class Action for Securities Proceedings B.E. .... by the Securities and Exchange Commission largely adopted the principles found in Rule 23 of the United States Federal Rules of Civil Procedure, a concept which aimed to give injured parties a greater role in seeking redress for wrongdoings. The essential provisions of this law comprised 3 parts, namely:

(1) The appropriate prerequisites for initiating a class action. Principles from the United States of America have been adopted whereby the court plays a central role in determining whether leave should be granted for a class action.

(2) Most trial procedures would still be subject to the law on civil procedures. However, there will be certain procedures specifically enacted for class actions. For example, in an ordinary case, the Civil Procedure Code provides that the withdrawal of a lawsuit may be achieved simply by giving notice to the court if a defence plea has not yet been filed by the defendant. If a defence plea has already been filed, then the court must first hear the defendant's objections. On the other hand, in a class action, the court has the discretion in every case in determining whether leave should be granted to the plaintiff to withdraw the lawsuit. When making a determination, the interests of the class member would be the primary consideration. The reason for stipulating such a condition is that if the plaintiff is allowed to withdraw a class action lawsuit in the same manner as an ordinary case, the plaintiff may employ class actions as a means of coercing the defendant to pay compensation in return for withdrawing the lawsuit at the expense of the interests of a very large number of class members.

(3) Motivation for class actions. The person who plays one of the most significant roles in a class action is the attorney who encouraged the filing of a lawsuit. The attorney would have to advance all costs of proceedings with the ultimate attorney's fees being the motivating factor for carrying out the lawsuit.

The Securities and Exchange Commission completed its draft of the Bill on Class Action for Securities Proceedings B.E. ... towards the end of 2001 at which time the Bill was forwarded to the Office of the Council of State in advance of it being submitted to the Council of Ministers for consideration. The Secretary-General of the Council of State at that time (Professor Chaiwat Wongwattanasan) considered it appropriate to submit the Bill to the Civil Procedure Code Revision Committee, chaired by Mr. Jamras Khemajaru (Privy Councillor and former President of the Supreme Court), to determine whether the principles of class action should be extended to incorporate cases of mass losses resulting from torts, breach of contracts or other forms of losses arising from specific laws which were designed to protect a wide span of the population. The Secretary-General believed that the application of this legal principle to other legal proceedings would greatly enhance the facilitation of justice to the people as class actions save costs and time as well as provide an efficient means of reducing the number of cases that reach the courts.

The Committee subsequently appointed a “Subcommittee for the Revision of the Civil Procedure Code on Aspects Relating to Class Actions”, chaired by former Vice-President of the Supreme Court Mr. Somboon Boonphinont, to take charge of drafting a law on class action. The Subcommittee determined that provisions on class action proceedings should be incorporated in the Civil Procedure Code and commenced drafting at the end of 2001. During the drafting process, laws relating to class actions in other countries were studied. Moreover, in order to ensure that the Bill was drafted meticulously and most effectively, the Office of the Council of State formulated a project entitled “Developing a Thai Class Action Law” with the sponsorship of and informational support on class actions from the U.S. Agency for International Development (USAID) under the “Accelerating Economic Recovery in Asia (AERA)” program. Under this project, two video conferences between Thai and American lawyers were held at the Embassy of the United States of America through Kenan Institute Asia and the American Bar Association (ABA). These dialogues were further supplemented by study visits participated by certain members of the Subcommittee and researchers to observe class action proceedings in Washington D.C., the United States of America, a seminar for Thai lawyers to express their opinions on the draft law on class action and an International Class Action Workshop in which Thai lawyers from all legal professions were invited to engage in discussions with legal experts from the US, comprising of a professor of law, a judge, an attorney and other experts.

Data and opinions were drawn from the above activities and applied by the subcommittee to the preparation of the draft law on class action. Upon completion, the draft was submitted to the Committee for Revision of the Civil Procedure Code for consideration. At present, the Committee has already completed its consideration of the draft law on class action which now awaits introduction to the National Legislative Assembly as a Bill of Law.

### **3. GENERAL CONCEPTS OF A CLASS ACTION**

The core concept of a class action is the presence of a significant number of injured parties forming a class. Parties seeking to become a class member must have suffered injuries from an act that share common facts and law. In court proceedings, a

class representative must be appointed to act as plaintiff in the class action to guard his/her individual interests as well as the interests of the class as a whole.

In economic terms, class action is a procedure which best suits the protection of a large number of parties injured from a single act but whose individual damages may not be so significant. An example is a case relating to the protection of consumers. Individual damages suffered by each party may not be worth the cost of proceedings in an ordinary case. However, if all the injured parties are able to collectively initiate a class action aided by a team of attorneys that document the facts of the case to file a single lawsuit in court, the protection of interests for minor victims would be greatly strengthened along with costs and time savings.

In any event, the plaintiff attorney plays a central role in carrying out the trial proceedings as well as advancing all costs incidental to the proceedings. As such, the ultimate reward from the outcome of the case becomes a major motivating factor for the attorney as this may represent a high return on a risky investment. Prior to filing the lawsuit, the plaintiff attorney prepares a register of class members which he/she will be responsible for maintaining and also contacting the victims in order to make a determination of the potential size of the class in the proceedings. This consideration is inseparable from his/her assessment of the value of investment return. The preparation of a class register is also highly beneficial during proceedings relating to the calculation of damages and the filing of applications for individual shares as the register would be prima facie evidence of the class members and the amount of each member's entitlement to a share of the damages. During the process which the plaintiff attorney collects information, potentially qualified class members are concurrently submitted to the court for consideration.

The essential principles of a class action proceeding may be separately considered as follows.

### **3.1 There are 4 essential principles in a class action proceeding, namely:**

(1) Commonality. There must be commonality in the issues of fact and issues of law between the plaintiff and other class members.

(2) Notice. A judgment should bind class members who are not direct parties in the proceedings so long as sufficient notice is given to those class members on the developments of the case and each class member's entitlements.

(3) Opting-out. Despite having defined the qualifications of members of the class that would be bound by a judgment in the case, each class member still has the right to express an intention to opt-out of the class and exclude himself/herself from being bound by the outcome of the class action without prejudicing his/her right to bring an individual lawsuit.

(4) The plaintiff and plaintiff attorney. The court must exercise due care and diligence in selecting a plaintiff and plaintiff attorney. Requisite qualifications must be strictly adhered to in order to sufficiently and fairly protect the collective interests of the class members.

### **3.2 There are 5 benefits to bringing a class action:**

(1) lower cost of proceedings;

(2) better efficiency in facilitating justice to a larger section of the society;

(3) ensures consistent results in proceedings on identical issues and so the defendant is not affected by inconsistent judgments;

(4) protects the interests of the less privileged in society and parties suffering from minor damages by providing a means of securing compensation.

### **3.3 Drawbacks of bringing a class action:**

(1) Class actions bear a significant impact on businesses which may eventually be rendered insolvent. This in turn affects the economy as a whole.

(2) Plaintiffs may employ threats of class action lawsuits as leverage in bargaining with a defendant for compensation without genuine regard for the interests of other class members.

(3) Class actions may upset Thai traditional values which cherish forgiveness and compromise.

## **4. THAI CLASS ACTION PROCEDURES**

Thailand's class action procedures under the draft law are provided under Part 2 (Procedures in the Court of First Instance), Chapter 2, Sub-chapter 4 (Extraordinary Procedures in the Court of First Instance) of the Civil Procedure Code. Provisions on class action may be further divided into 4 subdivisions, viz.:

1. General provisions on class actions;
2. Normal procedures for class actions;
3. Special procedures for class actions;
4. Judgment and time prescriptions.

### **4.1 General provisions on class actions**

A class action is initiated by the plaintiff filing a plaint with the court together with a motion requesting leave to commence a class action. A judgment in the case would bind all class members, an exception to the principle of *res judicata* under which a judgment only binds parties to the proceedings. The essence of the general provisions on class action may be summarized, as follows:

## **(1) Definitions**

The draft law on class action contains definitions of several key terms, especially “class” and “class member”.

### **(1.1) Definition of “class”.**

“Class” means a group of persons having identical rights arising from common issues of facts and law as well as possessing identical characteristics that are specific to the class even if there are variations in the type of damages suffered by each person. From this definition, the elements of a “class” may be separately considered, as follows:

- Common facts, i.e. the common facts shared by the class give rise to a common right to raise a claim, e.g. a gas explosion on Phetburi Road which caused numerous injuries to life, body and property;

- Common law, i.e. the claims and arguments raise a common cause of action, e.g. a tortious act or a breach of contract.

(1.2) “Class member” is defined as a person representing identical points of facts and points of law.

## **(2) The qualifications of a plaintiff in a class action**

A person acting as plaintiff in a class action is obliged to represent the entire class, which may amount to as many as a million members, without having any opportunity to discuss or meet with those members. It is therefore a significant risk for the class representative to bear the burden of the entire class’ costs of proceedings, which may not in the end offer any return if the case is lost. On the other hand, the class representative who undertakes a class action inefficiently may also be a detriment to the class members. For these reasons, the court must exercise strict controls in the selection of a class representative.

The first requirement of a plaintiff is commonality, i.e. the class representative and class members must share a common cause of action and have common arguments. The prospective plaintiff must be a person entitled to bring a lawsuit on his own behalf. If a person is unable to bring a lawsuit in his individual capacity then the court is precluded from authorizing the appointment of such person as class representative. This first requirement therefore acts as a form of guarantee that the class representative would exercise due diligence in guarding the interests of the class since the interests of the class representative coincide with those of the class, and in guarding those interests, the claims and arguments raised by the class representative would also be beneficial to the class. However, this requirement is not absolute. The court may deem the requirement as having been satisfied merely upon determining an absence of any conflict of interest between the class representative and members. Nonetheless, there is still a second requirement, namely, adequacy of representation. The rationale for this requirement may be traced to the fact that a plaintiff in a class action files a lawsuit not only for the protection of his/her own rights, but also the interests of other class members.

### **(3) Qualifications of a plaintiff attorney**

The plaintiff attorney plays a central role in a class action for he/she is the person who prepares the list of victims who suffered damages from the same facts and laws. The plaintiff attorney also files evidence and advance all expenses pertaining to the costs of proceedings, which includes the cost of seeking evidence and costs of publicizing and sending notices of the class action to class members. A class action which spans a large number of injured parties would inevitably incur greater expenses as already stated. In practice, the plaintiff attorney would strive to employ a means of publicity and notice that would reach the widest extent of class members as is possible in a given case. The ultimate financial rewards to be gained by the plaintiff attorney remains the chief motivating factor in this regard.

In a class action, even if a class member has already retained an attorney, that attorney does not automatically become an attorney of the class. Moreover, there may be several plaintiff attorneys working together as a team, possibly under the direction of an

appointed lead attorney, in developing case strategies. It is not uncommon for the lead attorney to receive a higher level of remuneration than other attorneys.

A plaintiff attorney must also be free of any conflict of interests with class members. Case precedents in the United States of America have denied authorization of a class representative nomination due to conflicts of interests with class members, such as in a case where a nominee used to be a director in the defendant's board. The plaintiff attorney must have the financial capacity to advance all costs of proceedings, especially expenses relating to the publication and sending of notices of the class action to class members, which may be prohibitive to some attorneys. In practice, prior to the court granting leave to proceed as a class action, the court would summon the parties to an inquiry hearing of the motion for class action so as to offer an opportunity to the defendant and defendant attorney to conduct a cross-examination in an attempt to show that the class representative and plaintiff attorney are unable to proceed with the class action.

A point worth taking into consideration on the qualifications of the plaintiff attorney is the risk of a bad faith exertion of rights to seek personal gains. An example is an instance where a plaintiff attorney discloses information to his associates of a forthcoming class action lawsuit against a defendant company thereby hinting a quick sale of shares in order to avoid an imminent sudden drop in share prices when the lawsuit is eventually filed. Such an act is deemed as a disclosure of inside information, an instance of a wrongdoing. In another example, upon the court granting leave to proceed as a class action, the plaintiff attorney may apply pressure on the defendant to the extent that the latter is unable to continue with its business. Where that happens, the defendant may seek business reorganization to the detriment of the class members, being a loss resulting from a decision made by the plaintiff attorney. In an attempt to deal with these risks, the Thai draft law on class action provides that in the case where a plaintiff attorney is unable to sufficiently and fairly guard the interests of the class members, the latter may file a motion with the court requesting a change of plaintiff attorney (draft section 222/16).

#### **(4) Publication and notices to class members**

The process of making a publication and sending notices to class members is considered to be a very important aspect of any class action. Such publication or notice must contain details of the case, including the competent court and case number, the names and addresses of the parties and plaintiff attorney, a summary of the plaint, a clear description of the class, the entitlements of the class, the deadline for giving notice to opt-out of the class and the consequences of opting-out of the class. These requirements are intended to inform the class members of their specific rights and afford convenience in monitoring the progress of the case if the class member wishes to acquire further details. Therefore, if an efficient publication and notice procedure is in place, class members wishing to opt-out of the class are safeguarded from any injuries that may arise from not being sufficiently informed of the case.

#### **(5) Rights of class members**

Upon being informed of a class action through the publication or notice duly given under law, a class member would be aware of his/her rights. However, owing to the fact that a class member is not a party in the case, the rights to participate in proceedings would be limited only to the extent allowed by law, such as attending a trial hearing of the class action and appointing an attorney to attend such hearing.

#### **(6) Opting-out of the class**

If a class member does not wish to be bound by a judgment in the class action, he/she has the right to express his/her intent to opt-out of the class by giving notice of such intention to the court within the prescribed period. Where a class member gives notice to opt-out of the class after the expiration of the period prescribed by the court, he/she will have to request leave of the court. Once the class member opts-out of the class action, he/she has the right to file a separate individual lawsuit on his/her own behalf, but not another class action, which is barred by *res judicata*. Also, a class member who has opted-out may not file a motion to intervene or join as a plaintiff in the class action at a subsequent date.

## **4.2 Normal trial procedures**

### **(1) Court with competent jurisdiction over class actions**

A court which has jurisdiction over class actions must be a highly experienced court due to the need to play an active role in safeguarding the interests of the plaintiff and class members in a just and fair manner. The court's role commences from the selection of the plaintiff and plaintiff attorney from a pool of qualified parties and extends to the management of the case so as to provide convenience, expediency and justice for all parties concerned. Due to these apparently important roles of the court, judges must be highly trained and possess great expertise and experience in conducting trials.

### **(2) Fact-finding powers of the court**

Since class actions affect a wide section of the population, courts are clothed with the power to find facts in much the same way as the court's powers in an inquisitorial trial system.

In the Thai draft law on class action, the courts are provided with the power to summon qualified persons or experts to testify as witnesses in court. The terms "qualified person" or "expert" are given different definitions in the context of class actions as compared to the definitions in ordinary cases. "Expert" in a class action means a "qualified person" or an expert having the characteristics of an "*amicus curiae*" (friend of the court). In this regard, the court, at its own instance, would summon these persons to testify in court as well as determine the remuneration and expenses for the "qualified persons" and "experts" without applying the schedule prescribed by the Rules of the Office of the Judiciary. The amount of remuneration would be determined as appropriate for each particular case.

**(3) Preliminary hearing or determination of issues.**

Evidences are preliminarily examined in this process which at one time used to be incorporated into Thai civil procedures by the Act Amending the Civil Procedure Code (No. 13) B.E. 2535 (1992). However, after encountering a number of difficulties in putting the procedure into practice, it was subsequently repealed. Despite that, the draft law on class action has decided to return to this principle once again with certain changes made to improve its efficiency and enable its actual application to cases.

**(4) Submission of depositions.**

This is the same principle applied in the Intellectual Property and International Trade Court as well as the Arbitration Institute of the Office of the Judiciary. Under this procedure, parties may take depositions of witnesses and submit such depositions to the court thereby eliminating the need to examine witnesses in court; leaving only cross-examinations by the opposing party and additional examinations in this process.

Where a witness resides in a foreign country, depositions may also be submitted in lieu of an oral testimony in court. This principle has been provided in the Bill Amending the Civil Procedure Code (No. ..) B.E. .... which was introduced by the previous government to the House of Representatives. However, due to the recent change of administration, the Bill will have to be reaffirmed by the new Council of Ministers before the National Legislative Assembly can proceed with its consideration. If this piece of legislation is approved by the National Legislative Assembly, identical provisions in the draft law on class action may have to be removed since the provisions of the amended civil procedure code apply *mutatis mutandis* to class actions.

### **4.3 Special trial procedures**

#### **(1) Termination of a class action**

In the following cases, the court may order the termination of a class action and allow the plaintiff to proceed as an ordinary case in relation to the plaintiff's individual claims:

1) the plaintiff fails to comply with a court order requiring an advance for expenses relating to publications and notices on the class action to class members;

2) according to the court's own determination or pursuant to a statement made by a party, the class action would not benefit or safeguard the interests of class members in a fair and just manner;

3) the plaintiff attorney is unable to exercise his/her functions to protect the interests of the plaintiff and class members in a fair and just manner, following which the court has ordered the plaintiff or class members to select a new plaintiff attorney but the plaintiff or class members are unable to do so; in this case the court may terminate the class action proceedings and allow the plaintiff to proceed as a personal action in relation to his/her claims;

4) there is a cause for replacing the plaintiff by a member of the class pursuant to draft section 222/24, but an application has not been filed by any class member to replace the plaintiff; in this case the court may order the termination of the class action proceedings and allow the plaintiff to proceed as a personal action in relation to his/her claims.

#### **(2) Default judgment in a class action**

In an ordinary trial, if a defense has not been submitted within the prescribed deadline or a party does not attend a trial hearing, provided that the case is not of a type which the law makes evidence examination mandatory, the court may exercise its

discretion to disallow evidence examination. The draft law on class action, however, provides that the court must always examine witnesses even if a defense was not submitted within the time allowed or a party does not appear for a hearing. Draft section 222/18 paragraph two provides that if the plaintiff does not adduce evidence or the plaintiff does not appear for a hearing or both parties fail to show up for a hearing, a class member may assume the rights of the plaintiff in proceeding with the class action pursuant to draft section 222/24. In other cases, if not stated otherwise, the provisions on default proceedings apply *mutatis mutandis*.

The reason for explicitly providing that the provisions on default proceedings apply *mutatis mutandis* is because these provisions are contained in the chapter on special proceedings and therefore may not apply to class action proceedings automatically.

### **(3) Sub-class divisions**

The Thai draft law on class action purports to prescribe principles on sub-class division differently from sub-classes in the United States of America by allowing subdivisions only for the reason of differences in the nature of damages. Such subdivisions have the purpose of promoting convenience in proving damages. In contrast, sub-classes are allowed under the class action principle in the United States for all cases, whether that may be differences in details relating to points of facts, points of law or damages.

An example of a subclass under the Thai draft law on class action is the case where an industrial plant emits wastewater into a river causing losses to inhabitants along the riverbank. In this case, the Thai draft law on class action allows class members to form subclasses only for the reason of differences in injuries suffered. In other words, injured parties may be subdivided into the following subclasses: class members who suffered injuries as a result of water extraction for agricultural purposes; class members who suffered injuries from water consumption; class members who suffered injuries in shrimp farms, etc. The sole purpose of these subdivisions is to aid the parties in the calculation of damages for each subclass.

#### **(4) Replacing the plaintiff**

When an event arises under draft section 222/24(1)-(8), the court shall by public notice invite applications from parties wishing to succeed the plaintiff under rules and procedures prescribed by the court.

#### **(5) Withdrawal of plaint, settlement and submission of dispute to arbitration**

1) A plaint may be withdrawn at two instances:

- A plaint withdrawal before a court order granting leave to proceed as a class action may be made by the plaintiff without leave of the court.

- A plaint withdrawal subsequent to a court order granting leave to proceed as a class action may be made after notice is given to the class members.

2) Settlements and submission of dispute to arbitration. In the event of a settlement or the submission of a dispute to arbitration prior to a court order granting leave to proceed as a class action, the plaintiff and defendant may notify the court of their intentions to settle or to submit the dispute to arbitration. However, if the settlement or submission of dispute to arbitration is made subsequent to a court order granting leave to proceed as a class action, notice must be given to the class members in order to enable those not wishing to be bound by the settlement or arbitral proceeding on an issue of the case to opt-out of the class. In this regard, a settlement agreement or submission of dispute to arbitration must be authorized by the court. This authorization requirement provides judicial oversight over the fairness of a settlement agreement or arbitration submission for the class members. In any case, a settlement agreement or arbitration submission must not be made exclusive to any subclass.

#### **4.4 Judgment and prescription period.**

(1) A judgment in a class action, though similar to that of an ordinary case, is different from the latter with respect to certain details. The court presiding over a class action must prescribe clear and detailed characteristics which are common to all

members of the class. The court must also provide rules and procedures for calculating damages for class members as well as the attorney fees.

(2) The prescription period for class actions may be separately considered, as follows:

(2.1) Prescription period for the plaintiff runs according to the rule provided in section 193/11 of the Civil Procedure Code, i.e. the prescription period discontinues once a lawsuit is filed but restarts upon the occurrence of a specified event.

(2.2) Prescription period for class members is provided in draft section 222/37, i.e. the prescription period discontinues once a lawsuit is filed, but restarts upon the occurrence of a specified event. However, if the prescription period expires during proceedings, it shall be extended for another 60 days pursuant to the lawsuit filed.

## **5. CLASS ACTION ENFORCEMENT**

### **(1) Persons entitled to initiate enforcement proceedings in a class action**

Only 2 persons are entitled to initiate enforcement proceedings in a class action, viz. the plaintiff and the plaintiff attorney on behalf of all class members. Class members, in their individual capacities, are not entitled to initiate enforcement proceedings in a class action.

### **(2) Enforcement procedure in class actions**

Once judgment is given, the court must notify the Director-General of the Department of Legal Execution and class members in the case concerned. The Director-General of the Department of Legal Execution would thereafter make arrangements with respect to enforcement of the class action judgment whereby a class member can submit an application for repayment of the judgment debt from a legal execution officer within the time period prescribed by the court. The word “legal execution officer” in the context of a class action carries a different definition from that in an ordinary case. In a

class action, the legal execution officer carries out functions comparable to a receiver in a bankruptcy proceeding and has the power to summon persons in relation to an application for debt repayment. In the case where an application for debt repayment submitted by a class member is uncontested, the receiver has the power to authorize payment, after which the receiver must submit a report to the court.

Otherwise, a class member has the right to file an objection to another class member's application for repayment of judgment debt. If an objection is filed against a class member's application, the legal execution officer should conduct an inquiry hearing and make one of the following orders:

- 1) dismiss the application for repayment of judgment debt;
- 2) grant full repayment;
- 3) grant partial repayment.

A class member who is not satisfied with an order of the legal execution officer issued pursuant to this section may appeal to the court within 15 days as of the order date. If a party is still dissatisfied with the Court of First Instance's ruling in this respect, a further appeal may be made to the Supreme Court within 1 month of the Court of First Instance's order.

### **5.1 The right to appeal of class members**

A class member has the right to appeal only on an issue related to his or her right to seek debt repayment. In other cases, a class member has no right to exercise a right to appeal to the Supreme Court.

### **5.2 Judgment debt repayment in a class action**

When a legal execution officer receives an application for repayment of judgment debt from a class member, he or she shall conduct an inquiry on the application. Related

persons may be summoned for the purposes of the inquiry. Once the total amount of judgment debt to be repaid has been ascertained, a notice will be sent to the defendant to remit funds or deliver properties to the legal execution order, or once the defendant's assets are sold in open market or disposed by other means subject to costs and fees being deducted from the amount received and without prejudice to preferred creditors, the legal execution officer shall disburse fees to the plaintiff attorney followed by payments to the plaintiff and class members or other judgment creditors who requested an apportionment of the judgment sum as the case may be. In this regard, the research team proposed the establishment of a fund for judgment debt repayment in a class action, a method employed in certain other countries. The Thai draft law on class action provided that the damages to be paid by the defendant will comprise of two portions. The first portion will be paid to the plaintiff or class members. The second portion, on the other hand, will be legal fees which shall be no more than 30 percent of the damages received by the class members.

### **5.3 Attorney's fees**

Prior to a judgment of the court in a class action, draft section 222/36 provides that an attorney shall submit an account of expenses to the court wherein all the costs of the proceedings expended by the attorney, including the attorney's remuneration, must be shown. When considering the attorney's fee, the court will take into account the complexity of the case and the amount of time taken.

The principles on payment of attorney's fees set out in the draft law on class action in Thailand differ from those stipulated in the United States of America on several points. In the United States of America, class members are responsible for payment of attorney's fees, i.e. attorney's fees would be deducted from the damages awarded to the class members. On the other hand, the Thai draft law on class action makes the defendant responsible for payment of attorney's fees calculated on the basis of not more than 30 percent of the damages received by the class members. In other words, if a defendant loses a class action, he or she must pay damages to the plaintiff and class members as well as an additional amount in attorney's fees. Where there has been a

change of attorneys, the court shall determine the attorneys' fees in proportion to the costs of proceedings expended by each attorney.

#### **5.4 Priority of judgment debt repayment in a class action**

Once the defendant has remitted sums or handed over properties to the legal execution officer, after making deductions for costs, enforcement fees and repayments to preferred creditors, the legal execution officer shall first disburse attorney fees to the attorneys before paying damages to the plaintiff and class members or other judgment creditors entitled to an apportionment of the debt, as the case may be.

In the case where enforcement of a judgment debt does not yield an amount sufficient to cover the entire judgment debt, the plaintiff attorney, plaintiff and class members shall apportion the amount of repayment amongst themselves by paying the attorney's fees first in an amount not exceeding 30 percent of the amount obtained from each enforcement proceeding, the remainder of which shall be paid to the plaintiff and class members.

#### **5.5 Class member appeals**

(1) Class members' rights of appeal are restricted to those stated in draft section 222/44. That is, a class member may file an appeal only on matters relating to applications for repayment of judgment debts. In other cases not stated in such provision, the class member shall have no right whatsoever to make an appeal.

(2) The claim amount on appeal.

Only the price of properties or other assets in dispute on appeal in relation to the plaintiff and defendant will be deemed as the claim amount on appeal.

In the case where the defendant files an appeal against an order dismissing a motion for leave to appeal, the draft law on class action provided that the defendant shall

deposit costs in the amount which the defendant may ultimately be liable to the plaintiff, but not including the costs in relation to the attorney's fees.

(3) An appeal cannot be made solely on the issue of attorney's fees, except where such fees are unlawfully awarded.

(4) In the case where an appeal has been filed and the Court of First Instance refuses leave to appeal, a party has one of two courses of action. A decision to take one course of action will prohibit the party from adopting the alternative. The two courses of action are as follows:

1) appeal the Court of First Instance's order to the Supreme Court;

2) file a motion for leave to appeal to the Supreme Court in accordance with the rules, procedures and conditions prescribed by the General Assembly of the Supreme Court.

Where an appeal is not prohibited by law but the Supreme Court considers that the issue on appeal does not merit a ruling of the Supreme Court, the Supreme Court has the discretion to dismiss the appeal. Nonetheless, the proceeding must comply with rules prescribed by the General Assembly of the Supreme Court which are distinct from ordinary cases.

Publication in the Government Gazette is a precondition for the entry into force of Rules of the General Assembly of the Supreme Court.

### **5.6 Establishment of a class action division in the Supreme Court**

The draft law on class action stipulates that the President of the Supreme Court establish a class action division in the Supreme Court. The class action division thereby established shall perform the functions of an information center on class action and shall also further enhance the expeditiousness and efficiency of class actions.

### **5.7 Costs in a class action**

Costs in class actions have been provided for in the following cases:

(1) Court fees for filing an application for judgment debt repayment and fees for filing an objection to an order of the legal execution officer with regard to the application for judgment debt repayment have been set at 200 baht per application. However, if an application is for repayment of a judgment debt not exceeding 20,000 baht, the court fees prescribed in the Civil Procedure Code shall apply.

(2) Court fees in the case of an appeal on attorney's fees have been set at 200 baht per application.

(3) Other fees shall follow the rate prescribed in the schedule to the Civil Procedure Code.