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Thailand's New Multimodal Transport Act

Implications On International Multimodal Transport Operators

Thailand's new Multimodal Transport Act ("MTA") has recently been passed, and will come into force on 23rd December 2005. The MTA affects all multimodal transport operators ("MTO"), both local and overseas, who wish to provide multimodal transport in Thailand.

The legislation will also apply to all international multimodal transport contracts in which the place for taking charge of the goods or the place for delivery of the goods (as provided for in the multimodal transport contract) is located in Thailand. The MTA requires Thai and International MTOs to register in Thailand before they can operate multimodal transport in Thailand and failure to do so may result in severe penalties.

We are aware that prior to the passing of the MTA, Thailand had no specific law,which focuses on multimodal transport. Instead, multimodal transport disputes were governed by existing Thai law pertaining to the carriage of goods, found in the Thai Civil and Commercial Code and/or the Carriage of Goods by Sea Act. Which of these may govern would depend on the circumstances of the dispute.

This article will highlight some of the key provisions in the MTA, how these provisions affect the MTOs, and where applicable, to what extent the MTA differs from Singapore's Carriage of Goods by Sea Act (Cap. 33) ("COGSA"), the United Nations Convention on the Carriage of Goods by Sea 1978 (the "Hamburg Rules") and other common law principles.

What is a Multimodal Transport?

Multimodal transport simply means the carriage of goods by at least two different modes of transport under one multimodal transport contract. In some jurisdictions, multimodal transport is commonly referred to as "inter-modal transport". However, under the MTA, "multimodal transport" has been very meticulously defined. A multimodal transport would begin from a country at which the goods are taken charge by the MTO to a place designated for delivery situated in another country. This definition is similar to that under the United Nations Convention on International Multimodal Transport of Goods 1980 (the "MT Convention").

The specification of two different countries in the definition of "multimodal transport" is an extension of the definition of a "multimodal transport contract" in the UNCTAD/ICC Rules for Multimodal Transport Documents. The UNCTAD/ICC Rules for Multimodal Transport Documents merely refers to the "multimodal transport contract" as a single contract for the carriage of goods by at least two different modes of transport. No reference to countries is mentioned, suggesting that the multimodal transport can be two modes of transport in the same country.

Since there is a reference to two different countries for a multimodal transport under the MTA, the operations of pick-up and delivery of goods as specified in a unimodal transport contract shall not be considered as a multimodal transport.

Who are the Multimodal Transport Operators?

The MTO are persons who, on his own behalf or through another person acting on his behalf, concludes a multimodal transport contract and assumes responsibility for the performance of the transport in accordance with the contract.

In essence, the MTO are akin to the "carrier" under COGSA, that is, the owner or the charterer who enters into a contract of carriage with a shipper.

The reason for the MTO "assuming responsibility" for the performance of the multimodal transport contract is linked to the extensive liability that the MTO invariably faces in entering into a multimodal transport contract.

Liability of the MTO

The liability of the MTO is based on the notion of presumed fault. The MTA provides that the MTO shall be liable for loss resulting from loss of, damage to, or delay in delivery of the goods if the cause of such loss, damage or delay in delivery has occurred from the time the MTO has taken the goods in charge to the time of delivery of the goods, unless the MTO proves that he, his servants or agents or any other person whose services he makes use for the performance of the multimodal transport contract have taken all measures that could reasonably be required to avoid the occurrence of such loss, damage or delay in delivery including the consequences thereof.

Therefore, the MTO is liable for the performance of the contract, commencing from the time he has taken the goods in his "charge" to the time of their delivery. This liability based on presumed fault is in line with the MT Convention. This is also similar to that of the carrier's liability under the Hamburg Rules.

The idea of making the MTO/carrier liable from the time he has taken the goods into his "charge" is based on a single rule – that the MTO/carrier is liable unless he can prove that he is not at fault. This would mean that the MTO/carrier remains liable for the periods of transport and any other occurrences located outside, and even away from, the ports of loading and of discharge, so long as the goods are within his "charge".

This would not mean that the MTO would face a plethora of claims if it were unable to discharge its burden of proof. Unlike the position under COGSA and the Hamburg Rules, the MTA has set out several instances wherein the MTO would not be liable for loss, damage or delay in delivery. For instance, the MTO shall not be liable for loss, damage or delay in delivery if such loss, damage or delay in delivery arises or results from force majeure, willful act or negligence of the consignor or consignee, inherent nature or latent defect of the goods, strike, lock out, work stoppage etc.

Limitation of Liability of the MTO

Since the MTA places such a huge liability on the MTO's part, the MTA sets out a detailed analysis on how much the MTO is liable for in the event that the MTO is unable to discharge its burden of proof.

In respect of a carriage of goods by sea or inland waters, where goods have been partially or totally lost or damaged, the liability of the MTO is restricted to 666.7 SDR per shipping unit, or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is higher.[1] A shipping unit is the unit of goods counted as a unit and can be carried separately. This value translates to be approximately S$1,603.66 (THB38,439.73) per shipping unit, or S$4.80 (THB115.05) per kilogramme.

Footnotes

[1] This differs with the limit set pursuant to the MT Convention where the MTO's liability shall be limited to an amount not exceeding 920 SDR per package or other shipping unit or 2.75 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

For cases where there has not been carriage of goods by sea or inland waters, the MTO's liability is limited to 8.33 SDR per kilogramme of goods lost or damaged, i.e. approximately S$20.03 (THB480.11) per kilogramme of goods lost or damaged.

It must be noted that the MTA specifically provides that the conversion of the SDR to the Thai Baht shall be calculated according to the exchange rate prevailing at the time of calculation of compensation as announced by the Bank of Thailand.

The time of calculation of compensation is as follows. Where goods are lost or damaged, compensation shall be calculated on the basis of the value of the goods at the time and place of delivery to the consignee or at the time and place where delivery of goods should have been made to the consignee according to the multimodal transport contract.

How the compensation is calculated is as follows. The value of the goods is calculated based on the current commodity exchange price or if no such price is available, the value will be the normal value of goods of the same kind or quality.

What happens in a discrepancy if the value of the goods calculated based on the current commodity exchange price or the normal value of goods of the same kind or quality differs from the value stated in the multimodal transport bill of lading ("MTBL")? If the value of the goods calculated based on the current commodity exchange price or the normal value of goods of the same kind or quality is lower than that on the MTBL, then the MTO is liable for the value so calculated, and not the value stated in the MTBL. However, if the calculated value is higher, the MTO would only be liable for the value stated in the MTBL.

Generally, if the MTO is liable for loss caused by delay or consequential loss other than loss of or damage to goods, liability is limited to the equivalent of the freight under the contract. However, the aggregate liability of the MTO shall not exceed the limits of liability for total loss of the goods.

Having said this, the MTA gives effect to party autonomy by allowing parties to the multimodal transport contract to agree to fix a higher amount of limitation of liability of the MTO.

Duty and Liability of the Consignor

One of the interesting provisions in the MTA is that the MTO must notify the consignor and ask for his instructions if the consignee cannot be found, or if the consignee refuses to receive the goods.

This brings us to the question on what the role of the consignor is in a multimodal transport contract.

The MTA has been fairly comprehensive in the duties which the consignor must have. This differs from the position in COGSA which relies on an implied term in the contract or by way of collateral contract for the shipper's duty in this regard. Similarly, this differs from the Hamburg Rules, which does not set out how the shipper is liable, save for the fact that he is not liable unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents.

Under the MTA, when the goods are taken in charge by the MTO from the consignor (or any other person acting on behalf of the consignor), the consignor shall be deemed to have guaranteed to the MTO the accuracy of all particulars relating to the general nature of the goods, their marks, numbers, weight, volume, quantity and the dangerous character of the goods as notified or furnished by him for insertion in the MTBL.

The consignor is bound to indemnify the MTO for any inaccuracies or inadequacies of the particulars, although it is the MTO that remains liable to the third party under the multimodal transport contract.

Specific Provisions Regarding Dangerous Goods

Unlike COGSA, the MTA spells out detailed obligations of the consignor with regards to dangerous goods. This is very similar to the provision in the Hamburg Rules and is in line with recent developments on the carriage of dangerous goods.

Specifically, the consignor must mark or label dangerous goods in accordance with international conventions or any relevant legislation or regulations. This would impose a huge responsibility on the consignor to ensure that the various conventions, legislation and regulations are complied with.

It would also appear that the consignor must inform the MTO on the dangerous nature of the goods. If the consignor fails to inform the MTO, and the MTO does not have knowledge of such goods, the consignor remains liable to the MTO for losses or expenses incurred from the shipment of such goods. This is similar to the position at common law, where it is a long established rule that the shipper is under a strict duty not to ship dangerous goods.

If dangerous goods are indeed shipped, like the Hamburg Rules, the MTO has the discretion to unload the goods and to destroy or render innocuous the dangerous goods as circumstances may require, without any payment of compensation.

However, the MTO would remain liable for general average if he unloads, destroys or renders such goods innocuous, even if the consignor has informed the MTO about the nature of the goods and it later turns out that the goods are dangerous.

Duties of the Consignee

The consignee appears to have an obligation to inform the MTO in writing when they have received goods that are partially lost or damaged. The consignee has to inform the MTO without delay, as the MTA provides that in the event that the damage is not apparent at the time of delivery, the consignee is entitled to make the written protest within six days from the date it received the goods. If the consignee does not do so within six days, the same presumption of properly delivered goods will apply

The allowance of six days is a longer period of time than that given under the Hamburg Rules. Under the Hamburg Rules, unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is prima facie evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

At common law, the duties of the consignees are limited to taking delivery of the goods in a reasonable time. There is no specific time wherein the consignee must make a protest by. There is consequently no such presumption at common law that the goods have been properly delivered. Instead, reference would be made to the bill of lading, which would be prima facie evidence of statements as to the condition of the goods.

Evidentiary Function of the Multimodal Transport Bill of Lading

As it can be seen, what the consignor tells the MTO and what is indeed stated in the MTBL is very important. What is the function of the MTBL?

Like the bill of lading under COGSA and the Hamburg Rules, the MTBL is prima facie evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading.

Clausing the Bill of Lading

Just like how the carrier under the Hamburg Rules must insert a reservation specifying the inaccuracies in the bill of lading, the MTA places the obligation on the MTO to clause the MTBL if it is not sure of the accuracy of the particulars given by the consignor. If the MTBL does not contain statements such as "shipper's weight, load count" or "container packed by shipper", the particulars as indicated on the MTBL will be prima facie evidence that the MTO has taken the cargo in the state described on the MTBL.

(continued overleaf)

This is similar to the Singapore position in COGSA, wherein a statement in the bill that the goods were shipped or received in apparent good order and condition is evidence of the external condition of the goods at the time of shipment or receipt. However, the Singapore position has a caveat by providing that the carrier shall not be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

The writers opine that such prima facie evidence in the MTBL would seek to ensure that the MTO fulfills its duties under the MTA. If the MTO were unsure of the contents of the goods, it would be obliged to ask the consignor for further clarifications.

Bill of Lading in the Hands of a Third Party

One other similarity between the bill of lading in the MTA, COGSA and the Hamburg Rules is this – if the bill of lading has been transferred to the consignee or third party who has in good faith relied on the contents and information set out in the bill of lading, any evidence provided by the carrier/MTO to prove otherwise shall not be admissible. Proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein. The carrier/MTO would be estopped as against a consignee of a bill of lading from disputing the truth of the statement.

Required contents of a Multimodal Transport Bill of Lading

The MTA sets out certain requirements relating to the contents of the Multimodal Bill of Lading ("MTBL"). The writers opine that such requirements are largely adopted from that of the Hamburg Rules.

The MTA voids all stipulations which directly or indirectly absolve the MTO from all liability or duty owed to the consignor or consignee.

The MTA requires the following minimum contents to be set out in the MTBL:-

i) Description of the general nature of the goods to be shipped, identification marks, whether goods are dangerous goods / perishable goods (if applicable), the quantity as measured in units and weight, as notified or provided by the consignor of the goods;

ii) Apparent condition of the goods to be shipped;

iii) Name and principal place of business of the MTO;

iv) Name of consignor;

v) Name of consignee (where applicable);

vi) Date and place where goods were handed over to the MTO;

vii) Delivery location;

viii) Date or period of time for delivery at a designated location (where applicable);

ix) Whether the MTBL is negotiable or non-negotiable;

x) Date and place of issue of the MTBL;

xi) Signature of the MTO or its authorized representative;

xii) Statement indicating the freight rate payable by the consignee for each mode of transportation, or indicating that freight rate is payable by the consignee as agreed by parties;

xiii) Intended route and mode of transport, if already known at the time of the issuance of the MTBL

However, the existence of an exclusion of liability clause will not render the whole MTBL void. The MTBL would still be valid so long as it meets the definition of the MTBL

in the MTA, that is, a document issued by a MTO to the consignor as evidence of a multimodal contract with the essentials showing the MTO has taken in charge the goods specified in the MTBL and that the MTO undertakes to deliver the said goods to the consignee or the person entitled to receive them.

Claims

Legal proceedings (court action or arbitration) for claims arising from the multimodal carriage of goods must be taken out within nine (9) months from the date the MTO delivered, or ought to have delivered the goods. Parties may give a signed written consent to extend this time bar period, but in any case, this time bar extension period must not exceed two (2) years from the day the MTO delivered, or ought to have delivered the goods.

This is in contrast with the position under the Hamburg Rules. Any action relating to carriage of goods under the Hamburg Rules is time-barred if judicial or arbitral proceedings have not been instituted within a period of two (2) years.

This is also in contrast to the Singapore position under COGSA. Suit must be brought within one (1) year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has risen.

Jurisdiction & Arbitration

Unlike COGSA, parties in the MTA are free to agree on the governing jurisdiction for the MTBL or any multimodal transport contract as well as agree on arbitration to be carried out in any jurisdiction. Where the MTBL and said contract is silent on the governing jurisdiction, and parties have not agreed in writing after the claim arose on where the claim should be adjudicated, the plaintiff may institute an action in any of the following jurisdictions (should the courts, according to the law of that country, decide to adjudicate the matter):-

i) The country where the defendant's principle office is domiciled, or where the defendant is situated,

ii) The country where the multimodal transport contract was executed, provided that the Defendant has a place of business or an agent in that country,

iii) The country where the MTO took charge or delivered the goods.

Again, this is largely based on the Hamburg Rules position. The MTA therefore gives parties great freedom in deciding where their claim should be adjudicated. For example, where arbitration is concerned, in the case of a dispute between an MTO which is a Singapore company, and a consignee which is a Thai company, the arbitration could be held in Singapore, with governing law of the arbitration being Thai law or Singapore law.

What does a company have to do to operate multimodal transport in Thailand?

Now that the reader has been given a gist of what the MTA entails, and the obligations on the various parties under a multimodal transport contract, what does a company have to do if it wishes to carry out such multimodal transport operations in Thailand in the future? Similarly, what statutory requirements must the company comply with if it is already operating as a MTO in Thailand?

Compulsory registration of MTOs is necessary under the MTA. The following three classes of companies can be MTOs:-

i) A Thai company who wish to operate as an MTO;

ii) A MTO registered in a foreign country and recognized by Thailand under a Treaty or international agreement; and

iii) A MTO or any transport operator in a foreign country who wish to operate multimodal transport in Thailand.

We deal with each class of MTOs now.

Class (i): Thai company wishing to operate as a MTO

A Thai company that wishes to be a MTO as set out in (i) above is now required to be a limited company or a public limited company incorporated under the Thai laws and having its principal office situated in Thailand. This company is required to have a paid up capital of not less than 80,000 Special Drawing Rights (SDR). 80,000 SDRs amounts to approximately SGD192,994.88, or about THB4,626,087.27. *Tai Holding Co. Ltd.* [1995] where injustice to the prevailing party was considered over the grounds).

With the requirement of incorporation and a paid up capital minimum of 80,000 SDRs, the smaller MTOs in Thailand will now be required to incorporate a company (if they have not done so), and/or raise their paid up capital increased to THB4,626,087.27. This requirement would either force smaller MTOs to increase their capital, or stop operating as a MTO.

However, the advent of this requirement will theoretically benefit the shippers and consignees, as the MTOs in Thailand would, as a result of a higher paid up capital, be likely to meet liabilities arising from its obligations as an MTO.

How does a Thai company become a MTO? Procedurally, the Thai MTO will be required to register.

its company with the Director General of the Marine Department or its appointed officials (the "Registrar"). This process should take not more than 45 days. If the Registrar rejects the application, he would have to notify the applicant within 20 days after receiving the application by the MTO.

Once the application is approved, the Registrar will issue certificates to the MTOs. This certificate will be valid for 5 years from the date of issue.

Not only must a potential Thai MTO have a paid up capital minimum of 80,000 SDRs, the Thai MTO must maintain a minimum asset value of 80,000 SDRs throughout the period of its operation as an MTO.

Class (ii):- A MTO registered in a foreign country and recognized by Thailand under a Treaty or international agreement

A foreign company classified under (ii) above needs to register with the Registrar to be put on official record that it is a foreign company recognized by Thailand under treaty or international agreement.

The foreign company is also required to have an agent or a branch office in Thailand. The agent can either be a registered Thai multimodal transport operator falling under (i) above, or a Thai registered company whose objectives include engaging in the transport, agency or brokering businesses.

This provision probably provides for a future possibility where foreign countries have signed bilateral or multilateral agreements with Thailand to allow their country MTO to fall under this class of MTOs. As the MTA is relatively new, we are not yet aware of any countries that have made such agreements or treaty to allow their MTOs to be classified under this category.

The MTA appears to envisage a corresponding form of regulation (i.e. compulsory registration) to be effected in a foreign country by providing that the certificate of official record is valid for the same time period that the foreign MTO's registration is valid in its own country, up to a maximum of 2 years from the date of the issuance of the official record certificate.

Class (iii):- A MTO or any transport operator in a foreign country who wish to operate multimodal transport in Thailand

A foreign company classified under (iii) above who wishes to provide multimodal transport in Thailand will need to register their association with an agent in Thailand.

The agent would then be jointly liable with the registered MTO for any damage caused by breach of contract or wrongful act toward the consignor or consignee or other third party in Thailand.

This certificate issued to a company in class (iii) is valid for the duration of the agency agreement, but shall not exceed a period of 2 years from the date of the issuance of the certificate. The agent that is appointed must also be a company that is registered in Thailand under class (i) above.

Penalties for failure to register

A person or company who carries out multimodal transport operations without registering can be fined between 100,000 baht to 1 million baht (approximately S$4,710.80 – S$4,170,800.00). In addition, if any multimodal transport contract has been entered into by that person of company who failed to register, there is an additional fine of 50,000 baht (approximately S$2,355.40) per contract.

There is also an interim provision allowing for an MTO who has been carrying out multimodal transport before this Act (passed on 11th July 2005) to apply for registration or for an official record (where applicable) within 60 days from the date the Act comes into force (23rd December 2005). An MTO who has made the necessary application within the stipulated time set out above can continue to operate as such, until the Registrar issues an order disallowing the MTO's registration or application to be placed on official record.

Any company which fall under the definition of a MTO under this Act and would like further information about the MTA, or wish to seek assistance in registering their company with the relevant Thailand authorities can contact Mr. John Sze at our Bangkok office. The contact information for our Bangkok office can be found at the last page of this e-bulletin.

Conclusion

The MTA therefore provides a comprehensive guide to multimodal transport operations in Thailand. It seeks to strike a fairer balance between MTO/carriers and shippers in the allocation of risks, rights and obligations with regard to liability and shift the balance of liability slightly from the shipper to the carrier, but without radically changing the established liability system. Just like how the Hamburg Rules are favoured by shippers and predictably are opposed by shipowners and their liability insurers, it would remain to be seen how the MTA would affect the Thai multimodal shipping market.

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