

ASIAN-MENA COUNSEL

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SHIPPING & INSURANCE: The changing tides



In-House Insight

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Pushing the boat out on limitation

Noppramart Thammateeradaycho of *Tilleke & Gibbins* provides us with a helpful guide to limitation of liability (for ship owners) under Thai law. Navigating through the difficulties associated with the proposed legislation, she explains the efforts being taken to change the seascape for ship owners in Thailand. She also tells us that with the necessary steps being initiated to accede to the relevant international conventions, ship owners may see greater certainty in terms of limitation on the horizon.

Ship owners of vessels operating in the Thai territorial jurisdiction face potential liability, either from their direct use of their own vessels or by chartering of vessels to third parties under a carriage of goods by sea agreement or through a charter party agreement. In general, a ship owner's liability can occur as the result of contractual breach, the commission of civil torts, and through application of specific law. In this article, we endeavor to provide practical guidance on ship owners' rights in seeking to limit potential liability under Thai law. In so doing, we also provide an overview of new and proposed legislative efforts to modify applicable law on limitation of liability.

Limitation of liability under Contract

Compensation resulting from breach of contract is generally governed by section 222 of the Thai Civil and Commercial Code (CCC), which states, in principle, that ship owners may be liable for the full amount of damages incurred. However, it should be noted that ship owners may limit their liability by contract, provided that such agreement is not contrary to public policy or the good morals of Thailand.

In addition, if damage is incurred from a specific carriage of goods by sea agreement, then a statutory limitation on liability for a ship owner may also apply. This is because section 58 of the Carriage of Goods by Sea Act B.E. 2534 (Thai COGSA) allows ship owners acting as a carrier to limit their liability to THB 10,000 per carriage unit or THB 30 per kilogram in cases where there is loss or damage to goods. Further, section 58 of the Thai COGSA provides for a limitation of ship owner liability to no more than 2.5 times the amount of freight fees on goods delivered late.

In short, despite the fact that there is no general limitation of liability for ship owners under the Thai CCC, there exists the right to contractually limit such liability or, where there is a specific carriage of goods by sea agreement by parties, the Thai COGSA may provide statutorily defined limitations of liability for contracting ship owners.

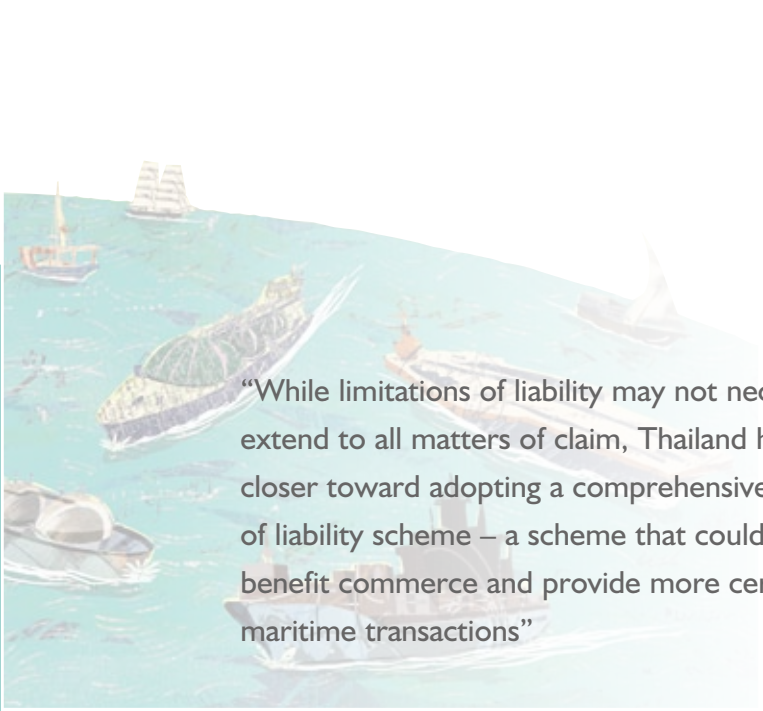
Limitation of liability for wrongful act

Liability incurred from the commission of a wrongful act/tort is defined under section 438 of the CCC, which states, in part, that court awards of compensation for wrongful acts will be determined by the court based upon proof of wrongdoing, proximate causation, and the seriousness of the wrongful acts. Under the CCC, there is no specific right to limitation of liability where a wrongful act has been committed. As such, ship owners may be liable for the full amount of compensation in relation to the damage caused by the wrongful act, even if they had previously limited liability by contract.

Limitation of liability for carriage of normal goods

Thailand is not a signatory to the London Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC). The LLMC limits liability for claims according to the tonnage of each marine vessel in accordance with a specific scale approved by member countries.

In 1988, Thailand proposed to become a party to the LLMC and formulated a bill complying with the LLMC. Despite the initial drafts, however, this bill has not been submitted to Parliament for approval due to a perceived lack of political support. One possible explanation is that Thailand has a limited



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Noppramart Thammateeradaycho

number of maritime vessels and, as such, does not have a significantly powerful political or economic interest in the LLMC. Further, there has been speculation that being a signatory to the LLMC may actually be disadvantageous to Thai interests, rather than beneficial, since some may argue that there is already adequate civil remedy through the Thai courts, which is based upon proof of liability, the issues of proximate causation, and the seriousness of a wrongful act. Other observers believe that claims for wrongful acts occurring in Thailand better serve the interests of non-ship owner Thai litigants, by not allowing a limitation of liability to mostly foreign ship owners involved in Thai civil claims.

Limitation of liability for nuclear-powered vessels and for carriage of nuclear and/or dangerous goods or chemicals

Thailand has no specific law addressing nuclear-powered vessels or the carriage of nuclear or other hazardous chemicals *per se*. However, if cargo damage occurs as the result of hazardous cargo carriage by sea, sections 34-35 of the Thai COGSA will apply. In addition, tort law as it relates to personal injury may also provide a means to seek compensation from an otherwise liable ship owner carrying hazardous goods or chemicals.

Section 33 of the Thai COGSA states that any goods classified as dangerous, such as explosives and flammables (and any other possible goods deemed to be dangerous), must be marked or announced by the carrier by attaching a reasonable tag to inform others that the goods are dangerous.

If potentially dangerous goods are assigned to a carrier or a subsequently contracted third-party carrier, the first carrier has an obligation to inform the third-party carrier of the dangerous condition of the goods. If the carrier or third-party carrier requests the shipper to provide a warning and conduct adequate preventative measures related to the hazardous goods, the shipper must comply with the request.

Section 34 of the Thai COGSA states that if the shipper has followed section 33 accordingly and the carrier or third-party car-

rier does not know of the dangerous condition of the goods, the rights and duties of the shipper, carrier, and other carriers are as follows:

- (1) At any time, the carrier or third-party carrier may discharge the goods, damage, or act to remove any dangerous condition caused by the goods at any necessary opportunity without the payment of compensation.
- (2) The shipper is liable for damages and other expenses incurring from such carriage, excluding the expenses as stated in (1) above.

Section 35 of the Thai COGSA states that even where the shipper has acted in accordance with section 33, or where the carrier or third-party carrier has accepted carriage by acknowledging the dangerous condition of the goods, if later it becomes evident that the goods are dangerous toward life or property, subsequently the carrier or third-party carrier may discard the goods from the vessel, destroy them, or eliminate them using necessary measures, without payment of compensation.

The above provisions stipulate the duty of the shipper in assigning the dangerous goods to the carrier and furthermore stipulate the liability of the shipper if it has not performed its duties accordingly. However, the issue of liability of the ship owner for carrying dangerous goods which may cause damage to a third party is governed under Thai tort law as stated in the CCC.

Limitation of liability of the owners of tankers and vessels causing oil pollution

On June 5, 2007, the Thai government submitted a proposal to become a member of the International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC). The rationale for seeking membership in the CLC is that most oil carriages involve marine transportation. Such marine transportation, essentially involving tankers, can potentially cause considerable damage to the natural environment by releasing oil into the sea. This can be the result of oil leaking from vessels or from larger marine

accidents which cause damage, not only at the accident site, but also potentially expanding to the marine territories of other countries in the region.

The International Maritime Organization (IMO) introduced the CLC in order to obtain reasonable compensation from oil-related acts by imposing strict liability for owners of marine vessels. It also imposes an obligation on owners to obtain insurance or other means of financial security in order to award compensation, if required.

Once Thailand becomes a full member of the CLC, it must then promulgate internal laws to ratify the convention. On September 4, 2012, the Thai Cabinet approved the first draft of the supporting legislation, in the form of the bill on Civil Liability for Oil Pollution Damage, to be submitted for approval by Parliament. The bill contains 38 sections, including the following key provisions:

- The bill covers damages from pollution in Thailand, including its contiguous zones and exclusive economic zones, as well as expenses incurred from the employment of preventative measures taken to protect damaged areas.
- The bill does not apply to warships or other vessels held by the state or operating for state business which have no commercial obligations.
- Ship owners are liable for the consequence of the damages at the time of an incident or for subsequent incidents, if they result directly from the first incident.
- Ship owners are not liable for damage resulting from war, civil war, unavoidable and unpreventable natural phenomena, third-party actions, or negligent or illegal action of the state or of authorities with the duty of maintaining lighthouses or machines which assist sailing.
- Ship owners are liable if the damages are caused by their own actions or personal negligence.
- Thai vessels carrying oil of more than 2,000 tonnes must have a certificate confirming they have sufficient insurance or financial security if they become liable for damage pollution.
- Foreign vessels carrying oil of more than 2,000 tonnes must

have a certificate administered by the authorities of state members of the CLC.

- Any vessel that cannot prove or otherwise verify its certificate will be fined in the region of THB 5,000 to THB 20,000.
- Following an incident, a ship owner must deposit a monetary indemnity, ensuring it reflects the correct quantum of liability in monetary terms to the court via cash deposit, bank guarantee, or other financial security. If any person or guarantor deposits the indemnity, the ship owner must ensure it is of the correct amount.
- The right to claim for oil pollution under this bill has a limitation period of three years from the date when the pollution occurred, or six years from the date when the first incident took place.
- Masters and ship owners of Thai and foreign vessels can be fined a maximum of THB 2 million (US\$65,253.) Moreover, the authority can seize vessels if they do not comply with the law.

A step in the right direction

In summary, the limitation of ship owners' liability depends on numerous factors and may be subject to specific statutory limitations based upon the Carriage of Goods by Sea Act or via other specific statutory provisions. In addition, Thailand has sought to join its international partners in acceding to conventions which seek to provide certain limitations of liability. While limitations of liability may not necessarily extend to all matters of claim, such as those involving wrongful acts, Thailand has moved closer toward adopting a comprehensive limitation of liability scheme – a scheme that could ultimately benefit commerce and provide more certainty to maritime transactions.

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In next month's issue...

In next month's edition of ASIAN-MENA COUNSEL, we take a look at the opening up of the South Korea legal market. Given that the debate over its liberalisation has been brewing for some time, we will consider the factors which ultimately led to the culmination of the EU and US Foreign Trade Agreement in this regard. What opportunities and threats will international firms encounter following their launch and how much of an impact will these firms have on the local legal community? External counsel from some of the most eminent firms in Seoul will weigh in with their thoughts. These are just some of the issues we will be examining, so watch this space for more on South Korea's changing legal landscape.



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