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The International Comparative Legal Guide to:

## Aviation Law 2019

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**Group Consulting Editor**

Alan Falach

**Publisher**

Rory Smith

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Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
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# Thailand

Weerawong, Chinnavat & Partners Ltd.

Nattaporn Pengkul



## 1 General

### 1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in your jurisdiction.

The principal legislation relating to civil aviation includes (i) the Air Navigation Act B.E. 2497 (1954), as amended (the “**Air Navigation Act**”), (ii) the Notification of the Revolutionary Council No. 58 B.E. 2515 (1972), and (iii) any regulation, notification or order issued thereunder. The legislation empowers each of the Ministry of Transport (“**MOT**”), the Civil Aviation Authority of Thailand (“**CAAT**”) and the Department of Airports (“**DOA**”) to regulate the aviation sector.

The CAAT holds general and supervisory responsibilities regarding safety and aeronautical matters (other than those under the responsibility of the DOA), which include the registration of aircraft operated by Thai licensed operators. The DOA, which is an organisation under the supervision of the MOT, is in charge of the operation of airports belonging to the government and acts as the operator of such airports.

### 1.2 What are the steps which air carriers need to take in order to obtain an operating licence?

An air transportation licence and an air operator certificate are the main licences required to be obtained prior to operating an airline business.

#### **Air Transportation Licence (“ATL”)**

The following key requirements must be fulfilled by a company applying for an ATL:

1. it must be a Thai company (i.e. at least 51% of the shares are owned by Thai nationals or Thai government agencies, or Thai companies);
2. the majority of the directors must be Thai nationals;
3. the registered capital (which has been fully paid up) must be not less than THB 200 million; and
4. in the case of a regular flight service operation, there must be a plan to acquire at least two aircraft for the fleet.

The air carrier (which meets the requirements above) shall submit an application form along with a corporate authorisation document, an operation plan and an analysis of the feasibility of such operation plan to the MOT through the CAAT.

#### **Air Operator Certificate (the “AOC”)**

The AOC will be granted to an air carrier which has obtained an ATL. To apply for an AOC, certain documents (e.g. a business plan, financial information and a maintenance plan) are required to be submitted to the CAAT.

When the MOT and the CAAT review an application, the capability of the applicant to operate an airline business and its compliance with all the requirements and manuals are the main things considered.

In addition to these two business licences, the Certificate of Registration and the Certificate of Airworthiness of each specific aircraft are required in order for the airline to operate that aircraft.

### 1.3 What are the principal pieces of legislation in your jurisdiction which govern air safety, and who administers air safety?

The Air Navigation Act and any regulation, notification or order issued thereunder. The CAAT is the main authority which administers air safety.

### 1.4 Is air safety regulated separately for commercial, cargo and private carriers?

No. However, different levels of requirements apply to each type of carrier, such as the stipulated insurance policy limit.

### 1.5 Are air charters regulated separately for commercial, cargo and private carriers?

The CAAT is the administrative body, and the Air Navigation Act (along with any regulation, notification or order issued thereunder) governs air carrier businesses, regardless of whether they are commercial, cargo or private operators. However, chartered flight operators are subject to a number of different levels of requirements, such as the stipulated policy limit, and the number of aircraft required to be registered in the fleet.

### 1.6 As regards international air carriers operating in your jurisdiction, are there any particular limitations to be aware of, in particular when compared with ‘domestic’ or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.

Assuming that both international and domestic are Thai licensed carriers, they are subject to the same general regulations.

### 1.7 Are airports state or privately owned?

Airports in Thailand are both state- and privately-owned.

While most of the airports outside Bangkok are owned by the DOA, Airports of Thailand Public Company Limited (which is a state-owned enterprise) owns Suvarnabhumi Airport, Don Mueang Airport, Chiang Mai Airport and Phuket Airport.

### 1.8 Do the airports impose requirements on carriers flying to and from the airports in your jurisdiction?

Apart from obtaining route permission from the CAAT, airport operators themselves do not impose any restriction or requirement on flying to and from the airports in Thailand.

### 1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?

The Air Navigation Act is the main regulation that governs air accidents. The Air Accident Investigation Committee is responsible for the investigation of any accident in relation to an aircraft.

### 1.10 Have there been any recent cases of note or other notable developments in your jurisdiction involving air operators and/or airports?

As part of addressing significant safety concerns (“SSC”) raised by the International Civil Aviation Organisation, a number of laws and regulations have been enacted, including the regulations on re-certification of air operators.

## 2 Aircraft Trading, Finance and Leasing

### 2.1 Does registration of ownership in the aircraft register constitute proof of ownership?

As Thailand has an operatory registry, the registration of an aircraft which is evidenced by the Certificate of Registration does not constitute an absolute proof of ownership. The ownership over the aircraft can be proven by documents that show the transfer of title of the aircraft to the owner (e.g. a bill of sale).

### 2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?

The concepts of aircraft mortgage and charges are not recognised under Thai law. Mortgages and security interests governed by foreign law cannot be registered in Thailand, as Thailand does not have a central registration system of legal interests in respect of the aircraft.

It is possible to pledge an aircraft under Thai law. The owner would pledge the aircraft to the lender, as the pledgee, and the owner and the pledgee would agree that the third-party operator of the aircraft shall act as custodian of the aircraft for the pledgee. There is no registration requirement in relation to the pledge.

It should also be noted that, since July 2015, an aircraft could be granted as a security under Thai law by way of a business security

under the Business Security Act B.E. 2558 (2015). The security receiver must be a Thai financial institution or any other person as prescribed in a ministerial regulation. Currently, foreign banks outside Thailand are not qualified to be a security receiver unless it provides a facility in the form of a syndication with commercial banks in Thailand.

### 2.3 Are there any particular regulatory requirements which a lessor or a financier needs to be aware of as regards aircraft operation?

#### Age of an aircraft that can be leased/financed to Thai airlines

On the date of application for registering an aircraft in the Thai aircraft registry, an aircraft must not be over 16 years old. However, if an operator will only operate such aircraft for cargo operations, the aircraft must not be over 18 years old. A helicopter, on the date of application, shall not be over five years old.

#### Deregistration of the aircraft

In general, an aircraft can only be deregistered by the person who registered the aircraft. Originally, as a foreign entity cannot register an aircraft in Thailand, only the Thai operator that originally registered the aircraft is able to apply for the voluntary deregistration of the aircraft. However, following the recent implementation of the new rule of the CAAT, an owner may apply for deregistration in its own right as owner of the aircraft in certain circumstances although it did not register the aircraft in Thailand. Such circumstance is, for example, where the Thai lessee ceased to have the right to possess the aircraft due to a termination of the lease and the owner (as lessor) has submitted an irrevocable deregistration power of attorney with the application to export the aircraft to the CAAT. It should still be noted that the decision to permit deregistration of the aircraft under such rule is still under the discretion of the Director General of CAAT.

Please note that a financier still cannot apply for deregistration of aircraft in its own right.

In practice, a Thai lessee would normally be required to grant at the outset a deregistration power of attorney for unilateral deregistration upon the termination of the lease by the owner or lessor. In reality, the enforcement of such a power of attorney is uncertain given the revocability of a power of attorney under Thai law and the fact that the CAAT and other Thai authorities may still require a Thai lessee’s confirmation or cooperation on such deregistration process.

### 2.4 As a matter of local law, is there any concept of title annexation, whereby ownership or security interests in a single engine are at risk of automatic transfer or other prejudice when installed ‘on-wing’ on an aircraft owned by another party? If so, what are the conditions to such title annexation and can owners and financiers of engines take pre-emptive steps to mitigate the risks?

In a situation in which engines or parts of an aircraft are removed and installed on another aircraft which is owned by another person, there is one important principle of law which needs consideration. Where several movables belonging to different persons become joined in such a manner as to become component parts or invisible, then the relevant owners become co-owners in the composite property (in proportion to the value of that person’s component part). However, if one of the component elements would be considered as the “principal” part – the owner of the principal part becomes the sole owner of the entire property, but at the same time becomes liable to pay to the owner(s) of the “subsidiary” parts the value of those parts.

There was a court case decades ago in which it was deemed that the car frame is the “principal” property and that the engine is a subsidiary part thereof. At that time, the court considered that, without an engine, even though the form of the car frame remained the same, it could not by its nature be considered a car, given that it would no longer be capable of propulsion. Nevertheless, there has been no court case in relation to an airframe and aircraft engine regarding this issue, or any recent cases in respect of such principle of law. The issue to be considered is whether, taking into account the business circumstance and engine/parts pooling agreement to date, the engines and parts are deemed to be component parts or invisible parts of the airframe.

Possible ways to protect against that risk could be (i) a written agreement included in the lease agreement that ownership over an engine or any significant parts is vested to the owner at all times irrespective of installation on another party’s airframe, (ii) requiring the lessee to furnish a letter of recognition of rights signed by the owner of the other airframe in which an engine or any significant parts is installed, and (iii) clearly marking on the engine and any other significant parts that they are subject to the ownership interest of the owner.

**2.5 What (if any) are the tax implications in your jurisdiction for aircraft trading as regards a) value-added tax (VAT) and/or goods and services tax (GST), and b) documentary taxes such as stamp duty; and (to the extent applicable) do exemptions exist as regards non-domestic purchasers and sellers of aircraft and/or particular aircraft types or operations?**

An entity which is or is deemed to be resident, domiciled or carrying on any commercial activity or business in Thailand for Thai tax purposes is subject to the general tax regime (e.g. income tax and VAT).

In a transaction contemplated by the lease/financing of an aircraft, there is documentary stamp duty as detailed below if the documents are executed in Thailand or their originals are brought into Thailand.

1. A lease of aircraft is not subject to stamp duty. However, if a lease is categorised as a hire purchase agreement, *ad valorem* stamp duty applies.
2. An aircraft pledge agreement is subject to *ad valorem* stamp duty unless the underlying loan documents secured by the pledge agreement have been duly stamped.
3. Each power of attorney (including but not limited to the deregistration power of attorney) is subject to stamp duty.
4. Each duplicate and counterpart of any dutiable instrument is also subject to stamp duty.

**2.6 Is your jurisdiction a signatory to the main international Conventions (Montreal, Geneva and Cape Town)?**

The Geneva Convention was ratified by Thailand on 10 October 1967, and the Montreal Convention was ratified on 4 August 2017. However, Thailand is not a party to the Cape Town Convention.

**2.7 How are the Conventions applied in your jurisdiction?**

Under Thai law, becoming a party to an international convention does not automatically make such treaty a part of Thai law. To do so, the provisions of the convention must specifically be enacted.

The Montreal Convention has been applied by the International Air Carriage Act B.E. 2558 (2015) (as amended). However, in relation to the Geneva Convention, no such act has yet been enacted and, therefore, registration of rights over aircraft is not available.

**2.8 Does your jurisdiction make use of any taxation benefits which enhance aircraft trading and leasing (either in-bound or out-bound leasing), for example access to an extensive network of Double Tax Treaties or similar, or favourable tax treatment on the disposal of aircraft?**

Thailand has entered into a number of Double Tax Treaties which help to facilitate cross-border transactions. Tax benefits relating to each transaction need to be ascertained on a case-by-case basis, as the tax benefits under each Double Tax Treaty may not be the same.

**3 Litigation and Dispute Resolution**

**3.1 What rights of detention are available in relation to aircraft and unpaid debts?**

An aircraft may be detained in certain circumstances as set out below.

**Right of retention**

A right of retention allows a person who has possession of an aircraft to retain it until any obligation relating to the aircraft (e.g. repairer’s charge) is performed. The right may be exercised until the obligation is wholly performed.

**Airport charges**

In principle, an aircraft may be seized if there is a violation of the provisions of the Air Navigation Act relating to the aircraft. However, the meaning of the term “provisions ... relating to the aircraft” is not precise. Airport charges include airport charges to be collected from passengers using the airport (or departure passenger service charges) and airport charges to be collected from an aircraft using the airport, including landing and parking charges.

While an airport charge is still outstanding, a competent officer may consider there to have been a violation of the provisions concerning the aircraft and, therefore, seize the aircraft.

**Other matters**

An aircraft may be intercepted (and its use suspended) by a military officer having the authority as specified in the anti-air warfare plan under Air Navigation Contraventions law. Furthermore, tax, criminal and public interests are also factors that could see an aircraft inspected or detained by the competent officers.

**3.2 Is there a regime of self-help available to a lessor or a financier of an aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?**

As there are no “self-help” remedies under Thai law, if a lessee acts contrary to the terms of the lease/financing arrangement, the lessor or the financier may notify the lessee to comply with the agreement. If the lessee still fails to comply, the lessor or the financier may terminate the lease/financing arrangement and demand that the lessee return possession of the aircraft. If the lessee refuses to return possession, a court order will be required for the aircraft to be seized by the court. In order for the lessor or the financier to take possession of an aircraft following a default under the lease/financing agreement, the lessor or the financier must prove to the satisfaction of the Thai court the existence of the lease agreement, the default and that it is the lessor’s or the financier’s right to take possession upon such default. Various documents must be furnished to the court, such as the executed lease agreement.

The lessor's or the financier's right to take possession of the aircraft will also be subject to and limited by the provisions of laws of general application relating to or generally affecting the enforcement of the parties' rights and remedies, including the provisions of any applicable laws relating to bankruptcy, insolvency, reorganisation or moratorium.

**3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in your jurisdiction regarding the courts in which civil and criminal cases are brought?**

Generally, aviation disputes between the offshore financier/lessor and Thai airlines are under the jurisdiction of the Civil Court and the Central Intellectual Property and International Trade Court. However, the Administrative Court will have jurisdiction over a case where there is a dispute over an order exercised by the MOT, the CAAT and/or the DOA.

**3.4 What service requirements apply for the service of court proceedings, and do these differ for domestic airlines/parties and non-domestic airlines/parties?**

As a general rule, a notice of court proceeding must be served to a place where the concerned party is domiciled.

**3.5 What types of remedy are available from the courts or arbitral tribunals in your jurisdiction, both on i) an interim basis, and ii) a final basis?**

Under Thai law, there are two types of expedited procedure, i.e. (i) procedure for a "petty case", and (ii) procedure for a civil case. A petty case procedure is expedited quicker than ordinary civil cases because fewer procedures are required. In a petty case, the court, at its discretion, can order the parties to proceed with a reconciliation and a hearing on the same day.

A case will be considered as a petty case if (i) the relief applied for in such case is an amount not exceeding THB 300,000, or (ii) it is a case involving the eviction of any person from an immovable property with a rental of not exceeding THB 30,000 per month. However, we have not yet come across a case where the courts agree to accept lease repossession proceedings as a "simple case".

Where there are pending procedures in the courts of Thailand, interim proceedings (i.e. protective measures or an injunction) necessary to safeguard an asset until the substantive dispute is finally resolved, can be taken.

With respect to arbitration, Thailand is a party to the New York Convention, which allows an arbitral award from internationally recognised arbitration institutions to be enforced (providing they fulfil certain criteria, notably that they must not contradict public order or the good morals of the people of Thailand) through the Thai courts upon registration, thereby avoiding the need for a re-trial. The foreign arbitration venue may be any other appropriate country that is a party to the New York Convention.

**3.6 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal and, if so, in what circumstances do these rights arise?**

Subject to legal restrictions (e.g. value threshold of the dispute), the parties of each dispute can appeal to the Court of Appeal and the Supreme Court, respectively.

## 4 Commercial and Regulatory

**4.1 How does your jurisdiction approach and regulate joint ventures between airline competitors?**

A joint venture will not be regulated if it does not result in (i) a foreign entity being allowed to have control over a Thai licensed airline, or (ii) the creation of either a monopoly or a business operator with a dominant position; or may substantially lessen competition.

A code share arrangement is allowed provided that an approval from CAAT is obtained.

**4.2 How do the competition authorities in your jurisdiction determine the 'relevant market' for the purposes of mergers and acquisitions?**

As the Trade Competition Act B.E. 2560 (2017) (the "TCA") has only recently come into force (5 October 2017) the determination of the regulations of the Trade and Competition Commission (the "TCC") regarding the determination of the relevant market are currently being drafted and it is not yet final nor implemented.

**4.3 Does your jurisdiction have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?**

Merger control is governed by the TCA which divides regulated mergers into two categories: those which require approval (pre-merger filing) from the TCC and those which only require notification to the TCC (post-merger notification). Essentially, submission of a pre-merger filing will be required if the merger may result in the creation of either a monopoly, or a business operator with a dominant position. On the other hand, the merging entity (or merging entities) must notify the TCC after the completion of the merger if the merger may substantially lessen competition.

**4.4 How does your jurisdiction approach mergers, acquisition mergers and full-function joint ventures?**

Please refer to our response to question 4.3 above. With respect to foreign ownership, not only are foreigners not permitted to own over 49% of shares in the Thai airline, but they shall also not have any effective control over the airline.

**4.5 Please provide details of the procedure, including time frames for clearance and any costs of notifications.**

For a pre-merger filing, once the parties have submitted the required data and documents to the TCC, the TCC will then have 90 calendar days (plus a possible extension of 15 calendar days) from the date of submission to issue its decision. On the other hand, a post-merger notification is required to be submitted within seven days after the transaction has been completed.

**4.6 Are there any sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including (without limitation) state aid?**

A state bail-out for an airline does not exist under Thai law. However, certain tax exemption or reduction is granted if the airline obtains a business promotion from the Board of Investment of Thailand.

**4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?**

No state subsidies are available.

**4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines and airports?**

There is no specific law in relation to personal data protection under Thai law because the Thai Personal Data Protection Act has not yet been enacted. It is still to be submitted to the Cabinet for approval. However, as a general rule, airlines and airports are prohibited from disclosing passenger data without prior consent from the passengers.

**4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?**

Please refer to our response to question 4.8 above.

**4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?**

Thailand has a registration system for intellectual property (e.g. trademarks and patents). The Central Intellectual Property and International Trade Court is the competent court for disputes relating thereto.

**4.11 Is there any legislation governing the denial of boarding rights and/or cancelled flights?**

Yes, there is. If a passenger has checked in within the required time period and does not contravene any safety regulations, denial of boarding by the airline is prohibited. If it occurs, such passenger must be compensated. In a case where the flight is cancelled, the airline is required to either reimburse the amounts paid by the passengers or provide an alternative flight for the passengers. The airline is also required to provide free of charge any appropriate assistance to the passengers (i.e. water, food, accommodation) and pay the passengers' compensation.

**4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?**

Passengers are protected by the regulation issued by the MOT. An airline has a duty to compensate the passengers in the manner prescribed under the regulation.

**4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?**

Airport authorities are subject to the Air Navigation Act and any regulation, notification, rule or order issued thereunder.

**4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?**

Please refer to our response to question 4.11 and 4.12 above.

**4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?**

FedEx, UPS and DHL are major GDSs operating from and to Thailand.

**4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?**

If a GDS does not register as a Thai air carrier, no ownership requirement applies. However, an offshore GDS, when operating in Thailand, should take into account the regulations relating to a business conducted by a foreign company.

**4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?**

Vertical integration is possible provided that it does not trigger the conditions set out in our response to questions 4.3 and 4.4 above.

**4.18 Are there any nationality requirements for entities applying for an Air Operator's Certificate in your jurisdiction or operators of aircraft generally into and out of your jurisdiction?**

An air operator who has its headquarters situated in Thailand may apply for an Air Operator Certificate in Thailand. However, in general practice, prior to the application for the Air Operator Certificate under Thai law, such air operator is required to obtain the Air Operator Licence which only a Thai national can obtain.

## 5 In Future

**5.1 In your opinion, which pending legislative or regulatory changes (if any), or potential developments affecting the aviation industry more generally in your jurisdiction, are likely to feature or be worthy of attention in the next two years or so?**

Currently, there are plans to further amend the existing Air Navigation Act. The draft of the amendment to the Air Navigation Act has been approved by the Cabinet and Parliament and the draft will be proposed to the National Legislative Assembly of Thailand. One of the key changes is that the CAAT will be empowered to issue a separate regulation in relation to the deregistration of an aircraft (which the CAAT currently does not have authority to do so).

Whilst the above draft amendment to the Air Navigation Act has not been finalised, the CAAT has just issued the new rule regarding the registration of aircraft in Thailand which came into effect in August this year. Under such rule, if the operator refuses to cooperate to deregister the aircraft for the lessor, such regulation opens the opportunity for the lessor to request that it deregisters the aircraft itself. Although the decision to permit deregistration of the aircraft under regulation is still at the sole discretion of the Director General of CAAT, it could be considered that this signifies progress in relation to deregistration of aircraft upon termination of the relevant lease agreement. However, the necessary practical steps and clear guidelines of the CAAT in relation to this deregistration are still awaited.

From our discussion with the CAAT, there is no plan for Thailand to join the Cape Town Convention in the near future.



### Nattaporn Pengkul

Weerawong, Chinnavat & Partners Ltd.  
22<sup>nd</sup> Floor, Mercury Tower  
540 Ploenchit Road, Lumpini, Pathumwan  
Bangkok 10330  
Thailand

Tel: +66 2 264 8000

Fax: +66 2 657 2222

Email: [nattaporn.p@weerawongcp.com](mailto:nattaporn.p@weerawongcp.com)

URL: [www.weerawongcp.com](http://www.weerawongcp.com)

Ms. Nattaporn Pengkul is a partner in the projects and banking practice group at Weerawong, Chinnavat & Partners Ltd. She advises banks, corporations and other clients in domestic and cross-border transactions. Nattaporn has expertise in many industry sectors, including: banking and financial services; commercial and residential real estate; power and renewable energy; and transportation and infrastructure. Nattaporn was named as one of the 'top 40 under-40' lawyers in the region by *Asian Legal Business* in 2016. She has an LL.B. degree from Chulalongkorn University and an LL.M. degree in commercial law from the University of Cambridge, UK. <http://www.weerawongcp.com/people-show.php?id=128>.



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59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [info@glgroup.co.uk](mailto:info@glgroup.co.uk)