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The International Comparative Legal Guide to:

Insurance & Reinsurance 2018

7th Edition

A practical cross-border insight into insurance and reinsurance law

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Strategic Partners

General Chapters:

1	**Aspects of the Impact of Brexit on UK/EEA Insurance and Reinsurance** – Jon Turnbull & Ivor Edwards, Clyde & Co LLP	1
2	**Cyber Insurance at Lloyd's: Coverage and Regulation of Global Digital Risks** – Patrick Davison & David Powell, Lloyd's Market Association	7
3	**Fire and Wire: Canadian Business Interruption Insurance in the Age of Cyber-Risk and Climate Change** – David R. Mackenzie & Dominic T. Clarke, Blaney McMurtry LLP	14
4	**Brexit Relocations: The Story So Far** – Darren Maher, Matheson	21
5	**Trending Tremors: Cat Bond Developments in Mexico and Latin America** – Leonel Perezneto del Prado & María José Pinillos Montaño, Creel, García-Cuéllar, Aiza y Enríquez, S.C.	23
6	**Reinsurance in an Era of Sanctions** – Lilia Klochenko & Stanislava Adamaytis, AKP Best Advice	27

Country Question and Answer Chapters:

7	**Australia**	MinterEllison: Kemsley Brennan & James Stanton	31
8	**Austria**	Vavrovsky Heine Marth: Philipp Strasser & Jan Philipp Meyer	38
9	**Azerbaijan**	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	44
10	**Belgium**	Steptoe & Johnson LLP: Philip Woolfson & Alexander Hamels	49
11	**Bermuda**	Kennedys Chudleigh Ltd.: Mark Chudleigh & Nick Miles	57
12	**Brazil**	Tavares Advogados: André Tavares & Daniel Chacur de Miranda	63
13	**Canada**	McMillan LLP: Carol Lyons & Lindsay Lorimer	69
14	**Cayman Islands**	Maples and Calder: Abraham Thoppil & Luke Stockdale	78
15	**Colombia**	DAC Beachcroft Colombia Abogados SAS: Juan Diego Arango Giraldo & Angela María Hernández Gómez	84
16	**Costa Rica**	Cordero & Cordero Abogados: Ricardo Cordero B.	91
17	**Denmark**	BECH-BRUUN: Anne Buhl Bjelke & Henrik Valdorf-Hansen	96
18	**England & Wales**	Clyde & Co LLP: Jon Turnbull & Michelle Radom	102
19	**Finland**	Railas Attorneys Ltd.: Lauri Railas	111
20	**Georgia**	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	117
21	**Germany**	Clyde & Co (Deutschland) LLP: Dr Henning Schaloske & Dr Tanja Schramm	121
22	**Greece**	Christos Chrissanthis & Partners: Dr. Christos Chrissanthis & Xenia Chardalia	128
23	**India**	Tuli & Co: Neeraj Tuli & Celia Jenkins	136
24	**Ireland**	Arthur Cox: Elizabeth Bothwell & David O'Donohoe	143
25	**Israel**	Gross Orad Schlimoff & Co.: Harry Orad	150
26	**Italy**	Legance – Avvocati Associati: Gian Paolo Tagariello & Daniele Geronzi	156
27	**Japan**	Chuo Sogo Law Office, P.C.: Hironori Nishikino & Koji Kanazawa	163
28	**Kazakhstan**	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	168
29	**Korea**	Bae, Kim & Lee LLC: Jong Ku Kang & Jong Min An	173
30	**Malta**	Camilleri Preziosi Advocates: Diane Bugeja & Francesca Galea Cavallazzi	179
31	**Mexico**	Creel, García-Cuéllar, Aiza y Enríquez, S.C.: María José Pinillos Montaño & Allan Galileo Olmedo Villegas	186
32	**Netherlands**	Dirkzwager advocaten & notarissen N.V.: Daan Baas & Niels Dekker	191

Continued Overleaf →

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Country Question and Answer Chapters:

33	**Norway**	DLA Piper Norway DA: Alexander Plows & Michal Jorek	198
34	**Portugal**	Gouveia Pereira, Costa Freitas & Associados: José Limón Cavaco & Ana Isabel Serra Calmeiro	204
35	**Russia**	AKP Best Advice: Lilia Klochenko & Ekaterina Mikhaylova	210
36	**Saudi Arabia**	Clyde & Co: Mark Beswetherick & Saud Alsaab	217
37	**Singapore**	Rajah & Tann Singapore LLP: Elaine Tay Ling Yan	222
38	**Spain**	DAC Beachcroft SLPU: José María Pimentel & José María Álvarez-Cienfuegos	227
39	**Sweden**	Advokatfirman Vinge KB: Fabian Ekeblad & Paulina Malmberg	233
40	**Switzerland**	Eversheds Sutherland Ltd.: Peter Haas & Barbara Klett	240
41	**Taiwan**	LCS & Partners: Mark J. Harty & Alex Yeh	245
42	**Thailand**	R & T Asia (Thailand) Co., Ltd.: Sui Lin Teoh & Saroj Jongsaritwang	250
43	**Turkey**	Cavus & Coskunsu Law Firm: Caglar Coskunsu & Burak Cavus	255
44	**Ukraine**	BLACK SEA LAW COMPANY: Evgeniy Sukachev & Anastasiia Sukacheva	261
45	**United Arab Emirates**	BSA Ahmad Bin Hezeem & Associates LLP: Michael Kortbawi & Michel Abi Saab	266
46	**USA**	Paul, Weiss, Rifkind, Wharton & Garrison LLP: H. Christopher Boehning	272
47	**Uzbekistan**	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	279

EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Insurance & Reinsurance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of insurance and reinsurance.

It is divided into two main sections:

Six general chapters. These are designed to provide readers with an overview of key issues affecting insurance and reinsurance work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in insurance and reinsurance laws and regulations in 41 jurisdictions.

All chapters are written by leading insurance and reinsurance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Jon Turnbull and Michelle Radom of Clyde & Co LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Office of Insurance Commission ("***OIC***") (under the supervision of the Ministry of Finance ("***MOF***")), is the main authority regulating insurance and reinsurance companies in Thailand.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

An insurance company can only be established as a public limited company or a branch of a foreign insurance company.

To set up a local insurance company, promoters of the new company are required to apply for a licence to operate insurance business with the MOF. If the application is approved, the promoters must incorporate a public limited company. The company must place a security deposit and maintain a capital fund of the amount required under relevant regulations within six months from the registration of the public limited company. The Minister of the MOF will issue the insurance licence upon completion of the said requirements.

In setting up a branch of a foreign insurance company, the foreign insurance company would be entitled to apply for a licence to operate insurance business, with the MOF, only if it has held an operating licence (overseas) for not less than three years. Its branch would be permitted to operate insurance business in Thailand within the scope of its existing overseas licence. If the application is approved, the branch of the foreign insurance company must place a security deposit and maintain a capital fund of the amount required under relevant regulations. The Minister of the MOF will issue the insurance licence upon completion of the said requirements.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers are not entitled to write business directly with an insured person/organisation. If a foreign insurance company wishes to write insurance directly, it would be required to establish a branch to conduct insurance business in Thailand. Alternatively, the foreign insurance company may write reinsurance of a domestic insurer.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Yes. There are provisions of law which restrict the parties' freedom of contract, insofar as they require that all insurance policies and the calculation of insurance premiums must be reviewed and approved by the Secretary-General of the OIC. Provisions in an insurance policy which are considered by the OIC as having an adverse impact on the insured would generally not be approved.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes, this is permitted.

1.6 Are there any forms of compulsory insurance?

Yes, there are two forms of compulsory insurance in Thailand; namely insurance under the Motor Accident Victims Protection Act B.E. 2535 (A.D. 1992), and the Social Security Act B.E. 2533 (A.D. 1990).

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

There are three main substantive laws regulating insurance business in Thailand; namely the Civil and Commercial Code ("***CCC***"), the Non-Life Insurance Act B.E. 2535 (A.D. 1992) ("***NLIA***") and the Life Insurance Act B.E. 2535 (A.D. 1992) ("***LIA***"). The CCC is generally neutral, as its provisions are based upon the principles of freedom of contract. On the contrary, the provisions of the CIA and the LI are more favourable to insureds because their objectives are to enable governmental entities to control and protect the interest of the general public; for instance, to control and regulate the rate of insurance premiums.

2.2 Can a third party bring a direct action against an insurer?

Yes, a third party can bring a direct action against an insurer.

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2.3 Can an insured bring a direct action against a reinsurer?

No, as there is no contractual relationship between the insured and the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Under the CCC, an insured is required to disclose material facts which would have caused an insurer to raise an insurance premium or to refuse to enter into an insurance contract with the insured. If the insured omits to disclose material facts or makes false statements, the insurance contract is voidable, unless the insurer knew of the facts or should have known of the facts if it had acted diligently as a reasonable person.

The insurer is required to exercise its right of avoidance within one month from the time when the insurer became aware of the grounds for avoidance, or within five years from the date of execution of the insurance contract.

When a voidable contract is voided, it is deemed to have been void from the beginning and the parties must be restored to their former condition (and where it is not possible to restore the parties as required, they must be indemnified with an equivalent).

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Yes. At the time of entering into an insurance contract, an insured is required to disclose material facts which may induce an insurer to raise an insurance premium or to refuse to enter into an insurance contract, irrespective of whether or not the insurer had specifically asked about those facts.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

There is an automatic right of subrogation by an insurer who has paid compensation to an insured, provided that the extent of the right of subrogation is limited to the amount of compensation paid by the insurer. Therefore, if the insurer has paid only part of the compensation, the insurer cannot exercise its right to prejudice the right of the insured or the beneficiary to claim for the remainder of the loss from a third person.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Under Thai law, the court which has jurisdiction to hear commercial insurance disputes is either the court which has jurisdiction over the place (i) in which the defendant is domiciled, or (ii) in which the cause of action arose, regardless of whether or not the defendant has a domicile in Thailand.

However, jurisdiction also depends upon the value of the claim. The Municipal Courts have jurisdiction over a civil case where the claim amount does not exceed THB 300,000, and provincial courts/civil courts have jurisdiction over a civil case where the claim amount exceeds THB 300,000.

However, disputes which involve insurance relating to international trade, financial instruments, services and transportation, fall within the jurisdiction of the Central Intellectual Property and International Trade Court ("***IPIT Court***"), regardless of the value of the claim.

In any event, the law requires all insurance policies (except marine hull and marine cargo policies) to have a provision entitling the insured to submit its claim to arbitration before the OIC. The arbitration proceedings would be conducted by an officer of the OIC and the parties are entitled to enforce or challenge the award under the provisions of the Thai Arbitration Act.

Thailand does not have a jury system.

(Note: Each type of court may have specific procedural rules which apply to first instance court and appeal proceedings, which may deviate from the provisions of the Civil Procedure Code. Our responses in this chapter are, however, based upon the general civil procedural rules set out in the Civil Procedure Code and do not cover the process in any specialised court or other dispute resolution forum.)

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

Proceedings in the Court of First Instance usually take one to two years from the date of filing the complaint until the court issues its judgment. Proceedings in the Appeal Court and the Supreme Court are considered based upon written submissions only and it could take between one-and-a-half and two years to complete each stage of appeal.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

There is no discovery process in Thailand. However, under Thai procedural law, a party to a dispute may submit an application requesting the court to issue a summons to demand either party in the proceedings or third parties to produce specific documents. The court will exercise its discretion when considering applications for the production of documents. However, the court has no authority to demand persons outside of Thailand to produce evidence. In making the application, the party would be required to identify the requested evidence or document in detail (i.e., the name of the document, the name of the parties to the document, the date of the document, and the person who possesses the document). Whilst it is not prohibited to cite only a broad description of the document requested, doing so would increase the chance of the court rejecting the application and the party on whom the court summons is served denying the existence of the document.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

The Thai Civil Procedure Code and the Thai Penal Code protects professionals (such as lawyers) from disclosing information received

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by them in the course of exercising their profession. There is, however, no provision which expressly protects disclosure by a party to proceedings of advice given by lawyers, documents prepared in contemplation of litigation or produced in the course of settlement negotiations. Strictly speaking, therefore, there is no right to withhold disclosure of the said documents.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

No. However, upon request by a party, the court has the power to issue a subpoena to order any person in Thailand to give oral evidence in any hearing during the course of the court proceedings. In addition, at any time during or after the witness has given testimony but before judgment is rendered, the court has the power to ask questions as it considers necessary for the completion of the evidence of the witness.

4.4 Is evidence from witnesses allowed even if they are not present?

Yes. If a witness is not present to give evidence, a party is entitled to request the court to take evidence from the witness by video-conference.

If a witness is not domiciled in Thailand, the parties are entitled, by making a joint request to the court, to apply for an order that a written witness statement be submitted, without the necessity of the witness physically attending the court to give evidence.

In addition, if the parties agree that a witness who has given a written statement does not need to attend to give evidence in court or does not require cross-examination, the court is required to admit the written statement as evidence of the witness in question.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

No, there are no restrictions on calling expert witnesses in court proceedings. Although the court itself has the power to appoint an expert, this is not a common practice in a Thai court. It is, however, more common for the parties to appoint their own experts to give evidence in court proceedings.

4.6 What sort of interim remedies are available from the courts?

Under the Civil Procedure Code, a party may seek several interim measures from the court, by filing a motion with the court at the time of filing the plaint or any time before the judgment is rendered. The available interim measures are as follows:

(1) Seizure or attachment of the property in dispute or the defendant's property.

(2) A temporary injunction restraining the defendant from repeating or continuing any wrongful act or breach of contract or the act, or other order which would minimise injury which the plaintiff may continue to suffer from the defendant's act, or a temporary injunction restraining the defendant from the transfer, sale, removal or disposal of the property in dispute or the defendant's property, or an order stopping or preventing damage to the property in question.

(3) An order directing the competent official or any other person having legal power to extinguish registration, modification, or cancellation of registration pertaining to the property in dispute or the defendant's property, or concerning the act complained of on an interim basis.

(4) An order to arrest and temporarily detain the defendant.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Yes, there are two stages of appeal in Thailand; the first being appeals against judgments of Courts of First Instance, which are filed with the Appeal Court. Appeals against decisions of the Courts of First Instance are permitted on both points of law and points of fact. However, appeals on points of fact can be made only if the disputed amount in the appeal stage exceeds THB 50,000.

A further appeal can be made to the Supreme Court on limited legal grounds (for example, on issues relating to public interest or public policy).

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes, interest is recoverable at the rate specified in the relevant contract. There is no capped rate, except in respect of a loan agreement, under which the maximum rate of interest is 15% per annum. If the interest rate is not specifically provided for in the relevant contract, a rate of 7.5% per annum would be applied.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The court has the discretion to decide which party would bear costs in any proceedings, including the court fees and lawyers' fees. However, in practice, the court would generally order the losing party to bear costs. Under Thai law, court fees payable upon the commencement of civil court proceedings are (i) 2% of the amount of the claim, but not exceeding THB 200,000 for the first THB 50,000,000 of the claim amount, plus (ii) 0.1% of the claim amount over and above THB 50,000,000. In respect of lawyers' fees, the law provides that the maximum which a court is entitled to award is 5% of the amount of the claim in the Court of First Instance, and 3% of the amount of the claim in the Appeal Court and Supreme Court. In practice, the court would generally order the losing party to pay a very small portion of the successful party's lawyers' fees.

If the case is settled prior to the court issuing its judgment, the court would generally refund a part of the court fees (the amount of which would depend upon the progress of the case at the time of settlement).

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

Under Thai law, the court is not empowered to compel the parties to mediate disputes. However, in practice, the court generally encourages both parties to find an amicable settlement prior to setting the case down for trial.

4.11 If a party refuses to a request to mediate, what consequences may follow?

If a party refuses a request to mediate, the court would then proceed to set the case down for trial.

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5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The court would uphold an arbitration agreement in a contract. The court's involvement during arbitration proceedings would generally only extend to issuing subpoenas or interim relief (such as injunctions). Otherwise, the court would not generally intervene in the conduct of an arbitration.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Yes, under the NLIA and the LIA, insurers are required to include specific wording agreeing that the insured has the right to choose to refer any dispute under the insurance policy to arbitration. The required wording, translated into English, states:

> "**Settlement of Disputes by Arbitration**
>
> In the event of dispute or disagreement, or any claim under this insurance policy between the person who has the right to claim under the policy and the company, and if such person wishes to settle such dispute by arbitration, the company consents to settle the dispute by arbitration under the Arbitration Rules of the Office of the Insurance Commission."

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

There is no express provision that allows a court to refuse enforcement of an arbitration clause. However, it is likely that certain grounds which entitle a court to refuse to enforce an arbitration award could be relied upon by the court to refuse to enforce an arbitration clause, as follows:

(1) A party to an arbitration contract was under some incapacity under the law applicable to that party.

(2) The arbitration contract is not binding under the law of the country agreed upon by the parties, or the law of the country in which the award is rendered in case there is no country agreed upon.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The interim measures available under Thai procedural law are set out in our response to question 4.6 above. It is worth noting that the parties are able to apply to the court for an interim injunction prior to filing the arbitration proceedings, but in doing so, the party making the application would be required to file the arbitration proceedings within 30 days from the date of receiving the court's order on the interim injunction (note that this is different from the process under normal civil proceedings, where the main claim has to be filed at the same time or before the application for the interim injunction is made to the court).

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Yes, under the Thai Arbitration Act, the tribunal must clearly state its reasons for making its decision in the award, unless the parties agree otherwise.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

A party may appeal against an arbitral award by filing a motion requesting the competent court to set aside the award, within 90 days from receipt of a copy of the award. The court is required to set aside the arbitral award where the party filing the motion is able prove one of the following:

(1) A party to the arbitration contract was under some incapacity under the law applicable to that party.

(2) The arbitration contract is not binding under the law of the country agreed to by the parties, or under Thai law in case there is no country agreed upon.

(3) The party making the application was not given proper advance notice of the appointment of the arbitral tribunal or the arbitral proceedings or was otherwise unable to defend the case in the arbitral proceedings.

(4) The award deals with a dispute outside the scope of the arbitration contract or contains a decision on matters beyond the scope of the arbitration contract. However, if the award on the matter which is beyond the scope thereof can be separated from the part that is within the scope of arbitration contract, the court may set aside only the part that is outside of the scope thereof.

(5) The composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the contract of the parties or, unless otherwise agreed by the parties, in accordance with the Arbitration Act.

In addition, where the court finds that the award deals with a dispute not capable of settlement by arbitration under the law, or that the recognition or enforcement of the award would be contrary to public policy, the court may refuse to enforce the award.

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Thailand

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- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

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