

DEFECTS AND THE DESIRE FOR FITNESS FOR PURPOSE – A THAI LAW PERSPECTIVE

7 MARCH 2023 • ARTICLE



There are growing concerns in the Thai construction and engineering sector as to how courts and tribunals will assess design defects and a project's fitness for purpose, leading employers and contractors alike to question the extent of their design obligations. Many of these concerns arose following a surge of legal commentary on the impact of the UK Supreme Court's 2017 judgment in *MT Højgaard v E.ON ("MT Højgaard")*.¹ In short, the court decided that, in a contract obliging a contractor to work with reasonable skill and care and to produce an end-product which was fit for purpose, the fitness for purpose obligation took precedence where the two standards conflicted.

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These legal concepts can be summarised as follows:

- (i) **Reasonable Skill and Care:** an implied, contextual standard of competence which requires that a party works to at least the minimum quality standard expected of a reasonably competent member of its profession; and
- (ii) **Fitness for Purpose:** an objective, contractually specified standard which requires that a party's end-product meets its prior agreed purpose.

Of principal concern to contractors is the fact that many contracts in the Thai market are hastily prepared, amended standard forms and as a result, it is not easy for a contractor to appreciate – unless there is extremely clear and certain wording – precisely what design risks it has bargained for. On some occasions even the overall intention of the parties is unclear as to the contractor's design obligations. This is compounded by the approach of the Thai courts; in instances where there is no precise wording on design obligations in the contract, they have been reluctant to give an indication as to the tests that ought to be applied when assessing a contractor's obligations for design, workmanship or materials.

THE THAI LAW POSITION ON DEFECTIVE WORK, MATERIALS AND DESIGN

Understanding the Thai law position on liability for defective design, workmanship or materials, as well as the concepts of fitness for purpose and reasonable skill and care in the Thai construction industry, requires reference to the Hire of Work and Sale of Property sections of the Thai Civil and Commercial Code (the “CCC”). There are currently very few in-depth commentaries available on this matter but, in short, the position (in the order it appears in the CCC), is as follows:

"What causes concern, however, is precisely how the Thai courts assess and apply the subjective “fitness for purpose” standard and the more onerous, objective “fitness for the purposes of the contract” standard, which is contractually specified by the employer."

(i) if the defect in the work arises from the quality of materials supplied or from instructions provided by the employer then the contractor is not liable for defects that arise, unless the contractor knew that the materials were of improper quality or the instructions were incorrect and did not notify the employer of this;²

(ii) a contractor is liable for defects that arise from materials supplied by it;³

(iii) a contractor is not liable for defects that arise from materials supplied by it if: (a) the employer knew of the defect at the time the contractor performed the works or would have known if it had exercised such care as might be expected from a person of ordinary prudence; or (b) the defect was apparent at the time of delivery and the employer accepted the works without reservation;⁴ and

(iv) a contractor is not liable if the employer has accepted defective works without reservation either expressly or impliedly, unless the defect could not be discovered when the work was accepted or had been concealed by the contractor.⁵

There is nothing controversial in what the CCC sets out above, however it is notable that these provisions refer to “*work*” and “*materials*” rather than to design, workmanship, and materials individually. Our interpretation of these sections of the CCC is that the broad notion of “*work*” will *almost always* encompass all three composite elements of design, workmanship and materials; each one is necessary for successful completion of a construction and engineering project.

In practice, the concept of “*works*” is a creature of contract in the construction sector rather than statute and will naturally vary depending on the project. The CCC has therefore embraced this to provide statutory efficacy to contractual provisions.

By virtue of certain provisions concerning sale of property, the CCC does provide some guidance on how a Thai court might assess liability for the defective design, workmanship or materials of a contractor. Specifically, section 472 provides that liability will arise from a defect when it can be demonstrated that a defect in a sold property impairs that property’s:

(i) value;

(ii) fitness for purpose (in the ordinary sense); and/or

(iii) fitness for the purposes of the contract.⁶

At first glance, the latter two potential causes of liability look very much like the reasonable skill/care and fitness for purpose concepts which are established in English law and were considered in *MT Højgaard*. What causes concern, however, is precisely how the Thai courts assess and apply the subjective “*fitness for purpose*” standard and the more onerous, objective “*fitness for the purposes of the contract*” standard, which is contractually specified by the employer.

Unfortunately, there aren’t any judgments of the Thai Supreme Court which provide a detailed explanation of how a Thai court might assess design defects and liability where a contract contains both fitness for purpose and reasonable skill and care obligations. Nor has there been any definitive guidance given as to precisely how section 472 of the CCC (on sale of property) can be applied to construction and engineering projects in relation to design and workmanship.

In a 2001 judgment concerning the construction of the Rama IX bridge in Bangkok, the Thai Supreme Court did recognise both duties to work with reasonable skill and care and to deliver a project which is fit for its intended purposes. Consequently, various design and control engineers were found liable for failure to meet these standards through selection of inappropriate construction materials. However, the judgment was silent as to which of the two design standards would take priority should they conflict.

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In other instances where substantial defects have arisen on projects, often during the defect liability period (similar to the defect that occurred in the *MT Højgaard* case), the Thai courts do not appear to have fully investigated the provisions of the contract that underpin liability for design and defects. In a 1997 decision, the Thai Supreme Court found the employer and contractor jointly liable for the construction of a defective weir which collapsed shortly after completion. This conclusion was somewhat surprising since, on the facts, the employer was responsible for the defective design which was ultimately unfit for purpose, while the contractor appeared to have exercised reasonable skill and care in testing the surrounding soil and materials prior to construction. It is plausible that blame was apportioned to the contractor due to the weir collapsing within the one year defect liability period specified in the project contract, or that the defective elements of the weir were only uncovered after the employer had accepted the completed works.⁷ Once again, we see uncertainty as to what the Thai courts appreciate by the concepts of fitness for purpose and reasonable skill and care, as well as their interaction when both provisions feature in a contract.

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What is clear from the judgments of the Thai courts though, is that they can be expected to give effect to clearly drafted and defined contractual provisions and, in the event of conflicting principles, will seek to enact the parties' shared intentions by taking a holistic view of the circumstances. Further certainty for contractors and employers can be achieved where Thai law contracts are based on recognised standard forms such as the popular FIDIC suite of contracts.

In such scenarios, provided the parties are sophisticated commercial entities, the provisions of the CCC regarding contractual interpretation, including the concept of "*ordinary usage*"⁸, may take effect so that a common understanding of recognised industry-specific concepts will be expected from the parties. It is our view that with a strong evidential base and persuasive argument, the English law appreciation of fitness for purpose and reasonable skill and care (and their relationship following *MT Højgaard*), although foreign legal concepts, should apply in Thai construction projects which are based on standard form contracts. This is particularly so when clause 4.1 of the ever-popular FIDIC 1999 suite of contracts, which concerns "*fitness for purpose*", remains either unamended or amended with clear and certain language.

WHAT DOES THIS ALL MEAN FOR THE CONTRACTOR?

Given the lack of overall clarity on the status of fitness for purpose and reasonable skill and care obligations in a Thai legal context, and the uncertainty surrounding the approach of the Thai courts, contractors should bear in mind the following practical points:

(i) Rely on clear drafting rather than court interpretation of default CCC provisions

Although unsurprising, the need for contractors and employers to thoroughly discuss and clearly document their respective contractual obligations as to standards of work is of primary importance. Assuming tenders are based on a standard form, contractors should only agree amendments to the base document which add detail to the nature of obligations, as well as a clear indication of priority where both reasonable skill/care and fitness for purpose provisions feature in the contract.

It is also notable that the CCC does not offer a definition of "*defects*". Hence, parties opting to tailor standard form design obligations should ensure their drafting clearly reflects the intentions of the parties to avoid any undesired interpretation from the Thai courts. These steps should go some way to overcoming the uncertain approach of Thai courts as it is expected that the common intention of the parties will be enacted where a dispute arises.

(ii) "*Ordinary Usage*" interpretation should be used as an accessory tool

While sections 171 and 368 of the CCC on interpretation seemingly provide a convenient method of introducing a common, industry understanding of foreign legal concepts such as reasonable skill/care and fitness for purpose into a Thai construction/engineering project, contractors should view these provisions as a "*back-up*" accessory tool rather than a primary means of achieving certainty. Clear and certain contractual drafting to reflect the precise intentions of the parties should always take precedence, as the Thai courts will generally seek to give effect to such intentions in the event of dispute.

(iii) Remember that some uncertainty is inevitable

Despite these suggested approaches to achieve greater clarity of contractual obligations, contractors should accept that some level of uncertainty is inevitable when dealing with reasonable skill/care and fitness for purpose concepts in a Thai construction project. For one, as set out above, the approach of the Thai Supreme Court in its limited judgments of relevance has been somewhat unpredictable. Moreover, there can be difficulty in assessing the applicable prescription period in a dispute; this can vary drastically from one year⁹ to ten years¹⁰ depending on whether an employer's claim is one for damages arising from defects under the CCC or instead as a breach of clearly drafted provisions in the contract, setting out the contractor's obligations in relation to design, materials, workmanship and fitness for purpose. This illustrates the near impossibility for a contractor to be prepared for any eventuality in a Thai construction context.

While contractors in Thailand should strive to conclude detailed contracts based on standard forms featuring widely recognised industry concepts, when it comes to the apportionment of design obligations and the inclusion of reasonable skill and care and fitness for purpose provisions, they should ultimately keep their wits about them.

UK Trainee Matt Buxton in Bangkok also contributed to this article.

[1] MT Højgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd and Another [2017] UKSC 59 BLR 477.

[2] Thailand Civil and Commercial Code, Book III, Title VII: Hire of Work, Section 591.

[3] Thailand Civil and Commercial Code, Book III, Title VII: Hire of Work, Section 595;

Thailand Civil and Commercial Code, Book III, Title I, Chapter II: Duties and Liabilities of the Seller, Part II: Liability for Defects, Section 472.

[4] Thailand Civil and Commercial Code, Book III, Title VII: Hire of Work, Section 595;

Thailand Civil and Commercial Code, Book III, Title I, Chapter II: Duties and Liabilities of the Seller, Part II: Liability for Defects, Section 473.

[5] Thailand Civil and Commercial Code, Book III, Title VII: Hire of Work, Section 598.

[6] Thailand Civil and Commercial Code, Book III, Title I, Chapter II: Duties and Liabilities of the Seller, Part II: Liability for Defects, Section 472.

[7] By virtue of Thailand Civil and Commercial Code, Book III, Title VII: Hire of Work, Section 598.

[8] See Thailand Civil and Commercial Code, Book I, Title IV: Juristic Acts, Chapter 2: Declaration of Intention, Section 171; and Thailand Civil and Commercial Code, Book II, Title II: Contract, Chapter I: Formation of Contract, Section 368.

[9] As set out in: Thailand Civil and Commercial Code, Book III, Title VII: Hire of Work, Section 601.

[10] As set out in: Thailand Civil and Commercial Code, Book I, Title VI: Prescription, Chapter II: Period of Prescription, Section 193/30.

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