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WILLIAMS

BRIEFING

THE NEW THAI OFFENCES AGAINST  
NAVIGATION ACT: 6 MONTHS IN –  
TURBULENT OR SMOOTH SKIES?  
AUGUST 2015

- ON 14 AUGUST 2015, IT WILL BE SIX MONTHS SINCE THE NEW THAI *OFFENCES AGAINST NAVIGATION ACT* CAME INTO FORCE
- THE ACT CREATES A NEW REGIME FOR DEALING WITH OFFENCES WHICH EITHER JEOPARDISE THE SAFETY OF AN AIRCRAFT OR THE ORDER AND OPERATION OF A FLIGHT.



In late July 2015, a Swiss national became drunk and abusive on a flight from Zurich to Bangkok. After he became abusive, injured other passengers and damaged airline property, he had to be physically restrained by the crew with the assistance of other passengers. As none of the injured passengers nor the airline pressed charges, he appears to have only faced an approximately US\$500 fine.

Would this have been the result if this had happened on the ground rather than in the air?

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“WOULD THIS HAVE BEEN THE RESULT IF THIS HAD HAPPENED ON THE GROUND RATHER THAN IN THE AIR?”

This is a timely reminder that on 14 August 2015, it will be six months since the new Thai *Offences against Navigation Act* (the Act) came into force.

In this briefing, we consider:

- How the Act changes the law on crimes on board aircraft
- Grounded? How the Thai police have enforced the Act
- Flying forward: How airlines should ensure that they comply with the Act and understand how it will be enforced.

**How has the Act changed the law on crimes on board aircraft?**

The Act creates a new regime for dealing with offences which either jeopardise the safety of an aircraft, including passengers and property, or jeopardise the order and operation of a flight.

The Act builds on the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963 (the **Tokyo Convention**) but also contains some key features which place it within a growing body of international legislation designed to address the deficiencies of the Tokyo Convention and to provide a stronger deterrent for offenders.

The International Civil Aviation Organization (ICAO) has encouraged states to ratify the Montreal Protocol of 2014 (MP14) to overcome the limitations of the Tokyo Convention and to counter the gradual rise in threats to aviation security. In many ways the Act has pre-empted the provisions of the as yet unratified MP14 by providing a broader jurisdiction and a clearer framework for determining the key constituents of an offence against aviation security.

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“THE ACT SETS OUT A BROAD RANGE OF OFFENCES WHICH CONSTITUTE 'UNRULY PASSENGER BEHAVIOUR'...”

#### Key features of the Act:

- Covers a range of offences with tougher penalties than those prescribed in the Thai Penal Code
- Sets out powers and immunity for pilot in command, crew members and passengers
- Streamlines post incident procedures
- Broader jurisdiction
- No compensation for airlines for diversion and other costs of dealing with unruly passengers

#### The Offences

The Act sets out a broad range of offences which constitute 'unruly passenger behaviour' and which range from basic assault, sexual assault and murder to destruction of property and tampering with aircraft equipment, including interfering with smoke detectors or using a mobile phone while in flight.

The Act expands on the distinction between offences under penal law and those which 'may or do jeopardise the safety of the aircraft' and broadly reflects the offences set out in the ICAO Circular 288 *'Guidance Material on the Legal Aspects of Unruly / Disruptive Passengers'* (the **Model Legislation**). This distinguishes between:

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“ALTHOUGH THE ACT DRAWS UPON OFFENCES AS THEY ARE DEFINED IN THE THAI PENAL CODE, THE SYSTEM OF PENALTIES IT PROVIDES ARE FAR HARSHER...”

- Offences committed against crew members including assault, threats or refusal to follow the instruction of crew members.
- Offences endangering safety or jeopardising good order including assault, destruction of property and drunken behaviour.
- General offences including use of portable devices, smoking in lavatories and tampering with a smoke detector or security device.

The Act arguably goes further than the Model Legislation by applying to:

- those who 'facilitate' an offence,
- those who 'attempt' to commit an offence, and
- those who carry out an act in preparation to commit an offence.

Although the Act draws upon offences as they are defined in the Thai Penal Code, the system of penalties it provides are far harsher than their Penal Code equivalents. The severity of these punishments reinforces the global move towards legislation which provides greater deterrence to perpetrators, an area in which the Tokyo

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## “THE KEY TO DETERRENCE IS ENFORCEMENT...”

Convention has been criticised, and reflects the increase in unruly passenger incidents in recent years.

The key to deterrence is enforcement, particularly where foreigners face criminal charges and prosecution in Thailand. Inconsistent or weak enforcement reduces the impact of deterrence.

### **Powers of Crew and Pilot in Command**

The Act builds upon the Tokyo Convention by permitting the pilot in command, operating crew and passengers (subject to a right of retraction by the pilot in command) to apply reasonable measures to preserve the security of the aircraft, its persons or property if they have reasonable grounds to believe that a person has committed, or is about to commit, an offence. As with the Tokyo Convention, the Act grants immunity to the pilot in command, the crew, the passengers, the owner/operator of the aircraft and the person on whose behalf the flight was performed.

The Act provides a detailed procedure for the disembarkation of an unruly passenger which includes the duty of the pilot in command to file a report of the incident with the designated authorities on the ground. As with the Tokyo Convention, the pilot in command will need to collect any related documents and evidence, lawfully within his control, in connection with the incident.

### **Jurisdiction – departure from Tokyo**

The Act departs from the Tokyo Convention in the way it deals with jurisdiction.

The Tokyo Convention gives the state of aircraft registration sole jurisdiction over offences and other acts that occur while the aircraft is in flight. This causes issues when the captain of the aircraft delivers or disembarks an unruly passenger to the competent authorities who often determine that they do not have jurisdiction as the state of landing when the aircraft is registered in another state. Similarly, the police and authorities in the state of registration may have little connection with an incident taking place in another country.

The Act follows the form of the Model Legislation and MP14 by extending mandatory jurisdiction to overcome the jurisdictional gaps of the Tokyo Convention. Where an individual has committed a particular offence on a 'Thai aircraft', their offence will be punishable in Thailand. 'Thai aircraft' is defined as an aircraft registered in Thailand or an aircraft in flight over Thailand where that aircraft is operated by a Thai operator or bears no Chicago Convention state of registration. The inclusion of a reference to the state of the aircraft operators takes account of the increasing trend toward dry leasing aircraft, where the state of registration is not necessarily the same as the state of the operator.

Like the Model Legislation and MP14, the Act also grants jurisdiction to the state of landing. For example, an offender who commits certain offences on board a foreign aircraft can also be tried in Thailand, where Thailand is the first place of landing.

Arguably, the Act goes further still than the Model Legislation and the prospective amendments of MP14 by granting Thailand jurisdiction in cases where the culprit is detained on board an aircraft and that aircraft lands in Thailand or the culprit is subsequently found in Thailand and they do not face extradition.

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## “THE ACT DEPARTS FROM THE TOKYO CONVENTION IN THE WAY IT DEALS WITH JURISDICTION.”

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“THE ACT ADOPTS A VERY BROAD APPROACH TO JURISDICTION WHICH IS CLEARLY DESIGNED TO OVERCOME THE LOOPHOLES OF THE TOKYO CONVENTION...”

Where certain offences occur on the ground in a foreign but international airport, such as the use of weapons to jeopardise the safety of an aircraft or damage to navigation equipment, Thailand may have jurisdiction over the offence where the offender is subsequently discovered in Thailand and they do not face extradition.

The Act adopts a very broad approach to jurisdiction which is clearly designed to overcome the loopholes of the Tokyo Convention to ensure that an unruly passenger will not evade criminal, administrative or other legal sanctions for their misconduct. It will be interesting to see how this extensive jurisdiction operates in practice as the Act operates a slightly different mode of allocating jurisdiction compared to the Tokyo Convention and its successors. Under the Act, the application of a given jurisdiction will depend upon the nature of the offence committed. The Act groups certain offences together so as to suggest that the severity of the offence will govern the way jurisdiction is allocated. In a way, this approach of grading offences and allocating jurisdiction is a more structured forerunner to MP14, which states that the intended state of landing will be given mandatory jurisdiction only where the offence is sufficiently serious, where the safety of the aircraft or of the persons or property therein is jeopardised.

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“CARRIERS WILL NEED TO FULLY AND CAREFULLY UNDERSTAND THE TYPES OF OFFENCES COVERED BY THE ACT...”

Carriers will need to fully and carefully understand the types of offences covered by the Act and the way these offences can complicate the applicable jurisdiction.

#### **MP 2014: More change to come?**

One area in which the Act is silent is the matter of recourse in the event of an offence taking place in flight. MP14 acknowledges that airlines may have a right to seek compensation for costs incurred as a result of unruly passenger behaviour. The Act makes no reference to such a right of compensation which may suggest that the airlines will bear the costs incurred as a result of an unruly passenger incident. Where this involves diversions to disembark an offending passenger, the costs can be substantial.

It remains to be seen whether the Act will be amended to incorporate such a provision (pending the ratification of MP14). A provision expressly enabling carriers to recover these costs would provide certainty, a clear and strong deterrent and provide carriers with some means of public identification of unruly passengers.

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“... WHICH MAY SUGGEST THAT THE AIRLINES WILL BEAR THE COSTS INCURRED AS A RESULT OF AN UNRULY PASSENGER INCIDENT.”

#### **Grounded? How the Thai police have enforced the Act**

At the two primary ports of entry for air passengers, Bangkok’s Don Mueang and Suvarnabhumi airports, the number of charges and prosecutions in the first six months of the operation of the Act relatively minimal, particularly given annual passenger numbers. There do not appear to have been any arrests and no unruly passengers have been deported.

The majority of offenders appear to have been issued with fines and/or warnings. These have been primarily for smoking and the use of mobile devices when prohibited.

The recent incident involving a Swiss national on a flight from Zurich to Bangkok suggests that the deterrent value of the Act is still relatively limited. A more rigorous application of the Act going forward would serve to enhance the deterrence, particularly given the discussion of the incident and the photographs uploaded by other passengers to social media.

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“PREVENTION IS CRITICAL. ARE YOUR POLICIES, PROCEDURES AND TRAINING CURRENT? DO THEY REFLECT THE CHANGES IN THE LEGAL REGIME?”

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“PHOTOGRAPHS AND VIDEO RECORDINGS OF UNRULY BEHAVIOUR ARE LIKELY TO BE UPLOADED AND SHARED BY PASSENGERS. HOW DO AIRLINE PUBLIC AFFAIRS AND SOCIAL MEDIA POLICIES AND PROCEDURES ADDRESS THESE INCIDENTS, PARTICULARLY IF OTHER PASSENGERS UPLOAD FOOTAGE AND ARE CRITICAL OF HOW THE AIRLINE DEALT WITH SUCH AN INCIDENT?”

### Flying Forward: What do airlines need to do?

The Act is clearly designed to build on the Tokyo Convention by bestowing the same powers and immunities. However its divergence on matters of jurisdiction and its drive to delineate a range of offences which may pose a threat to aviation security, place it within a growing body of legislation designed to deal with the deficiencies of the Tokyo Convention so as to better handle what IATA describes as ‘a very real and serious safety issue’. Carriers should review the following in light of the Act’s arrival:

- Prevention is critical. Are your policies, procedures and training current? Do they reflect the changes in the legal regime?
- Photographs and video recordings of unruly behaviour are likely to be uploaded and shared by passengers. How do airline public affairs and social media policies and procedures address these incidents, particularly if other passengers upload footage and are critical of how the airline dealt with such an incident?
- What is the airline policy on damage to seats, IFE and other airline property caused by unruly passengers?
- Training to identify the earliest signs of unruly behaviour including incident motivators and triggers.
- Ensure all crew are familiar with airline standard operating procedures for dealing with unruly behaviour.
- Pilots and crew should be trained to ensure they are aware of the powers and immunities under the Act and airline policies and procedures so as to assess and deal effectively with unruly passenger behaviour, particularly in relation to the service of alcohol and abusive and threatening behaviour.
- Airline policy on the issue of disruptive passengers should be communicated in all relevant airline documentation.
- What is the airline policy on future flights by disruptive passengers? Can an airline deny carriage and ban future travel by disruptive passengers?
- Consider training for all staff on the use and completion of reporting forms.
- Possible post incident response program to address unruly behaviour which falls outside of criminal sanction, including warning and banning letters and loss of frequent flyer status.
- Ensure that there is good communication and a good relationship between the airport police and the Board of Airline Representatives.
- If ground services are outsourced to a ground handler, another airline or other third party, ensure that their staff are familiar with the airline procedures for unruly behaviour and the position under the Act.

## FOR MORE INFORMATION

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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.



**ALAN POLIVNICK**  
Partner  
Bangkok

+66 2 665 7805  
apolivnick@wfw.com



**SUPATTANA SUTHAPORN**  
Associate  
Bangkok

+66 2 665 7822  
ssuthaporn@wfw.com



**RHIAN WOODEND**  
Trainee Solicitor  
London/Bangkok

+44 20 7814 8092  
rwoodend@wfw.com

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