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Global Legal Group

# The International Comparative Legal Guide to: Patents 2012

## A practical cross-border insight into patents law

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# Thailand



Nandana Indananda



Vasan Abe Sun

Tilleke & Gibbins

## 1 Patent Enforcement

### 1.1 How and before what tribunals can a patent be enforced against an infringer?

The Central Intellectual Property and International Trade (IP&IT) Court in Bangkok, Thailand, is a specialised Court that has exclusive jurisdiction over various civil and criminal proceedings, including patent enforcement. The IP&IT Court was established by the Act for the Establishment of and Procedure for the Intellectual Property and International Trade Court B.E. 2539 (1996), and its procedures are set out in the Civil Procedure Code, the Criminal Procedure Code and the Rules for Intellectual Property and International Trade Cases B.E. 2540 (1997).

There are generally two means available for a patent owner to enforce a patent against an alleged infringer, depending on whether the patent owner wishes to seek civil or criminal remedies. If a patent owner desires to enforce their patent rights through criminal proceedings, the patent owner may launch a criminal case by involving specialised police enforcement teams to conduct searches and seizures of evidence of infringement. However, such specialised police enforcement teams are unlikely to participate unless presented with strong evidence of infringement. On the other hand, if a patent owner prefers to enforce their patent rights by way of civil remedies, the patent owner may choose to first issue warning notices of infringement to the infringer before proceeding to launch a civil infringement case. A civil proceeding is commenced against an alleged infringer by filing a Complaint Form with the IP&IT Court detailing the patent infringement claim.

Regardless of the type of remedies sought, gathering evidence of infringement before commencing action is crucial, particularly due to the lack of a formal discovery process in Thailand. There is, however, a limited form of document disclosure available under the Civil Procedure Code which involves bringing a motion before the Court to seek disclosure of an identified document by another party. The Court will grant such a motion if the Court is of the opinion that the evidence is relevant to the case. If the other party fails to comply with such document disclosure orders, an admission by the other party will be deemed as to the facts of the document.

### 1.2 What are the pre-trial procedural stages and how long does it generally take for proceedings to reach trial from commencement?

As described in question 1.1, there are generally two ways in which a patent owner can enforce a patent against an alleged infringer.

#### Criminal Proceedings

After the specialised police enforcement teams agree to participate in the patent infringement case, the relevant police personnel will submit a request to the IP&IT Court for a search and seizure order. Pursuant to the order, if evidence of infringement is found, the alleged infringer will be charged and asked to submit a plea. If the alleged infringer pleads not guilty, designated investigation officer(s) will take evidence from both parties and submit an opinion to the public prosecutor as to whether or not to prosecute. The criminal case will proceed to the IP&IT Court if the public prosecutor agrees with the investigation officer's findings and a *prima facie* case against the alleged infringer can be established and demonstrated. Thereafter, the Court will set out trial dates.

#### Civil Proceedings

In a civil proceeding, enforcing a patent against an alleged infringer commences with the filing of a written Complaint Form by the plaintiff(s) with the IP&IT Court, and serving of a copy of the Complaint Form along with a summons issued by the Court on the defendant(s). The Complaint Form must detail which patent and which claim or claims of the patent are being allegedly infringed. In response, the defendant(s) may reply with a defence of non-infringement by filing an Answer to the Complaint with the IP&IT Court and serving the Answer to the Complaint on the plaintiff(s). A Counterclaim for patent invalidity may also be filed along with the Answer to the Complaint. If a Counterclaim is filed, the plaintiff(s) may reply by filing an Answer to the Counterclaim with the IP&IT Court and serving the Answer to the Counterclaim on the defendant(s). In general, the mode of service by a party dictates the deadline for the reply by the other party. If service is in person, then the receiving party will be entitled to 15 days in which to file an Answer. If service is by mail, then the served party will be entitled to 30 days in which to file an Answer. Deadlines for an Answer to the Complaint, Counterclaim and Answer to the Counterclaim are extendible at the discretion of the Court.

Thereafter, the Court will set a meeting of the parties date for the purpose of determining the possibility of dispute resolution between the parties. If both parties are committed to litigation in the IP&IT Court, the Court will proceed to set out the issues to be tried in the case. In the settlement of issues meeting, the Court will also set the number of witnesses allowed by each party, the witness testimony dates, and the deadlines for pre-trial procedures, including conducting of experiments to prove infringement, submission of each party's evidence list and submission of evidence particulars.

Due to the availability of deadline extensions of the pleadings, along with the increasingly heavy case loads of the IP&IT Court judges, it is difficult to estimate the duration of time for proceedings to reach trial from commencement. On average, the time will range between 6 months and 18 months.

### 1.3 Can a defence of patent invalidity be raised and if so how?

Defendant(s) may raise a defence of patent invalidity by filing a Counterclaim of patent invalidity along with their Answer to the Complaint. Alternatively, an invalidity action may be taken as a separate case. Procedurally speaking, a patent invalidation action is treated as a civil case and therefore will be carried out in accordance with the IP&IT Act and the Civil Procedure Code.

### 1.4 How is the case on each side set out pre-trial? Is any technical evidence produced and if so how?

At the settlement of issues meeting, if the parties have not reached an agreement on the issues set out in the pleadings, the Court will set out the issues to be decided in the case. This occurs after submissions of the Complaint by the plaintiff(s), the Answer to the Complaint and Counterclaim (if any) by the defendant(s) and the Answer to the Counterclaim by the plaintiff(s), and before the submission of each party's evidence list. Each party may submit technical evidence if detailed in their respective evidence lists, and such technical evidence may include documentary evidence, physical evidence and expert witness reports.

### 1.5 How are arguments and evidence presented at the trial?

As a matter of procedure, examination of a witness has been replaced with a requirement for submission of an affidavit by the witness prior to the trial. The deadline for affidavit submissions will vary depending on the case and the judge. Witness testimonies in the IP&IT Court will commence with a cross-examination by the opposite party's litigator, followed by a re-examination by the same party's litigator. Proceedings are conducted strictly in the Thai language. Foreign witnesses may use interpreters during their testimonies in the IP&IT Court.

### 1.6 How long does the trial generally last and how long is it before a judgment is made available?

Pleadings generally take about 3 to 6 months. A settlement of issues meeting is typically scheduled shortly thereafter. Trial dates generally commence within 12 months of the settlement of issues meeting. Witness testimonies for both parties may take from 2 months to 6 months. Thereafter, closing statements by each party are generally due for submission to the IP&IT Court within 1 to 2 months of the last trial date. Judgment is typically rendered about 3 to 6 months after the deadline for submission of closing statements. In summary, patent infringement cases generally span 18 to 36 months from the submission of the pleadings to the time of judgment.

### 1.7 Are there specialist judges or hearing officers and if so do they have a technical background?

At present, no specialist judges have specialised technical backgrounds in the IP&IT Court. However, it is not uncommon for a quorum of three judges in a complex patent infringement case to include one associate judge who has extensive relevant technical background.

### 1.8 What interest must a party have to bring (i) infringement (ii) revocation and (iii) declaratory proceedings?

In accordance with the Patent Act, only a patentee or a transferee of

a patent from the patentee can bring an infringement action in the IP&IT Court. In regards to revocation of a patent, a party challenging the validity of the patent must be able to demonstrate that the party is an interested party. There are no declaratory proceedings in Thailand.

### 1.9 Can a party be compelled to provide disclosure of relevant documents or materials to its adversary and if so how?

A limited form of document disclosure is available under the Civil Procedure Code by bringing a motion before the IP&IT Court seeking disclosure of an identified document by the other party. If the Court is of the opinion that the evidence is relevant to the case, the Court will issue a summons order for the other party to file the original evidence with the Court. If the other party fails to comply with such document disclosure orders from the Court, an admission by the other party will be deemed as to the facts of the document.

### 1.10 Can a party be liable for infringement as a secondary (as opposed to primary) infringer? Can a party infringe by supplying part of but not all of the infringing product or process?

The Patent Act is silent on secondary or contributory infringement. Furthermore, Thailand has yet to see a judgment acknowledging secondary or contributory infringement. However, in the case of criminal proceedings of patent infringement wherein patent infringement is a criminal offence, the Penal Code is expected to assist. Specifically, Section 84 of the Penal Code defines an instigator as whomever, whether by employment, compulsion, threat, hire, asking as a favour or instigation, or by any other means, causes another person to commit any offence. In general, a plaintiff patent owner in a criminal proceeding must prove that the alleged infringer possessed the requisite intent to commit the criminal offence of patent infringement.

### 1.11 Does the scope of protection of a patent claim extend to non-literal equivalents?

In accordance with the Patent Act, the scope of a patent will be determined by its claims. However, a form of doctrine of equivalents does exist in the Patent Act, which allows for a plaintiff patentee to argue patent infringement even if the claims are not literally infringed.

### 1.12 Other than lack of novelty and inventive step, what are the grounds for invalidity of a patent?

In accordance with the Patent Act, an invalidation action may be brought if: (i) a patent is not new; (ii) a patent does not have an inventive step; (iii) a patent is incapable of industrial application; (iv) a patent is directed to non-patentable subject matter (naturally occurring micro-organism and their components; plants or animals or extracts of plants or animals; scientific or mathematical principles or theories; computer programmes; methods of diagnosing, treating or curing animal or human diseases; and anything contrary to public order, morals, health or safety); (v) named inventor issues; or (vi) unqualified applicant issues. It should be noted that Thailand has yet to see a judgment acknowledging lack of unity, lack of enablement or improper prosecution as sufficient grounds for patent invalidity.

### 1.13 Are infringement proceedings stayed pending resolution of validity in another court or the Patent Office?

No, they are not.

### 1.14 What other grounds of defence can be raised in addition to non-infringement or invalidity?

Thailand has yet to see a judgment in favour of an alleged infringer on any grounds of defence other than non-infringement and invalidity.

### 1.15 Are (i) preliminary and (ii) final injunctions available and if so on what basis in each case?

Preventive injunctions are available in Thailand. In accordance with the Patent Act, if there is clear evidence that a person has committed or is about to commit an act in violation of a patent owner's rights, the patent owner may apply to the IP&IT Court for an injunction against the said person to stop or refrain them from committing such infringing acts.

### 1.16 On what basis are damages or an account of profits estimated?

The right of a patent owner to receive compensation in a civil action for losses suffered as a result of infringement is set out in the Patent Act, which states that in the case where a patent owner's rights have been violated, the IP&IT Court has the power to order compensation for damages to the patent owner in such amount as the Court considers appropriate. In doing so, the Court will take into consideration the seriousness of the damages as well as loss of benefits and the necessary expenses incurred in enforcing the rights of the patentee. One of the most difficult aspects of claiming and awarding damages before the IP&IT Court concerns proof of damages. Specifically, the patent owner must prove that the actual amount of damages suffered is a direct result of the infringement. Furthermore, there is no concept of punitive damages or exemplary damages in Thailand.

### 1.17 What other form of relief can be obtained for patent infringement?

In addition to damages and injunctive relief, the IP&IT Court may also order the destruction of the infringing goods or vesting of the infringing goods in the patent owner.

### 1.18 Are declarations available and if so can they address (i) non-infringement and/or (ii) claim coverage over a technical standard or hypothetical activity?

Declarations are not available in Thailand.

### 1.19 After what period is a claim for patent infringement time-barred?

There is no time-barring of a claim for patent infringement in Thailand, so long as the patent is valid, enforceable and has not expired.

### 1.20 Is there a right of appeal from a first instance judgment and if so is it a right to contest all aspects of the judgment?

A decision of the IP&IT Court can be appealed to the Supreme Court (Dika Court). Appeals need not be confined to issues of law, and it is quite common for the Dika Court to re-examine the entire case. Appeals are conducted in written submission, and there are no hearings (with the exception of the judgment hearing). Judgment by the Dika Court can take up to 2 years.

### 1.21 What are the typical costs of proceedings to first instance judgment on (i) infringement and (ii) validity; how much of such costs are recoverable from the losing party?

Costs for patent infringement and invalidity proceedings will vary considerably depending on the complexity of the case. Parties to an infringement and validity proceeding should expect to see costs starting at about THB 1 million (USD 31,000). Although costs may be awarded against the losing party, such cost awards are typically small amounts which cannot be seen as enabling the prevailing party to recoup costs.

## 2 Patent Amendment

### 2.1 Can a patent be amended *ex parte* after grant and if so how?

A patent cannot be amended after being granted.

### 2.2 Can a patent be amended in *inter partes* revocation proceedings?

No it cannot.

### 2.3 Are there any constraints upon the amendments that may be made?

See above answer.

### 2.4 Do reasons for amendment need to be provided and if so is there a duty of good faith?

See above answer.

## 3 Licensing

### 3.1 Are there any laws which limit the terms upon which parties may agree a patent licence?

Limitations regarding licensing of patent rights can be found in the Patent Act, which states that a patent licensing agreement must be made in writing and registered with the Department of Intellectual Property. Furthermore, a patent owner cannot impose upon the licensee any condition, restriction or any royalty term which is unjustifiably anti-competitive. Furthermore, a patent owner cannot require the licensee to pay royalties for the use of a patented invention after the patent has expired.

### 3.2 Can a patent be the subject of a compulsory licence and if so how are the terms settled and how common is this type of licence?

In accordance with Thailand's TRIPS obligations, the Patent Act sets out a number of circumstances where a compulsory licence may be obtained. An applicant is entitled to apply to the Director General of the Department of Intellectual Property for a compulsory licence for the patent. The ability to obtain such a licence typically arises when the patented invention is not being used in Thailand, demand is not being met on reasonable terms, or the working of an improvement patent is not possible without such a licence. Furthermore, the applicant must demonstrate that unsuccessful efforts had been made to obtain a voluntary licence from the patent owner and that an agreement could not be reached within a reasonable time.

## 4 Patent Term Extension

### 4.1 Can the term of a patent be extended and if so (i) on what grounds and (ii) for how long?

The term of a patent cannot be extended in Thailand.

## 5 Patent Prosecution and Opposition

### 5.1 Are all types of subject matter patentable and if not what types are excluded?

The Patent Act clearly sets forth five categories of subject matter that are non-patentable, namely any: (i) naturally occurring micro-organism and their components, or plants or animals or extracts of plants or animals; (ii) scientific or mathematical principles or theories; (iii) computer programmes; (iv) methods of diagnosing, treating or curing animal or human diseases; or (v) anything contrary to public order, morale, health or safety.

### 5.2 Is there a duty to the Patent Office to disclose prejudicial prior disclosures or documents?

If a patent application claims priority to an earlier-filed application in any foreign country, the applicant will be required to submit an examination report of the earlier-filed foreign application with the Department of Intellectual Property.

### 5.3 May the grant of a patent by the Patent Office be opposed by a third party and if so when can this be done?

The Patent Act sets forth a 90-day window for a third party to file an opposition, which commences upon the publication of a patent application. Thereafter, a third party may only oppose the grant of a patent through a revocation proceeding.

### 5.4 Is there a right of appeal from a decision of the Patent Office and if so to whom?

An appeal from a decision of the Department of Intellectual Property lies in the Board of Patents.

### 5.5 How are disputes over entitlement to priority and ownership of the invention resolved?

In general, there are three relevant time periods to consider regarding the issue of entitlement disputes: (i) opposition period; (ii) after the opposition period and before granting of the patent application; and (iii) after granting of the patent.

#### Opposition period

Thailand provides for a 90-day opposition period which commences upon the publication of a patent application by the Department of Intellectual Property. During the opposition period, a party who believes that they, and not the applicant, are entitled to the invention may apply to the Department of Intellectual Property. If the Director General of the Department of Intellectual Property decides that the invention belongs to the party and not the applicant, then the Director General will reject the application. Thereafter and within 180 days of the final decision of the Director General, the prevailing party may submit a new patent application for the invention and receive the original filing and publication dates.

#### After opposition period and before grant

There are no means of dispute resolution available during this period.

#### After grant

Issues as to entitlement disputes may be made before the IP&IT Court *inter partes* during infringement proceedings, revocation proceedings or as a separate entitlement case.

### 5.6 What is the term of a patent?

The term of a patent is 20 years from the filing date. If a patent claims priority to a first-filed patent in a foreign country, then the 20 years commences from the filing date of the first-filed foreign patent.

## 6 Border Control Measures

### 6.1 Is there any mechanism for seizing or preventing the importation of infringing products and if so how quickly are such measures resolved?

Presently, border control measures only exist for copyright and trademark infringement.

## 7 Antitrust Law and Inequitable Conduct

### 7.1 Can antitrust law be deployed to prevent relief for patent infringement being granted?

Thailand has yet to see the application of antitrust law as a successful defence of patent infringement.

### 7.2 What limitations are put on patent licensing due to antitrust law?

In accordance with the Patent Act, a patent owner is prohibited from imposing upon the licensee any condition, restriction or royalty that is unjustifiably anti-competitive.

## 8 Current Developments

### 8.1 What have been the significant developments in relation to patents in the last year?

There have not been any.

### 8.2 Are there any significant developments expected in the next year?

None are expected.

### 8.3 Are there any general practice or enforcement trends that have become apparent in Thailand over the last year or so?

We have not seen any new patent practice or enforcement trends over the last year.



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