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Aviation: Finance & Leasing 2023

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Thailand: Law & Practice

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Tilleke & Gibbins



THAILAND



Law and Practice

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Tilleke & Gibbins is a South-East Asian regional law firm with over 230 lawyers and consultants. Established in Bangkok in 1890, the firm now operates seven offices across six jurisdictions in South-East Asia, including Cambodia, Indonesia, Laos, Myanmar, Thailand and Vietnam, with a global reach through the legal networks Lex Mundi and Multilaw. Tilleke & Gibbins' cross-disciplinary aviation team serves airlines, aircraft lessors and lessees, insurers, banks, air

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

Apart from the general tax regime (which can include income tax, value-added tax (VAT), stamp duty and import duties), an aircraft or engine sales agreement is not subject to a specific tax or stamp duty.

1.1.2 Enforceability Against Domestic Parties

Under Thai law, there is no specific requirement that an aircraft or engine sales agreement be translated, certified, notarised or legalised to be enforceable against a domestic party. In the event of enforcement, however, certified Thai translations of the whole or any material part of the aircraft or engine sales agreement and any relevant agreements/documents may be required. If so, these must be attached to the originals when they are submitted as evidence to a Thai court.

1.2 Transfer of Ownership

1.2.1 Transferring Title

As Thai law does not specifically provide for the transfer of title to an aircraft, engine or other installed parts, including the APU, such transfer will be subject to general provisions of law regarding the transfer of ownership of movable property. Generally, unless agreed or specified otherwise by the parties, the ownership of the property is transferred to the buyer from the moment when the contract of sale is entered into.

Under Thai law, the sale of the ownership interest in the entity that owns an aircraft or engine would not effectively be recognised as a sale of such aircraft or engine itself.

1.2.2 Sales Governed by English or New York Law

Thai law recognises the contracting parties' right to specify a foreign law to govern the bill of sale, to the extent that such law is not contrary to the public order or good morals of Thailand. However, the party seeking to enforce foreign law must prove it to the satisfaction of the Thai court; otherwise, Thai law shall apply. In any event, such bill of sale and relevant agreements/documents, and the transfer of title, must be legal, valid, binding and enforceable under, and be in the forms prescribed by, English law or New York law (as the case may be) and/or Thai law if they are to be legally enforced in Thailand.

Although the sale of aircraft is not subject to specific formalities specified by Thai law, the contracting parties need, at a minimum, to ensure that the bill of sale is in writing and signed by the party liable, or that there is part performance or consideration given, and that it is not contrary to the public order or good morals of Thailand.

1.2.3 Enforceability Against Domestic Parties

Under Thai law, there is no specific requirement that a bill of sale be translated, certified, notarised or legalised to be enforceable against a domestic party. In the event of enforcement, however, certified Thai translations of the whole or any material part of the bill of sale and any relevant agreements/documents may be required to be submitted and attached to the originals thereof when they are submitted as evidence to a Thai court.

1.2.4 Registration, Filing and/or Consent From Government Entities

Under Thai law, a bill of sale is not required to be registered or filed with any government entity to become effective.

There is no prerequisite to the execution and delivery of a bill of sale in relation to an aircraft in Thailand under Thai law.

1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

Apart from the general tax regime (which can include income tax, VAT, stamp duty and import duties), a bill of sale is not subject to a specific tax or stamp duty under Thai law.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-permissible Leases

Subject to compliance with applicable laws, operating, wet and finance leases will be recognised and permissible if and to the extent that they are not contrary to Thai law, or the public order or good morals of Thailand. However, for wet leases, the air operator is required to obtain permission from the Civil Aviation Authority of Thailand (CAAT), for which the air operator must submit an application in accordance with the Notification of CAAT regarding Criteria for the Use of Aircraft under the Wet Lease and Use of Aircraft under the Code Share Agreement by Air Operator. In granting permission, the CAAT will rely primarily on the criteria set out in the Notification.

2.1.2 Application of Foreign Laws

The parties may agree for a lease to be governed by a foreign law. However, according to Thailand's Act on Conflict of Laws BE 2481 (1938), the foreign law shall only be applied to the extent that such law is not contrary to the public order or good morals of Thailand. In addition, the party seeking to enforce the foreign law must prove to the satisfaction of the Thai court; otherwise, Thai law shall apply. In any event, the lease and

relevant agreements/documents must be legal, valid, binding and enforceable under, and be in the forms prescribed by, such foreign law and/or Thai law if they are to be legally enforced in Thailand. In relation to property or assets, please note Sections 9 and 16 of the Act on Conflict of Laws.

Section 9 states: "Unless otherwise provided by this Act or other laws of [Thailand], the formal validity of a juristic act shall be governed by the law of the country where the act is made. However, the law of the country where a property is situated governs the form required for the validity of a contract, document or other juristic act relating to immovable property."

Section 16 states: "Movable and immovable property is governed by the law of the place where the property is situated. However, in the case of exportation of movable property, the law of nationality of its owner shall govern from the time of exportation."

2.1.3 Restrictions Concerning Payments in US Dollars

There are no material restrictions imposed on domestic lessees for making rent payments to foreign lessors in US dollars. The domestic lessees must, however, comply with, inter alia, the Thai exchange control, tax and anti-money laundering laws/regulations, and must be able to provide documentary evidence for such transfer to the authorised juristic person or licensed financial institution.

2.1.4 Exchange Controls

Exchange controls in Thailand are governed primarily by the Exchange Control Act BE 2485 (1942), as amended, and Ministerial Regulation No 13. Outward remittances for rent payments under and according to a valid lease are permit-

ted, provided that proper documentary evidence for such payment is submitted to the authorised juristic person or licensed financial institution.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

A lease agreement for movable property (eg, an aircraft) is not subject to stamp duty. However, where the lease of an aircraft is regarded as a hire-purchase agreement, it will be subject to stamp duty at the amount in Thai baht equivalent to 0.1% (ie, THB1 for every THB1,000 or fraction thereof) of the total value, regardless of whether such agreement is in electronic or physical format. Each executed physical copy, duplicate or counterpart of an instrument, if any, shall be subject to stamp duty in the amount of THB1 if the duty with which the original is chargeable does not exceed THB5, or THB5 if the duty with which the original is chargeable exceeds THB5, except where the party liable to duty is a co-operative society.

2.1.6 Licensing/Qualification of Lessors

Under Thai law, it is not necessary that the lessor is licensed or otherwise qualified in Thailand to lease an aircraft from abroad to a lessee in Thailand. However, as lease of property is considered as service business, which is a restricted business to foreigners, under List 3(21) of the Foreign Business Act BE 2542 (1999) (FBA), if any part of the lease activity carried out by a foreign lessor occurs in Thailand, the foreign lessor would be subject to the FBA and hence be required to obtain a foreign business licence according to the FBA before the foreign lessor can carry out such business activity with a domestic lessee in Thailand.

2.2 Lease Terms

2.2.1 Mandatory Terms for Leases Governed by English or New York Law

Under Thai law, the lease of property is a contract whereby the lessor agrees to let the lessee have the use or benefit of the property for a limited period and the lessee agrees to pay a rent therefor. Apart from that, there is currently no law that specifically requires that particular terms are to be included in a lease agreement for movable property.

2.2.2 Tax and Withholding Gross-Up Provisions

“Freedom of contract” is an underlying principle of Thai law whereby the intention of parties to the contract will be recognised. Therefore, the parties may agree to tax and other withholding gross-up provisions, and such provisions would be permissible and enforceable to the extent that they are not contrary to the public order and good morals of Thailand.

2.2.3 Parts Installed or Replaced After a Lease’s Execution

A lease may cover parts that are installed or replaced on an aircraft or engine after its execution, provided that terms to such effect are included in the lease agreement.

2.2.4 Risk of Title Annexation

There could be a risk of title annexation in respect of aircraft engines installed on an airframe. According to Thai law, if several movable properties belonging to different persons are joined to become component parts or are indivisible, those different persons become co-owners of the composite property and each co-owner’s share would be in proportion to the value of their respective component part.

Notwithstanding the above, if one of the component parts is regarded as a principal part, the owner of such principal part will become the sole owner of the entire composite property in which the sole owner would be liable to pay to the other owners for the value of other parts respectively held by each of them.

2.2.5 Recognition of the Concepts of Trust/Trustee

Thai law does not recognise the common law concepts of liens, trust, charge or hypothecation, or a security interest created thereunder, except in the context of the Trust for Transactions in Capital Market Act BE 2550 (2007), which provides for a trust created for the benefit of transactions in the capital market pursuant thereto, and therefore, a trust and the role of an owner trustee under a lease are generally not recognised under Thai law.

2.3 Lease Registration

2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

Thai law does not specifically require or provide for registration of an aircraft lease. Generally, to operate a leased aircraft lawfully in Thailand, the lessee (which must be a Thai national), as the operator, must register the aircraft according to the Air Navigation Act BE 2497 (1954) and obtain a certificate of registration (Sections 30 and 31 of the Air Navigation Act). Such certificate of registration is not a document of title in respect of the aircraft. Practically, if an aircraft owner is not the operator of the aircraft, then the names and addresses of both the aircraft owner and aircraft operator may be stated in the certificate of registration. In the certificate of registration, the operator's rights in respect of the aircraft and the possession and use thereof (eg, as lessee pursuant to a lease agreement) might also be indicated.

If a foreign aircraft registered with a state party to the Convention on International Civil Aviation is used by a Thai air operator for its operation under a lease agreement, and Thailand has an agreement with that state of registry to transfer the responsibility of the state of registry to Thailand in accordance with the Convention on International Civil Aviation, the foreign aircraft is deemed an aircraft registered under Thai law. Accordingly, certain licences or operations (eg, certificate of airworthiness, personnel licence, air navigation of aircraft of the air operator, etc) will be subject to Thai law.

2.3.2 Registration if the Owner Is Different From the Operator

See 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register.

2.3.3 Aircraft/Engine-Specific Registers

See 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register. Under Thai law, there is no specific register for leases concerning aircraft or engines.

2.3.4 Registration of Leases With the Domestic Aircraft Registry

See 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register.

Under Thai law, leases are not subject to consent from any government entity, and as stated above, leases concerning aircraft or engines are not required to be registered or filed with any government entity to become effective.

There is no prerequisite under Thai law for the execution and delivery of an aircraft or engine lease in relation to an aircraft in Thailand.

2.3.5 Requirements for a Lease to Be Valid and Registrable

Under Thai law, there is no specific requirement that an aircraft or engine lease be in a specific form, translated, certified, notarised or legalised to be valid and enforceable against a domestic party. In the event of enforcement, however, certified Thai translations of the whole or any material part of the aircraft or engine lease and any relevant agreements/documents may be required to be submitted and attached to the originals thereof when they are submitted as evidence to a Thai court.

2.3.6 Taxes/Duties Payable for Registering a Lease

There is no registration of an aircraft or engine lease under Thai law.

2.3.7 Registration of Aircraft in Alternative Countries

There are no common alternative countries to register Thailand-based aircraft. Thailand-based aircraft are registered in Thailand.

2.3.8 Requirements for Documents Concerning Registration

Normally, all documents required and submitted to the officials should be certified as true copies of the original documents by the authorised director(s) or representative(s) of the company, with the company's seal affixed, or as stipulated in the company's affidavit, if the registrant is a juristic person, unless specified otherwise by the officials.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

A foreign lessor could be subject to the following taxes upon leasing an aircraft or engine to a domestic or Thai lessee.

- *Income tax* – rental income paid to a foreign company not carrying on business in Thailand is subject to Thai withholding tax at the rate of 15%, unless the exemption or a lower rate of withholding tax is applicable under a double tax agreement (if any).
- *Customs duty* – importation of an aircraft of an unladen weight exceeding 15,000 kg (Harmonised Code No 8802.400) is exempted from customs duty.
- *VAT on importation of leased property* – importation of an aircraft into Thailand is subject to VAT, which is currently imposed at the rate of 7%. Principally, the base for VAT computation is the aggregate of the value (CIF price) of the imported property or goods, customs duty, excise tax (if any) and other fees or surcharges applicable to the imported items. The VAT is payable by the importer upon the payment of import duty. If the importer is a VAT registrant, such VAT payable can be used to set off against the importer's VAT liability or can be claimed for refund.
- *VAT on rental payment* – lease of aircraft is deemed a provision of service performed in a foreign country and being used in Thailand. Thus, such lease is subject to 7% VAT under Section 83/6(2) of the Thai Revenue Code. The lessee, as a payer of rental income, is liable to self-assess and remit 7% VAT to the Revenue Department on or before the seventh day of the month following the month of payment. If the lessee is a VAT registrant, this VAT can be used to set off against the lessee's VAT liability or claimed for refund.
- *Stamp duty* – an aircraft lease agreement is not subject to stamp duty. If such agreement is deemed as a hire-purchase agreement, ad valorem stamp duty will be applicable.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that a foreign lessor would be deemed to be resident, domiciled, or carrying on business in Thailand by reason only of its execution or enforcement of an aircraft lease.

For tax, see 2.4.1 Tax Requirements for a Foreign Lessor.

2.4.3 Engine Maintenance and Operations

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that a foreign lessor would be subject to liabilities in respect of aircraft or engine maintenance and operations imposed on it by reason only of its execution of an aircraft lease. There is, at present, no specific law governing the obligation of the parties on the maintenance and operations of the aircraft or engine. However, under the Civil and Commercial Code of Thailand (CCC), generally, a lessor is liable for any defect arising during the lease period, and the lessor must make all necessary repairs other than those required by laws or custom to be carried out by the lessee. If a lessee has incurred any expenses for the preservation of the leased property, the lessor will be obliged to reimburse to the lessee all such necessary and reasonable expenses, except expenses for ordinary maintenance and minor repairs. The parties to a lease agreement may contractually agree otherwise on these, as is typically the case in an aircraft lease.

2.4.4 Damage or Loss Caused by an Asset

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that a foreign aircraft or engine owner or lessor, or financier, would be liable under the doctrine of strict liability as a result of damage or loss

caused by the asset. The doctrine of strict liability is technically a common-law principle, while the lessor would more likely be liable under Thai tort law (eg, for wrongful acts).

2.4.5 Attachment by Creditors

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that a creditor could attach an aircraft leased to it but owned by a different entity. In the case of unpaid governmental fees for the operation prescribed by law, the aircraft might be prohibited from flying in Thailand but would probably not be attached or retained by the governmental entity, which is the creditor in such case. The responsible authority can merely not issue the permit to fly for the aircraft in this regard.

2.4.6 Priority of Third Parties' Rights

Under Thai law, the obligations of the lessee under an aircraft or engine lease rank at least equally (*pari passu*) in respect of priority with all other unsecured obligations of the lessee, except for certain classes of creditors who are entitled to such mandatorily and generally applicable statutory preferential rights, general or special, and hence have preference over other unsecured creditors under the laws of Thailand, particularly under Sections 251 to 289 of the CCC, and Section 130 of the Bankruptcy Act of Thailand.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

It is not mandatory for the insurance to be placed with a domestic insurance company.

2.5.2 Mandatory Insurance Coverage Requirements

According to Thai aviation law and the relevant regulations, an aviation business operator must

provide insurance that covers damages to the life, body and property of passengers and third parties. The minimum coverage is as follows:

- for passengers, 128,821 SDRs per person, per flight;
- for baggage, 1,288 SDRs per person, per flight;
- for goods, 22 SDRs per kilograms; and
- for third parties, from 0.75 million SDRs to 700 million SDRs, depending on the Maximum Takeoff Mass (MTOM) in kilograms.

For the combined single limit insurance, the minimum coverage for each aircraft shall be calculated from:

- for passengers, 128,821 SDRs multiplied by the maximum number of passengers carried on the aircraft;
- for baggage, 1,288 SDRs multiplied by the maximum number of passengers carried on the aircraft;
- for goods, 22 SDRs multiplied by the weight of goods, in kilograms, carried on the aircraft; and
- for third parties, from 0.75 million SDRs to 700 million SDRs, depending on the MTOM in kilograms.

2.5.3 Placement of Insurances Outside of Jurisdiction

Reinsurance can be placed outside Thailand up to 100% coverage. However, it is also reported that the Office of the Insurance Commission (OIC) – the regulatory body for the insurance industry in Thailand – has issued a circular letter to all licensed insurance companies in the country seeking co-operation to maintain a certain portion of domestic coverage. Although this does not have the force of law, insurance companies would generally follow the OIC's request.

2.5.4 Enforceability of “Cut-Through” Clauses

Thai law does not specifically prohibit the inclusion of cut-through clauses in insurance or reinsurance documents. However, in order to be valid and enforceable, cut-through clauses that are included need to comply with the requirements regarding third-party contract rights, as prescribed in the CCC. According to the CCC, the parties to a contract can agree to perform debt to a third party, which must notify its intention to the debtor (ie, the reinsurer) that it will take the benefits relating to the contract.

2.5.5 Assignment of Insurance/Reinsurance

Thai law does not specifically impose any prohibitions on the assignment of insurance or reinsurance. The assignment of insurance or reinsurance could be made by complying with the conditions prescribed in the CCC, which are as follows:

- an assignment must be made in writing; and
- a written notification regarding such assignment must be sent to the debtor, or written consent from the debtor must be obtained.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

There are no restrictions on a lessor's ability to terminate a lease, re-export the aircraft and/or sell the aircraft following termination:

- the lessor can terminate the lease in accordance with the lease agreement;
- to re-export the aircraft, the lessor must comply with regulations of the CAAT; and
- the lessor can sell the aircraft after termination if there are not any restrictions provided in the lease agreement.

The aircraft does not need to be physically located in Thailand at the time of termination and sale.

2.6.2 Lessor Taking Possession of the Aircraft

A court order must be obtained for the lessor to take physical possession of the aircraft without the lessee's consent.

2.6.3 Specific Courts for Aviation Disputes

The Intellectual Property and International Trade Court (IP&IT Court) has jurisdiction to decide aviation disputes where the lessor is a foreign party and the lessee is Thai, and the aircraft is delivered from a foreign country to Thailand.

All such cases have been submitted to and considered by the IP&IT Court.

2.6.4 Summary Judgment or Other Relief

Under Thai law, interim relief pending final judgment can be obtained. For the lessor to obtain emergency relief, it must apply to the court. If the court considers the case an emergency, it will conduct an ex parte hearing on the filing date. The court will decide on the interim relief requested and will only hear from the lessor. The evidentiary standard to obtain an emergency injunction in Thailand is very high. In practice, it is challenging to obtain such emergency injunctions.

A lessor can also seek non-emergency injunctive relief, where the lessee will have an opportunity to challenge the lessor's request for the injunction. In this situation, the court will hear from both parties. The evidentiary standard to obtain relief here is lower.

A lessor cannot obtain summary judgment or equitable relief. A full trial must be conducted before a final judgment is issued, and the con-

cept of "equitable relief" is not recognised under Thai law.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Under Thai law, foreign law can apply as long as it is not contrary to public order and good morals. Such foreign law must also be proved to the Thai courts' satisfaction.

As mentioned, the IP&IT Court has jurisdiction to consider cross-border aviation lease disputes. Therefore, if the initiating party submits a claim to the IP&IT Court, it will accept and consider the case even in instances where the lease agreement specified that the case must be exclusively submitted to the foreign court.

However, if the initiating party submits a claim to a foreign court, the IP&IT Court will consider the foreign court order or judgment as evidence only. Foreign court orders or judgments are not enforceable in Thailand.

Domestic courts will generally uphold a waiver of immunity.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

In Thailand, a domestic court will not enforce a foreign court judgment. The foreign court judgment is recognised as evidence only.

However, a foreign arbitral award is recognised and enforceable without re-examination of the case merits.

2.6.7 Judgments in Foreign Currencies

If the request for monetary damage in the complaint is in a foreign currency, the Thai court will award as requested.

2.6.8 Limitations on Lessors' Actions Following Termination

There are no limitations for a lessor to recover default interest under the Thai statutory rate and additional rent following termination of the lease. The Thai court may enforce the default interest provided in the lease agreement, but if the court considers the lease-provided rate to be a penalty then the Thai court may use its own discretion to lower such default interest.

However, for additional rent following termination of the lease, the Thai court may award this only if the actual loss is proved.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

The main fees required would be legal fees and court filing fees.

2.6.10 Mandatory Notice Periods

The notice period specified in the lease agreement must be complied with by the lessor. However, if the rent is due monthly and the notice period specified is less than 15 days, it is recommended that the lessor provide 15 days' notice before termination, which is the notice period specified under Thai law.

2.6.11 Lessees' Entitlement to Claim Immunity

A lessee is generally not entitled to claim sovereign or other immunity in a lease enforcement action.

2.6.12 Enforcement of Foreign Arbitral Decisions

Thailand is a party to the New York Convention. Foreign arbitral awards are generally recognised and enforced by Thai courts, so long as the award does not contravene Thai public policy or public order.

2.6.13 Other Relevant Issues

Lessors should be aware of CAAT Regulation No 23, announced on 6 November 2019. Under Clause 12 of the regulation, the Director-General of the CAAT has authority to deregister an aircraft without the lessee's request on any of the following grounds:

- if the certificate of registration is invalid in accordance with Section 32 of the Air Navigation Act;
- if the aircraft is registered by the lessee, and the possessory right to the aircraft in accordance with the lease agreement has expired for any of the following reasons:
 - (a) the lease agreement has expired due to the lease term;
 - (b) the lease agreement has been terminated by the lessor or the lessee as specified in the lease agreement;
 - (c) the lessor and lessee agree to terminate the lease agreement; or
 - (d) the lessor notifies the termination of the lease agreement and submits an irrevocable deregistration power of attorney together with an application requesting the exportation of the aircraft;
- if a final court judgment orders cancellation or revocation of the certificate of registration; or
- if the aircraft is enforced as security in accordance with the Business Security Act.

2.7 Lease Assignment/Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Thailand recognises the concepts of contractual assignment and novation.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

Thailand is a freedom-of-contract country and the assignment or novation of rights pursuant

to a New York or English law-governed assignment and assumption agreement or novation/deed will be held valid by a Thai court, to the extent that such provisions are not contrary to the public order and good morals of Thailand, and are not unfair. In any event, in addition to compliance with such foreign law requirements, such assignment and assumption agreement or novation/deed and the creation or perfection thereof should be carried out in accordance with and in the forms prescribed by Thai law as well. Accordingly, under Thai law, the consent of, or notice to, the debtor with respect to the assignment/novation in writing will also be required.

Assigning or Transferring Claims

Generally, under Thai law, with respect to assignment (or transfer of claims), a claim may be assigned or transferred, unless its nature does not admit of it or it is not subject to judicial attachment, or if the parties have declared a contrary intention. Such declaration of intention, however, cannot be set up against a third person acting in good faith. An assignment/transfer of the rights or obligations performable to a specific creditor shall be valid only if it is made in writing. Such assignment/transfer cannot be set up against the debtor or any third persons, unless notice thereof in writing has been given to the debtor, or the debtor has consented to the assignment/transfer in writing.

If the debtor has only received a notice of assignment/transfer, the debtor may set up against the assignee/transferee any defence that the debtor has had against the assignor/transferor before the notice was received. If the debtor has against the assignor/transferor a claim not yet due at the time of the notice, the debtor can set off the claim, provided that it would become due no later than the claim assigned/transferred. An assignment/transfer of an obligation perform-

able to order can be set up against the debtor or other third persons only if such assignment/transfer is endorsed on the instrument and the instrument itself is delivered to the assignee/transferee.

Novation

When the parties concerned have concluded a contract changing the essential elements of an obligation, such obligation is extinguished by novation. If a conditional obligation is made unconditional, or a condition is added to an unconditional obligation, or a condition is changed, it is regarded as a change of an essential element of such obligation. A novation by a change of the creditor is also governed by the provisions of the laws concerning the assignment. A novation by a change of the debtor may be effected by a contract between the creditor and the new debtor; however, such novation cannot be performed against the will of the original debtor. If the obligation resulting from a novation does not come into existence (or is annulled) because of an illegality or because of some reason unknown to the parties, the original obligation is not extinguished.

2.7.3 Enforceability of Lease Assignments/Novations

Under Thai law, there is no specific requirement that an aircraft or engine lease assignment and assumption/novation must be translated, certified, notarised or legalised to be enforceable against a domestic party. In the event of enforcement, however, certified Thai translations of the whole or any material part of the aircraft or engine lease assignment and assumption/novation and any relevant agreements or documents may be required to be submitted and attached to the originals thereof when they are submitted as evidence to a Thai court.

2.7.4 Filing/Registration of Lease Assignments/Novations

Under Thai law, it is not specifically required for an aircraft or engine lease assignment and assumption/novation to be registered or filed in the domestic aircraft registry, and it is not subject to any consent from any government entity. However, a certificate of registration of an aircraft becomes ineffective when there is a change in the possessory right in such aircraft (Section 32 of the Air Navigation Act). Accordingly, where there is a change in the possessory right in the aircraft (ie, where there is a lease assignment and/or assumption/novation affecting such possessory right), the person who has the possessory right must seek permission for registration from the Minister of Transport as well as apply for registration of the aircraft.

A person flying an aircraft that is not registered under Section 30 of the Air Navigation Act shall be liable to imprisonment for a term not exceeding one year or a fine not exceeding THB40,000, or both (Section 68 of the Air Navigation Act).

While an aircraft or engine lease assignment and assumption/novation is not specifically required under Thai law as indicated above, for registration of an aircraft, a person, natural or juristic, who applies for aircraft registration needs to hold Thai nationality.

Partnerships and Limited Companies

In the case of a partnership or limited company or public limited company, it shall be registered under Thai law, the principal place of business of the partnership or company shall be situated in Thailand and:

- in the case of an ordinary partnership, all partners shall hold Thai nationality;

- in the case of a limited partnership, all partners who jointly have unlimited liability shall hold Thai nationality and at least 51% of the capital of such partnership shall belong to natural persons who hold Thai nationality; and
- in the case of a limited company or public limited company, such company shall not have bearer shares on issue, a majority of its directors shall hold Thai nationality and at least 51% of all shares shall belong to any one or any combination of the following persons:

- (a) natural persons who hold Thai nationality;
- (b) ministries, sub-ministries or government departments;
- (c) limited companies or public limited companies, of which ministries, sub-ministries or government departments hold not less than 51% of all shares;
- (d) limited companies or public limited companies, of which natural persons holding Thai nationality hold not less than 51% of all shares; and
- (e) other juristic persons as specified in the Ministerial Regulations.

Associations

In the case of an association, it shall be registered under the law of Thailand, the principal place of business of the association shall be situated in Thailand and the regulations of the association shall have been approved by the Civil Aviation Board.

Registrations and Changes of Information

The application for registration and the aircraft registration must be in accordance with applications, guidance or other documents as prescribed in the Ministerial Regulations enacted by virtue of the Air Navigation Act. The period of completion is dependent upon whether the applicant has all requisite documents in order

as well as the discretion of the Minister of Transport.

If there is a change of information on the certificate of registration, including a change in ownership of an aircraft, an application must be filed with the CAAT for the reissuance of the certificate of registration within 30 days from the date of such change. Generally, an application for reissuance of a certificate of registration can only be accepted if the applicant is the certificate of registration holder.

Government applications or consents are not required as a prerequisite to the execution and delivery of an aircraft and/or engine lease assignment and assumption/novation in relation to an aircraft registered domestically.

2.7.5 Taxes/Duties Payable on Assignment/Novation

Under Thai law, an aircraft or engine lease assignment and assumption/novation is not subject to stamp duty.

2.7.6 Recognition of Transfer of Ownership Interests

If the ownership interest of an entity owning an asset is transferred, the legal title to the asset, including aircraft, will remain with that entity. Note that as Thailand has an operator registry, documents evidencing the transfer of title of the aircraft to the owner, such as a bill of sale, will be used to determine the ownership of the aircraft.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in This Jurisdiction

The persons who can request deregistration of the aircraft are the lessor, the owner, the lessee, the authorised person specified in the lease

agreement, or any person(s) with a possessory right. See **2.6.13 Other Relevant Issues**.

2.8.2 Lessee's/Operator's Consent

An aircraft owner, mortgagee or lessor can apply to the CAAT for deregistration without the lessee's or operator's consent.

2.8.3 Required Documentation

The documents required for deregistration are as follows:

- a lease agreement;
- evidence confirming the identity of the person applying for deregistration – for example, if the applicant is a legal entity (called a juristic person in Thailand), the corporate documents such as the certificate of incorporation are required;
- a termination notice together with supporting evidence showing that the lessee is in default;
- an irrevocable deregistration power of attorney;
- an application for re-exportation; and
- a power of attorney showing the person who submits the application for deregistration is authorised by the applicant.

2.8.4 Duration of Deregistration Process

Without the lessee's consent, deregistration can take approximately three to six months or longer.

2.8.5 Aviation Authority's Assurances

In general, the CAAT confirms that the CAAT regulations will be followed and the case will be considered without delay.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

Other than legal fees, there are no significant costs, fees or taxes chargeable in respect of deregistration.

2.8.7 Deregistration Power of Attorney

A deregistration power of attorney (DPOA) is recognised, but only when submitted under CAAT Regulation No 23. There is no form required. It is not necessary to have the DPOA certified, notarised, legalised and translated. However, it is recommended that the DPOA be irrevocable and the applicant submit the original DPOA to the CAAT.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

Additional documents required to enforce a DPOA include:

- a lease agreement;
- evidence confirming the identity of the person applying for deregistration – for example, if the applicant is a legal entity (called a juristic person in Thailand), corporate documents such as the certificate of incorporation are required;
- a termination notice together with supporting evidence showing that the lessee is in default;
- an application for re-exportation; and
- a power of attorney showing the person who submits the application for deregistration is authorised by the applicant.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A DPOA does not have to be governed by the laws of Thailand. The DPOA must comply with the national laws of where the DPOA is made. However, with that in mind, a DPOA that does follow Thai law can help avoid any challenge raised by the CAAT or the lessee.

2.8.10 Revocation of a Deregistration Power of Attorney

In theory, under Thai law, a DPOA expressed to be irrevocable can be revoked at any time. How-

ever, due to CAAT Regulation No 23 Clause 12 (2) (d), an irrevocable DPOA is recognised by the CAAT. See 2.6.13 Other Relevant Issues.

2.8.11 Owner's/Lessor's Consent

An applicant who requests for deregistration and re-export of the aircraft without the lessee's consent must comply with CAAT Regulation No 23 Clause 12 (2) (d).

If the owner, the mortgagee or the lessor can prove to the CAAT that it has the rights to request for deregistration then it can apply for re-export of the aircraft without the lessee's consent.

In order for the owner, the mortgagee or the lessor to re-export the aircraft without the lessee's consent, the applicant must comply with CAAT Regulation No 23 Clause 12 (2) (d).

The aircraft must be located in Thailand when the applicant requests for deregistration and re-export of the aircraft.

2.8.12 Aircraft Export Permits/Licences

Aircraft export permits/licences are issued in Thailand. The flight permit for re-export of the aircraft is issued by the CAAT. After deregistration of the aircraft, the applicant can request for the re-export of the aircraft. Alternatively, the applicant can request for deregistration and re-export of the aircraft at the same time according to CAAT Regulation No 23 Clause 12 (2) (d).

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

The lessor must ensure that any outstanding aircraft parking fees, maintenance fees and other official fees to the airport authority are paid in order to export the aircraft.

2.8.14 Practical Issues Related to Deregistration of Aircraft

The removal of registration marks from an aircraft is made only after deregistration is granted. In addition, an owner, lessor or mortgagee should expect to pay the debtor's outstanding debts to government creditors in order to export the aircraft.

2.9 Insolvency Proceedings

2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

Pursuant to the Thai Bankruptcy Act BE 2483 (as amended), there are two types of insolvency proceedings in Thailand: bankruptcy and business rehabilitation. Both bankruptcy and business rehabilitation cases are under the jurisdiction of the Central Bankruptcy Court. Whether a lessee files for bankruptcy or business rehabilitation would have a significant impact on the lessor's ability to repossess the aircraft.

Bankruptcy

If the lessee files for bankruptcy in Thailand, the lessor can still seek the deregistration and repossession of the aircraft. The lessor has this option regardless of whether the lessee is under absolute receivership in a bankruptcy. However, the lessor cannot file a lawsuit against the lessee for debts owed. The lessor is required to submit a debt repayment application to the official receiver under the bankruptcy proceedings. The debt repayment application must be filed within two months from the date of the publication of an order placing the lessee in absolute receivership. However, if the lessor is located outside Thailand, the official receiver may grant an extension of time for a period not exceeding two months.

Business Rehabilitation

If the lessee files for rehabilitation in the Central Bankruptcy Court, it would be more challenging for the lessor to repossess the aircraft. Rehabilitation proceedings aim to resolve the debtor's financial difficulties by allowing it to continue engaging in its business, while helping creditors to be repaid. To allow the debtor to continue engaging in its business, the Bankruptcy Act gives the debtor relief from creditors by providing for an "automatic stay". The automatic stay is imposed when the court accepts the debtor's rehabilitation petition and prevents, among other things, creditors from pursuing claims against the debtor and restricting a creditor's right to enforce security.

The Bankruptcy Act states that when the automatic stay is effective, an owner of leased property which is "essential for the operation of a debtor's business" cannot recover the property when it is in the debtor's possession or another person relying on the debtor's rights (eg, a sub-lessee). However, if the lease agreement has expired, then the lessor can recover its property.

When the debtor is an airline, the leased aircraft is likely to be considered essential for the operation of the debtor's business. If the aircraft is not airworthy, and the debtor has insufficient assets to properly maintain the aircraft, a lessor could argue that the leased aircraft is not essential to the debtor's business.

2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

See 2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations.

2.9.3 Co-ordination, Recognition or Relief in Connection With Overseas Proceedings

If the lessee files for bankruptcy in another jurisdiction, the foreign action would have no legal effect on the deregistration or repossession in Thailand. Thailand is not a party to any international treaty on insolvency or on the enforcement of recognition of foreign judgments. Thai laws also do not specifically provide for direct enforcement of a foreign judgment. A foreign court action may be used as evidence in Thailand, but that is all.

2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

Although the lessee is in the process of liquidation, the DPOA still stands. However, under the Bankruptcy Act, if the lessee is declared to be under receivership, the lessee is prohibited from undertaking any act relating to its business, except if ordered by or with the approval of the court, the official receiver, or a creditor's meeting.

2.9.5 Other Effects of a Lessee's Insolvency

Should a lessee in possession of an aircraft be put into liquidation or administration:

- the aircraft will not be considered as the lessee's asset – however, the lease agreement can be reviewed by the official receiver;
- the repossession of the aircraft can be delayed on termination of the lease since such termination can be reviewed and challenged by the official receiver;
- as mentioned in the first item, the aircraft will not be considered as the lessee's asset and the official receiver must comply with the lease agreement; and
- the liquidator/administrator will not impose the rights of any other creditors in priority to the lessor's – however, the secured creditor

naturally has rights over the asset, which are secured by the debtor prior to the receivership order, and need not file a debt repayment application.

2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The unsecured assets of the lender will be managed by the official receiver. Generally, such assets will be sold at a public auction and money received by the official receiver will be distributed to all creditors who have submitted their debt repayment application on a pro rata basis.

2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings

The Bankruptcy Court can place an "automatic stay" (ie, a moratorium) if the lessee files a business reorganisation petition with the court and the term of the lease agreement has not yet expired. In this case, the lessor cannot repossess the aircraft from the day when the court accepts the business reorganisation petition until the expiry of the time to implement the business plan or the day on which the business plan is successfully accomplished. The automatic stay is lifted on the day that the court dismisses the debtor's petition or rejects the case, or the day on which the debtor is placed under absolute receivership.

If a repossession action has been taken before the automatic stay, the automatic stay causes the repossession action to be suspended, unless otherwise ordered by the Bankruptcy Court (who received the debtor's rehabilitation petition). The repossession case can also resume after the day on which the Bankruptcy Court orders the business reorganisation and the party responsible for the rent defaults on payment under the lease

agreement twice consecutively or commits a material breach of the agreement.

2.9.8 Liquidation of Domestic Lessees

There are several methods by which a domestic lessee can be liquidated or placed in administration or receivership, as follows:

- the creditor of the lessee submits a complaint requesting the court to declare the lessee bankrupt;
- a lessee who has more liabilities than assets can request the court to declare the lessee bankrupt; or
- the lessee files a business reorganisation petition with the court.

2.9.9 Ipso Facto Defaults

To repossess an aircraft during a lessee insolvency, the automatic stay must be lifted and the conditions stated in in **2.9.8 Liquidation of Domestic Lessees** must be met.

2.9.10 Impact of Domestic Lessees' Winding-Up

The impact of domestic lessees' winding-up is as follows:

- aircraft – since the aircraft is not the lessee's asset, it will not be sold at a public auction;
- lease rentals – the lessor is required to submit a debt repayment application to the official receiver requesting the outstanding debts, which includes rent;
- lease security deposit – please see the second point above; and
- maintenance reserves – please see the second point above.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Thailand has not ratified or acceded to the Convention on International Interests in Mobile Equipment (the "Convention") or the related Protocol on Matters Specific to Aircraft Equipment (the "Protocol").

2.10.2 Declarations Made Concerning Conventions

Thailand ratified the Chicago Convention in 1947, the Geneva Convention in 1967 and the Montreal Convention in 2017.

2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

The Protocol does not apply in Thailand.

2.10.4 Enforcement of Conventions

The Convention and Protocol are not enforceable in Thai courts.

2.10.5 Other Conventions

Thailand ratified the 1948 Geneva Convention on the International Recognition of Rights in Aircraft in 1967. However, Thailand is not a party to the 1933 Rome Convention.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

Subject to compliance with applicable laws, there are no restrictions on foreign lenders financing an aircraft locally, or on borrowers using the loan proceeds.

3.1.2 Effect of Exchange Controls or Government Consents

Thailand features a comprehensive exchange control regime that regulates foreign exchange transactions including outward remittance of Thai or foreign currency. Authorised juristic persons, such as commercial banks in Thailand, are allowed to approve certain foreign exchange transactions, while other such foreign exchange transactions can only be carried out with the approval of the Bank of Thailand.

With respect to necessary remittance of foreign currency to repay a foreign loan, or for payment under a guarantee or security document (net of applicable Thai withholding tax), the party seeking to remit such funds must, at each time of application for outward remittance, submit documentary evidence with respect thereto (such as the relevant invoice, a copy of the relevant loan or other relevant agreement and any other relevant documents or instruments).

3.1.3 Granting of Security to Foreign Lenders

Subject to compliance with applicable laws, borrowers are permitted to grant security to foreign lenders to secure a valid primary obligation.

3.1.4 Downstream, Upstream and Cross-Stream Guarantees

Subject to compliance with applicable laws, downstream, upstream and cross-stream guarantees by Thai companies or individuals as security for a valid primary obligation of a third-party debtor in favour of lenders are permitted. There are no consideration or corporate benefit or registration requirements for such guarantees to be valid under Thai law.

3.1.5 Lenders' Share in Security Over Domestic SPVs

Under Thai law, a pledge of shares of a domestic/Thai SPV that owns the financed aircraft is recognised and advisable.

3.1.6 Negative Pledges

Under Thai law, the provisions relating to a negative pledge are recognised and acceptable, if and to the extent that they are not against Thai laws or the public order or good morals of Thailand.

3.1.7 Intercreditor Arrangements

Subject to compliance with applicable laws, there are no material restrictions or requirements imposed on intercreditor arrangements.

3.1.8 Syndicated Loans

The concept of agency and, accordingly, the role of an agent (such as the facility agent) under a syndicated loan are recognised under Thai law.

3.1.9 Debt Subordination

Under Thai law, provisions or arrangements setting forth subordination of any rights of a person to any rights of another person under an agreement are binding and enforceable only upon the parties thereto, and to the extent and upon the conditions as may be agreed upon by the parties concerned. However, they may not create preferential rights nor become binding upon and enforceable against a third person.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

Subject to compliance with applicable laws, the transfer or assignment of all or part of an outstanding debt under a valid English or New York law-governed loan is recognised and permissible under Thai law.

3.1.11 Usury/Interest Limitation Laws

There are usury or interest limitation laws in Thailand. Principally, with respect to a loan transaction, interest shall not exceed 15% per annum. However, the maximum rate of interest chargeable by the international financial institutions to which Thailand is a member, or banks or financial institutions registered and located in foreign countries, shall not exceed 20% per annum. If the interest rate applicable under the relevant agreement/document exceeds the maximum rate of interest permissible under Thai law, the whole interest charged is void and unenforceable and only the principal amount would be recoverable. If the interest has been paid, it was in violation of the law. As a result, the borrower cannot claim restitution. The lender must also apply the amount paid as interest in violation of the law towards the repayment of principal, and in such an event, all interest accrued but unpaid may not be recoverable by the lender and/or the persons purportedly entitled thereto, according to the terms of such agreement/document. The laws governing the aforesaid maximum rate of interest extend the scope of interest to benefits in lieu of interest.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Traditionally, the typical forms of security recognised under Thai law include:

- mortgage of immovable property (such as land, buildings and structures on the land, and condominium units) or certain types of movable property (such as machinery and vessels);
- pledge of movable property (including shares); and
- guarantee (either corporate/institutional or personal).

In addition, the Business Security Act BE 2558 provides for the recognition of a security interest created by a business security agreement, which is an agreement whereby a contracting party (the security provider) has placed a property with the other contracting party (the security receiver), as security against debt repayment, with no need to deliver the property to the security receiver. Creation of a business security is recognised as security interest under Thai law, which then will provide the security receiver with preferential rights over that asset in the case of bankruptcy. The Business Security Act BE 2558 requires security receivers to be eligible persons as prescribed by the Business Security Act BE 2558 and its ministerial regulations, which currently includes, inter alia, Thai commercial banks, and foreign banks providing a loan in syndication with Thai commercial banks. Otherwise, at present, foreign banks and foreign entities are not eligible security receivers as provided under the Business Security Act BE 2558 and its ministerial regulations.

A security provider may place its own property as security against debt repayment payable by a third person. A business security agreement must be made in writing and registered with the Business Security Registration Officer. At present, however, Thai law does not provide for the mortgaging of aircraft, and accordingly, registration or perfection of a mortgage over an aircraft under Thai law may not currently be achievable or practicable. In certain circumstances, assignment of income/proceeds or insurance may be used.

3.2.2 Types of Security Not Available

At present, a mortgage over an aircraft is not permissible in Thailand under Thai law.

3.2.3 Trust/Trustee Concepts

Principally, Thai law does not recognise the common law concepts of liens, trust, charge or hypothecation, or a security interest created thereunder, except in the context of the Trust for Transactions in Capital Market Act BE 2550 (2007), which provides for a trust created for the benefit of transactions in the capital market pursuant thereto. The typical alternative structures that could be used include the parallel debt or the appointment of a security agent, instead of a security trustee.

3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Subject to compliance with applicable laws, it is permissible under Thai law for a borrower to assign its rights under an aircraft lease (including in relation to insurances) to any person, including the security agent/trustee.

In relation to mortgages, at present, Thai law does not provide for the mortgaging of aircraft.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

Assigning the rights and benefits without assigning the attendant obligations of a lessor is permissible under Thai law.

3.2.6 Choice of Foreign Law

Principally, a security assignment or a guarantee can be expressed to be governed by English or New York law. Please note, however, Sections 9 and 16 of the Act on Conflict of Laws BE 2481 (1938).

- Section 9 states: “Unless otherwise provided by this Act or other laws of [Thailand], the formal validity of a juristic act shall be governed by the law of the country where the act is made. However, the law of the country

where a property is situated governs the form required for the validity of a contract, document or other juristic act relating to immovable property.”

- Section 16 states: “Movable and immovable property is governed by the law of the place where the property is situated. However, in the case of exportation of movable property, the law of nationality of its owner shall govern from the time of exportation.”

Therefore, in addition to compliance with the English or New York law requirements, such security assignment or guarantee, and creation/perfection thereof, should be carried out in accordance with and in the forms prescribed by Thai law as well.

Further, under Thai law and in any proceedings taken in Thailand for the enforcement of such security assignment or guarantee, the choice of English or New York law, as the case may be, to govern such security assignment or guarantee is a valid choice of law, and the Thai courts will observe and give effect to the choice of English or New York law (as the case may be) as the governing law of such security assignment or guarantee, in so far as the English or New York law is established and proved to the satisfaction of the Thai court, and by the discretion of the Thai court, not considered in any way contrary to the public order or good morals of Thailand. If the foreign law is not proved to the satisfaction of the Thai courts, Thai law shall apply. In any event, such security assignment or guarantee and any other relevant agreements/documents must be legal, valid, binding and enforceable under, and be in the forms prescribed by, English or New York law, as the case may be, and/or Thai law if they are to be legally enforced in Thailand.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

Under Thai law, with respect to an assignment, a claim may be assigned or transferred, unless its nature does not allow this or it is not subject to judicial attachment, or if the parties have declared a contrary intention. Such declaration of intention, however, cannot be set up against a third person acting in good faith. An assignment or transfer of the rights or obligations performable to a specific creditor is valid only if it is made in writing. Such assignment or transfer cannot be set up against the debtor or any third persons, unless notice thereof in writing has been given to the debtor, or the debtor has consented to the assignment/transfer in writing. If the debtor has only received a notice of assignment or transfer, he may set up against the assignee or transferee any defence that he or she has against the assignor or transferor before such notice was received. If the debtor has against the assignor/transferor a claim not yet due at the time of the notice, the debtor can set off the claim, provided that it would become due not later than the claim assigned/transferred.

An assignment or transfer of an obligation performable to order can be set up against the debtor or other third persons only if such assignment or transfer is endorsed on the instrument and the instrument itself is delivered to the assignee or transferee. A novation by a change of the creditor is also governed by the provisions of the laws concerning the assignment. A novation by a change of the debtor may be effected by a contract between the creditor and the new debtor; however, such novation cannot be done against the will of the original debtor.

Under Thai law, there is no specific requirement that a security assignment be translated, certified, notarised or legalised to be enforce-

able against a domestic party. In the event of enforcement, however, certified Thai translations of the whole or any material part of the relevant agreements or documents may be required to be submitted and attached to the originals thereof when they are submitted as evidence to a Thai court.

3.2.8 Domestic Law Security Instruments

See 3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments. Thailand has not ratified or acceded to the Convention or the Protocol.

3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

Under Thai law, there is no specific requirement to register an assignment with any local authority.

3.2.10 Transfer of Security Interests Over Aircraft/Engines

Subject to compliance with applicable laws, transfer of security interests over an aircraft or engines is recognised in Thailand.

3.2.11 Effect of Changes in the Identity of Secured Parties

Depending on the change and the type of security or security interest, the security interests could be jeopardised.

3.2.12 “Parallel Debt” Structures

See 3.2.3 Trust/Trustee Concepts.

3.2.13 Effect of Security Assignments on Residence of Secured Parties

Subject to the terms of the lease and other relevant facts or circumstances, it is unlikely that a secured party under a security assignment would be deemed to be resident, domiciled, or carrying on business in Thailand by reason only

of its execution or enforcement of a security assignment.

3.2.14 Perfection of Domestic Law Mortgages

At present, Thai law does not provide for the mortgaging of aircraft and, accordingly, registration or perfection of a mortgage over an aircraft under Thai law may not currently be achievable or practicable.

3.2.15 Differences Between Security Over Aircraft and Spare Engines

Subject to compliance with applicable laws, a pledge of spare engines might be practically feasible.

3.2.16 Form and Perfection of Security Over Bank Accounts

Typically, subject to compliance with applicable laws, assignment of a bank account and sometimes a pledge of a bank account would be used. In addition, a security interest over a bank account created under and according to the Business Security Act BE 2558 would also be recognised.

3.3 Liens

3.3.1 Third-Party Liens

Thai law does not recognise the common-law concept of a lien, or a security interest created thereunder. Under Thai law, however, the right of retention and preferential rights, general or special, are recognised and provided for. The right of retention permits the lawful possessor of a property belonging to another party, who has an obligation in his or her favour in relation to the property possessed, to retain the whole of the property until the obligation is fully performed.

Pursuant to the CCC, the right of retention only covers the obligation or value of the work done

in relation to the asset or property that is in his or her possession.

Thai law does not recognise the concept of a fleet lien. A third party can only have the right of retention over an asset that he or she possesses.

3.3.2 Timeframe to Discharge a Lien or Mortgage

The right of retention permits the lawful possessor of a property to retain the whole of the property until the debt or obligation in relation to the property possessed is fully paid or performed. At present, Thai law does not provide for the mortgaging of aircraft, and accordingly, registration or perfection of a mortgage over an aircraft under Thai law may not currently be achievable or practicable.

3.3.3 Register of Mortgages and Charges

At present, Thai law does not provide for the mortgaging of aircraft, and accordingly, registration or perfection of a mortgage over an aircraft under Thai law may not currently be achievable or practicable. Subject to compliance with applicable laws, a security interest over an aircraft under and according to the Business Security Act BE 2558 could probably be created and recognised.

3.3.4 Statutory Rights of Detention or Non-consensual Preferential Liens

See 3.3.1 Third-Party Liens.

3.3.5 Verification of an Aircraft's Freedom From Encumbrances

An aircraft cannot presently be mortgaged or pledged under Thai law. However, an aircraft can be registered as a business security under the Business Security Act BE 2558. In such event, a purchaser can verify such business security with the Department of Business Development.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

The concept of security assignment is not recognised under Thai law. However, assignment of an account receivable in project finance may be considered as a novation and applicable under Thai law, if a written assignment agreement is made between an assignor and assignee with consent from or notification to a debtor.

Enforcement can only be through a court. However, unlike enforcing a loan, the right to enforce a guarantee is subject to particular requirements under the CCC, such as timing of the demand notice, the duration of the debt, the maximum amount secured, and so on. In order for the guarantee agreement to be enforceable, the guarantee agreement must also be made in writing and signed by the guarantor. Certain specific incidents may result in a guarantee being discharged, such as the creditor granting the debtor an extension of time for payment.

3.4.2 Security Trustees' Enforcement of Their Rights

Since the concept of a security trustee is not recognised under Thai law, enforcement of the rights under the security assignment requires litigation in the Thai courts.

3.4.3 Application of Foreign Laws

Whenever the governing law is foreign law, the foreign law can apply in so far as it is not contrary to the public order or public policy of Thailand. If the Thai court establishes that foreign law applies, the party relying on such foreign law has to prove the foreign law to the satisfaction of the Thai court; otherwise, Thai law will apply.

There has been no instance of the Thai court dismissing a case based on a choice-of-forum

clause designating a foreign court. Indeed, case precedents show that the Thai court claims discretion to exercise jurisdiction contrary to the clause when the Thai court has jurisdiction over the dispute.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Thailand is not a party to any conventions on enforcing foreign judgments. The Thai court does not enforce foreign judgments but will accept foreign judgments as evidence in a new trial. Even if the foreign judgment is based on the merits, the claimant must present all the key witnesses and testimony in the new trial before the Thai court.

A foreign arbitral award can be enforced after the Thai court has recognised and enforced the award as per the procedures of a normal lawsuit by filing an application for enforcement of a foreign arbitral award. In response to the application, the Thai court will look at procedural and due process matters related to the foreign arbitral proceeding, and not the underlying merits. Thus, the Thai court will usually grant an order to enforce the award unless it finds one of the grounds for setting aside an arbitral award as prescribed in Section 43 of the Arbitration Act BE 2545, which states similar conditions as set forth in the UNCITRAL Model Law on International Commercial Arbitration. In addition, according to Section 44 of the Act, the Thai court will refuse to enforce an arbitral award if the court finds that an award dealing with a dispute cannot be settled by an arbitration, or if the enforcement would be against public order or public policy.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party would need the lessee's or operator's consent.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

Generally, the common civil courts have authority to try to adjudicate civil cases concerning enforcement of a security agreement.

3.4.7 Summary Judgments or Other Relief

There is no summary judgment procedure of the type of case found in Thai civil procedure law. Normally, the Thai court requires the entire case to be tried in court before rendering its judgment regarding the enforcement of any agreements, including security agreements.

3.4.8 Judgments in Foreign Currencies

In rendering a judgment, the Thai court may, at its discretion, enter a judgment in a foreign currency (if requested in the complaint), even if obligations of the debtor are originally expressed in a foreign currency.

3.4.9 Taxes/Fees Payable

Generally, if there is interest on a loan paid to a creditor, the creditor is liable to income tax.

The fees for enforcement of a court judgment typically range from 1% to 3% of the amount of money seized or attached, or the value of the asset attached.

3.4.10 Other Relevant Issues

The litigation process in Thailand can be lengthy. In some cases, the market value of an aircraft may decrease below the repayments owed on the aircraft due to the length of enforcement time.

Additionally, a debtor may not have or be able to access technical aircraft documentation, since there is no central authority in Thailand for keeping such records. Thus, a proper records management system should be set among or between the parties involved.

4. Other Issues of Note

4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft

Under Thai law, foreign entities are not eligible to register aircraft in Thailand. As such, a non-Thai lessor cannot register an aircraft. In practice, it means that a Thai lessee-operator must register the aircraft.

4.2 Current Legislative Proposals

A replacement to the Air Navigation Act BE 2497 (1954), Thailand's primary law governing aviation, has been discussed for a few years. It is uncertain if or when the new version of the Air Navigation Act will become law. However, the last amendment of the Air Navigation Act was made on 24 May 2019.

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