

WATSON FARLEY & WILLIAMS

BRIEFING

THAILAND RATIFIES MONTREAL CONVENTION

SEPTEMBER 2017

- THAILAND DEPOSITED THE INSTRUMENT OF ACCESSION TO THE MONTREAL CONVENTION 1999 IN AUGUST 2017.
- THE MC99 WILL COME INTO FORCE ON 2 OCTOBER 2017.
- THERE ARE KEY CHANGES TO THE THAI LIABILITY REGIME FOR AIR CARRIAGE.
- WILL THIS ASSIST TO HAVE THE ICAO 'RED FLAG' REMOVED?



Last month, Thailand deposited the instrument of accession to the Montreal Convention 1999 ("MC99") with the International Civil Aviation Organisation ("ICAO") and the MC99 will come into force on 2 October. From this date, the overwhelming majority of carriage to and from Thailand will for the first time be subject to an international convention and to internationally defined and accepted standards, providing transparency, certainty and clarity to liability in carriage by air. This will result in significant changes to the way in which claims are handled, addressed and resolved.

After many years of reluctance to accede to MC99, the impetus for accession appears to be to remove the 'red flag' ICAO imposed in 2015 for various safety and regulatory shortcomings in Thai civil aviation.

The key changes

Passenger death and injury

The International Air Transport Act and the International Air Transport Amendment Act (jointly "the Act") introduce a minimum liability limit for passenger death and injury claims of SDRs 113,100 and allow for advance payments. Levels of compensation in Thailand are comparably low by global standards and damages of SDRs 113,100 would be extremely unusual and likely to be awarded only in exceptional cases.

Litigation in Thailand arising from all forms of death and injury claims remains relatively low. In many cases, a court-supervised pre-hearing mediation resolves the

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claims before the evidence is formally considered. There are few reported cases setting out damages awards or the basis of the calculation of these awards by the court. Thai courts are not bound by the decisions of other courts, and judgments of other Thai courts, primarily the Supreme Court, are influential or persuasive at best. The application of foreign judgments is addressed below.

Thai personal injury claims routinely include compensation for future medical expenses. The Act does not directly address this issue other than to stipulate that claims must fall within its scope, regardless of the basis for such claims. It is likely that the Thai courts will continue to award such compensation for claims subject to the Act.

It remains to be seen whether strict liability up to SDRs 113,100 will create upward pressure on compensation claims and demands, particularly if this makes litigation of claims on behalf of Thai passengers more attractive to international plaintiff attorneys. Carriers should assert that strict liability is only for proven damages up to this limit in accordance with the requirements of proof of loss under Thai law. This is likely to be a matter for each court to decide as it sees fit and carriers should anticipate varying outcomes depending on the court and claims before it.

Carriers should also anticipate demands for advance payments and ensure that they are prepared to respond to such demands, particularly where these are made publically and through social media.

Baggage

The Act introduces a liability limit of SDRs 1,131 per passenger for baggage loss, damage or delay claims. This is a positive step for carriers since it appears to remove the uncertainty over the extent of their liability. Prior to the Act, no statutory limit of liability applied and carriers had to rely on their contractual liability limits and accommodate uncertainty over compliance with requirements for the express agreement of the passenger to contractual limits of liability.

Provided the Thai courts accept that the Act overrides Article 639 of the Civil and Commercial Code (“CCC”), the courts should enforce the liability limit.

An increasing number of disputed baggage claims are dealt with by the Office of the Consumer Protection Board (“CPB”). The simplified, consumer-friendly case-handling procedures impose lower burdens of proof on claimants than in litigation before the Thai courts. It is unclear to what extent the CPB will accept that it is now bound by the Act, particularly where these limits may be seen as unfair to passengers and to what extent the CPB will refer claims to the Thai courts in accordance with the provisions of the Act on jurisdiction.

For claims pursued in the Thai courts or through the CPB and where notice was given outside the stipulated periods, a critical issue will be the extent to which such claims are dismissed. Thai courts are typically reluctant to order summary judgment and will often require the entire case to be heard and then rule on an application to dismiss because notice was given outside the permitted time period. This may prove to be a bigger issue for carriers than the imposition of a liability limit, particularly as the claimants are individuals and consumers.

“THE ACT DOES NOT ADDRESS HOW DAMAGES FOR DELAY ARE TO BE ASSESSED.”

“A CRITICAL FEATURE IS THE ELIMINATION OF THE NEED FOR CARRIERS TO DEMONSTRATE THE EXPRESS CONSENT OF A SHIPPER TO CONTRACTUAL LIABILITY LIMITS. PROVIDED THE THAI COURTS ACCEPT THAT THE ACT OVERRIDES ARTICLE 625 OF THE CCC, THE PRACTICE OF SETTLEMENT BY REFERENCE TO THE INVOICE VALUE OF CARGO CLAIMS SHOULD COME TO AN END.”

A further issue is the extent to which Thai courts and the CPB will strictly enforce the written notice requirements.

Delay

On liability for delay, the Act follows counterpart provisions in MC99. These provisions remain largely untested in the Thai courts as international carriers tend to apply their existing procedures for delayed or cancelled flights, including in relation to compensation. Statutory regimes, notably [Regulation \(EC\) 261/2004](#), have also created defined procedures for dealing with claims for delay.

The Act does not address how damages for delay are to be assessed. Thai courts are likely to look to other legislation, primarily the CCC, in assessing damages. This may result in a contractual claim for damages resulting from a breach of the contract of carriage and/or a tortious wrongful act claim. The latter has been used in delay claims against road carriers such as intercity bus companies. As most of the claims are resolved prior to judgment, the extent to which this is successful and the levels of damages awarded remain unclear.

Typically, Thai courts award compensation where the court accepts that the actual damages, primarily expenses resulting from delay or cancellation, result directly from the delay or cancellation. This is likely to raise issues of interpretation of terms and conditions of carriage, particularly those in relation to scheduled operating times and where flights are delayed or cancelled.

International carriers should also ensure that their codeshare agreements with Thai operations contain provisions that ensure that liability for delayed or cancelled flights rests with the appropriate party. Issues as to liability for compensation have arisen where a delayed or cancelled domestic flight results in a missed international connecting flight and vice versa. The Act neither addresses nor clarifies this.

Cargo

The Act introduces a liability limit of SDRs 19 per kilogram for cargo loss, damage or delay claims. If correctly and consistently applied, this would represent a long overdue improvement on the previous position, particularly given the volume and value of air cargo carried to and from Thailand.

A critical feature is the elimination of the need for carriers to demonstrate the express consent of a shipper to contractual liability limits. Provided the Thai courts accept that the Act overrides Article 625 of the CCC, the practice of settlement by reference to the invoice value of cargo claims should come to an end. Airline cargo claims teams should be made fully aware of the changes and the strict limits.

A critical issue will be the extent to which the Thai courts enforce the notice requirements and the consequences of a failure to provide written notice within the stipulated time period.

The use of electronic AWBs should also increase significantly once the Act comes into force as many of the legal issues affecting the use of electronic AWBs, notably on notice of limits of liability, are addressed by the Act.

It is not clear how the provisions in relation to disposal of cargo will be implemented, given existing Thai cargo import, export and clearance procedures and practices.

“ALTHOUGH THAILAND WILL BECOME A PARTY TO MC99, IMPLEMENTATION BY THE THAI COURTS WILL BE BY REFERENCE TO THE ACT AS DOMESTIC LAW.”

One issue to consider is potential customs duties and other taxes where cargo is delivered to a party in transit. Although the consignor is liable for any expenses resulting from the exercise of the right of disposition, airlines may face pressure to meet customs duties and any storage and handling charges, particularly where the consignor is not based in Thailand.

Treaty status: turbulence ahead?

Thailand is a party to comparatively few international agreements and conventions and the courts do not have the same level of experience in dealing with the conflict between domestic law and treaty obligations as in other jurisdictions.

Although Thailand will become a party to MC99, implementation by the Thai courts will be by reference to the Act as domestic law. This is significant and may affect the extent to which Thai courts interpret the provisions of MC99 consistently with other jurisdictions.

Thai courts do not typically apply foreign law and have a broad discretion as to whether to consider and apply foreign judgments. This discretion can frequently be exercised to exclude foreign judgments, particularly given the more limited role of case law in Thailand’s civil code legal system. Thai courts will consider the position primarily from the perspective of Thai law and Thai standards and this may result in decisions that diverge from internationally accepted practice and interpretation of MC99.

A key issue is the relationship between the Act and key legislation, primarily the CCC. Although a specific law, such as the Act, should take precedence over general legislation, such as the CCC, it remains to be seen how the courts will interpret directly and indirectly conflicting provisions. The Act does not expressly address the issues of conflict between it and other Thai laws.

Critical examples are the limits of liability imposed by the Act and the provisions of the CCC on limiting liability and the consequences of a failure to provide written notice of baggage and cargo claims.

Cleared for take-off?

Carriers should:

- Ensure that their conditions of carriage are appropriately worded to accommodate the change in the legal regime for carriage to and from Thailand.
- Provide briefings, training and education for local staff on the changes, particularly in relation to written notice requirements and in dealing with passenger injury and death claims.
- Ensure that claims staff are aware of the position in relation to claims arising before 2 October.
- Monitor claims activity in the six months after the Act comes into force.
- Be prepared to defend claims that are subject to the Act and are pursued on the basis of the superseded legal regime.
- Be prepared to defend claims that challenge the validity of the Act, particularly where its provisions are inconsistent with other Thai laws.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



ALAN POLIVNICK
Partner
Bangkok

T +66 2 665 7805
apolivnick@wfw.com



KULKANYA VORAWANICHAR
Senior Associate
Bangkok

T +66 2 665 7839
kvorawanichar@wfw.com



NICHAREE MUSIKAPRAPHAN
Associate
Bangkok

T +66 2 665 7840
nmusikapraphan@wfw.com