

Newsletter No 15 (EN)

How to Enforce Court Orders and Arbitration Awards

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Overview

After obtaining a court order or an arbitral award it may occur that the defendant does not comply with the judgments or awards. While the law in principle does not allow private parties to enforce an order or an award by themselves, the enforcement has to be done by the power of the governing law or statute.

This Newsletter is made to describe how the execution is taken place under the Thai law in respect of civil cases and international commercial disputes either those resulting from lawsuit or arbitration.

I. Execution of Court Orders¹

Under the power of the Civil Procedure Code (CPC), the execution procedures can only begin in the following cases:

1. When the Court of First Instance or the Court of Appeal has rendered its judgment and the party who lost the case could not get an order for a stay of execution.
2. The case is final because the party who lost the case did not appeal to the higher court within a specific time period.

¹ See Preecha Mahorabutr, Guideline for Litigation, Chapter 12 Common Civil Execution Procedures, P. 179 - 205, Kumpol Legal Book Publishing (1993)

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Under the Thai Civil Procedure Code, execution procedures are conducted through the following steps:

1. Getting a Decree

Having the defendant to acknowledge a decree from the Court to perform according to the judgment is the first step necessary before the execution. If the defendant is in the Court during the reading of judgment, the Court may record its decree and have the parties sign for acknowledgement (Sec. 272 CPC), especially in the case where it can make a compromise or settlement and the Court decides according to such compromise or settlement. The Court will decide and have both parties sign for acknowledgement by using the phrase “the Court orders the defendant to Otherwise, the defendant will be subject to property seizure or imprisonment” (Sec. 273 Para 4 CPC). In this case if the defendant does not perform according to such compromise or settlement, the plaintiff can ask the Court to execute immediately without having to submit a statement to the Court asking for a decree.

In the event that the defendant does not acknowledge the decree of the Court, the plaintiff's lawyer has to ask the Court to issue a decree by making a statement to the Court saying that the case has been decided but the defendant has not yet acknowledged the Court's decree. In practice, the Court will issue a decree and send it to the Warrant Sending Officer. Then, the lawyer has to follow up with the officer regarding when a decree would be issued and request the officer to send a decree. If the lawyer does not do so within 15 days, the officer will return a decree to the Court. The lawyer also has to check the date the defendant receives a decree in order to determine the default period. Normally, the Court will demand the

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defendant to perform within 1 month after the defendant receives the decree. If it is the case of posting of a decree, it will be deemed received after posting for 15 days (Sec. 79 CPC).

When the due date according to the decree comes, in case it is a deposition of the money for debt payment, the lawyer has to check whether the plaintiff has deposited the money to the Court according to the decree or not. This can be done either by making a statement to examine the file or by checking with the Court's Treasury Department.

In order to get the money from the Court, the lawyer has to contact the plaintiff to submit a statement for taking the money. The plaintiff can take the money by himself or assign the lawyer to do so.

2. **Appointing an Executing Officer**

The purpose of appointing an executing officer is to proceed with the Court decision. Because the plaintiff cannot enforce the Court decision by himself, the enforcement has to be done by the power of the CPC Section 271 stating that in case the defendant does not comply in whole or in part with the judgment or order and such defendant already acknowledged a decree from the Court to perform according to the judgment or order, the party who wins the case is entitled to ask the Court to execute by virtue of and in accordance with the decree issued by the Court within 10 years from the date of pronouncement of the judgment or order.

Although the CPC does not mention an appointment of an executing officer, Section 275 provides that the creditor according to the judgement may submit an application by motion to the Court for a writ of execution and Section 276

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provides that the Court shall notify such writ to the executing officer. In practice, such application shall include a wording asking the Court to appoint an executing officer to seize defendant's property in the case of money debt.

After submitting an application mentioned above, if the motion is granted, the Court officer will issue a writ appointing an executing officer. This writ will be sent to the Execution Department in Bangkok or the Court Sheriff or the Deputy Court Sheriff in other provinces.

3. Seizure

The lawyer has to contact the executing officer for further proceedings. To do so, the lawyer must have another power of attorney signed by the plaintiff. After obtaining a power of attorney, the lawyer shall contact the executing officer. The executing officer will ask the lawyer to submit a deposit money for expenses and then set the seizure date. However, it is also necessary to submit to the executing officer a request form and a property list.

To seize property, the lawyer has to accompany the executing officer to the defendant's residence, land, or other real estate listed (Sec. 279 CPC). The executing officer will record the seizure and announce the property seized. If the property is a movable property, the executing officer may ask the plaintiff or its representative to transport such property to the Execution Department in order to sell by compulsory auction afterward. If the property is land or other real estate, the executing officer will post a notice there stating that the property is under attachment.

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The lawyer then has to follow up with the executing officer regarding the auction date. On the auction date the lawyer will lead the auction. If the lawyer sees that the price would be too low, he may ask the executing officer to postpone the auction, and if, in the next auction, the highest bidder bids at the price not lower than the price having been bided by the highest bidder in the last auction, the executing officer may decide to sell the property to such highest bidder. However, if the lawyer still thinks that the price is too low and such unreasonably low price has taken place in pursuance of a fraud among persons relating to the bidding, or with bad faith or gross negligence of the executing officer in exercising his function, the lawyer may file an application by motion with the Court for an order setting aside the sale by auction.

After the property has been sold, the officer will deduct expenses and executing fees and then give the money to the lawyer.

4. Attachment of Claims against Third Parties

In some cases the defendant may not have property to be seized, but monies which will be subsequently received from other persons, i.e. salary or claims against third parties. The executing officer may ask the Court to detain, which is to prohibit the defendant to dispose of such claims and prohibit third party to make payment or submit property to the defendant but to the Court in stead.

In order to attach money or property of the defendant, the lawyer has to submit a petition to the executing officer stating where to attach the defendant's money or whom the defendant would receive money from.

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According to CPC Section 310 (3) and 311, it can be inferred that the executing officer may submit an application by motion to the Court in order to attach such claims. However, in practice there are some cases that the executing officer issues an attachment order by himself.

II. Execution of Foreign Court Orders

It is a fact that every country has a different legal system and different rules dealing with the civil procedure. The enforcement of foreign court orders in principle is quite complicated and subject to certain approval procedures under the Thai law. In the opposite to domestic court orders, foreign court orders (for instance, a judgment of a German civil court) is not likely to be enforceable under the Thai law because Thailand did not sign any bilateral agreement or reciprocal agreement with Germany. Therefore, it is advisable for the parties to enter into an arbitration agreement in order to secure the enforcement and execution in case of cross-border commercial disputes.

III. Execution of Arbitral Awards

Arbitration can be defined as a voluntary agreement for the parties to submit a dispute to an impartial person (Arbitral Tribunal) to determine an equitable settlement in a judicial manner.

Arbitration can be divided into two categories, national and international arbitration. According to Chapter III of the CPC concerning national arbitration, this type of arbitration is exclusively for the case pending before a Court of First Instance where the parties can choose to submit the dispute to one or more arbitrators for settlement by

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filing a joint-application to the Court, and if the Court is of opinion that it is not contrary to the law, the Court shall grant the application (Sec. 210 CPC). The awards given by the national arbitration is a final binding arbitration, after due consideration , the arbitrator shall file their award with the Court and the Court shall give judgment or order in accordance with such award (Sec. 218 CPC). However, it is still considered a domestic court order, which is still subject to enforcement and execution limitation in foreign countries.

The current Arbitration Act B.E. 2545 (2002) was enacted on 29 April 2002 and enforced on 30 April 2002. This Act replaced the Arbitration Act B.E. 2530 (1987), which was criticized because it did not correspond with the principles of international arbitration law and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which has been widely accepted and recognized as a prototype for international arbitration law. Therefore, a significant consideration behind this Act was to adopt the UNCITRAL Model Law as a basis for the core development of the arbitration system in Thailand in order to keep pace with other developed economies and to develop the Thai arbitration system to be equal terms to international communities, and that there be promoted the use of arbitration proceedings in the settlement of international civil and commercial disputes.

Outlined below are several advantages for the parties to refer their dispute to arbitration rather than to commence an action in court:

- The parties can choose the place of jurisdiction, the language used and the applicable law.
- The process consumes less time, cost, and effort than those in a civil court. Some organizations that provide arbitration offer fee schedules based on the size of the claim.
- In case that the dispute involves a technical matter, the parties have the ability to select the arbitrate tribunal with expertise in a certain subject matter and generally possess the more appropriate qualifications.

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- Unwanted publicity can be avoided because the proceedings are presumed to be confidential and private.
- Because an arbitral award is not subject to appeal it is a final and binding decision.

1. Recognition and Enforcement

Although one of the most important advantages for the parties to settle their dispute in arbitration is the international recognition of arbitral award, it is important to note that according to the new Act if the award was made in a foreign country, the Court having the jurisdiction may pass its judgement enforcing the award only when such award is subject to a Treaty, Convention, or International Agreement to which Thailand is a member, and it shall be enforceable as long as Thailand agrees to be bound by them only (Sec. 41 Para 2 “the Arbitration Act B.E. 2545”). At present, about 120 countries have signed the 1958 United Nations “Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, known as the “New York Convention”. This Convention facilitates the enforcement of awards in all contracting countries and Thailand became a member in 1961.

2. Application

Under this Act in Section 9, parties can file an application to execute an arbitral award to one of the following Courts:

- (1) The Central International Trade and Intellectual Property Court
- (2) The Court having the jurisdiction over where the arbitration is taking place

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- (3) The Court having the jurisdiction where either party is domiciled
- (4) The Court having the jurisdiction over the dispute duly forwarded to the arbitrator

According to Section 42 of the Act, to enforce an arbitral award the winning party has to submit an application to the court having jurisdiction within three years as from the date the award is enforceable. Along with an application, the following documents shall be attached:

- (1) Original of the arbitral award or its duly certified copy
- (2) Original arbitration contract or its certified copy
- (3) Thai translation of the arbitral award and arbitration contract made by the translator who has sworn or made oath before the court or official or the person having power to accept the oath, or who has made oath to, or represented by, the official authorized to certify the translation or by a diplomatic delegate or the Thai consul in the country in which the arbitral award or the arbitration contract was made.

3. Judicial Review

Although the Act is meant to promote the recognition and the use of arbitration proceedings to enforce an arbitral award, the award may be rejected by the Court having jurisdiction, irrespective of the country in which it was made, if the party against whom the enforcement is invoked can prove that:

- (1) A party to the arbitration agreement is incapable under the law applicable to the said party;

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- (2) The arbitration contract is not legally binding under the law of the country to which the parties have agreed upon or, in the case where there is no such agreement, under the law of the country where the award was made;
- (3) The party whom the award shall be imposed was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings, or the said person was unable to present his case in the arbitration proceedings by other reasons.
- (4) The award deals with a dispute not falling within the terms of arbitration contract, or contains decisions on matter beyond the scope of the agreement on submission of dispute to arbitral tribunal, however, if it can be separated, the court may withdraw only that part.
- (5) The composition of the arbitral tribunal or the arbitration procedure was not in accordance with the agreement of the parties, or was not in accordance with the law of the country the award was made in case the parties have not made an agreement.
- (6) The award has not yet become binding or has been withdrawn or suspended by a court having the jurisdiction or under the law of the country the award was made, except in the case it is during the period of asking the court to withdraw or suspend the award, when the court may postpone the proceedings of the application for the enforcement as it deems fit, and if the party applying for the court to enforce the award make a request, the Court may order the party whom the award shall be imposed on to furnish a suitable security.

These conditions are also in accordance with the conditions set forth in the UNCITRAL Model Law on International Commercial Arbitration.

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In addition, according to Section 44 the court having jurisdiction may refuse an application if the Court is of the opinion that an award deals with the dispute that cannot be settled by arbitration under the law, or if the enforcement under the said award would be against the peace and order or the good morals of the public.

However, Section 45 prohibits parties to appeal to the higher court against the order or judgement of the court having the jurisdiction, except:

- (1) The recognition or the enforcement of the said award would be against the peace and order or the good morals of the public.
- (2) The said order or judgement is against the provisions of the law governing the peace and order of the public.
- (3) The said order or judgement does not correspond to the award of the arbitral tribunal.
- (4) The judge or the justice hearing the case has made a counter-opinion in the judgement.
- (5) It is an order relating to the temporary measure to protect the benefits of the party.

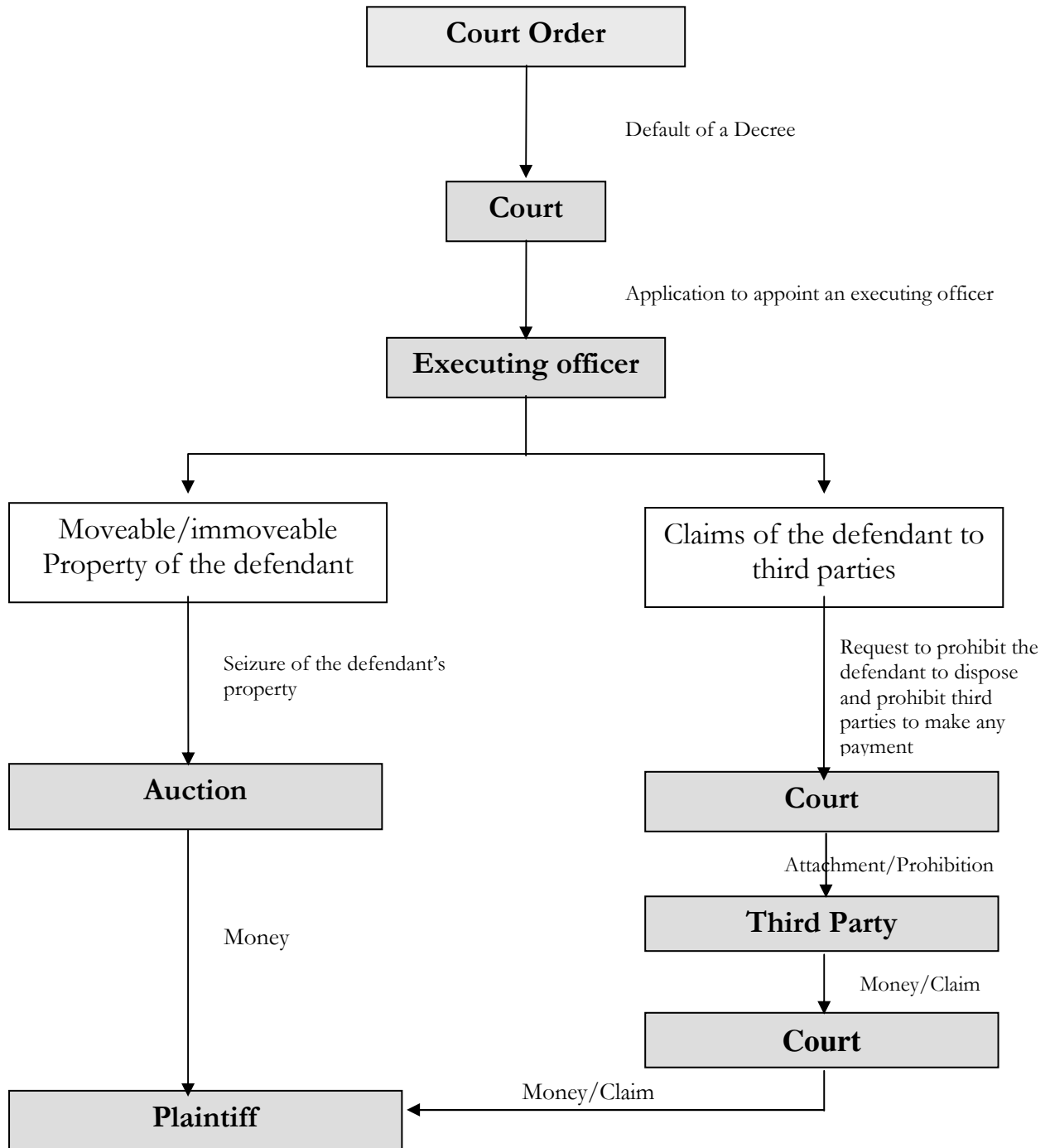
4. Further procedure

After the Court has passed the order or judgment stating that the award is enforceable, further procedure shall be the same as those of Civil Court, i.e. getting a decree, appointing an executing officer, seizure, and so on (see page: 2).

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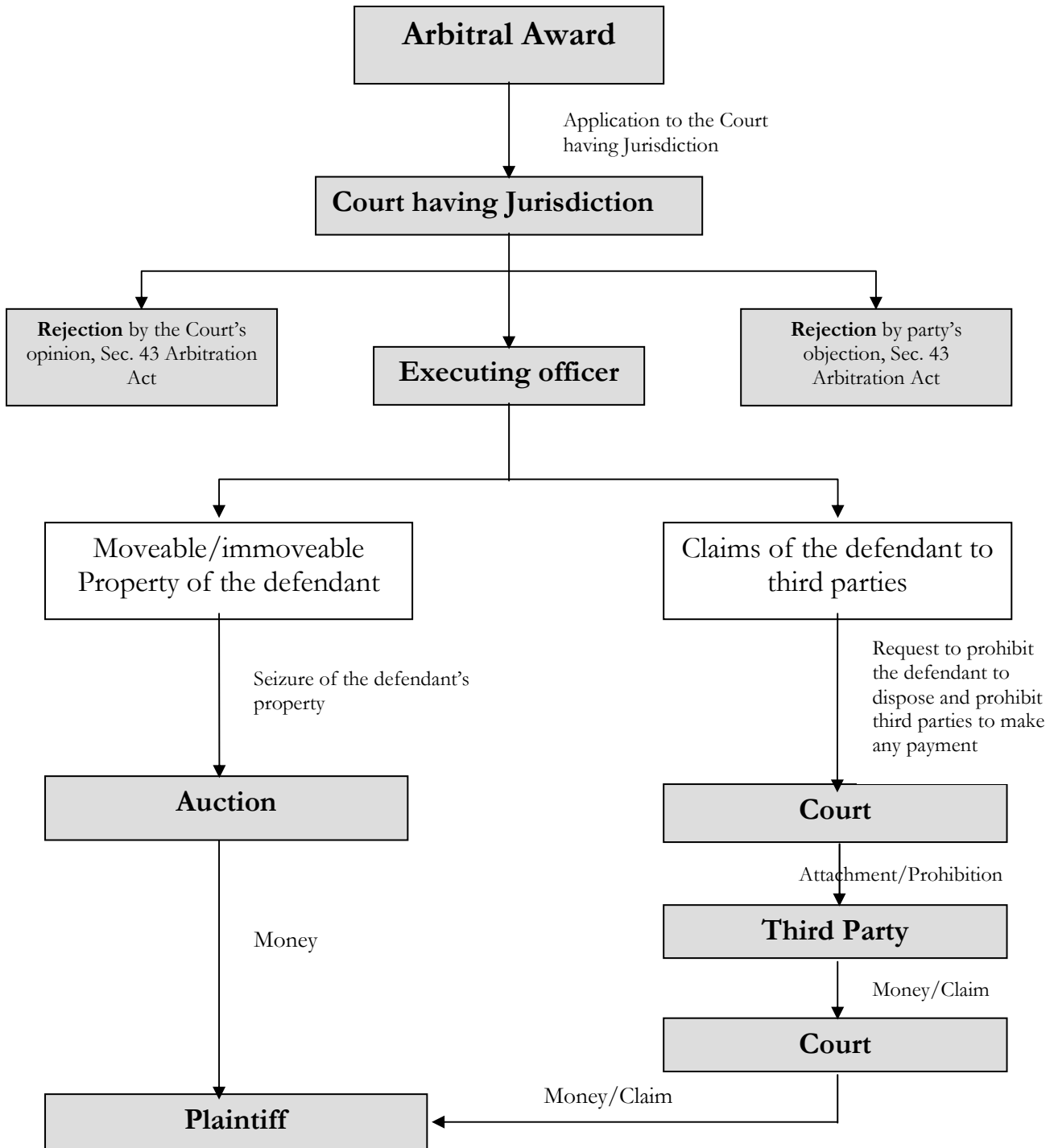
Table 1: Enforcement of Court Orders



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Table 2: Enforcement of Arbitral Awards



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We hope that the information provided in this newsletter was helpful for you.

If you have any further questions please do not hesitate to contact us.

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