

POLICY WORDINGS, COVER AND CLAIMS: RECENT DEVELOPMENTS IN THAILAND

29 NOVEMBER 2017 • ARTICLE



Policy wordings and the extent to which cover reflects the insured risks are often only properly tested when a claim is presented. WFW's involvement in recent power, construction and infrastructure related insurance claims in Thailand provides some useful examples and lessons for brokers, insurers and reinsurers.

POLICY WORDINGS

The use of English language wordings for Thai risks is widespread and largely uncontroversial. In part, this reflects the input and involvement of international reinsurers and reinsurance brokers, their more extensive understanding of the technical aspects of the risks and the likely exposure to losses and claims on a regional or global basis. There is a focus on adopting and complying with international and industry standards, particularly where wordings have been developed and enhanced through a significant exposure to claims outside Thailand, and often in jurisdictions with a more developed body of relevant case law.

It remains essential to ensure that policy wordings reflect the actual risks. Competition to place risks does not always allow the time or expense of redrafting wordings, seeking regulatory approval for new wordings or for the appropriate level of technical analysis and input. Even where risk engineers provide input and analysis, commercial considerations will often, understandably, take priority. This is often on the basis that issues of policy interpretation will only arise if and when a claim is presented.

In situations where a loss results in litigation in Thailand and the wordings do not reflect the risks, particularly from a technical or operational perspective, there is a risk that the court or arbitration tribunal will interpret the provisions against the insurer. This can often have a dramatic impact on anticipated exposure to the loss and the financial and risk analysis on which cover was offered. In the event that insurers' exposure to a loss is significantly greater than expected, the exposed insurers may not have sufficient reinsurance cover to respond or, if they have sufficient cover, reinsurers may then also face a greater exposure than had been anticipated.

It is also important to consider the need to translate the policy into Thai for use in local court proceedings. This can often lead to unexpected issues, particularly where the translator has limited or no understanding of insurance concepts, the terms and provisions do not neatly align with Thai insurance law concepts or terms or where the Thai equivalent does not clearly communicate the meaning of the provision in English.

DOES COVER REFLECT THE INSURED RISK/S?

The increasing value, complexity and sophistication of power, construction and infrastructure projects in Thailand has made appropriate and responsive insurance cover even more critical. Thai insureds have also become increasingly sophisticated and savvy buyers of insurance cover and this is reflected in the more aggressive manner in which they deal with claims recoveries.

In assessing the risk exposure, it is important to ensure that the risk is not viewed in isolation and that potential exposure to other parties is identified, addressed and/or managed. This is particularly in the context of business interruption, loss of use and loss of profit claims.

In their focus on the cost of cover, the nature and extent of cover and exclusions can be given lesser significance and prominence by an insured. This can often lead to divergent assumptions as to the nature and extent of cover and these divergences only emerge when a claim is presented. Reliance on a strict and often technical interpretation of an exclusion clause may not always produce the anticipated outcome, particularly in the Thai courts. This is considered further below.

As insureds become increasingly aggressive in claims recoveries, this divergence in assumptions can often result in litigation against insurers when a claim is declined. A further avenue is to pursue a claim against the brokers for a failure to properly place the risk. In response to such claims, if brokers can demonstrate that they have procedures to document the nature and extent of cover requested and their explanation of the options available to an insured and to demonstrate compliance with these procedures, such claims should have little merit and limited prospects for success. However, insureds are increasingly aware of the reputational and commercial consequences for brokers if they are sued in Thailand. This can often be the basis for some form of commercial settlement with an insured.

Thai reinsurance brokers can face claims and proceedings as the agent of a foreign principal, the participating offshore reinsurers. Although this misinterprets the role of brokers in placing risks, a successful defence of such claims requires evidence of procedures, evidence of compliance with those procedures and a Thai court to properly and consistently interpret the actual role of the broker in claims brought by a Thai insurer. Reinsurance brokers may face the increasing prospect of such actions even if only to pressure them to persuade the reinsurers to settle claims where liability has not been established, to settle claims on strictly commercial grounds or to seek a contribution from the reinsurance broker where the amount offered by the reinsurers is less than the claimed amount.

LET'S GET TECHNICAL

The input and analysis of technical experts at the risk assessment and underwriting stage can play a significant role if and when a claim is presented. This is particularly the case where an insured has provided technical specifications or operating parameters and requirements as part of the risk assessment. When a claim is presented and these specifications, parameters and requirements are not met, this data can play a critical role in determining the extent of insurers' exposure to the claim.

The involvement of the same experts in both the underwriting and claims aspects can provide a measure of continuity and familiarity. It can also expedite claims analysis as the experts are already familiar with the insured, the risks and their operations, particularly where there are challenges in obtaining information and documentation from an insured.

In relation to technical experts, a further factor to consider is the extent to which they may be required to give evidence in subsequent litigation. In proceedings in the Thai courts, evidence must be given in Thai. For non-Thai speaking experts, the availability of translators with the necessary technical or industry knowledge can be a significant factor. Whilst the parties can agree to arbitrate their disputes in a language other than Thai, this should be considered and addressed during the underwriting process and expressly included in the arbitration clause. Where the arbitration clause does not address the applicable language, this can become an initial flashpoint between the parties.

CLAIMS HANDLING: INSURED, BROKERS, REINSURERS...

In power, construction and infrastructure project claims, a critical focus should be on understanding how the claim has arisen, and the extent to which this has resulted from an act or omission of the insured, and whether this represents a departure from approved procedures, specifications or operations.

The co-operation and assistance of the insured are essential to assessing the exposure of insurers. Insureds are increasingly less willing to co-operate with insurers and their representatives, including loss adjusters, forensic accountants, technical experts and lawyers and requests for information and access are referred to the lawyers for the insured, who are being instructed at increasingly earlier stages in a claim. This can make it difficult to accurately assess a risk, including recovery prospects against third parties.

Where insurers are faced with limited co-operation from an insured, the extent and nature of documents, records and data from the underwriting stage can play a critical role, including any risk analysis and technical input.

Although policies will typically include claims co-operation clauses and provisions requiring an insured to provide its insurer with documents and records to enable the insurer to assess the claim, Thai law does not allow an insurer to decline cover solely on the basis that an insured has failed to fully or promptly comply with such provisions.

A further and related issue is the extent to which the limited flow of information could affect the response of the reinsurers, particularly where a significant portion of the risk is reinsured. An insurer's inability to provide sufficient information to a reinsurer may result in the reinsurer not accepting liability or requiring further information from the insured before it can reach a decision. This can place an insurer under significant pressure, particularly where the expiry of the limitation period under Thai law is imminent.

REINSURERS: MIND THE GAP?

The high level of offshore reinsurance of Thai risks is also a relevant factor in claims handling. The use of international and industry standard wordings can provide reinsurers with some comfort. However, this should be balanced with the interpretation of terms and conditions under Thai law and an understanding of the divergences between Thai insurance law and insurance law in other jurisdictions and internationally accepted custom and practice. This divergence can often result in reinsurers having exposure, once a claim is presented, where little or no exposure was anticipated.

The issue often arises in relation to the interpretation of clauses excluding or limited liability, particularly where reinsurer exposure has been assessed by reference to the interpretation of such clauses in other jurisdictions.

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Limited co-operation by an insured in relation to requests by their insurer for information and records can affect assessment of exposure by reinsurers and complicate efforts to resolve claims.

LAW AND JURISDICTION

Where the applicable law of the reinsurance policy differs from the Thai law governed underlying insurance policy, insurers may face the risk of being found liable under the Thai law-governed policy with their insured but without corresponding liability of their reinsurers. The differential appears to be increasing in tandem with the sophistication and technical complexity of risks.

A further factor is the extent to which judgments in other jurisdictions, dealing with the clauses in dispute, will be considered by Thai courts and arbitrations. Thai courts are not bound by the decisions of other courts and have a broad discretion in considering and applying judgments of courts in other jurisdictions. As a civil code jurisdiction, Thai courts are not bound by the judgment of other Thai courts and do not treat the judgments of other Thai courts as binding authority. This makes it more difficult to persuade a Thai court to apply the judgments of foreign courts, particularly judgments of courts in common law jurisdictions.

This issue is notably relevant to interpretation of clauses which define, limit or exclude liability and where interpretation and application of these clauses is based on case law and custom and practice. The prospect of a Thai court ignoring internationally accepted practice and custom or declining to follow judgments from other jurisdictions should be considered and addressed as early as possible.

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