

Insurance and reinsurance in Thailand: overview

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MARKET TRENDS AND REGULATORY FRAMEWORK

1. What were the main trends in the insurance and reinsurance markets over the last 12 months?

Insurance

The main development in the insurance market has been the passing of the Life Insurance Act and Non-Life Insurance Act on 5 March 2015. Both Acts provide more flexible solutions for foreign shareholdings in insurance companies, and remedies to the insured when the insurance company is insolvent or being dissolved.

Claims activity during the last 12 months has continued to be dominated by the settlement of outstanding claims arising from Thailand's catastrophic floods in 2011. Reinsurance issues have come to the fore, with disputes taking place both in Thailand and other jurisdictions as to the amounts properly recoverable from the international markets under extensive treaty and facultative arrangements.

The regulatory focus in recent years has been on tightening capital requirements, with risk-based capital requirements being introduced in 2011, and increased capital adequacy requirements introduced annually thereafter.

Some smaller local insurers have experienced financial distress and have been unable to maintain the increased statutory deposit requirement due to high-value outstanding claims and delayed payments from reinsurers. As a result, penalties have been levied on such insurers.

The non-life sector is crowded, with 66 insurers holding local licences. The regulator has identified the need for consolidation, and restrictions on foreign investment have started to be relaxed, enabling a number of significant M&A transactions to take place.

Both life and non-life insurance sectors continue to grow, with increases in collected premiums of 21.53% and 29.2% respectively reported in 2012. Figures have yet to be released for 2013 but the total gross written premium (GWP) was again predicted to show growth in double figures. In terms of distribution, bancassurance has gained greater prominence, with new regulations being issued by the Office of the Insurance Commission (OIC), and several significant new partnerships between insurers and banks having been announced. Retail distribution of consumer insurance products has also been established and is likely to contribute significantly to the growth of the sector.

Reinsurance

Thailand's local capacity is limited, and a significant proportion of the 2011 flooding losses were reinsured to the international markets, leading to additional layers of complication and disputes. Thailand has very little law or regulation applying specifically to reinsurance and the legal framework for international reinsurance businesses is therefore perceived to be inadequate to deal with the

complexity of issues arising. However, local licensing requirements and restrictions on foreign ownership mean that reinsurance continues to be the principal means by which international insurers participate in the underwriting of Thai risks.

2. What is the regulatory framework for insurance/reinsurance activities?

Regulatory framework

Insurance is governed by various sections of the Thai Civil and Commercial Code, and the Life and Non-Life Insurance Acts B.E. 2535 (1992), both of which were amended significantly in 2008 and 2015, respectively. New draft Life and Non-Life Insurance Acts were proposed to the Cabinet and the Parliament for consideration in 2012. Subsequently, the Life and Non-Life Insurance Acts No. 3 of 2015, as relevant, were enacted and became effective on 6 March 2015 (after publication in the Thai Government Gazette on 5 March 2015) and certain provisions of the Life and Non-Life Insurance Acts B.E. 2535 (1992), as amended, have been repealed and replaced with new provisions to cater to current insurance situations in Thailand, while further notifications and regulations will be issued in the future to implement the 2015 amendments.

The Acts lay out the following basic regulatory principles:

- Formation and licensing: insurers are required to be public limited companies, and are required to hold a licence issued by the Minister of Finance.
- Restrictions on shareholders and directors.
- Deposit, reserve, and capital requirements.
- Restrictions on investment of funds.
- Approval of policy wordings by the regulator.
- Licensing requirements for brokers, agents, adjusters, and actuaries.
- Reporting requirements.
- Establishment of funds to protect policyholders in the event of insurer insolvency.
- Penalties for compliance breaches.

Under the two Acts, the regulator and Minister of Finance issue various notifications, declarations, and regulations in order to implement and update the above provisions.

Regulatory bodies

Insurance business in Thailand is regulated by the Office of the Insurance Commission (OIC), which was established in 2007 by the Insurance Commission Act B.E. 2550, replacing the Department of Insurance. At the same time, ultimate responsibility for supervision of the insurance business was 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.

REGULATION OF INSURANCE AND REINSURANCE CONTRACTS

3. What is a contract of insurance for the purposes of the law and regulation? How does it differ from a contract of reinsurance?

Contracts of insurance are defined by the Thai Commercial and Civil codes as those in which a person agrees to make compensation or pay a sum of money in case of a contingent loss or any other future event specified in the contract, and another person agrees to pay a sum of money for this, called a premium.

Insurance contracts are not binding unless the insured person has an interest in the event insured against.

Thai law does not distinguish between insurance contracts and reinsurance contracts, and all laws applying to insurance in theory apply equally to reinsurance.

4. Are all contracts of insurance/reinsurance regulated?

All insurance contracts are regulated by the Office of the Insurance Commission (OIC) in Thailand, including life and non-life. The non-life sector is heavily dominated by motor insurance and property insurance.

CORPORATE STRUCTURE

5. What form of corporate organisation can insurers take?

Since 2008, amendments to the Life Insurance Act 1992 and the Non-Life Insurance Act 1992 have stipulated that life and non-life insurance businesses can 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 can continue to operate for a further three years, but cannot issue new policies. Failure to convert to a public company by February 2016 will lead to a loss of licence.

REGULATION OF INSURERS AND REINSURERS

6. Are all insurers and reinsurers regulated? Are they all regulated in the same way?

All insurers are subject to regulations in the same way under the Life and Non-Life Insurance Acts.

7. Can insurers and reinsurers carry on non-insurance business? Are there any restrictions on their business activities?

Insurers and reinsurers can only carry out the business specified in their business licences. The Life and Non-Life Insurance Acts set out a number of activities and investments which insurers are prohibited from pursuing. The Office of the Insurance Commission (OIC) also issues regulations restricting the ways in which insurers can invest their funds. Life insurers cannot engage in non-life business and vice versa.

8. Are there any statutory limits or other restrictions on, or requirements relating to, the transfer of risk by insurance or reinsurance companies?

Reinsurance treaties must be filed with the Office of the Insurance Commission (OIC) on an annual basis. Insurers were previously required to cede 5% to the main local reinsurer, Thai Reinsurance. The restriction has been lifted and is now followed on a voluntary basis.

OPERATING RESTRICTIONS

Authorisation or licensing

9. Does the entity or person have to be authorised or licensed?

Insurance/reinsurance providers

The Insurance Acts prohibit any person from entering into a contract as an insurer unless he has obtained a licence to engage in life/non-life insurance business.

An application for a licence to engage in the insurance business must be lodged by the company promoters with the minister of finance. On approval being granted by the minister, the promoters must:

- Incorporate a public limited company.
- Lodge a security deposit.
- Maintain an adequate capital fund within six months of incorporation.

On 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.

Insurance/reinsurance intermediaries

A broker, defined as a person who, expecting a commission, indicates the opportunity or arranges for a person to enter into a non-life/life insurance contract with an insurer, is required to obtain a licence from the Office of the Insurance Commission (OIC). Broker licences may be awarded to individuals or corporate entities.

An agent, defined as a person assigned by an insurer to induce persons to enter into a non-life/life insurance contract with the insurer, must obtain a licence from the OIC, which is specific to a single insurer. Agent licences are only granted to individuals who must:

- Be legally competent.
- Be domiciled in Thailand.

- Not be adjudged incompetent or quasi incompetent.
- Never have been sentenced to imprisonment, on final judgment, for dishonest offences relating to property, unless the sentence was completed at least five years prior to the date of application.
- Not be bankrupt.
- Not be a broker (life or non-life, as relevant).
- Not have had an agent's or broker's licence revoked within the five years prior to the date of application for a licence.
- Have studied the non-life/life insurance business at an institute prescribed by the Registrar of the OIC (Registrar), or have passed an examination concerning non-life insurance knowledge, in accordance with the subjects and procedures having been prescribed by the Registrar.

Other providers of insurance/reinsurance-related activities

Adjusters and actuaries are also required under the Life and Non-Life Insurance Acts to hold licences issued by the Registrar.

10. What are the main exemptions or exclusions from authorisation or licensing?

There are no particular exemptions or exclusions from the licensing regime.

Restrictions on ownership or control

11. Are there any restrictions on the ownership or control of insurance-related entities?

Insurance/reinsurance providers

At least 75% of the voting shares of an insurance company must be held by either:

- Thai individuals or Thai non-registered partnerships, in which all partners are Thai nationals.
- Entities registered in Thailand which have more than 50% of their voting shares held by persons falling within the first point above, or by a parent company fulfilling the same conditions.

In addition, at least three out of four of the total number of directors must be Thai nationals.

The Office of the Insurance Commission (OIC) has the power to permit up to 49% foreign ownership and has the power to permit foreign directors to account for more than one out of four directors but less than half of the total number of directors.

In the event that the company's status or the company's operation is in a situation that may harm the benefits of the insured or the public, or increase the company's stability or the insurance market as a whole, the ministry, by recommendation of the OIC, may allow the company to have a different shareholding and/or director structure as prescribed above.

This permit must also be published in the *Royal Gazette* with specific conditions and timelines.

This new measure is enacted in the amended acts and is due to the significant losses suffered by the local market arising out of the 2011 floods.

Insurance/reinsurance intermediaries

An insurance broker must have its head office in Thailand, and must have among its business objectives "life insurance brokerage business" and/or "non-life insurance brokerage business," as the case may be. Insurance brokerage business is reserved for Thais

under the Foreign Business Act B.E. 2542, and, as such, a company with 50% or more foreign shareholding would require a foreign business licence.

Other providers of insurance/reinsurance-related activities

Other service providers would also likely be subject to the provisions of the Foreign Business Act described (*see above, Insurance/reinsurance intermediaries*).

12. Must owners or controllers be approved by or notified to the relevant authorities before taking, increasing or reducing their control or ownership of the entity?

Insurers must notify the Office of the Insurance Commission (OIC) of any change in shareholding that gives rise to a breach of the restrictions on foreign investment. Any transfer of business or amalgamation of insurance companies is subject to the prior approval of the OIC.

Ongoing requirements for the authorised or licensed entity

13. What are the key ongoing requirements with which the authorised or licensed entity must comply?

Insurance/reinsurance providers

Solvency and capital requirements have been a major focus of the regulator in recent years. The Non-Life Insurance Act No. 2 2008 and its life equivalent introduced a risk-based capital (RBC) regime for the first time, replacing the previous fixed minimum paid-up capital requirements of THB500 million (life) and THB300 million (non-life). The RBC regime relates capital requirements and solvency margins to the following types of risk:

- Insurance risk.
- Marketing risk.
- Credit risk.
- Clustered portfolio risk.

The RBC regime has now been fully implemented by the Office of the Insurance Commission (OIC). According to the RBC regime, the evaluation of assets and debts is also going through changes; for example, the calculation of fair value of assets is being switched from using book value or amortised value to using market value. Calculation of debt switches from fixed formula calculation using net premium value to using gross premium valuation for life insurance, and using international standards such as the chain ladder method in non-life insurance.

Non-life insurers must maintain reserve funds mainly for:

- Reserve funds for a net written premium.
- Reserve funds for claims.

Reserve funds for a net written premium. A non-life insurer must maintain reserve funds for a net written premium up to the amount of at least the value of the premium reserve value after reinsurance.

Reserve funds for claims. A non-life insurer must maintain reserve funds for claims up to the amount of at least the value of the total claim reserve after reinsurance.

Only cash, Thai government-issued bonds, current account deposits, outstanding income from investments, outstanding income from trading in the stock exchange within five days of trading, or any investment assets are allowed to be calculated as reserve funds. All of these assets must be free from any debt or liens, except for limited exceptions such as any trade or derivatives that are authorised by the OIC's registrar.

Other than maintaining the prescribed capital adequacy ratio, insurers are required to:

- Maintain a deposit with the OIC.
- Report annually in the form prescribed by the OIC.
- Comply with statutory requirements regarding approval of policy wordings and premium rate.
- Comply with statutory requirements regarding investment activities.

The investment activities of non-life insurers are governed by the OIC's Notification re Investments and Other Business Operations of Non-Life Insurers B.E. 2013. The insurer must prepare its investment policy and its investment plan in writing and submit to the OIC annually. Insurers are also allowed to retain a professional investment advisory firm as their adviser with prior consent from the OIC's registrar. The Notification prescribes investment proportions depending on the issuer/owner of assets, as follows:

- Thai government, Bank of Thailand, Ministry of Finance, Financial institution rehabilitation and development funds: unlimited proportion.
- Financial institution: for each institution not exceeding 30% of the insurer's investment assets.
- State owned enterprise, limited company under the government securitisation campaign, limited company that is registered in the stock exchange market (both Thai and foreign), limited company that is in a process of minor stocks distribution according to the Stock Exchange of Thailand, or limited company that has a credibility rating above the minimum requirement: for each entity not exceeding 15% of the insurer's investment assets.
- Limited company that issues debt securities which received a credit rating above the minimum requirement: for each company not exceeding 15% of the insurer's investment assets and for investments other than debt securities: for each company not exceeding 5% of the investment asset.
- International organisations such as the World Bank, Asian Development bank, International Finance Corporation, or other allowed organisations: for each organisation not exceeding 15% of the insurer's investment assets.
- Other entities: for each entity not exceeding 5% of the insurer's investment assets.

The Notification provides proportions of investment assets and further requirements for each permitted investment entity in great detail.

The same Notification also allows non-life insurers to conduct or to operate other business as follows:

- Leasing of immovable property only to prevent wasteful economic loss or to prevent deterioration of the assets.
- Operation of supporting business which must be an operation that the insurer must perform in its normal course of business, such as claims management, accounting, HR, compliance, and so on, for other persons.
- Holding equity instruments for the purpose of operating other businesses.

Non-life insurers can hold 10% of the equity instruments issued by a legal entity according to foreign law, provided that such an entity is an authorised insurer in the foreign country or has its main business as the holding securities of an ASEAN insurance company.

Non-life insurers can hold more than 20% of the equity instruments issued by a legal entity provided that such an entity is:

- A limited company established for the benefit of the Thai insurance market and is approved by the OIC's registrar.
- A limited company that is authorised to operate as a life insurance broker.
- A non-life reinsurer that may purchase equity instruments of life reinsurers with authorisation from the OIC's registrar.
- Any life or non-life insurer for the purpose of financial rehabilitation.

Non-life insurers can operate business related to the stock exchange as follows:

- As an agent that provides support for the buying or selling of stock units.
- As marketing agents of private funds.
- In the provision of marketing services for stock exchange companies or commercial banks according to the laws regarding financial institution business.

Insurance/reinsurance intermediaries

Brokers and agents are required to maintain and renew their licences on an annual basis, which includes the payment of fees. Brokers are required to submit registers and accounts in the prescribed form to the regulator.

Other providers of insurance/reinsurance-related activities

Loss adjusters and actuaries are required to maintain and renew their licences on an annual basis, for which fees are payable.

Penalties for non-compliance with legal and regulatory requirements

14. What are the possible consequences of an entity failing to comply with applicable legal and regulatory requirements? What recourse do policyholders have if they have done business with a non-approved entity?

The Life and Non-Life Insurance Acts set out a wide raft of penalties for compliance failure, some of which are as follows.

Insurance/reinsurance providers

The Life and Non-Life Insurance Acts impose a range of penalties including:

- Fines of up to THB500,000 or THB20,000 per day in the case of continuing offences.
- Revocation of licences.
- Imprisonment of up to one year in the case of individuals.

Policyholders that have done business with an unlicensed entity would not necessarily find that their contracts of insurance is unenforceable, but they would not have the benefit of the various statutory protections afforded to policyholders of insurance contracts issued by licensed entities.

Insurance/reinsurance intermediaries

Any agent that enters into a contract on behalf of an insurer without the appropriate authority is liable to imprisonment of up to two years in prison and/or a fine of THB200,000.

Any broker who collects a premium without the written authorisation of the insurer is also liable to imprisonment of up to two years and/or a fine of up to THB200,000.

Other providers of insurance/reinsurance-related activities

Any person acting as an adjuster without a licence issued by the Office of the Insurance Commission (OIC) is liable to up to three years' imprisonment or a fine of up to THB300,000, or both. Any

adjuster that makes a false report of inspection or assessment is liable to up to two years' imprisonment and/or a fine of up to THB200,000.

Any actuary who makes a false statement certifying a report on the calculation of insurance policy liability, or a false report, or furnishes false documents in connection with such a report, is liable to imprisonment of up to two years and/or a fine of up to THB200,000.

Restrictions on persons to whom services can be marketed or sold

15. Are there any restrictions on the persons to whom insurance/reinsurance services and contracts can be marketed or sold?

There are no restrictions on the persons to whom insurance/reinsurance services and contracts can be marketed or sold.

REINSURANCE MONITORING AND DISCLOSURE REQUIREMENTS

16. To what extent can/must a reinsurance company monitor the claims, settlements and underwriting of the cedant company?

The entitlement of a reinsurer to monitor the claims, settlements, and underwriting of its cedant company depends entirely on the agreed terms of the applicable reinsurance contract, as there are no statutory or regulatory rights or obligations implied.

In facultative reinsurance contracts between Thai cedants and foreign insurers, claims co-operation or claims control clauses are common, particularly where the cedant retains an insignificant proportion of the risk, or is being used for fronting purposes.

Conversely, in treaty arrangements, "follow the settlements" and similar clauses are common, meaning that the rights of the reinsurer to participate in or challenge claims decisions made by its cedant are significantly restricted.

17. What disclosure/notification obligations does the cedant company have to the reinsurance company?

There are no specific laws or regulations in Thailand imposing any particular disclosure or notification obligations on a cedant (*see Question 16*).

The general provisions of the Thai Commercial and Civil Code applying to insurance contracts apply equally to reinsurance, meaning that the reinsurance contract would become voidable if the cedant knowingly omits to disclose facts which would have induced the reinsurer to raise the premium or to refuse to enter in the contract, or knowingly makes false statements in regard to such facts. The right to void the contract must be exercised within one month, and the reinsurer will not be entitled to void the contract if he or she knew or should have known of such facts.

INSURANCE AND REINSURANCE POLICIES

Content requirements and commonly found clauses

18. What are the main general form and content requirements for insurance policies? What are the most commonly found clauses?

Form and content requirements

The Thai Civil and Commercial Code provides that a contract of insurance is not enforceable unless it is evidenced in writing and signed by the authorised officer of the insurer, and that the policy must contain:

- The subject of the insurance.
- The risk assumed by the insurer.
- The value of the insurable interest, if it has been fixed.
- The insured sum.
- The amount of premium and the manner of payment.
- If the duration of the insurance is fixed, its commencement and ending.
- The name or trade name of the insurer.
- The name or trade name of the insured.
- The name of the beneficiary, if any.
- The date of the contract of insurance.
- The place where, and the date when, the policy was made.

In addition, all policy wordings must be approved by the Office of the Insurance Commission (OIC) before being issued.

19. Is facultative or treaty reinsurance more common? What are the most commonly found clauses in reinsurance policies?

Facultative/treaty reinsurance

Both facultative and treaty reinsurance is common and used extensively in Thailand, whose limited local capacity means that high-value complex risks tend to be heavily reinsured to the international markets, particularly London and Singapore.

Commonly found clauses

Although generally (but not exclusively) subject to Thai law, reinsurance contracts tend to use international or London market slips and wordings.

Arbitration clauses are commonly included in international reinsurance agreements to enable the local cedant to enforce the reinsurance contract against the reinsurer in its home jurisdiction.

"Follow the fortunes" or similar clauses are common in treaty wordings, while facultative reinsurance often grants reinsurers a degree of claims control or co-operation.

Implied terms

20. Are there any terms that are implied by law or regulation (even if not included in the insurance or reinsurance contract)?

The Office of the Insurance Commission (OIC) requires a standard form arbitration clause to be included in all insurance contracts issued by licensed insurers in Thailand. The clause is implied into any policy issued in which it is absent.

The Civil and Commercial Code also requires insurers to pay insureds for:

- The actual amount of loss.
- Any damage caused to insured property by reasonable measures taken for preventing the loss.
- All reasonable expenses incurred for preserving the property from the loss.

The insurer is also required to bear the expenses for valuation of the loss. These terms are therefore implied into any insurance policy issued that does not specify them.

Under Thai law, a general duty of good faith applies to all contracts, and no higher standard is specified in relation to contracts of insurance.

Customer protections

21. How do customer protections in the general law affect insurance contracts? What customer protections are generally included in insurance policies to supplement this?

Insurance policies

General consumer protection in Thailand is governed largely by the Consumer Case Procedure Act, which was the first major consumer protection legislation to be enacted, in 2008.

The aim of the act was to increase access to justice for consumers, for example, by removing the requirement to pay court fees when issuing proceedings and by bestowing the courts with the power to award punitive damages against business operators for the first time.

Claims under insurance contracts are generally judged to be consumer claims within the meaning of the act, even where the policyholder is a corporate entity rather than an individual. Reinsurance disputes would not, however, be judged to fall under the jurisdiction of the act.

The mandatory Office of the Insurance Commission (OIC) arbitration clause (*see Question 20*) is also intended to give the consumer an option of resolving any dispute with its insurer in a more cost-effective and less time-consuming manner than by issuing court proceedings.

Standard policies or terms

22. What are the main standard policies or terms produced by trade associations or relevant authorities?

There are no standard policies or terms produced by trade associations or the authorities, but all policy wordings must be registered and approved by the Office of the Insurance Commission (OIC).

INSURANCE AND REINSURANCE POLICY CLAIMS

Establishing an insurance claim

23. What must be established to trigger a claim under an insurance policy?

Regardless of any notice requirements contained within the policy wording, the Thai Civil and Commercial Code requires the insured or beneficiary under the policy to give notice to the insurer of any loss occurring "without delay," after having knowledge of such loss.

Failure to give notice without delay does not entitle the insurer to deny coverage, but the insurer can claim compensation for any damage suffered as a result of the delayed notification, unless the

insured can prove that it was impracticable to have complied with the notice requirement.

Third party insurance claims

24. What are the circumstances in which third parties can claim under an insurance policy?

Generally, only a person named as the insured or a beneficiary in the insurance policy can make a claim against the insurer.

Under the Commercial and Civil Code, an injured third party can receive compensation directly from an insurer providing liability insurance to the party causing the injury. The third party can issue proceedings directly against the insurer, as long as the insured is included as a co-defendant in the action. The insurer is not discharged from its liability to the injured person by paying the compensation to the insured, unless it can prove that the insured has already paid the compensation to the injured third party.

Time limits

25. Is there a time limit outside of which the insured/reinsured is barred from making a claim?

The Thai Civil and Commercial Code imposes a two-year prescription period on insurance claims, which starts to run from the date of loss. The prescription period may be interrupted under certain circumstances, including where the insurer has acknowledged (admitted) the claim, made partial payments, or in the case of consumer contracts, where negotiation is ongoing. Otherwise, the claim is time-barred after expiry of the two-year period, unless court proceedings or arbitration proceedings are initiated.

Problematically, Supreme Court decisions in Thailand have also applied the same two-year limitation period to reinsurance claims, meaning that an insurer's right to claim from its reinsurer under facultative or treaty reinsurance contracts could be extinguished before claims have been finalised and settled under the underlying contract.

Thai law prohibits any agreement to extend or waive the two-year prescription period, meaning that insureds and insurers looking to preserve their rights of recovery must seek to rely on one of the methods of interruption described above.

Enforcement

26. Can the original policyholder or other third party enforce the reinsurance contract against a reinsurer?

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 are reflected in the underlying direct policy. The enforceability of the clause depends on compliance with a number of conditions required under the Civil and Commercial Code for third-party contract rights.

Even in the absence of such a cut-through clause, the Thai courts have, on occasion, been willing to allow reinsurers to be joined to existing proceedings between the insured and insurer, and to grant an award payable directly by the reinsurer to the underlying insured.

Remedies

27. What remedies are available for breach of an insurance policy?

Insurer

Insurers are under a statutory obligation not to delay, without sufficient reason, payment of any sum or return of premium to an insured or beneficiary under an insurance policy, or make a payment or return in bad faith. A breach of this obligation exposes the insurer to a fine of up to THB500,000, plus a daily fine of THB20,000 for continuing delays.

Insured

In the event that an insurer refuses to pay amounts due to an insured or beneficiary under an insurance policy, the insured may either refer the matter to Office of the Insurance Commission (OIC) arbitration or issue proceedings in the Thai civil courts. Any such proceedings would seek recovery of the amounts that should have been paid under the policy, any additional losses arising from the insurers' failure to pay, and interest on the amounts claimed at 7.5%. The interest may be awarded from the date of loss or from the date the proceedings were issued.

In addition, under the Consumer Case Procedure Act, if the insured can demonstrate the insurer's "wilful act to unfairly take advantage of the consumer or intent to cause damage to the consumer or act in breach of the responsibility as a professional or businessman who is usually trusted by the public", the court is empowered to award punitive damages against the insurer of up to double the amount of actual damages, or up to five times the amount of actual damages in claims valued at under THB50,000.

Also as a consumer, the insured is exempt from paying court fees, which are calculated as proportion of the value of the claim, and can therefore be significant (subject to the discretion of the court). The court also provides legal assistance for consumers who wish to file a claim against an insurer, who will be deemed a business operator according to consumer protection laws.

Punitive damage claims

28. Are punitive damages insurable? Can punitive damages be reinsured if they are covered by an underlying policy?

Punitive damages awards are rare in Thailand, and can only be awarded under the Consumer Case Procedure Act 2008. 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 conditions that must be met under the Consumer Case Procedure Act to justify an award of punitive damages, in most cases, amount to bad faith or gross negligence, and any insurance policy purporting to provide coverage for such awards is therefore unlikely to be enforceable.

INSOLVENCY OF INSURANCE AND REINSURANCE PROVIDERS

29. What is the regulatory framework for dealing with distressed or insolvent insurance or reinsurance companies, or other persons or entities providing insurance or reinsurance related services? What regulatory and/or other protections exist for policyholders if the insurance company is insolvent?

In the event an insurer goes bankrupt, policyholders with outstanding claims against the insurer are ranked as preferential creditors in any bankruptcy proceedings. Policyholders are also ranked as secured creditors in respect of the security deposit held by the Office of the Insurance Commission (OIC).

Non-life insurers must deposit cash with the OIC's registrar according to Ministerial Regulation No. 5 B.E. 2539. The insurer is required to submit a fixed amount of THB3.5 million to the registrar for each type of insurance they intended to provide, for example, fire insurance, motor insurance, transportation insurance, and other insurance.

Non-life insurers must also submit a deposit of no less than 25% of the total capital reserve for the net written premium to the OIC's registrar. The assets must be submitted together with:

- The report of the total reserve for the second quarter of each year.
- The fourth quarter report regarding the financial situation of the insurer of each year.
- The annual report regarding the total reserve.

The deposit must be submitted to the OIC no later than one month from the date that the reports mentioned above are due.

The assets submitted to the OIC's registrar must not be enforceable against any other debts as long as the insurer is still operable. When an insurance company dissolves or is declared bankrupt, insureds who have an existing right to claim under their policy have the highest priority as creditors over these assets and can enforce their debts in preference to other debts.

In addition, the Life and Non-Life Insurance Acts established funds for the purpose of protecting policyholders of insolvent insurers. The amended acts also provide that the funds can be nominated by a liquidator of the insurer company going through liquidation. The funds are funded by levies payable by life and non-life insurers calculated as a percentage of premium received, capped at 0.5% of premiums received, and currently ranging from 0.2 to 0.3% of premiums in the case of non-life insurers, and 0.1 to 0.3% of premiums in the case of life insurers.

Policyholders can seek compensation from the fund in respect of unpaid claims, provided that they have also brought a claim against the insurer; this is subject to a maximum payment of THB1 million per policyholder. The fund then becomes a preferential creditor of the bankrupt insurer in respect of amounts paid to policyholders.

30. Can excess insurance policies "drop down" to provide coverage if the primary insurer goes into insolvency?

There are no statutory or other provisions requiring an excess policy to drop down in the event of insolvency, and the right to claim will be determined by reference to the policy terms.

31. Is a right to set-off mutual debts and credits recognised in an insolvency proceeding involving an insurer or reinsurer?

Before an insurer's dissolution, the statutory security deposit and statutory reserve are not subject to execution. In the event an insurer dissolves, creditors with the right to receive payment from insurance have the highest preferential rights with respect to the statutory security deposit and statutory reserve, and have the right to receive payment from such assets, before any other creditors having other preferential rights.

The insured also has preferential rights in the same hierarchy as tax creditors to enforce against all other assets of the insurer. The same rules apply when the insurer's licence is terminated by the Office of the Insurance Commission (OIC).

According to the amended Life Insurance Act and Non-Life Insurance Acts, the termination of the insurer's licence is now treated in the same way as the company being dissolved. The OIC must submit the deposit and the reserve to the liquidator, and the directors and the employees of the company must provide the liquidator with all documents related to the finance of the company. Within 30 days of nomination, the liquidator must send letters notifying all insureds and declaring that the company's insurer licence has been terminated. The insured must then file a debt collection notice to the liquidator within the 60 days given in the notice. The liquidator must pay the insured from the OIC submitted reserve and deposit prior to submitting the company through the bankruptcy process.

When an insurer becomes bankrupt, creditors with the right to receive payment from insurance have preferential rights with respect to the statutory security deposit and statutory reserve, and have the same right to receive payment from these assets as a secured creditor under bankruptcy law. A creditor having the right to receive payment from insurance has the right to receive payment from the insurer's assets other than the statutory security deposit and statutory reserve, like a holder of preferential rights, with the same priority as tax obligations, as specified in the Civil and Commercial Code. Otherwise, the bankruptcy of an insurer would largely proceed according to the statute of general application. This is applicable to insurers and reinsurers under Thai law.

TAXATION OF INSURANCE AND REINSURANCE PROVIDERS

32. What is the tax treatment for insurers, reinsurers, and other persons or entities providing insurance and reinsurance-related services?

Under the Revenue Code of Thailand, any insurance company is subject to corporate income tax (currently 20%) on its net profit. The life insurance business is subject to Special Business Tax (currently 2.75% on interest, service fees, and other fees), in contrast to non-life insurance business, which is subject to VAT (currently 7% on premium and stamp duty). Both life insurance policies and non-life insurance policies require stamp duty, the amount of which differs depending on the specifics of the insurance and the circumstances. Life insurance premiums are not subject to withholding tax, while non-life insurance premiums are subject to a 1% withholding tax.

INSURANCE AND REINSURANCE DISPUTE RESOLUTION

33. Are there special procedures or venues for dealing with insurance or reinsurance complaints or disputes?

The Office of the Insurance Commission (OIC) provides its own arbitration service, to which any dispute under a contract of insurance can be referred. The OIC mandates that all policies issued must include a dispute resolution clause in a specified form, which provides that the insured (only) has the option to refer any dispute under the policy for arbitration under the OIC's rules. In addition, the clause is to be implied into any insurance policy issued in which it is absent.

However, policies covering commercial risks are commonly issued with dispute resolution clauses that do not refer to the OIC's arbitration procedure, electing instead to submit to the exclusive jurisdiction of the Thai courts, or providing for arbitration under the rules of the Thai Arbitration Institute (TAI), or for *ad hoc* arbitration. Complex commercial disputes are commonly pursued through the Thai civil courts or arbitration.

34. Are arbitration clauses in insurance and reinsurance agreements enforceable?

Arbitration clauses are enforceable, provided they comply with the requirements of Thailand's Arbitration Act, and subject to the mandatory option for the insured to choose Office of the Insurance Commission (OIC) arbitration (*see Question 33*).

International reinsurance agreements commonly contain standard arbitration clauses, either *ad hoc* or under the auspices of the Thai Arbitration Institute (TAI) or another institution.

35. Are choice of forum, venue and applicable law clauses in an insurance or reinsurance contract recognised and enforced?

Thailand is not a signatory to any treaty on mutual enforcement of judgments, other than the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). In order for a contract to be enforceable against a Thai insurer, it is therefore advisable that the parties submit to the jurisdiction of the Thai courts or arbitration.

The Office of the Insurance Commission (OIC) is unlikely to approve a policy wording applying any law other than Thai law.

Reinsurance contracts also generally choose Thai law, but arbitration is more commonly preferred than submitting to the jurisdiction of the Thai courts, largely because a judgment obtained in Thailand is unlikely to be enforceable in the home jurisdiction of an international insurer.

REFORM

36. What proposals are there for reform of the law, regulation or rules relating to the provision of insurance or reinsurance services?

The focus continues to be on the liberalisation of the market, strengthening capital requirements in order to protect policyholders, and movement towards harmonisation with regional and international governance standards.

In 2015, the Life and Non-Life Insurance Acts No. 3 of 2015 were enacted and became effective on 6 March 2015 (effectiveness after

the date of publication on Thai Government Gazettes dated 5 March 2015) to be suitable and in line with the current insurance situation in Thailand and to adopt various concepts from the 2008 Financial Institution Act, with the intention of bringing the regulation of the insurance industry in line with other financial services providers, both on a national and regional scale.

Further legislative and regulatory developments are likely to relate to the evolution of new distribution channels, including bancassurance and online/retail sale, and to the outsourcing of certain core functions to third-party providers.

MAIN INSURANCE/REINSURANCE TRADE ORGANISATIONS

Thai General Insurance Association

Main activities. The representative body of non-life insurers in Thailand.

W www.thaigia.com

Thai Life Assurance Association

Main activities. The central body of life insurance business operators and related professional groups.

W www.tlaa.org

Thailand Insurance Institute

Main activities. Providing insurance education to personnel in the field as well as providing insurance knowledge to the public, and maintaining standards of insurance professionalism.

W www.tiins.com

Thai Insurance Brokers Association

Main activities. The central body for insurance brokers and related professional groups.

W www.ibathai.com

ONLINE RESOURCES

W www.oic.or.th

Description. Website of the Office of the Insurance Commission, Thailand's insurance regulator. Contains details of laws, news, statistics, violations and enforcement information. English language sections of this site are not up-to-date, and translations of laws are provided for guidance only.

Practical Law Contributor profiles



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Recent transactions

- Advised London and Singapore-based Lloyds syndicates on liabilities under treaty and facultative reinsurance agreements with Thai insurers in respect of losses caused by the 2011 floods.
- Representing a Malaysian reinsurer in multiple sets of arbitration proceedings brought by Thai insurers over claims arising out of the 2011 floods.
- Advising European co-insurers on coverage and defence issues arising in respect of a claim brought in Thailand against the Singapore subsidiary of a global IT services provider.
- Advising a panel of international reinsurers on the defence of a US\$186 million coverage dispute in the Thai courts, in respect of losses caused by a ruptured gas pipeline in the Gulf of Thailand.
- Advised Singapore-based reinsurers on coverage issues arising out of a US\$250 million claim arising out of a catastrophic explosion at a petrochemical plant on Thailand's eastern seaboard.
- Advised the local operation of a global insurer on localisation of financial lines policy wordings.
- Advised local brokers on liabilities arising from the placement of reinsurance business with overseas reinsurance entities.

Languages. English

Publications.

- *Directors' Handbook: What You Need to Know as a Company Director in Thailand.*
- *Getting the Deal Through, Insurance 2013, Thailand Chapter.*
- *Company Directors in Thailand: Your Questions Answered.*
- *Creditors' Rights over the Life Insurance of Debtors.*



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Areas of practice. Corporate services; commercial transactions and M&A; insurance; property; employment.

Recent transactions

- Advised and assisted in one of only four acquisitions by foreign banks of domestic banks following the 1997 financial crisis.
- Assisted in the integration, renegotiation, and restructuring of two lubricants businesses in Thailand.
- Represented a large number of multinational corporations in the creation of joint ventures in Thailand, such as between two communications companies.
- Followed up mergers and acquisitions with legal services surrounding the restructuring and reorganisation of both an IT company and a bank. This involved working at the client's office for three to six months to facilitate a seamless transition.
- Advised several insurance companies on regulatory compliance with Thai insurance laws and other applicable laws, specifically when launching new products in the Thai market.

Languages. Thai, English

Publications.

- *Practical Law Doing Business In...Multi-jurisdictional Guide 2014: Thailand Country Q&A.*
- *Regulation of Investment Advisors in Thailand.*
- *Thailand's Export Control Regime.*

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Professional qualifications. Member of the Legal Institution of the Thai Bar Association; admitted as an Attorney-at-Law in the Thai Lawyers Council of Thailand; Attorney Licence qualified for Thailand.

Areas of practice. Insurance; dispute resolution and litigation.

Recent transactions

- Advising international reinsurers in multiple arbitration and court proceedings brought by Thai insurers in respect of claims arising from the 2011 floods.
- Advising UK reinsurers of a global retail chain in respect of Thai law aspects of proceedings brought in the English courts under a retrocession contract covering property damage and business interruption losses.

Languages. Thai, English

Publications

- *Enforcement of Loan Guarantees to Change under New Laws, Bangkok Post.*
- *Lex Mundi Guide to Doing Business in Thailand 2015.*