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BRIEFING

NEW PROCEDURES FOR LESSORS TO
DEREGISTER AIRCRAFT IN THAILAND

SEPTEMBER 2018

- THE CAAT ISSUED REGULATION 11 EARLIER THIS YEAR
- A KEY FOCUS OF REGULATION 11 APPEARS ON DEREGISTRATION OF AIRCRAFT WHERE THE LESSOR HAS TERMINATED THE LEASE
- THAI LAW DOES NOT PERMIT A FOREIGN PARTY, SUCH AS A LESSOR, TO REGISTER AN AIRCRAFT ON THE THAI REGISTRY



As Thailand is not a party to the Cape Town Convention, lessors must take into account the difficulties relating to repossession and removal of aircraft when leasing to Thai operators. In good news for the industry however, recent regulatory changes may provide some assistance to lessors as outlined in this briefing.

The Civil Aviation Authority of Thailand ("CAAT") issued Regulation 11 on requests for registration, and for registration of aircraft ("Regulation 11"), earlier this year. The regulations have now been published in the *Royal Gazette* and came into force on 7 August 2018.

A key focus of Regulation 11 is the deregistration of aircraft where the lessor has terminated the lease. This is a response to recent issues with and litigation in relation to deregistration of Thai registered aircraft.

Thai law does not permit a foreign party, such as a lessor, to register an aircraft on the Thai Registry. Although the interests of a foreign party, such as a lessor, can be recorded on the Certificate of Registration ("COR"), this does not confer any rights under Thai law.

“IT HAS BEEN DIFFICULT FOR LESSORS TO REPOSSESS AIRCRAFT IN THE ABSENCE OF A COURT ORDER IN THEIR FAVOUR, OR THE ABSENCE OF AN OBJECTION BY THE LESSEE.”

In the absence of the remedies and mechanisms in the Cape Town Convention, lessors must rely on the provisions of Thai law. Where a lessee consents to the deregistration of an aircraft, the process can be relatively straightforward. Pursuant to a deregistration power of attorney (“DPOA”), the lessee will appoint an attorney-in-fact to deregister the aircraft once an event of termination occurs.

The lessee can revoke the DPOA by issuing a new DPOA in favour of a different attorney-in-fact, regardless of whether the original DPOA is stated to be irrevocable. There is no obligation on the lessee to notify the lessors of the new DPOA and some lessors have only discovered the existence of the subsequently issued DPOA when the attorney under the original DPOA sought to deregister an aircraft.

Even where the DPOA has not been superseded, it has been difficult for lessors to repossess aircraft in the absence of a court order in their favour, or the absence of an objection by the lessee.

Enforcement of the rights of lessors has required litigation in the Thai courts to establish the validity of the grounds for termination of the lease and the entitlement of the lessor to repossess the aircraft. Thai law does not recognise the concept of precedent and each case must be argued on its merits. It is not unusual for lessees to continue to operate the aircraft during the proceedings and until the judgment of the court is handed down. The duration and uncertainty of litigation in Thailand has provided some advantages to Thai lessees, particularly those experiencing cash flow difficulties.

The CAAT and lessors have sought to rely on the provisions of the *Air Navigation Act* (1953) (the “ANA”) to allow the CAAT to deregister aircraft once the lease was terminated. The ANA requires the holder of a COR to be the owner, or have possessory rights over the aircraft and states that the COR becomes ineffective once the operator ceases to have possessory rights over the aircraft. Although the provisions appear clear and straightforward, enforcement has not provided the necessary certainty and consistency.

“THE RAPID INCREASE IN THE NUMBER OF THAI AIRLINES AND THE CORRESPONDING INCREASE IN THE USE OF LEASED AIRCRAFT HAS CREATED GREATER PRESSURE ON THE DEREGISTRATION PROCESS.”

The rapid increase in the number of Thai airlines and the corresponding increase in the use of leased aircraft has created greater pressure on the deregistration process, particularly for newer entrants to the Thai aviation market. In recent years, the CAAT has begun to take a more assertive role in deregistration of aircraft, particularly where the lease has been terminated.

Some Thai lessees appear increasingly less willing to accept the decision of the CAAT on deregistration. In 2017, the decision of the CAAT to deregister two aircraft was challenged by the lessee. The lessee disputed the ability of the CAAT to act and challenged the validity of its decision to deregister the two aircraft. The lessee asserted that it had continuing possessory rights over the aircraft and referred to litigation in the Thai civil court brought by the lessor to demonstrate that there was a dispute over the leases and possessory rights. The lessee argued that this did not allow the CAAT to deregister the two aircraft on the basis that the leases had been terminated. The challenge was filed in the Administrative Court and the lessee obtained an injunction from the Court to prevent the movement of the aircraft and any maintenance on the two aircraft during the proceedings.

“ALTHOUGH THIS PROVIDES THE CAAT AND LESSORS WITH SOME LEVEL OF ASSURANCE, THE DECISION DOES NOT CREATE ANY BINDING PRECEDENT.”

The Court took over a year to reach its decision, during which time the aircraft remained grounded in Thailand. The Court concluded that that the lessee was in breach for failure to make lease payments, that the lessor was entitled to terminate the lease of each aircraft and that the lessee’s possessory rights over the two aircraft ceased once the leases were terminated. On this basis, the Administrative Court concluded that the CAAT’s decision to deregister the aircraft was valid and a proper exercise of its powers under the ANA.

Although this provides the CAAT and lessors with some level of assurance, the decision does not create any binding precedent. The decision would not prevent a Thai lessee from seeking to challenge the decision of the CAAT on similar grounds in the future.

Regulation 11

Regulation 11 has been promulgated against this background and appears to seek to provide the CAAT with clearer grounds on which to deregister aircraft and to limit the ability of lessees to challenge the decisions of the CAAT on deregistration in the Thai courts.

In s.11, the Director-General of the CAAT is empowered to deregister an aircraft from the Thai register on four grounds. For lessors, the critical grounds in s.11 are as follows:

- (2) The possessory right over the aircraft in accordance with the aircraft lease agreement has expired, where the applicant for the COR has the possessory right, due to:
 - (a) Expiration of the aircraft lease term;
 - (b) Termination of the aircraft lease agreement by the lessee or lessor in accordance with the conditions specified in the agreement;
 - (c) The lessor and lessee agree to terminate the aircraft lease agreement; or
 - (d) The lessor notifies the termination of the aircraft lease agreement and submits the irrevocable deregistration power of attorney together with an application requesting the exportation of the aircraft.
- (3) A final judgement by a court has cancelled or revoked the COR; and/or
- (4) The aircraft is enforced as security.

The intention of s.11(2) (b) appears to be to seek to make the link between the lessee’s possessory rights and the validity of the lease clearer and to provide support for deregistration where the lease has been terminated. Provided the lessor has terminated the lease in accordance with its provisions, the position of the CAAT appears to be that the lessee’s possessory rights are extinguished and it is required to act in accordance with s.11(2) and deregister the aircraft. This appears to be in The application of s.11(2) (b) remains untested, although given some concerns about the

“STEPS TO REGISTER THE AIRCRAFT IN A DIFFERENT REGISTRY SHOULD BE UNDERTAKEN IN TANDEM WITH TERMINATION OF THE LEASE TO ENSURE THAT THE AIRCRAFT CAN BE FLOWN OUT OF THAILAND.”

response to the challenge in the Administrative Court and to provide regulatory justification for the decisions of the CAAT on deregistration.

The application of s.11(2) (b) remains untested, although given some concerns about the creditworthiness of certain Thai operators, it is unlikely to remain untested in the medium to long term.

The CAAT is likely to continue its practice, of inviting the lessor and lessee to discuss the termination of the lease and events leading up to the termination, before making a decision on a lessor’s application for deregistration. It is unclear to what extent Regulation 11 changes the dynamics and outcome of such discussions. If the CAAT can demonstrate to the court that it sought to resolve the issues and gave each side a fair hearing before deregistration, this may assist it in defending its decision to deregister. However, a continued reliance on the Thai courts to enforce provisions in regulations may not provide much comfort to lessors.

Lessors should consider the following issues:

- Their interest as lessor is recorded on the COR;
- Ensure that lease terms on default and termination are as clear as possible and, as far as possible, provide a direct path from default to termination;
- Delays in payment and late payments will need to be considered carefully and a decision will need to be made whether to document each breach and whether each breach constitutes an event of default;
- Efforts to address events of default should be documented and recorded;
- Termination proceeds in accordance with the terms of the lease;
- The CAAT may require evidence of the default of the lessee, that efforts to address the default have been exhausted and that the termination has proceeded in accordance with the terms of the lease and the evidence in relation to these issues should be as clear and comprehensive as possible;
- Lessors should be prepared to submit all supporting documents as quickly as possible to the CAAT;
- The likely time for the CAAT to make a determination, including meeting with the lessor and lessee, should be factored into aircraft repossession and redeployment plans; and
- Steps to register the aircraft in a different registry should be undertaken in tandem with termination of the lease to ensure that the aircraft can be flown out of Thailand as soon as possible after deregistration.

Regulation 11 also includes a requirement that the COR be updated when there are changes to the details recorded on the COR. Pursuant to s.8, the COR holder is required to notify the CAAT within 30 days of the date of the change by submitting the changes on the approved form and providing supporting documentation. The CAAT will then reissue the COR with the notation “RE-ISSUED”.

Regulation 11 does not contain any penalty or sanction for a failure to notify or late notification. It remains unclear how the CAAT will enforce this requirement, other than the possibility of a notice or warning to the lessee. This is entirely dependent on the CAAT having knowledge of changes in relation to the aircraft. This may be more difficult where the changes take place outside Thailand and do not result in any change in the operator of the aircraft, such as a lease novation.

Conclusion

One benefit of this provision is to ensure that changes in lessors are promptly recorded on the COR and in the records of the CAAT. This is presumably intended to provide greater visibility for lessors with the CAAT. Up-to-date records of the interests of lessors may be extremely helpful to lessors seeking to repossess aircraft in Thailand. Although the COR is not a document of title, official CAAT records of their interest should assist lessors in deregistration.

Lessors should consider the following:

- The requirement to update the COR in accordance with Regulation 11 should be a condition of the lease;
- The lessee should undertake to promptly provide a copy of the COR once updated; and
- Where the COR has not been updated in accordance with Regulation 11, this should be addressed before any change in lessor.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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