

# PATENTS

# ICLG

The International Comparative Legal Guide to:

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A practical cross-border insight into patents law

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# Thailand

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## 1 Patent Enforcement

### 1.1 Before what tribunals can a patent be enforced against an infringer? Is there a choice between tribunals and what would influence a claimant's choice?

The Central Intellectual Property and International Trade (IP&IT) Court in Bangkok, Thailand, is a specialised Court that has exclusive jurisdiction over intellectual property actions, including patent enforcement actions.

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).

### 1.2 What has to be done to commence proceedings, what court fees have to be paid and how long does it generally take for proceedings to reach trial from commencement?

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.

#### 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, the 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 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 date for the meeting of the parties 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 the conduction of experiments to prove infringement, submission of each party's evidence list and submission of evidence particulars.

#### Court filing fee

The Court fee for filing of the Complaint depends on the amount of damages claimed by the Plaintiff. If the claimed amount does not exceed THB 50 million, the Court fee is charged at 2% of the claimed amount and capped at THB 200,000. For any claimed amount exceeding THB 50 million, an additional Court fee is charged at 0.1% of such amount.

#### Time frame to reach trial from commencement

Due to the availability of deadline extensions of the pleadings, along with the increasingly heavy caseloads 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 six and 18 months.

### 1.3 Can a party be compelled to disclose relevant documents or materials to its adversary either before or after commencing proceedings, and if so, how?

This is very unlikely. A formal discovery process is not available 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.

### 1.4 What are the steps each party must take 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? Can a party change its pleaded arguments before and/or at trial?

As a matter of procedure, arguments and evidence are presented by way of witness testimony. Prior to the trial, a party who brings its witness is permitted to submit an Affidavit *in lieu* of direct testimony. 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.

An amendment of the pleaded arguments before the trial is acceptable by filing a motion before the day of the settlement of issues meeting, or no fewer than seven days before the day of taking evidence in cases without a settlement of issues meeting. An amendment of the pleaded arguments during the trial may be possible if the parties can show reasonable cause for the late submission, or where the amendment involves public order or the correction of an insignificant error or mistake. Prior to granting the request for such amendment, a motion for amendment is required to be served to the opposing party at least three days before the day fixed for examination of the motion, and the Court will inquire with the opposing party as to whether they are opposed to such request. The final decision will be made by the 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 three to six 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 between two months and six months. Thereafter, closing statements by each party are generally due for submission to the IP&IT Court within one to two months of the last trial date. A judgment is typically rendered about three to six 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 important to note that a quorum of the IP&IT Court must consist of two professional judges and one associate judge. The associate judge will usually be selected due to his or her expertise in intellectual property fields in order to assist the professional judges with the technical aspects of the case.

### 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 regard 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 If declarations are available, can they address (i) non-infringement, and/or (ii) claim coverage over a technical standard or hypothetical activity?

Declarations are not available in Thailand.

### 1.10 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 Can a party be liable for infringement of a process patent by importing the product when the process is carried on outside the jurisdiction?

Thailand's Patent Act holds that, in a case involving process patents, the patent owner has the exclusive right to use the process stated in the patent, including to produce, use, sell, possess for sale, offer for sale or import into Thailand products made through the application of the patented process. In light of this, the importation of products made by the process patent is considered to be an infringement of such process patent.



### 1.12 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.

### 1.13 Can a defence of patent invalidity be raised, and if so, how? Are there restrictions on such a defence e.g. where there is a pending opposition?

Although a patent is presumed valid, patent validity can be challenged by any person. In an infringement lawsuit, the defendant(s) may either:

- (1) raise a defence of patent invalidity in the Answer to the Complaint without initiating a patent invalidity action; or
- (2) file the Answer to the Complaint together with a Counterclaim to invalidate the patent in dispute.

This means that a defence of patent invalidity can be raised in the same case and at the same Court as the plaintiff files the Complaint against the defendant.

### 1.14 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:

- (1) a patent is not new;
- (2) a patent does not have an inventive step;
- (3) a patent is incapable of industrial application;
- (4) a patent is directed to non-patentable subject matter (naturally occurring micro-organisms and their components; plants or animals or extracts of plants or animals; scientific or mathematical principles or theories; computer programs; methods of diagnosing, treating or curing animal or human diseases; and anything contrary to public order, morals, health or safety);
- (5) there are named inventor issues; or
- (6) there are 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.

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

No, they are not. The IP&IT Court has exclusive jurisdiction.

It should also be noted that, in Thailand, the Patent Office does not have the authority to rule on patent validity after a patent is granted.

### 1.16 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.

### 1.17 Are (i) preliminary, and (ii) final injunctions available, and if so, on what basis in each case? Is there a requirement for a bond?

Preliminary and final 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 from committing such infringing acts.

### 1.18 On what basis are damages or an account of profits assessed?

Only actual damages, which can be proved by evidence, are awarded. In determining the amount of damages, the IP&IT Court will take all evidence presented by the plaintiff, and counterarguments presented by the defendant, into consideration.

### 1.19 What other form of relief can be obtained for patent infringement? Would the tribunal consider granting cross-border relief?

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.

It is unlikely that the Court would consider granting cross-border relief.

### 1.20 How common is settlement of infringement proceedings prior to trial?

Settlement of infringement proceedings prior to trial is not common.

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

There is no time-barring of a claim to stop patent infringement as long as the patent is still infringed. However, a claim for damages is barred by prescription after one year from the day on which the infringement and the infringer became known to the patentee, or 10 years from the day on which the infringement was committed.

### 1.22 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, which is a Court of first instance, can be appealed to the Supreme Court. Appeals need not be confined to issues of law, and it is quite common for the Supreme 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 Supreme Court may take over five years.

### 1.23 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.

**1.24 For jurisdictions within the European Union: What steps are being taken in your jurisdiction towards ratifying the Agreement on a Unified Patent Court, implementing the Unitary Patent Regulation (EU Regulation No. 1257/2012) and preparing for the unitary patent package? For jurisdictions outside of the European Union: Are there any mutual recognition of judgments arrangements relating to patents, whether formal or informal, that apply in your jurisdiction?**

This is not applicable in Thailand.

## 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, except under Section 53 of the Patent Act, which provides that a patentee may surrender his or her patent or any claim(s) thereof in accordance with the rules and procedures prescribed in the Ministerial Regulations. Under Ministerial Regulations No. 27, an application to surrender the claim(s) must be filed with: (1) the Department of Intellectual Property (DIP), Ministry of Commerce (the Patent Office is under the DIP); (2) the Provincial Commercial Office; or (3) another agency as prescribed by the Director General of the DIP.

However, an application to surrender the claim(s) will not be accepted if the patent is subject to court proceedings.

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

No. Refer to question 2.1 above.

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

Refer to question 2.1 above.

## 3 Licensing

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

Limitations regarding the 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 DIP. Furthermore, a patent owner cannot impose upon the licensee any condition, restriction or any royalty term which is unjustifiably anticompetitive. 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 DIP 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: (1) any naturally occurring micro-organism and their components, or plants or animals or extracts of plants or animals; (2) any scientific or mathematical principles or theories; (3) computer programs; (4) any methods of diagnosing, treating or curing animal or human diseases; or (5) anything contrary to public order, morality, health or safety.

**5.2 Is there a duty to the Patent Office to disclose prejudicial prior disclosures or documents? If so, what are the consequences of failure to comply with the duty?**

There is no affirmative duty to submit or disclose prejudicial prior art disclosures to the Examiner at the Patent Office. However, the Examiner is entitled to request any documents from the applicant, and the applicant must comply with such request within the set prescription time. Failure to do so would result in the application being deemed abandoned.

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 Patent Office.

**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.

After the patent is granted, a third party may only oppose the grant of a patent through a revocation (i.e., invalidation) proceeding.

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

A decision of the Patent Office can be appealed to 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: (1) opposition period; (2) after the opposition period and before granting of the patent application; and (3) 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 DIP. During the opposition period, a party who believes that they, and not the applicant, are entitled to the invention may apply to the DIP. If the Director General of the DIP 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 Is there a “grace period” in your jurisdiction, and if so, how long is it?

The grace period for filing an invention patent in Thailand is 12 months. The relevant laws concerning grace periods are provided in Section 6 of the Thai Patent Act B.E. 2522 (1979), as amended by the Patent Act (No. 2) B.E. 2535 (1992) and the Patent Act (No. 3) B.E. 2542 (1999).

According to Section 6(2) of the Patent Act, an invention is not new if it was described in a document or printed publication, displayed or otherwise disclosed to the public, in Thailand or in a foreign country, before the date of the application for a patent in Thailand. However, the last paragraph of Section 6 provides exemptions for:

- (1) a disclosure of the subject matter of the invention which has been unlawfully obtained; or
- (2) a disclosure of the subject matter of the invention by the inventor including display of the inventor’s work at an international exhibition or an official exhibition, whether in Thailand or in a foreign country.

Under these exemptions, these acts shall not be considered to be a disclosure if they took place within 12 months before the application for a patent in Thailand.

#### 5.7 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-year term 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?

At present, border control measures only exist for copyright and trademark infringement, not for patent 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 to prevent relief for patent infringement being granted.

#### 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 anticompetitive.

### 8 Current Developments

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

There have not been any major developments in the past year.

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

No, there are not.

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

No, there are not.



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## Tilleke & Gibbins

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Our firm represents the top investors and the high-growth companies that drive economic expansion in Asia in the key areas of commercial transactions and M&A, dispute resolution and litigation, and intellectual property.

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