

# COULD YOU BE GROUNDED? CHANGES TO THAI AVIATION INSURANCE REQUIREMENTS

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THE RAPID EXPANSION OF FLIGHTS TO AND FROM THAILAND AND THE PROLIFERATION OF THAI AND FOREIGN FULL SERVICE AND LOW COST CARRIERS SERVING THAILAND HAS INCREASED THE NEED FOR REGULATORY SUPERVISION AND OVERSIGHT.

FROM 26 JULY 2019, ALL AIRLINES OPERATING TO AND IN THAILAND MUST COMPLY WITH A NEW THAI CIVIL AVIATION REGULATION RELATING TO INSURANCE COVER.

This regulation is a timely reminder of the powers the Civil Aviation Authority of Thailand (“CAAT”) has over foreign airlines and operators of foreign registered aircraft.

The regulation, which was gazetted on 27 June 2017, requires airlines to be able to produce evidence of third party liability insurance for the following risks:

- Passenger death and injury;
- Passenger delay;
- Damage or delay to baggage; and
- Damage or delay to cargo.

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The regulation will be enforced by the CAAT as part of its broader powers over airlines, aircraft and operators. The purpose and objective of the regulation appears to be to ensure that airlines and operators have valid and appropriate insurance in the event of claims and this may be intended to provide assurance and protection to passengers on flights in, to and from Thailand.

The key provisions are set out in section 6 of the *International Carriage by Air Act* (2015) (“the Act”):

1. *“A carrier operating carriage by air within or to or from of the kingdom must provide insurance cover for the carrier’s liability under this Act.*

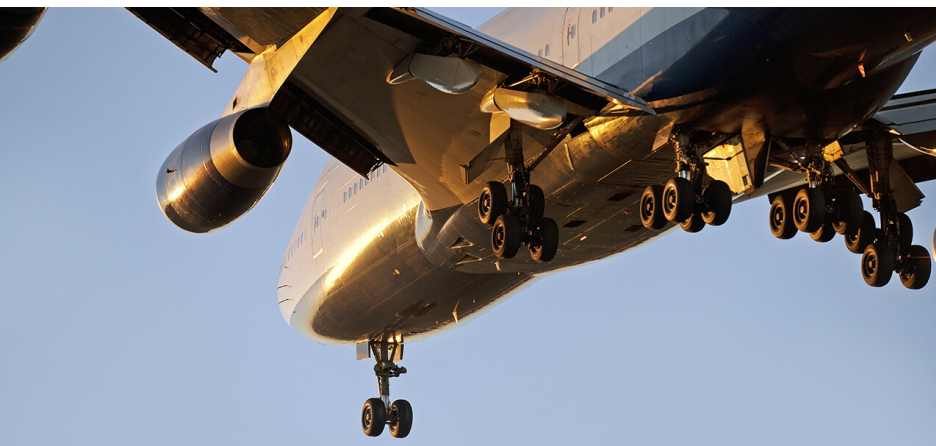
2. Rules, procedures, and conditions on the insurance under paragraph one shall be as prescribed in the Ministerial Regulation.
3. Regarding the insurance under paragraph one, the Director-General of Department of Civil Aviation has the power to order carriers to present proof that they hold this insurance.
4. In the event of contravention or a failure to comply with paragraph one or paragraph three, a competent official, with authority to permit air carriage, can order the carrier to suspend air carriage within, to or from the kingdom until the carrier complies with paragraphs one or three, as the case may be.”

The CAAT is likely to focus on confirming that there is valid third party insurance in respect of the aircraft for the above risks and prescribed liability limits. These limits are based on the liability limits in the *Montreal Convention* (1999) (“MC99”) as set out in the Act and are as follows:

- Passenger death and injury: SDRs 113,000;
- Passenger delay: SDRs 4,694;
- Damage or delay to baggage: SDRs 131 per passenger; and
- Damage or delay to cargo: SDR 19/kg.

## LIABILITY FOR DELAY

Liability for delay is not typically included in third party liability insurance cover. It is not clear how the CAAT will assess the extent of cover for delay to passengers, baggage or cargo, where this is not expressly included in the third party insurance cover certificate. Airlines may need to assess whether to obtain specific cover for this or provide some other form of security or undertaking in respect of liability for delay to passengers, baggage or cargo.



THE CAAT IS LIKELY TO FOCUS ON CONFIRMING THAT THERE IS VALID THIRD PARTY INSURANCE IN RESPECT OF THE AIRCRAFT FOR THE ABOVE RISKS AND PRESCRIBED LIABILITY LIMITS.

A further issue will be the relationship between the liability for delay in the Act and the compensation for delay in EC 261/2004, for which carriers do not typically have expressly stated insurance cover. Although EC 261/2004 does not apply to flights within Thailand and only applies to flights from the EU to Thailand and from Thailand to the EU for EU carriers, this compensation provides consumers with readily available compensation with few exclusions and exemptions available to carriers. This is especially the case where compensation payable under EC 261/2004 exceeds the damages which would be payable in accordance with the provisions of the Act and MC99.

By comparison with the provisions of EC 261/2004, liability for delay under Thai law and the Act is less clearly defined. Thai courts have not dealt with delay claims and litigation to the extent that EU courts have done either under the Act or its predecessor legislation. Although the judgments of Thai courts do not create binding precedent, the absence of a body of decided cases means that there are limited examples of how the courts would assess liability for delay arising from air carriage. It is likely that the Thai courts would apply more general principles of causation and quantification of loss to claims for delay arising from air carriage.

Although Thai courts are likely to accept and apply the liability limit in the Act, claims submitted to the Office of the Consumer Protection Board (“OCPB”) may result in damages in excess of this liability limit. This is particularly where the OCPB focusses on the infringement of consumer rights rather than a statutory or contractual right to compensation for delay. As the number of claims arising from air carriage which are submitted to the OCPB increase, this may be a more significant issue for airlines, particularly where insurance cover for such claims is not available.

**"the CAAT has the power to inspect the records of all aircraft operating to, from and within Thailand, and this specifically includes records relating to insurance."**

## FREIGHT FORWARDERS

Where a freight forwarder is the carrier, pursuant to a house air waybill, it must hold third party liability insurance over of THB10m (approximately US\$326,400).

## THE POWERS OF THE CAAT

Pursuant to section 6 of the Act, the CAAT has the power to inspect the records of all aircraft operating to, from and within Thailand, and this specifically includes records relating to insurance.

In practice, the CAAT may require foreign carriers and operators to provide details of their third party insurance when requesting permission to operate flights to

Thailand.

A certificate of insurance containing sufficient details to identify the carrier and aircraft as insured, the validity of the insurance cover and the policy limits should be sufficient to address the concerns of the CAAT in relation to third party liability in respect of passenger death and injury and damage to or loss of cargo.

Consistent with the apparent focus on the protection of consumers, the regulation does not include any requirement to provide policy coverage limits of, or the validity period for war and terrorism or hull liability cover.

## WHAT DOES THIS MEAN?

International airlines should ensure that their insurance cover clearly sets out the details of the cover and policy limits and that the cover clearly extends to the aircraft operating flights to and from Thailand.

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Details of the insurance cover should be provided to the CAAT as early as possible. Ground and cockpit crews should be reminded of the CAAT's power to inspect these and other documents and records and the insurance certificate/s to be produced.

Single aircraft, private and business jet operators should take steps to ensure that their liability cover meets the prescribed limits and that they have cover through internationally recognised and reputable insurers.

If you would like to discuss potential liability for delay under Thai law further and would like a copy of our September 2017 briefing on the Act and implementation of MC99 in Thailand, please contact Alan Polivnick.

## KEY CONTACTS



**ALAN POLIVNICK**  
PARTNER • SYDNEY

T: +61 2 9276 7607

[apolivnick@wfw.com](mailto:apolivnick@wfw.com)



**NICHAREE  
MUSIKAPRAPHAN**  
ASSOCIATE • BANGKOK

T: +66 2665 7840

[nmusikapraphan@wfw.com](mailto:nmusikapraphan@wfw.com)

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