

# Thailand



# Insurance Litigation

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Quick reference guide enabling side-by-side comparison of local insights, including into preliminary and jurisdictional considerations; interpretation of insurance contracts; providing notice; duty to defend; standard commercial general liability policies; first-party property insurance; directors' and officers' insurance; cyber insurance; terrorism insurance; and recent trends.

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## PRELIMINARY AND JURISDICTIONAL CONSIDERATIONS IN INSURANCE LITIGATION

### Fora

#### In what fora are insurance disputes litigated?

Most insurance policies written in Thailand contain a standard optional arbitration clause that provides alternatives for dispute resolution that the insured may choose. Disputes may either be submitted to arbitration or a lawsuit can be filed with the court. However, these standard clauses are less likely to be included in marine insurance policies.

For the courts, the following fora have the power to hear the case:

- courts of first instance;
- the Court of Appeal; and
- the Supreme Court.

General insurance disputes with a value of 300,000 baht or lower are heard in the district courts, while disputes with a value over 300,000 baht are heard in the provincial courts. Appeals on judgments of both the district courts and provincial courts can be filed with the Court of Appeals and the Supreme Court respectively.

The Central Intellectual Property and International Trade Court has jurisdiction over matters that involve international transport. The Central Property and International Trade Court is considered a court of first instance, and appeals on judgments rendered by this court can be filed with the Court of Appeals for Specialised Cases and the Supreme Court respectively.

Where the insured opts for arbitration under the standard optional arbitration clause, disputes will be submitted to the arbitration institute of the Office of Insurance Commission (OIC). Most non-life insurance companies in Thailand have entered into compulsory arbitration agreements, in which disputes on recourse claims between insurance companies will be submitted to the arbitration institute of the Thai General Insurance Association.

Reinsurance contracts generally include an arbitration clause that designates an arbitration institute with a seat in Bangkok, Thailand; however, these clauses rarely designate which arbitration centre or institute a claim must be filed in. Therefore, parties to these contracts may either agree to designate an institution to administer the arbitration on the dispute or proceed with ad hoc arbitration.

*Law stated - 01 December 2022*

### Causes of action

#### When do insurance-related causes of action accrue?

The Thai Civil Procedure Code does not provide an option for declaratory judgment. Parties to a contract will only be entitled to commence court proceedings after the contract in question is breached (eg, the insured has demanded indemnity under the insurance contract and the insurer has declined to pay). However, in practice, the liability insurer may be sued or enjoined in the proceedings as a co-defendant (with the insured who has underlying liabilities to a third party) without the need for making a demand and declination.

The prescription period for insurance claims under Thai law is relatively short (ie, two years from the date of loss). Moreover, the Supreme Court has ruled that the prescription period under reinsurance contracts is also two years from the date of loss of the underlying insurance contract. In practice, the relatively short time to file a claim can cause difficulties.

**Preliminary considerations**

What preliminary procedural and strategic considerations should be evaluated in insurance litigation?

**Choice of law**

Most insurance and reinsurance contracts in Thailand are governed by Thai law. Nevertheless, marine insurance policies are not governed by Thai substantive law. This is due to standard clauses in marine insurance policies that usually provide for English law and practice. Even in the absence of such English law clause, the Supreme Court will still apply English law as a general principle of law for marine insurance.

**Choice of forum**

Parties to an insurance and reinsurance contract should thoroughly review the policy in question and check whether those contracts contain compulsory or optional arbitration clauses. For a claim involving sensitive information that the insured does not wish to reveal to the public, such as the claim under product liability or professional indemnity insurance, the insured may consider submitting the dispute to arbitration if the policy contains an optional arbitration clause.

**Time and cost**

Normally, proceedings in the courts of first instance will take around one to two years. If the case is appealed to the Court of Appeals and/or the Supreme Court, proceedings will take an additional two to three years for each appellate stage. A winning party in court proceedings can redeem costs incurred. Note that courts will generally order a losing party to pay a low percentage of fees paid to legal representatives (eg, 5 to 10 per cent of the total lawyer's fees paid).

Arbitral proceedings can be concluded within one year, with a better chance of considerable reimbursement for legal fees. Note that a party may not appeal an arbitral award. A petition to set aside an arbitral award may be made with a competent court under particular circumstances.

**Surveying and loss adjusting**

Where a policy covering physical loss to property is written for a sum insured of 50 million baht or more and the amount of loss exceeds 1 million baht, surveying and loss adjusting activities must be handled by a licensed surveyor and loss adjuster. Failure to comply with this requirement can bring into question the credibility of the surveyor and loss adjuster if called as a witness in court.

**Time limitation**

The prescription period for insurance and reinsurance claims under Thai law is two years from the date that the loss under the underlying policy occurs. Any agreement in an insurance agreement extending this time frame is invalid under Thai law. As a result, the insured or ceding company can face difficulties where an adjustment of a claim is not completed before the end of the prescription period. However, in some circumstances – such as when a written acknowledgement of obligations is issued by the insurer or reinsurer, partial payment of the indemnity is made or some

security is given to the insured or ceding company – the prescription period can be interrupted. In consumer policies, the time limitation for a claim can be paused while the insured and insurer negotiate the amount of indemnity to be paid under the policy. Therefore, a claimant should commence court or arbitral proceedings within the prescription period or, at least, arrange to ensure that the time limitation is validly interrupted or paused.

## Ex gratia payment

Litigation may undoubtedly harm the relationship between the parties to a contract. Thus, some claims end up with ex gratia payment by the insurer with the primary purpose of avoiding litigation and maintaining a good relationship with the insured. Even though the ex gratia payments are not illegal under Thai law, the insurer (ceding company) is recommended to seek prior consent from the reinsurer. Reinsurance contracts often contain a clause that the reinsurer is not obliged to contribute to loss payments by the ceding company voluntarily knowing that it has no obligation under the underlying policy to make such payment.

*Law stated - 01 December 2022*

## Damages

What remedies or damages may apply?

### For the insured

Indemnifications under insurance contracts are not only restricted to the payment of money. The insurer may choose to repair or replace the subject-matter insured. In addition to indemnity for loss of, or damage to the subject-matter insured, the insurer is obliged to indemnify the insured for costs reasonably incurred for the purpose of averting and minimising loss. Late payment of indemnity or failure to make an indemnification by other means will result in default interest at 5 per cent per annum.

### For the insurer

Thai law does not provide distinctions between a breach of warranties or conditions. The court will construe issues on a case-by-case basis by taking into account wording and the rules of construction of the contract. Based on the precedent, if the policy does not clearly provide that the breach will result in non-payment of the indemnity or a discharge of the insurer's liability, the insurer will still have to indemnify the insured and then exercise its right to demand damages incurred as a result of the insured's breach (if any).

*Law stated - 01 December 2022*

Under what circumstances can extracontractual or punitive damages be awarded?

Under the Consumer Case Procedure Act, the court will have the discretion to impose punitive damages on the insurer not exceeding two times the actual damages. However, only disputes under the insurance contract that the insurer enters into with the individual insured, and not for commercial purposes, will be considered as a consumer case. For insurance, contracts under which the insured is the corporation or relates to commercial purposes, the dispute under such contract will not be regarded as a consumer case and the court does not have the power to award punitive damages.

*Law stated - 01 December 2022*

## INTERPRETATION OF INSURANCE CONTRACTS

### Rules

What rules govern interpretation of insurance policies?

General rules on the construction of contracts apply to the interpretation of insurance policies. Apart from such general rules, note that clauses in the insurance policy are required by law to be approved by the Office of Insurance Commission (OIC) before sales to the potential insured. Where an unapproved clause is included in a contract, the insured has the right to choose either the standard approved by the OIC or the unapproved one in the policy in question, whichever is more beneficial to the insured.

Insurance policies are considered standard contracts that are subject to further review by the court under the Unfair Contract Terms Act. As a contract that falls under judicial review, clauses the OIC approves are not always guaranteed to be enforced. A contentious clause is subject to the court's discretion, with the objective of protecting the insured against unfair contractual terms.

*Law stated - 01 December 2022*

### Ambiguities

When is an insurance policy provision ambiguous and how are such ambiguities resolved?

Ambiguity in a policy will be resolved under the following principles:

- the policy should be considered as a whole;
- special clauses prevail over general ones;
- interpretation of the wording of a contract that specifies effectiveness prevails wording that does not indicate effectiveness;
- true intention of the agreement should be sought rather than literal meaning;
- good faith and ordinary trade usage should be taken into consideration;
- exclusions in the policy should be construed in a strict sense; and
- if, after applying the aforesaid rules, ambiguity remains, such clause is to be construed against the drafter (ie, in favour of the insured).

*Law stated - 01 December 2022*

## NOTICE TO INSURANCE COMPANIES

### Provision of notice

What are the mechanics of providing notice?

The insured is obliged by law to give notice to the insurer without delay after it becomes known of loss of or damage to the subject-matter insured. The law does not impose specific mechanics for providing such notice. In practice, means of notice can be set out as a contractual term in the insurance policy. The insured should ensure that the notice clause, which can vary among policies (eg, information to be notified, period of time for making such notification, verbal or writing, relevant evidence, etc), is understood and complied with.

Generally, the insured will be required by the policy to provide information that is necessary for the insurer to consider whether the loss is covered by the policy (eg, cause of loss, initial extent of loss and date of loss). For liability insurance

in particular, the insured will be required to provide court documents and information that will help to support the claim against a third-party claimant.

*Law stated - 01 December 2022*

## Obligations

### What are a policyholder's notice obligations for a claims-made policy?

Thai law does not provide specific rules for a claims-made policy; therefore, obligations are mainly in the form of contractual terms set out in the policy. For most claims-made policies, the coverage will be triggered where (1) the cause of the claim occurs after the beginning of the period of insurance or the retrospective date (if applicable) but before the end of the period of insurance; (2) the claim by the third party claimant against the insured is made within the period of insurance; and (3) the notice from the insured to the insurer in respect of the claim against the insured is made within the period of insurance or extended reporting period (if applicable). In addition, this type of policy typically requires that the notice must be made to the insurer in writing.

*Law stated - 01 December 2022*

## Timeliness

### When is notice untimely?

Thai law requires that notice be given 'without delay'; such terms allow judges or arbitrators with discretion to decide on a case-by-case basis whether the notice was given timely. However, to avoid such discretion, some policies impose certain periods for making notice (eg, 30 days from the date of occurrence of the loss). In a case where a defined notice period is specified, any notice given after that period will be treated as untimely, except where the insured can demonstrate that there is an impediment that prevents him or her from doing so within the specified period, and the notice was already given as soon as possible after such impediment ceases to have effect.

Under a claims-made policy, notice will be regarded as untimely where it is served to the insurer after the period of the insurance policy, or extended reporting period, unless the insured can demonstrate a legitimate excuse as discussed above.

*Law stated - 01 December 2022*

### What are the consequences of late notice?

Under the law, untimely notice does not discharge the insurer from liability to indemnify the insured under the policy. Nevertheless, an express clause in the policy that prescribes that untimely notice will result in discharging of the insurer's liability for such loss has been held valid and enforceable by the Supreme Court.

*Law stated - 01 December 2022*

## INSURER'S DUTY TO DEFEND

### Scope

#### What is the scope of an insurer's duty to defend?

The duty to defend does not exist under Thai law. The only way to impose such duty on the insurer is to expressly make

it a contractual obligation in the policy. However, Thai insurance policies have not, generally, included an obligation to defend against a claim. Certain types of policies include a 'right' to defend clause. As a result, an insurer typically has no duty to defend a claim made against the insured.

Nonetheless, most liability insurance policies will cover court fees, lawyer fees and expenses to defend any suits, as incurred by the insured, provided that the insurer has given prior written consent.

*Law stated - 01 December 2022*

## **Failure to defend**

### **What are the consequences of an insurer's failure to defend?**

If the policy does contain a clause that imposes a duty to defend the insurer and such duty is breached, the insured should demand the insurer to comply with a duty to defend within a reasonable period of time. If the insurer continues not to comply with the demand, the insured has two choices:

- the insured may decide to continue with the insurance contract and demand the insurer to compensate for any damage arising from the breach; or
- if a premium under the policy is of a great amount and the liability of the insured claimed by a third party is not of significance, the insured may opt to terminate the insurance contract and demand a refund of the premium from the insurer and further demand the insurer to compensate for any damages caused.

*Law stated - 01 December 2022*

## **STANDARD COMMERCIAL GENERAL LIABILITY POLICIES**

### **Bodily injury**

#### **What constitutes bodily injury under a standard CGL policy?**

A standard CGL policy provides for coverage for loss of life, bodily injury and illness including health accidents, but excludes mental injuries. Even though the insured may be held liable for an injured third party under tort law for mental injury – for example, posttraumatic stress disorder – the insured or the third party is not entitled to demand damages from the insurer.

*Law stated - 01 December 2022*

### **Property damage**

#### **What constitutes property damage under a standard CGL policy?**

Property damage is constituted where there is physical damage to property, including loss of use of such property, whether in whole or in part, and by accident.

*Law stated - 01 December 2022*

### **Occurrences**

#### **What constitutes an occurrence under a standard CGL policy?**

An occurrence under a standard CGL policy constitutes an incident of loss of life, bodily injury, illness or health of a

third party, or loss of or damage to property of a third party; in addition, such incident must have a fortuitous nature.

*Law stated - 01 December 2022*

### How is the number of covered occurrences determined?

Whether claims are stemmed from one occurrence or more will affect the limit of liability and deductibles or excess. In theory, proximate cause that effectively contributes to the loss is considered. Claims arising from the same proximate cause can be considered as stemming from one occurrence. If the claims originate from different proximate causes, they will not be considered as stemming from the same occurrence. Note that Thai law and the courts have not yet established a clear principle as to what constitutes 'proximate cause'. The ambiguity in established precedent under Thai law may be circumvented by clearly defined contractual terms in insurance policies.

*Law stated - 01 December 2022*

### Coverage

#### What event or events trigger insurance coverage?

Coverage will be triggered where there is an incident of an accidental loss of life, bodily injury, illness or health of the third party, or loss of or damage to property of the third party and such incident does not fall within exclusions under the policy. This type of policy generally excludes:

- liability arising out of a contract entered into by the insured for which the liability of the insured has not been incurred in the absence of the contract;
- loss covered by other types of liability insurance (eg, professional indemnity or product liability insurance);
- loss occurred due to internal persons of the insured, such as an owner, partner, director, staff (acting in the course of employment), family or relative of the insured (residing in the insured premises);
- liability for pollution;
- liability imposed by the judgment of a foreign court;
- liability arising out of or in connection with war, strikes, riots, civil commotion and terrorism;
- punitive damages, penalty and fines; and
- others, as specified by law, regulators or insurance providers' policies (subject to local regulations).

*Law stated - 01 December 2022*

### How is insurance coverage allocated across multiple insurance policies?

Under Thai law, if multiple insurance contracts are made successively (ie, on different days) and the accumulated sums insured exceed the amount of loss, the first insurer will be the first liable for the loss. If the indemnity paid by the first insurer does not cover the loss, the next insurer will be liable for the difference and so on until the loss is adequately covered. If the contract of insurance is entered into simultaneously (ie, within the same day), the insurers will have to indemnify the insured on a pro-rata basis, and their liability is not joint and several.

Nonetheless, the above-mentioned law on successive insurance rarely applies in Thailand. Most of the policies issued in Thailand contain a clause that results otherwise. That is, most policies state that the insurer will be liable on a pro-rata basis where there are other policies covering the same loss. Furthermore, some policies contain a clause stating that such policy will respond after the insured has claimed indemnity under other policies and only if the amount of indemnity paid under the other policy is not sufficient.

**FIRST-PARTY PROPERTY INSURANCE****Scope**

What is the general scope of first-party property coverage?

First-party property insurance may either be in the form of a standalone policy, such as in marine cargo, hull and machinery, motor or fire insurance or as a part of contractors' all risks or industrial all risks policies. The subject-matter insured may be specifically named in the policy, or the policy may just specify the class of the insured properties and premises where the properties are located.

The main purpose of this insurance is to provide coverage for loss of or damage to the insured property. The policy will essentially not cover economic loss unless the insured buys additional business interruption insurance. Exclusions generally found are as follows:

- deterioration arising from design, material, or manufacturing defects;
- ordinary wear and tear or inherent vice;
- loss without knowing the cause; war, strikes, riots, civil commotion, terrorism; and
- other causes, as determined by law, regulations or policies.

Law stated - 01 December 2022

**Valuation**

How is property valued under first-party insurance policies?

Insurance is a contract of indemnity whereby the insured will be indemnified not over the amount of loss that actually occurs. Therefore, the indemnity is to be adjusted in accordance with the market value of the insured property at the time of loss, and depreciation must also be taken into account.

For business efficacy, the parties to the insurance contract are allowed to agree to the value of the subject matter insured and state the value of that property in the policy, the so-called valued policy. In such an arrangement, the value fixed by the policy is, as between the insurer and insured, conclusive of the insurable value of the subject intended to be insured, whether the loss is total or partial. For example, if the insured suffers from a total loss of the property, the insurer will be obliged to indemnify the insured at the agreed value, not the market value. Nevertheless, to prevent fraud, the law further provides that the insurer is entitled to a reduction of the amounts of indemnity if it can prove that the agreed value is substantially too high and return a proportionate amount of the premiums with interest to the insured.

Even in the absence of the agreed value in the policy, as discussed above, the indemnity may be adjusted without taking depreciation of the subject matter insured into consideration, provided that the policy is written with a special replacement value clause or the 'new for old' clause.

Law stated - 01 December 2022

**Natural disasters**

Is insurance available in your jurisdiction for natural disasters and, if so, how does it generally apply?

Insurance for natural disasters is commonly available in Thailand. This coverage has proved worthwhile as Thailand

has experienced catastrophic floods and tsunamis.

An all-risks policy usually covers the risks arising from natural disasters with minor exceptions. In cases such risks are excluded from the main policy, the insured may negotiate with the underwriter to buy additional coverage in exchange for additional premiums. Except for marine insurance, coverage for these risks is usually restricted to the loss taking place in Thai territory. In addition, standard property policies usually contain special clauses prescribing that loss of, or damage to the insured property arising during any one period of 72 consecutive hours caused by an insured natural disaster will be deemed a single event and constitutes one occurrence that will ultimately affect the calculation of the limit of liability and deductibles or excess under the policy.

*Law stated - 01 December 2022*

## **Pandemic**

Is insurance available in your jurisdiction for pandemic-related losses and, if so, how does it generally apply?

As a result of the pandemic, most first-party property and business interruption insurance policies currently contain an express exclusion for pandemic-related loss; for example, a communicable disease exclusion or a coronavirus exclusion endorsement. Thus, if the insured wishes to be covered for such loss, it must negotiate with the insurer for an extension of coverage in this respect and pay an additional premium on a case-by-case basis. However, under the current situation, the insurance companies will be reluctant to provide such an extension since they are required by the reinsurers that such pandemic-related loss should be excluded.

Apart from ordinary life and health insurance, there are coverages for loss arising specifically from the coronavirus sold in the Thai market. At the start of the pandemic, the pure lump-sum payment policy was exceptionally popular in the market. The indemnity under which the agreed sum will be paid is under straightforward conditions where the insured is diagnosed as infected (regardless of actual medical expenses incurred and severity of the illness). However, since the situation has prolonged for additional years and the number of infected individuals has increased significantly, the insurance companies ceased selling such types of insurance. The insurance companies presently tend to narrow their coverage on a pure lump-sum basis to severe cases such as coma, brain death, neurologic failure and terminal illness. In addition, other current coverage available for coronavirus infection offers an indemnity for medical expenses on an actual basis, not lump-sum, or indemnity for loss of income in lump-sum (regardless of the actual losses), which is further restricted to the actual period of admission in the hospital or treatment.

*Law stated - 01 December 2022*

## **DIRECTORS' AND OFFICERS' INSURANCE**

### **Scope**

What is the scope of D&O coverage?

This type of policy provides coverage for directors, executive officers and top management of a company for financial losses or damages arising from violations or wrongful acts, for which such persons are legally responsible. Coverage also extends to the company in the event that the company is obligated to indemnify the directors and officers, for which such person is legally liable. Exclusions for this type of insurance are as follows:

- deliberate misconduct;
- insured versus insured claim;
- failure to maintain adequate insurance;

- outside directorships; and
- others, as specified by law, regulators, or insurance providers' policies (subject to local regulations).

*Law stated - 01 December 2022*

## **Litigation**

### **What issues are commonly litigated in the context of D&O policies?**

The issues that are commonly litigated under D&O policies are related to the disagreement between the insurer and insured on the definition of the 'director' and 'wrongful act' in accordance with the provisions under the policy. Other issues also involve the late notice of claims and misrepresentation in application process.

*Law stated - 01 December 2022*

## **CYBER INSURANCE**

### **Coverage**

#### **What type of risks may be covered in cyber insurance policies?**

Cyber insurance in Thailand covers an extensive range of risks that can result in first-party loss and third-party liability. It is designed to meet the needs of both business entities and individual persons. Most of the policies provide coverage for data loss and restoration, business interruption loss due to a network security failure or attack, human and programming errors, cyber extortion, crisis management event costs and security and privacy liability to a third party arising from a security or privacy breach. Recent policies have been drafted to cover cyber theft of funds, psychological treatment costs and legal defence costs arising from cyberbullying and e-commerce fraud.

*Law stated - 01 December 2022*

### **Litigation**

#### **What cyber insurance issues have been litigated?**

There has been no cyber insurance litigation in Thailand because the policies are very new.

*Law stated - 01 December 2022*

## **TERRORISM INSURANCE**

### **Availability**

#### **Is insurance available in your jurisdiction for injury or damage caused by acts of terrorism and, if so, how does it generally apply?**

Conventional insurance policies will generally not cover loss arising from or in connection with strikes, riots, civil commotion and terrorism. If the insured wishes to have such risks covered, they must enter a terrorism and political violence insurance policy, which is available in the Thai insurance market. This particular type of insurance is available for both property and business interruption.

Since 2010, there has been greater attention to policies that cover acts of terrorism from both the private and public sectors.







**UPDATE AND TRENDS****Key developments of the past year**

Are there any emerging trends or hot topics in insurance law in your jurisdiction?

The big issue for this year follows on from last year when the directive of the regulator, the Office of Insurance Commission (OIC), barred the insurance companies from cancelling active coronavirus insurance policies. The background of this issue is that most of the insurance policies that the OIC has approved contain a cancellation clause that allows either the insured or insurer to terminate the contract without cause before the insured period lapses, subject to certain conditions. After the number of coronavirus cases soared in 2021, some insurance companies decided to exercise their right to terminate coronavirus policies. Without hesitation, the regulator issued a directive barring the insurer from exercising its right under such clauses, with the purpose of protecting the interests of the insured. On the one hand, the OIC has been praised for protecting consumers. On the other hand, this directive has been highly criticised, as the regulator ordered to bar a clause that had already been legally approved by the regulator itself. In early 2022, some insurance companies commenced legal proceedings in this respect against the OIC in the Central Administrative Court seeking a withdrawal of such directive. However, within a month, all of them decided to withdraw the proceedings and were allowed to do so by the court.

*Law stated - 01 December 2022*

## Jurisdictions

	<b>Belgium</b>	Lydian
	<b>Chile</b>	JRR Abogados
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	<b>India</b>	Tuli & Co
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