

PANORAMIC

# INSURANCE LITIGATION

Thailand



LEXOLOGY

# Insurance Litigation

Contributing Editors

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## PRELIMINARY AND JURISDICTIONAL CONSIDERATIONS IN INSURANCE LITIGATION

### Fora

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

Most insurance policies in Thailand contain a standard optional arbitration clause that offers alternatives to dispute resolution that the insured may choose from. Disputes may either be submitted to arbitration, or a lawsuit can be filed with the court. However, it is less common to find these standard clauses included in marine insurance policies.

For the court proceedings, the following fora have the power to hear such cases:

- 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 those exceeding 300,000 baht are heard in the provincial courts. Appeals on judgments from both district 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 its judgments 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, the dispute 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, under which disputes on recourse claims between insurance companies are 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 with.

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 - 9 December 2023**

### Causes of action

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

The Thai Civil Procedure Code does not provide an option of declaratory judgment. Parties to a contract will be entitled to commence court proceedings only if the contract in question is breached (eg, an insured demands indemnity under the insurance contract and the

insurer declines to pay). However, in practice, the liability insurer may be sued or join in the proceedings as a co-defendant (alongside the insured who has underlying liabilities to a third party) without the necessity of a demand and declination.

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

**Law stated - 9 December 2023**

## **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 the application of English law and practice. Even in the cases where such English law clause is absent, the Supreme Court generally applies English law as a general principle of law for marine insurance.

#### Choice of forum

Parties to insurance and reinsurance contracts should thoroughly examine the policies 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 a 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 a case is appealed to the Court of Appeals and/or the Supreme Court, the proceedings can extend to an additional two to three years at each appellate stage. The winning party in court proceedings is eligible to redeem costs incurred. It is worth noting that courts generally order the losing party to pay a small percentage of the legal representative's fees (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. It should be noted that a party may not appeal an arbitral

award. A petition to set aside an arbitral award may be filed with a competent court under specific circumstances.

### Surveying and loss adjusting

Where a policy covering physical loss to property has been 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 conducted 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 they are called as a witness in court.

### Time for limitation

The prescription period for insurance and reinsurance claims under Thai law is two years from the date on which the loss under the underlying policy occurs. Any clause in an insurance agreement extending this time frame is invalid under Thai law. As a result, the insured or ceding company can encounter difficulties if a claim adjustment is not completed before the prescription period expires. However, in certain situations – 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. For consumer policies, the limitation period for a claim can be suspended from running while the insured and insurer negotiate the amount of indemnity to be paid under the policy. Therefore, claimants should commence court or arbitral proceedings within the prescription period or, at least, ensure that the time for limitation is validly interrupted or paused.

### Ex gratia payment

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

**Law stated - 9 December 2023**

## **Damages**

### **What remedies or damages may apply?**

For the insured



Under insurance contracts, indemnification is not only restricted to monetary payments. The insurer may opt 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 provide indemnification by other means will result in default interest at a rate of 5 per cent per annum.

For the insurer

Thai law does not provide distinctions between a breach of a warranty and a breach of a condition. Courts assess issues on a case-by-case basis, taking into account the contract's wording and rules of construction. Precedents show that if the policy does not clearly provide that a breach results in non-payment of indemnity or a discharge of the insurer's liability, the insurer is still required 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 - 9 December 2023**

### **Damages**

#### **Under what circumstances can extracontractual or punitive damages be awarded?**

Under the Consumer Case Procedure Act, courts have the discretion to impose punitive damages on insurers, not exceeding twice the actual damages. However, only disputes under insurance contracts that insurers enter into with individual insureds for non-commercial purposes, will be considered as consumer cases. For insurance contracts under which the insured is a corporation or which relates to commercial purposes, the dispute arising from such contracts will not be regarded as a consumer case and courts do not have the power to award punitive damages.

**Law stated - 9 December 2023**

## **INTERPRETATION OF INSURANCE CONTRACTS**

### **Rules**

#### **What rules govern interpretation of insurance policies?**

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

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 can undergo judicial review, the enforcement of clauses approved by the OIC is not always guaranteed. Contentious

clauses are subject to the discretion of the court, aiming to protect the insured against unfair contractual terms.

**Law stated - 9 December 2023**

## **Ambiguities**

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

Ambiguity in a policy is resolved under the following principles:

- the policy should be considered as a whole;
- special clauses prevail over general ones;
- interpretation of wording of a contract that specifies effectiveness prevails over wording that does not indicate effectiveness;
- the true intention of the agreement should be sought rather than the 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 persists, such clause must be construed against the drafter (ie, in favour of the insured).

**Law stated - 9 December 2023**

## **NOTICE TO INSURANCE COMPANIES**

### **Provision of notice**

#### **What are the mechanics of providing notice?**

The insured is obliged by law to notify the insurer without delay upon becoming aware of a loss of or damage to the subject-matter insured. While the law does not specify mechanics for providing notice, means of notification 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, time frame for notification, whether the notice should be verbal or in 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, the cause of loss, the initial extent of the loss and the date of the loss). Specifically, in liability insurance, the insured is required to provide court documents and/or information that helps to support the insured in substantiating or defending the claim brought against it by a third-party claimant.

**Law stated - 9 December 2023**

## **Obligations**

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

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

Law stated - 9 December 2023

### Timeliness

#### When is notice untimely?

Thai law requires that notice be given 'without delay'; such phrase grants judges or arbitrators the discretion to decide on a case-by-case basis whether the notice was timely. However, to avoid such discretion, some policies specify a certain timeframe for giving notice (eg, within 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, unless the insured can demonstrate an impediment that prevents him or her from giving such notice within the specified period, and that the notice was already given as soon as possible after such impediment ceased.

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

Law stated - 9 December 2023

### Timeliness

#### What are the consequences of late notice?

Under the law, untimely notice does not absolve the insurer from the liability for indemnifying the insured under the policy. Nevertheless, an explicit clause in the policy that prescribes that untimely notice results in discharging the insurer's liability for such loss has been held valid and enforceable by the Supreme Court.

Law stated - 9 December 2023

## 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. Such duty can only be imposed on the insurer if it is expressly stated as a contractual obligation in the policy. Generally, Thai insurance policies do not include an obligation to defend against a claim, although certain types of policies include a 'right to defend' clause. As a result, insurers typically have no duty to defend a claim made against the insured.

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

**Law stated - 9 December 2023**

## **Failure to defend**

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

In case where the policy does contain a clause that imposes a duty to defend on the insurer and such duty is breached, it is advisable for the insured to demand that the insurer comply with the duty to defend within reasonable period of time. If the insurer continues to fail to comply, the insured has two options:

- the insured may choose to continue with the insurance contract and demand compensation from the insurer for any damages arising from the breach; or
- in the case where a premium under the policy is substantial and the liability of the insured claimed by a third party is not significant, the insured may opt to terminate the insurance contract, demand a refund of the premium and further demand compensation for any damage caused from the insurer.

**Law stated - 9 December 2023**

## **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, illness including health accidents, but excludes mental injuries. Even though the insured may be held liable to an injured third party under tort law for mental injury, for example, posttraumatic stress disorder, neither the insured nor the third party is entitled to demand damages from the insurer.

**Law stated - 9 December 2023**

### **Property damage**

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

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

Law stated - 9 December 2023

## Occurrences

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

An occurrence under a standard CGL policy is constituted by an incident involving 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 be of a fortuitous nature.

Law stated - 9 December 2023

## Occurrences

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

The determination of whether claims stem from one occurrence or multiple occurrences affects the limit of liability and deductibles or excess. In theory, the 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. However, if the claims originate from different proximate causes, they will not be considered as stemming from the same occurrence. It is worth noting that Thai law and courts have not yet established a clear principle as to what constitutes 'proximate cause'. This ambiguity in established precedent under Thai law may be circumvented by clearly defined contractual terms in the insurance policy.

Law stated - 9 December 2023

## Coverage

### What event or events trigger insurance coverage?

Coverage will be triggered in cases of accidental loss of life, bodily injury, illness or health of a third party, or loss of or damage to a third party's property, provided that 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, without which contract the liability of the insured would not have arisen;
- losses covered by other types of liability insurance (eg, professional indemnity or product liability insurance);
- losses caused by 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 on the insured premises);
- liability for pollution;
- liability imposed by a foreign court judgment;
- liability arising out of or in connection with war, strikes, riots, civil commotion, terrorism,

- punitive damages, penalty and fines; and
- others, as specified by law, regulators or insurance providers' policies (subject to local regulations).

Law stated - 9 December 2023

## Coverage

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

Under Thai law, if multiple insurance contracts are made in succession (ie, on different days) and the accumulated sum insured exceeds the amount of loss, the insurer of the first policy will become primarily liable for the loss. If the indemnity paid by the first insurer does not fully cover the loss, subsequent insurers will be liable for the remaining amount until the loss is adequately covered. If the insurance contracts are entered into simultaneously (ie, within the same day), the insurers will indemnify the insured on a pro rata basis, and their liability is not joint and several.

Nonetheless, in practice, the above-mentioned law on successive insurance is rarely applied in Thailand. Most policies issued in Thailand contain clauses that lead to different results. These policies state that the insurer will be liable on a pro rata basis where other policies cover the same loss. Furthermore, some policies contain a clause stating that such policy's coverage will only apply after the insured has made indemnity claims under other policies, and only if the amount of indemnity paid under such other policies is not sufficient.

Law stated - 9 December 2023

## 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 standalone policies, such as marine cargo, hull and machinery, motor, and fire insurance, or as 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 insured properties and the 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. Essentially, the policy does not cover economic loss, unless the insured buys additional business interruption insurance. Exclusions generally include the following:

- deterioration arising from design, material, or manufacturing defects;
- ordinary wear and tear or inherent vice;
- loss when the cause is unknown;
- war, strikes, riots, civil commotion, terrorism; and
- other causes, as determined by law, regulations or policies.

Law stated - 9 December 2023

## 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 an insurance contract are allowed to agree to the value of the subject matter insured and state the value of that property in the policy, creating a so-called valued policy. In such an arrangement, the value fixed by the policy is, as agreed 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 on the indemnity amount if it can prove that the agreed value is substantially higher than it should be and to return a proportionate amount of the premiums with interest to the insured.

Even in the absence of an agreed value in the policy, as discussed above, the indemnity may be adjusted without considering depreciation of the subject matter insured, provided that the policy includes a special replacement value clause or the 'new for old' clause.

Law stated - 9 December 2023

## Natural disasters

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

Insurance covering natural disasters is commonly available in Thailand. This coverage has proved valuable as Thailand has experienced catastrophic floods and tsunamis.

An all-risks policy usually covers the risks arising from natural disasters with few exceptions. In cases where such risks are excluded from the main policy, the insured may negotiate with the underwriter to buy additional coverage in exchange for an extra premium. Except for marine insurance, coverage for these risks is usually restricted to the losses taking place in Thai territory. In addition, standard property policies usually contain special clauses prescribing that losses of or damage to insured property arising during any continuous 72-hour period caused by a natural disaster covered by the policy 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 - 9 December 2023

## Pandemic

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

Following the pandemic, most first-party property and business interruption insurance policies in Thailand now explicitly exclude pandemic-related losses, for example, communicable disease exclusions or coronavirus exclusion endorsements. Thus, to obtain coverage for such losses, the insured must negotiate with the insurer for an extension of coverage in this respect and agree to pay an additional premium on a case-by-case basis. However, under the current situation, insurance companies are generally reluctant to provide such extensions, 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 sold in the Thai market for losses arising specifically from the coronavirus. At the start of the pandemic, the pure lump-sum payment policies were exceptionally popular in the market. These policies provided indemnity under straightforward conditions: a predetermined sum would be paid if the insured was diagnosed as infected (regardless of the actual medical expenses incurred or the severity of the illness). However, as the pandemic extended over additional years and the number of infected individuals has increased significantly, insurance companies stopped offering such types of insurance. Insurance companies presently tend to limit their coverage on a pure lump-sum basis to severe cases, such as coma, brain death, neurological failure and terminal illness. In addition, other coverages available for coronavirus infection currently offer indemnity for medical expenses based on actual costs, not a lump-sum payment. There are also policies offering lump-sum indemnity for loss of income (regardless of the actual losses), but are further restricted to the actual period of hospitalisation or treatment.

**Law stated - 9 December 2023**

## 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 against financial losses or damage arising from violations or wrongful acts, for which such persons are legally responsible. Coverage also extends to the company itself in the event that the company is obligated to indemnify the directors and officers. Exclusions for this type of insurance are as follows:

- deliberate misconduct;
- insured versus insured claims;
- failure to maintain adequate insurance;
- outside directorships; and
- others, as specified by law, regulators, or insurance providers' policies (subject to local regulations).

**Law stated - 9 December 2023**



## 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 disagreements between the insurer and the insured regarding the definitions 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 - 9 December 2023

## CYBER INSURANCE

## Coverage

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

Cyber insurance policies in Thailand cover an extensive range of risks that can result in first-party loss and third-party liability. They are 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 network security failures or attacks, human and programming errors, cyber extortion, crisis management event costs and security and privacy liability to third parties arising from a security or privacy breaches. Recent policies have been drafted to expand coverage to include cyber theft of funds, psychological treatment costs and legal defence costs arising from cyberbullying and e-commerce fraud.

Law stated - 9 December 2023

## Litigation

### What cyber insurance issues have been litigated?

As of now, there has been no cyber insurance litigation in Thailand, primarily because the policies are relatively very new to the market.

Law stated - 9 December 2023

## 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 generally do not cover loss arising from or in connection with strikes, riots, civil commotion and terrorism. To obtain coverage for such risks, the insured must enter into 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 damage and business interruption.

Since 2010, there has been heightened awareness and interest in policies that cover acts of terrorism, with attention coming from both the private and public sectors.

**Law stated - 9 December 2023**

## UPDATE AND TRENDS

### **Key developments of the past year**

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

As a result of a regulatory guillotine carried out by the Office of Insurance Commission (OIC) during the past two years, the OIC issued a notification to set out rules for indemnity payment and acts regarded as an impediment to indemnity payment. The issue which causes an uproar in the insurance industry is the new requirement imposed on insurance companies in cases of payment declination on grounds of insurance fraud. This requirement poses a significant burden on insurance companies. Previously, an insurance company may decline indemnity payments by citing relevant laws or contractual provisions. Under this new notification, if an insurance company suspects that an insurance claim is an insurance fraud and wishes to decline it, the company must initiate criminal actions against the claimant as a prerequisite for denying the claim. Numerous attempts have been made by insurance companies to discuss and convince the OIC to amend this notification, but to no avail.

**Law stated - 9 December 2023**