

# Pursuing a Case Against the Right “Carrier”

■ Written by: Noppramart Thammateeradaycho

In the complicated business of carriage of goods by sea, multiple parties may be involved in a single shipment of goods, including a freight forwarder, shipping agent, customs agent, ship owner, ship manager, charterer, and more. Identifying the actor that may be held liable for cargo damaged in transit, under Thailand’s Carriage of Goods by Sea Act B.E. 2534 (1991) (COGSA), can be a complicated process, but it is a critical first step in recovering from the proper party.

If the incorrect “carrier” is selected, the plaintiff will waste time and money in pursuing the wrong defendant and will likely not secure any judgment from the court. In particular, if the case has been adjudicated, the plaintiff will likely be barred by the one-year prescription period from filing a claim against the real carrier. For smaller claims, the cost of filing two lawsuits against two different defendants may exceed the value of the claim.

## CARRIERS UNDER THAI LAW

Cargo owners, shippers, and insurance companies seeking to recoup expenses paid to a cargo owner or shipper, are well advised to review the definition of a “carrier” in COGSA. Under section 3 of COGSA, a “carrier” is defined as any person who (1) is a carrier of goods by sea (2) for remuneration in his ordinary course of trade and who (3) has entered into a contract for the carriage of goods by sea with a shipper.

In parsing the above definition of a “carrier,” we note three important elements in identifying a carrier. First, carriers receive carriage fees in exchange for the carriage of the goods of a shipper to a consignee.



Second, carriers operate the business of carriage of goods by sea as their normal practice.

Third, carriers enter into a contract for the carriage of goods by sea. It is important to note that COGSA does not require such contract to be made in writing, defining a “contract of carriage of goods by sea” as only an agreement whereby the carrier undertakes to carry the goods by sea from a port or a place of one country to another port or place of another country by charging freight.

A bill of lading is considered as evidence of a contract for the carriage of goods by sea; but, under Thai law, it is not considered to be the contract by itself. In other words, a bill of lading may be used as one piece of evidence to identify the carrier, but it is not dispositive—the issuer of a bill of lading may not ultimately be the carrier.

## ACTUAL CARRIAGE

Under the Hague Rules (1924), which Thailand has not ratified, the term “carrier” includes “the owner or the charterer who enters into a contract of carriage with a shipper.” Whereas the Hamburg Rules (1978), which Thailand has also not ratified, define a “carrier” as “any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.”

Notably, COGSA does not specify whether carriers are required to perform the actual carriage of goods, such as being a ship owner or charterer. We have found that in many cases the Supreme Court considers defendants who are freight forwarders with no ship to be liable as carriers.

In Supreme Court Judgment 1094/2545 (2002), the plaintiff filed a cargo claim against the first defendant (as a ship owner) and the second defendant (as a bareboat charter who issued the shipper a bill of lading and affixed its company name “as agent” and accepted the direct payment of freight from the plaintiff). The first defendant argued that it was not a contractual party with the shipper and

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received only charterer fees from the second defendant (i.e. it received no freight from the second defendant). The Supreme Court ordered that the first defendant was jointly liable as the other carrier with the second defendant as the carrier. This case shows that a ship owner who does not operate as the actual carrier may risk being jointly liable with its charterer.

Another interesting example is Supreme Court Judgment 15/2547 (2004). The plaintiff, as a shipper of auto parts, sought damages because the carrier could not deliver the goods to the promised port destination. The plaintiff contacted the first defendant, as a freight forwarder, to find a shipping line to carry its goods from a port in Thailand to a port in Egypt. The freight charges were paid to the first defendant, which contacted the second defendant (as an agent of a shipping line) to reserve transport for the plaintiff's goods. Both defendants argued that they were not carriers or other carriers and should not be liable

for any damages caused by the failure of delivery of the goods. The plaintiff submitted a schedule of the ship's arrival, provided by the first defendant, and claimed that it was evidence of a carriage of goods by sea contract with the first defendant. In addition, the plaintiff submitted a bill of lading provided by the second defendant, which had affixed its name as the agent of the carrier in the bill of lading (note that the first defendant was not listed in the bill of lading).

In this case, the Supreme Court ruled that the defendants were not carriers and that neither was liable for any damages, because neither defendant received carriage fees. It reasoned that although the first defendant received money from the plaintiff, the sum constituted agent fees only. In addition, the carriage charges that the first defendant paid to the second defendant were transferred to the carrier. Therefore, the Supreme Court held that both defendants were not carriers under COGSA.

## CONCLUSION

In conclusion, claimants should carefully consider the three elements in the definition of "carrier" before naming the defendants in any lawsuit. Where aggrieved parties are unsure of the proper defendants, they should look to the precedent opinions of the Thai Supreme Court and should consider including a claim for a wrongful act (i.e. tort) under section 420 of Thailand's Civil and Commercial Code (CCC)—a claim that does not require proof of carrier status. In addition, the agency provisions of the CCC (specifically, section 824) may be applicable in cases involving a freight forwarder and an agent of a shipping line company. All claims should be brought with the assistance of qualified counsel and after a full review of all possible defendants. ■

*Noppramart Thammateeradaycho, Attorney-at-Law, Tilleke & Gibbins, can be reached at Noppramart.T@tillekeandgibbins.com.*



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