

THAILAND: MULTIMODAL TRANSPORT OF GOODS INVOLVING CARRIAGE BY AIR OR SEA

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Prior to the enactment of the Multimodal Transport Act (the “MTA”) in 2005, Thailand did not have a single law governing that sector. Instead, a number of different laws were applicable depending on the mode of transport and identification of the stage at which loss or damage occurred. In this article, we consider how the MTA has been applied and interpreted, and the lessons learned from decided cases.

"The MTA was intended to provide a legal framework for shipments [and] more certainty as to liability."

The Multimodal Transport Act (2005)

A key reason for the MTA is Thailand’s increasing role as an air and sea cargo transshipment hub. As regional economic integration accelerates, the volume of goods being transported by multiple modes of transport has increased exponentially. The MTA was intended to provide a legal framework for shipments, strengthen regional cooperation in multimodal transport operations, provide more certainty as to liability and ensure that multimodal transport operators (“MTOs”) are registered.

Scope of application

The MTA applies to all international multimodal transport of goods from their place of origin to destination, affecting every MTO in Thailand. It also applies to all international multimodal transport contracts where the receipt or delivery of the goods is in Thailand. The MTA requires Thai registration of Thai and international MTOs before they can operate multimodal transport in the country. Failure to do so may result in significant monetary penalties. However, the failure to register does not release an MTO from liability under the MTA.

What constitutes “Multimodal Transport”?

Multimodal transport must include the following three elements:

- Be governed by a single multimodal transport contract;
- Involve at least two different modes of transport; and
- Involve carriage from one country, where the MTO receives the goods, to another country.

The Thai courts will consider the modes and nature of transport and assess whether they meet these requirements regardless of how the contract of carriage is defined.

Where one mode of transport is incidental to the other, this is unlikely to meet the requirement for two different modes of transport. The MTA does not directly address this other than to exclude transport comprising only pick-up and delivery of a shipment. The Thai Supreme Court has ruled that both modes of transport must involve substantial distances. The relevant distance is likely to depend, in part, on the total transit for the shipment, the distance of each mode of transport and the nature of the mode involving a shorter distance. In an international shipment to or from Thailand, the Thai domestic carriage would appear to require carriage over a provincial border at a minimum.

"The limitation period under the MTA for subrogated claims is not extended or suspended by subrogation."

Limitation periods for multimodal transport proceedings

For carriage which is subject to the MTA, proceedings must be commenced within nine months from the day on which the MTO delivered, or should have delivered, the goods. This is a shorter limitation period than in the Thailand Civil and Commercial Code (the "CCC"), the one-year limitation period in the Carriage of Goods by Sea Act (1991) (the "COGSA") and the two-year limitation period in the International Carriage by Air Act (2015) (the "ICAA").

A critical issue is determining the applicable limitation period between the MTA, COGSA and ICAA. The few reported decisions indicate that the limitation period in the MTA will take precedence over the COGSA in a multimodal shipment where the damage occurs during the ocean carriage. Does the MTA apply to the multimodal transport of goods where damage occurs during the period of carriage by air?

To date, there are no reported decisions on whether the limitation period in the ICAA or MTA will take precedence. It is unclear whether the Thai courts will apply the approach of the Supreme Court to proceedings involving ocean carriage. Unlike the COGSA, the ICAA has specific provisions to define carriage by air and liability for damage during this defined period. A finding that the ICAA governed damage caused during the period of carriage by air would be consistent with decisions in other comparable jurisdictions, such as Germany.

What is the limitation period for subrogated claims?

The limitation period under the MTA for subrogated claims is not extended or suspended by subrogation. The reported decisions require an insurer to commence proceedings within nine months from the day on which the MTO delivered, or should have delivered, the goods. This is consistent with the approach of the Thai courts to limitation periods in proceedings by subrogated insurers generally.

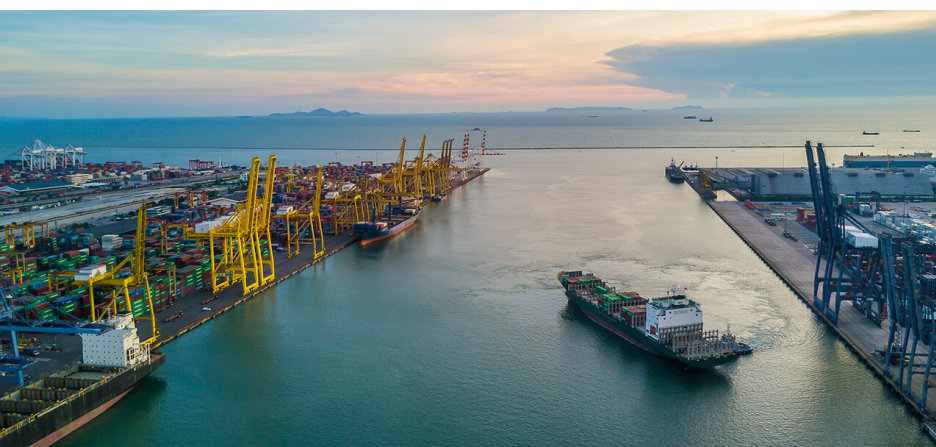
Liability limits under the MTA

Under the MTA, liability for delay is limited to the cost of the freight.

The MTA imposes a default statutory liability of the higher of Special Drawing Right (“SDR”) SDRs 667.67 per transport package unit and SDRs two per kilogram of the gross weight of the goods lost or damaged. Where the stage of carriage at which the loss or damage occurred can be identified and there are liability limits applicable to that stage, those liability limits and not the MTA liability limits will apply.

By comparison, the liability limits under the COGSA are the higher of THB10,000 (approximately SDRs 239.46) per unit of carriage or THB30 (approximately SDRs 0.72) per kilogramme and 19 SDRs per kilogramme under the ICAA.

The applicable liability limits will often play a critical role in the position of the parties as to which law will apply to claims for loss or damage.



IDENTIFICATION OF THE STAGE OF THE CARRIAGE AT WHICH THE DAMAGE OR LOSS OCCURRED AND WHETHER THE CARRIAGE FALLS WITHIN THE SCOPE OF THE MTA SHOULD BE THE FIRST AND HIGHEST PRIORITIES.

The MTA and freight forwarders

Identification of the stage of the carriage at which the damage or loss occurred and whether the carriage falls within the scope of the MTA should be the first and highest priorities. Forwarders should be prepared to deal with disputes over both issues from cargo interests and from ocean and air carriers.

Frequently, proceedings are commenced immediately prior to the expiry of the limitation period only against forwarders and not the air or ocean carriers. In such circumstances, the forwarder should immediately assess whether to seek an indemnity from or commence proceedings against the air or ocean carrier. Where this is not possible because of the expiry of the MTA limitation period, whether the claim is subject to the MTA is typically the issue in dispute as this will determine the liability regime for a claim against the air or ocean carrier, the limitation period and the liability limits.

The MTA and ocean carriers

It is important to carefully assess whether the carriage constitutes multimodal carriage and, if so, whether the MTA liability limits will apply. If the MTA does not apply, ocean carriers can rely on the lower liability limits in the COGSA.

Ocean carriers should also ensure that the applicable limitation period is established as soon as possible, particularly in circumstances where cargo interests seek to rely on the one-year COGSA limitation period rather than the nine-month MTA limitation period.

Forwarders can also be exposed to claims where their liability is subject to the MTA liability limits and the liability of the ocean carrier is subject to the lower COGSA liability limits.

The MTA and air carriers

The significant difference in the applicable limitation periods ensures that establishing whether a claim for loss or damage is subject to the MTA or ICAA is a critical initial issue. Airlines and their insurers should be prepared to support a consistent approach to the precedence of the MTA, that it should take precedence over the ICAA in the same way as it takes precedence over the COGSA. If the Thai courts decide that the MTA takes precedence over the ICAA, this will deny cargo interests and their insurers the higher liability limits and the longer limitation period under the ICAA.

"The significance of the parties focussing on and asserting contrary positions on the applicable liability limit should not be understated."

Until recently, air cargo claims in Thailand routinely focussed on whether contractual limits of liability had been incorporated and settlements were based on the invoice value of shipments. The significance of the parties focussing on and asserting contrary positions on the applicable liability limit should not be understated.

Conclusion

As the Thai courts become increasingly comfortable with the application of the liability regimes of the ICAA and MTA, this should provide more certainty as to liability exposure for forwarders and carriers. The enactment of the MTA and ICAA and their liability regimes represents significant progress in bringing the liability of forwarders and carriers.

Air and ocean carriers, freight forwarders and loss adjusters should ensure that the stage in the carriage where loss and damage occurred is identified as quickly and as clearly as possible.

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