



Insurance & Reinsurance

in 23 jurisdictions worldwide

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Regulation

1 Regulatory agencies

Identify the regulatory agencies responsible for regulating insurance and reinsurance companies.

Insurance business in Thailand is regulated by the Office of the Insurance Commission (OIC), which was established in 2007 by the Insurance Commission Act, replacing the Department of Insurance. At the same time, ultimate responsibility for supervision of the insurance business transferred from the Ministry of Commerce to the Ministry of Finance. The OIC regulates all aspects of both life and non-life insurance, and is administered by a board of directors, which includes the permanent secretaries of the ministries of finance and commerce, the Secretary-General of the Consumer Protection Board, the Governor of the Bank of Thailand, the Secretary-General of the Securities and Exchange Commission, and the Secretary-General of the OIC.

2 Formation and licensing

What are the requirements for formation and licensing of new insurance and reinsurance companies?

Since 2008, amendments to the Life Insurance Act 1992 and the Non-Life Insurance Act 1992 have stipulated that life and non-life insurance business may only be undertaken by a public limited company under the relevant public companies legislation, or a branch office of a foreign insurer (in both cases, subject to a licence being granted to operate from the Ministry of Finance, with approval of the cabinet).

Transitional arrangements were granted to private companies already registered and licensed until February 2013, from which date any non-compliant insurer may continue to operate for a further three years, but may not issue new policies. Failure to convert to a public company by February 2016 will lead to a loss of licence.

An application for a licence to engage in the insurance business must be lodged by the company promoters with the Minister of Finance. Upon approval being granted by the Minister, the promoters are required to incorporate a public limited company (or in the case of a foreign insurer, establish a branch office), lodge a security deposit and maintain an adequate capital fund within six months of incorporation. Upon satisfying the necessary conditions, a licence will be issued. If the company is unable to satisfy the capital and deposit requirements within six months of incorporation, the approval is deemed to be withdrawn. Fees are payable for the application and annual renewal of licences.

The Thai insurance market is crowded, and in 2012 the government announced that no new licences would be issued to foreign investors for at least five years.

3 Other licences, authorisations and qualifications

What licences, authorisations or qualifications are required for insurance and reinsurance companies to conduct business?

Separate licences are required to transact life and non-life business (defined as 'entering into a (Non)-Life Insurance contract with any person'), and composite licences are not awarded. Any person carrying on an insurance business without a licence is subject to imprisonment for a term of two to five years, and a fine of up to 500,000 baht plus an additional fine of up to 20,000 baht for each day during which the violation continues. Companies with a life or non-life licence can accept reinsurance business according to their licence.

4 Officers and directors

What are the minimum qualification requirements for officers and directors of insurance and reinsurance companies?

Directors and officers of life and non-life insurance companies are required to hold a bachelor's degree or higher qualification, or have work experience in relation to the insurance business, and must not:

- have been declared bankrupt;
- have been imprisoned for an offence relating to property;
- have been a director or officer of an insurance company whose licence has been withdrawn (at the time of withdrawal);
- be a director or officer of another insurance company, unless an exemption has been granted by the OIC;
- have been removed from the position of director or officer of an insurance company by the OIC;
- hold any political office;
- be an officer of the OIC; or
- have had a bad record or have carried out any activity showing a lack of responsibility or due care.

Not less than 75 per cent of the directors of an insurance company must be Thai nationals, although the OIC has the power to permit up to 50 per cent of the directors to be non-Thai nationals.

5 Capital and surplus requirement

What are the capital and surplus requirements for insurance and reinsurance companies?

The Non-Life Insurance Act No. 2, 2008 and the Life Insurance Act No. 2, 2008 introduced a risk-based capital (RBC) regime, replacing the previous fixed minimum paid-up capital requirements of 500 million baht (life) and 300 million baht (non-life). This relates capital requirements and solvency margins to risk. RBC has been fully implemented by the OIC since 1 September 2011, with an initial capital adequacy ratio (CAR) of 125 per cent, increasing to 140 per cent from 1 January 2013 and 150 per cent from 1 January 2014.

6 Reserves

What are the requirements with respect to reserves maintained by insurance and reinsurance companies?

Premium and claims reserve requirements are issued by the OIC. Premium reserves are set at various levels depending on the line of business, while claims reserves are calculated based on actuarial methods. Special reserve requirements apply where business is ceded to overseas insurers.

Reserving rules for life insurance require that the reserve of any policy year shall be equal to one-half of the sum of the reserve or surrender value, whichever is greater, as at the last day of the latest policy year. In addition, there is a requirement for one-half of the annual adjusted net premium plus the reserve or surrender value as at the close of the policy year, whichever is greater.

7 Product regulation

What are the regulatory requirements with respect to insurance products offered for sale? Are some products regulated by multiple agencies?

Both life and non-life insurance policies (including endorsements) must be in forms and wordings approved by the OIC, which has general discretion to amend or repeal wording already approved. In the event that an insurance company issues a policy that differs in form or wording from that approved by the OIC, the policy remains enforceable against the company, but the insured or beneficiary under the policy has the option of holding the company liable for payment in accordance with the wording issued by the company, or the wording approved by the OIC.

Text and pictures contained in advertisements or prospectuses are deemed to be an integral part of the insurance policy, and any conflicts or ambiguities arising thereon are resolved in favour of the insured or beneficiary.

8 Change of control

What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers and directors of the acquirer subject to background investigations?

Apart from the rules of foreign investment described in question 10, any transfer of business or company amalgamation is subject to consent from the OIC. The boards of directors of the relevant companies must jointly prepare and submit an operating scheme to the OIC in order to seek such consent, and the OIC may prescribe any condition deemed appropriate to protect the interests of insureds or to ensure the stability of business operations.

9 Financing of an acquisition

What are the requirements and restrictions regarding financing of the acquisition of an insurance or reinsurance company?

There are no specific laws governing the financing of an acquisition of an insurance or reinsurance company, but the transaction will be subject to the consent of the OIC as described in question 8.

10 Foreign investment

What are the requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign citizens, companies or governments?

At least 75 per cent of the voting shares of an insurance company must be held by:

- Thai individuals or Thai non-registered partnerships, in which all partners are Thai nationals; or (in addition)
- any entity registered in Thailand in respect of which more than 50 per cent of the voting shares are held by persons falling within the first point above, or by a parent company fulfilling the same conditions.

The OIC has the power to permit up to 49 per cent foreign ownership, and beyond that the Minister of Finance has discretion to allow foreign ownership of greater than 49 per cent in certain circumstances.

11 Reinsurance agreements

What are the regulatory requirements with respect to reinsurance agreements between insurance and reinsurance companies domiciled in your jurisdiction?

Overseas reinsurers are not required to be licensed in Thailand, nor do they have to put up deposits. Every insurance company is, however, required to submit copies of their reinsurance treaties to the OIC within 30 days of the signing or renewal date and must report on their treaties on an annual basis.

Reinsurance premiums are a tax-deductible expense and reinsurance recoveries are considered as taxable income. Under the recently implemented risk-based capital system, reinsurance credit-risk charges apply.

12 Ceded reinsurance and retention of risk

What requirements and restrictions govern the amount of ceded reinsurance and retention of risk by insurers?

By agreement, non-life companies cede a 5 per cent quota share of all risks to the principal domestic reinsurer (excluding aviation, crop, and livestock). An additional 5 per cent voluntary cession also applies, and at least 30 per cent of IAR policies with an average three-year loss ratio of less than 30 per cent must be reinsured in Thailand.

13 Collateral

What are the collateral requirements for reinsurers in a reinsurance transaction?

No collateral requirements are placed on reinsurers, but under the recently implemented risk-based capital system, reinsurance credit-risk charges apply.

14 Insolvent and financially troubled companies

What laws govern insolvent or financially troubled insurance and reinsurance companies?

The OIC has wide powers to intervene in the event of insolvency, including the revocation of licences.

In the event that an insurer is insolvent or has its licence revoked, insureds (and other creditors) have access to a policyholders' protection fund known as the Non-Life Insurance Fund, which is financed by levies on insurers at levels set by the OIC, but capped at 0.5 per cent of premiums received.

15 Intermediaries

What are the licensing requirements for intermediaries representing insurance and reinsurance companies?

Agents, brokers, and adjusters are required to be licensed by the OIC. No person may hold both an agent's and a broker's licence. Other than licensed agents, an insurance company may not appoint or assign any person to accept contracts on its behalf, and may not appoint any person to pay claims without express permission from the OIC.

An applicant for an agent's or broker's licence is required:

- to be sui juris;
- to be domiciled in Thailand;
- not to be adjudged incompetent or quasi incompetent;
- never to have been imprisoned for a dishonesty offence related to property within the past five years;
- not to be bankrupt;

- not to have had an agent's or broker's licence revoked within the past five years; and
- to have followed a prescribed insurance course at a prescribed institution, or have passed an examination in accordance with the requirements set down by the OIC.

A licence fee is payable upon application, and when issued, the initial licence is valid for a period of one year. After two consecutive applications, the newly issued licence is valid for a period of five years.

In order to apply for an adjuster's licence, the applicant must pass a course organised by the OIC or at an accredited institution, and not:

- be non compos mentis or mentally incapacitated;
- have been imprisoned for a dishonesty offence related to property in the past five years;
- be an employee or consultant to an insurance company;
- have a licence that is currently revoked or suspended; or
- have had a licence revoked within the past five years.

Insurance claims and coverage

16 Third-party actions

Can a third party bring a direct action against an insurer for coverage?

There is no statutory or other legal right for a third party to bring an action against an insurer unless the third party can establish that it was intended that they should be a beneficiary under the insurance policy.

17 Late notice of claim

Can an insurer deny coverage based on late notice of claim without demonstrating prejudice?

No. The insured or beneficiary has an obligation to give notice to the insurer with delay upon having knowledge of the loss, but a failure to comply with the notice requirement will only enable the insurer to claim compensation for any damage suffered as a result, unless the insured or beneficiary can prove that it was impracticable for him or her to comply.

Claims are subject, however, to a limitation period of two years from the date of loss, after which no action for payment can be entered.

18 Wrongful denial of claim

Is an insurer subject to extra-contractual exposure for wrongful denial of a claim?

Insurers are subject to statutory duties to appoint a licensed adjuster to inspect and adjust claims under the policy, and not to delay payment of any sum due under a policy without sufficient reason. Failure to comply with such duties may result in a fine of up to 500,000 baht and a daily fine of up to 20,000 baht for every consecutive day during which the failure continues. Further, proceedings for coverage under insurance policies are considered to be consumer claims in Thailand under the Consumer Case Procedure Act 2008 (regardless of whether the insured is an individual or a corporation) and, as such, have the potential to attract awards of punitive damages of up to double the compensatory damages award (or five times the compensatory damages where the value of the claim is below 50,000 baht). The courts have shown a willingness to impose punitive damages in the event that payments are withheld or delayed in bad faith.

19 Defence of claim

What triggers a liability insurer's duty to defend a claim?

Thai law imposes no specific duty to defend on an insurer and any trigger will therefore depend on the contractual arrangements set out in the policy wording.

20 Indemnity policies

For indemnity policies, what triggers the insurer's indemnity obligations?

The trigger for an insurer's indemnity obligations is a matter of contract and will be governed by the terms and conditions of the insurance policy. The Thai Civil and Commercial Code requires insurers to pay compensation for the actual amount of loss suffered, the damage caused to insured property by reasonable measures taken for preventing the loss and reasonable expenses incurred for preserving the insured property from the loss.

21 Incontestability period

Is there an incontestability period beyond which a life insurer cannot contest coverage based on misrepresentation in the application?

Life and non-life insurance contracts are voidable in the event that the insured knowingly makes false statements or omits to disclose facts that would have influenced the insurer's decision to enter into the contract or the level of premium payable, unless the insurer knew or should have known of the relevant facts or the falsity of the statement or statements. The right of avoidance is extinguished if not exercised within one month from the time when the insurer has knowledge of the ground of avoidance or within five years from the date of the contract.

22 Punitive damages

Are punitive damages insurable?

There is no prohibition against the insurance of punitive damages per se in Thailand, but insurers are relieved from liability in respect of losses caused by bad faith or gross negligence on the part of the insured or beneficiary, or in respect of losses resulting directly from the 'inherent vice' of the subject of insurance. The reasons for which punitive damages have been awarded would therefore need to be examined in each case, but it is likely that the conduct giving rise to the award will meet or exceed the bad-faith or gross-negligence threshold. The practical outcome is that punitive damages are unlikely to be insurable.

23 Excess insurer obligations

What is the obligation of an excess insurer to 'drop down and defend', and pay a claim, if the primary insurer is insolvent or its coverage is otherwise unavailable without full exhaustion of primary limits?

Thai law does not impose any extra-contractual duty to 'drop down and defend' on an excess insurer. Whether and when the excess policy would respond would therefore depend on its terms and conditions.

24 Self-insurance default

What is an insurer's obligation if the policy provides that the insured has a self-insured retention or deductible and is insolvent and unable to pay it?

There is no obligation on the insurer to drop down in the event of insolvency of the insured and the relevant self-insured retention or deductible would remain uninsured.

Update and trends

By the end of 2013, the majority of the numerous claims arising from Thailand's catastrophic floods in 2011 had been settled. Several high-value claims proceeded to litigation but were settled shortly after. The attention of the local market has now shifted from adjusting the claims at the local level, to pursuing recoveries against the local and international reinsurance market. Due to the size and complexity of some of the reinsurance programmes engaged, disputes have arisen over a variety of issues, at many levels, and in different venues. Due to the difficulty of enforcing Thai court judgments in foreign jurisdictions, cedants wishing to recover from their offshore reinsurers must choose the forum for any claim under the reinsurance contract carefully. Proceedings are currently ongoing not only in the Thai courts, but in the courts of many international reinsurers' home jurisdictions, as well as under the auspices of various arbitral institutions. Reinsurance brokers in Thailand have also found themselves exposed to claims arising out of foreign reinsurers' alleged failure to honour their reinsurance contracts with Thai cedants, due to certain provisions within Thailand's Civil and Commercial Code that the courts have interpreted to mean that international reinsurance brokers are acting as the reinsurers' agents in placing international business. Unsurprisingly, the proceedings are being vigorously defended.

In the regulatory sphere, the OIC continues with its programme to strengthen the capital adequacy of the local insurance market, including increased Capital Adequacy Ratios under the RBC requirements, and the introduction of mandatory stress testing models. As a result, greater consolidation is expected in the market, including a significant degree of anticipated foreign investment.

25 Claim priority

What is the order of priority for payment when there are multiple claims under the same policy?

There are no specific statutory or other legal rules on the order of payment of claims and this would therefore be governed by the terms of the policy.

26 Allocation of payment

How are payments allocated among multiple policies triggered by the same claim?

In the event that a claim triggers more than one policy, the policy with the earlier inception date shall respond first to the loss. In the event that the limits of the first policy are exhausted, the second policy sits excess and so on. If the inception dates of the policies are the same, the policies respond in proportion to the relevant sums insured.

Reinsurance

27 Reinsurance disputes

Are formal reinsurance disputes common, or do insurers and reinsurers tend to prefer business solutions for their disputes without formal proceedings?

Reinsurance disputes are more commonly resolved by negotiation than by recourse to formal proceedings, although both arbitration and litigation are used where settlement proves impossible. There is no specific body of law applying to substantive issues arising in the litigation or arbitration of reinsurance disputes.

28 Common dispute issues

What are the most common issues that arise in reinsurance disputes?

Common issues in recent years have included potential double coverage of losses arising from the 2010 civil unrest in Bangkok (focusing on the issue of whether the losses were caused by 'riot' and therefore covered under political violence policies), and valuation of

business interruption claims arising from the 2011 floods. In the latter case, reinsurers have raised allegations of excessively favourable settlements being granted by insurers to insureds within the same holding group or with whom other close connections are alleged to have influenced the value of settlement. The issues are further complicated by a common lack of clear contractual documentation setting out the terms of the coverage and any reinsurance, and a strict two-year limitation period applying to all insurance and reinsurance claims.

29 Arbitration awards

Do reinsurance arbitration awards typically include the reasoning for the decision?

Yes, unless otherwise agreed by the parties, the award must clearly state the reasons for the decision or decisions.

30 Power of arbitrators

What powers do reinsurance arbitrators have over non-parties to the arbitration agreement?

Arbitrators have no direct powers over non-parties to the arbitration agreement, but a majority of the arbitral tribunal can request a court to issue a subpoena or an order for submission of documents or materials. If the court believes that the subpoena or court order could have been issued if the action was being conducted in the courts, then it will proceed in accordance with the application, applying all relevant provisions of the Civil Procedure Code.

31 Appeal of arbitration awards

Can parties to reinsurance arbitrations seek to vacate, modify or confirm arbitration awards through the judicial system? What level of deference does the judiciary give to arbitral awards?

Arbitral awards are enforceable in the Thai courts, provided that the award was given in a country that is a signatory to the New York Convention or the Geneva Protocol. An arbitral award may be challenged via a proceeding to set aside an arbitral award issued in Thailand or to not enforce an arbitral award issued in Thailand or elsewhere. A set-aside proceeding must be submitted no later than 90 days after receiving a copy of the award.

Reinsurance principles and practices

32 Obligation to follow cedent

Does a reinsurer have an obligation to follow its cedent's underwriting fortunes and claims payments or settlements in the absence of an express contractual provision? Where such an obligation exists, what is the scope of the obligation, and what defences are available to a reinsurer?

There is no overriding obligation on a reinsurer to follow its cedent's fortunes or settlements and such issues would be determined by reference to the terms of the contract.

33 Good faith

Is a duty of utmost good faith implied in reinsurance agreements? If so, please describe that duty in comparison to the duty of good faith applicable to other commercial agreements.

All contracts in Thailand are subject to a general duty of good faith, but there is no higher standard implied in reinsurance agreements.

34 Facultative reinsurance and treaty reinsurance

Is there a different set of laws for facultative reinsurance and treaty reinsurance?

No, there are no specific laws governing reinsurance in Thailand, although insurers are required to report on their treaty arrangements to the OIC on an annual basis.

35 Third-party action

Can a policyholder or non-signatory to a reinsurance agreement bring a direct action against a reinsurer for coverage?

There is no statutory right for a third party to bring an action directly against a reinsurer for coverage, but cut-through clauses are sometimes used in reinsurance agreements and reflected in the underlying direct policy. The enforceability of the clause will depend on compliance with a number of conditions required under the Civil and Commercial Code for third-party contract rights. Regardless of the foregoing, the Thai courts have been willing, on occasion, to allow reinsurers to be joined to coverage proceedings between insured and insurer, and to issue a judgment enforceable by the insured directly against the reinsurer.

36 Insolvent insurer

What is the obligation of a reinsurer to pay a policyholder's claim where the insurer is insolvent and cannot pay?

Thai law does not impose any obligation on a reinsurer to pay claims directly to an insured under the underlying policy. In certain circumstances, cut-through clauses will be included as described above, but these will need to be carefully incorporated into both policies and must comply with the Civil and Commercial Code third-party contract rights requirements in order to be valid and enforceable. As above, the courts have been willing to look beyond the strict terms of the insurance and reinsurance contracts to imply a cut-through provision in certain circumstances.

37 Notice and information

What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer and how does the language of a reinsurance contract affect the availability of such remedies?

The notice requirements will be governed by the terms of the relevant facultative contract or treaty. In the absence of any specific

terms governing notice and information, the cedant bears the burden of proving the amount of loss paid under an underlying claim.

38 Allocation of underlying claim payments or settlements

Where an underlying loss or claim triggers multiple reinsured policies, how does the reinsured allocate its claims or settlement payments among those policies? Do the reinsured's allocations to the underlying policies have to be mirrored in its allocations to the applicable reinsurance agreements?

Where more than one policy responds to a loss, the Civil and Commercial Code provides that the policy with the earlier inception date shall respond first. The allocation to reinsurers would then follow the relevant reinsurance agreements.

39 Review

What type of review does the governing law afford reinsurers with respect to a cedent's claims handling, and settlement and allocation decisions?

Thai law does not grant any specific rights to reinsurers to involve themselves in the cedent's claims handling and settlement decisions. However, some form of claims-control clause is commonly included, giving the reinsurer a degree of control or right to participate in such decisions, or at the very least, a right to be notified. It is common practice in the context of high-value claims to involve reinsurers in the claims-handling process and to seek their consent to settlement, in order to avoid disputes after claims have been paid.

40 Reimbursing of commutation payments

What type of obligation does a reinsurer have to reimburse a cedent for commutation payments? Must a reinsurer indemnify its cedent for 'incurred but not reported' claims?

Reimbursement of commutation payments would be governed solely by the terms of the contract between the cedant and reinsurer.

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