

# International Comparative Legal Guides



## Aviation Law 2021

A practical cross-border insight into aviation law

**Ninth Edition**

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# Malaysia



Saranjit Singh



Dhiya Damia Shukri

**SARANJIT SINGH, Advocates & Solicitors**

## 1 General

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

The Ministry of Transport has an Aviation Division which is responsible for civil aviation affairs including policy formulation, licensing aviation infrastructure, safety and security, and promoting legislation and regulations to regulate aviation in Malaysia.

The principal Regulatory Bodies under the auspices of the Ministry of Transport are as follows:

1. Civil Aviation Authority of Malaysia (CAAM)  
CAAM is the primary technical regulator broadly regulating safety maintenance and security of Malaysian civil aviation as well as its enforcement.
2. Malaysian Aviation Commission  
This entity regulates and oversees the economic and commercial matters relating to civil aviation in Malaysia.
3. Air Accident Investigation Bureau  
The Air Accident Investigation Bureau is an independent investigation entity under the Ministry of Transport and is responsible for the safety investigation of all air accidents and incidents.

The core pieces of legislation regulating the civil aviation industry are as follows:

1. Civil Aviation Act 1969.
2. Carriage By Air Act 1974.
3. Aviation Offences Act 1984.
4. Airport and Aviation Services (Operating Company) Act 1991.
5. International Interest in Mobile Equipment (Aircraft) Act 2006.
6. Malaysian Aviation Commission Act 2015.
7. Civil Aviation Authority of Malaysia Act 2017.

Subsidiary pieces of legislation and regulations related to the primary pieces of legislation have been enacted to facilitate and aid the operations and enforcement of the primary pieces of legislation. These include:

1. Civil Aviation Regulations 2016.
2. Civil Aviation (Aerodrome Operations) Regulation 2016.
3. Civil Aviation (Fees and Charges) Regulation 2016.
4. Malaysian Aviation Consumer Protection Code 2016.
5. Malaysian Aviation Commission (Aviation Services Charges) Regulation 2016.
6. Malaysian Aviation Commission (Code of Conduct) Regulation 2018.
7. Malaysian Aviation Commission (Regulatory Services Charges) Regulations 2018.
8. Ministry of Transport Directives 2016.
9. Civil Aviation (Security) Regulations 2019.

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

Before an air carrier is permitted to operate the carriage of passengers, mail or cargo to or from Malaysia for hire or reward, both scheduled or unscheduled, the air carrier must first obtain the requisite licence/permit and the Air Operating Certificate (AOC).

The Air Services Licence (ASL) for scheduled air services or the Air Services Permit (ASP) for unscheduled air services is to be obtained from the Malaysian Aviation Commission whilst the AOC is issued by CAAM.

The brief steps required to be taken are as follows:

1. The air carrier must make the necessary application for an ASL or ASP, as the case may be, to the Malaysian Aviation Commission using the prescribed forms.  
The air carrier must also make an application to CAAM for the issuance of the AOC to enable it to operate a Malaysian Registered Aircraft for commercial air transport.
2. After an application for an ASL or ASP is made to the Malaysian Aviation Commission, the Malaysian Aviation Commission will first conduct an economic evaluation and if satisfied, it will issue a Conditional Approval to allow the air carrier to apply to CAAM for the AOC.
3. The Malaysian Aviation Commission will assess and evaluate the application and will only issue the ASL or ASP after a valid AOC is issued by CAAM.
4. The application form will necessarily be supported by details including the organisation structure, financial status and projection, air carrier business plan, aircraft, finance and leasing, maintenance, insurance and complaints management.
5. An ASL/ASP application requires a minimum of 90 days to process.
6. The Malaysian Aviation Commission's award of the ASL or ASP would usually be for a period of 10 years.

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

CAAM regulates and administers the safety and security of civil aviation in Malaysia.

This is provided for under the Civil Aviation Authority of Malaysia Act 2017.

The principal pieces of legislation governing and regulating air safety in Malaysia are as follows:

1. Civil Aviation Act 1969  
This Act, *inter alia*, provides for the regulation of civil aviation and gives effect to the Chicago Convention and any Annex to it.

## 2. Civil Aviation Regulations 2018

These regulations, made under the powers conferred by the Civil Aviation Act 1969, regulate matters concerning, *inter alia*, operation and maintenance of aircraft, air traffic control, licensing, operation of aircraft and accident investigation.

## 3. Aviation Offences Act 1984

This Act gives effect to various International Conventions, including the Tokyo Convention 1963, the Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 and the Montreal Convention on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988.

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

Apart from the Civil Aviation Act 1969, there are no separate pieces of legislation or regulations which regulate air safety for commercial, cargo and private carriers.

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

Air charterers are regulated under the Civil Aviation Act 1969 and Civil Aviation Regulations 2016, and the Aeronautical Information Circulars issued by CAAM from time to time.

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

For scheduled services, limitations could be in the bilateral/multilateral service agreements and approvals by CAAM and the Malaysian Aviation Commission.

For unscheduled services, foreign carriers are not permitted to carry out selected operations including:

- (a) Uplifting cargo and/or mail from Malaysia to any part beyond Malaysia unless they are able to provide a no-obligation letter from Malaysian ASL or ASP (cargo) operators.
- (b) Uplifting any pax, cargo and/or mail within parts of Malaysia.
- (c) Carry passengers, cargo and/or mail from Malaysia that differs from the pax/cargo manifest.
- (d) Uplifting any pax/cargo and/or mail on the positioning sector.

### 1.7 Are airports state or privately owned?

Thirty nine of the 42 airports in Malaysia are owned by the state-controlled entity known as Malaysia Airports Holdings Berhad. The other three are owned by private entities.

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

There are numerous charges and requirements imposed by airports which are regulated by the Malaysian Aviation Commission. These requirements and charges include obtaining the requisite Foreign AOC, slot allocation, loading charges, passenger service charges (PSCs), parking charges and security charges.

Airport requirements and charges are also found in Malaysia Airports Holdings Berhad's Conditions of Use of Designated Airports.

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

The principal regulatory requirements applicable to air accidents are found in the Civil Aviation Regulations 2016 and the Air Accident Investigation Bureau and Procedure Manual.

Air accident investigation is regulated under Part XXVI of the Civil Aviation Regulations 2016, which adopts and gives effect to Annex 13 to the Chicago Convention which relates to Aircraft Accident and Incident Investigation.

Under the Civil Aviation Regulations 2016 and the Air Accident Investigation Bureau, the Air Accident Investigation Bureau Policy and Procedural Manual as well as the International Civil Aviation Organization (ICAO) Manual of Aircraft Accident and Incident Investigation provide the reporting procedure and investigation guidance in the case of air accidents.

The Pilot in command or the owner/operator of the aircraft is responsible for reporting an accident/incident. The Air Accident Investigation Bureau Reporting Procedure is *via* its Public Notification Prescribed Form, which needs to be filled and lodged with the Ministry of Transport.

The Ministry of Transport will then appoint investigators, and among them an investigator-in-charge, to conduct the investigation of the incident. The investigation is conducted in accordance with Annex 13 of the Chicago Convention 1944.

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

The recent case of *Malaysia Airports (Sepang) Sdn Bhd v AirAsia X Bhd* [2020] 11 MLJ 709 before the High Court of Kuala Lumpur concerns Malaysia Airports' claim for an outstanding debt of PSCs against AirAsia. AirAsia's challenge against the PSC rates that were imposed were held by the High Court to be a dispute against the statutory decision of the Malaysian Aviation Commission in fixing the rates of the PSC and not considered a dispute between the two aviation service providers. The Court had allowed the claim for the outstanding debt by Malaysia Airports.

## 2 Aircraft Trading, Finance and Leasing

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

No, the registration of ownership in the Aircraft Register that is kept by the Civil Authority of Malaysia is only a non-conclusive, *prima facie* evidence of ownership and the registration is a procedural requirement before an aircraft can be legally operated in the country. Under Notice 7101 issued by the Civil Authority of Malaysia in relation to application for registration of aircraft, evidence or proof of ownership is the bill of sale or other evidence of ownership as accepted by the Director-General of the Civil Authority of Malaysia.

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

The Civil Authority of Malaysia keeps a register of aircraft mortgages. The entry of the aircraft mortgage into the Aircraft Register is made by way of form submission to the Civil Authority of Malaysia by the mortgagor and signed by the mortgagee in

duplicate. The fee for such an entry is MYR2,000. Removal of the mortgage in the Aircraft Register would also need to be made by way of form submission. Pursuant to the International Interest in Mobile Equipment (Aircraft) Act 2006, an aircraft mortgage already previously registered in the international registry is recognised under Malaysian law without there being a requirement for re-registration.

There is no register for aircraft charges kept by the Civil Authority of Malaysia, as charges do not constitute *in rem* rights over the aircraft and cannot be registered.

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

The main regulatory requirements as regards to aircraft operation would be the following:

- If the aircraft is owned by a foreign entity, the aircraft will first need to be leased to a *qualified person* under the Civil Aviation Act 1969 before the ownership of the aircraft can be registered in the Aircraft Register. An aircraft can only be operated upon registration of the aircraft.
- There is no requirement under Malaysian law to register an aircraft lease or there being a separate registration of leases in the Aircraft Register. If an aircraft is leased, part of the submission to the Civil Authority of Malaysia would be the leasing documents and this lease would be put in as a note or remark in the Aircraft Register.
- As Malaysia has ratified the Cape Town Convention 2001 under the International Interest in Mobile Equipment (Aircraft) Act 2006, a lessor who has registered its interest in the international registry has a right to detain an aircraft upon default payment of the lease without there needing to be any court enforcement.

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

A separate title or ownership rights of aircraft engines distinct from the ownership of an aircraft are recognised by Malaysian law under the International Interest in Mobile Equipment (Aircraft) Act 2006, when such ownership/security interests in aircraft engines have been registered in the international registry.

However, the Civil Authority of Malaysia does not keep a registry of ownership/security interests in aircraft engines and registration of such ownership/security interests is not available in Malaysia.

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

There are several categories of tax imposed in Malaysia. For non-domestic sale and purchase of aircraft, particular aircraft types or operations, the following are the relevant tax regimes:

- Sales & Services Tax (SST)/VAT (Under the Sales Tax Act 2018 & Services Tax Act 2018)  
SST would not be imposed for the sale and purchase of

aircraft for both domestic and non-domestic purchasers and sellers. For certain sales and purchases of goods relating to the operations of the aircraft, non-domestic airlines can enjoy exemptions from sales tax if the sales and purchases fall under Schedule A of the Sales Tax (Goods Exempted from Tax) Order 2018. There is no service tax applicable for the operations of non-domestic air transport services.

- Stamp Duty (Under the Stamp Act 1949)

Stamp duty can be imposed for the sale and purchase of aircraft by non-domestic purchasers and sellers if the execution of the transfer instrument was made within Malaysian jurisdiction or if the aircraft to be transferred is within Malaysian jurisdiction. The stamp duty is calculated *ad valorem*, whereby the duty imposed is based on the purchase price or market value of the aircraft, whichever is higher, at a rate provided for under the First Schedule of the Stamp Act 1949.

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

Yes, Malaysia is a signatory to the Montreal Convention 1999, the Geneva Convention 1949, the Cape Town Convention 2001 and the Chicago Convention 1944.

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

The Conventions have been applied and integrated into Malaysian law following the ratification of the Conventions through the passing of the Acts detailed below by the Malaysian Parliament:

- Montreal Convention 1999 – Carriage by Air Act 1974  
The Malaysian courts, in applying the provisions of the Montreal Convention 1999, have affirmed the principles in international jurisprudence on the interpretation and construction of the Convention.
- Geneva Convention 1949 – Geneva Conventions Act 1962  
It is believed that Malaysia would follow and affirm international jurisprudence on the interpretation and construction of the Convention.
- Cape Town Convention 2001 – International Interest in Mobile Equipment (Aircraft) Act 2006  
The applicability of the Cape Town Convention 2001 in Malaysia is made with some reservations, whereby Malaysia declares that the provisions of the Convention shall not affect its rights or any entity thereof, or any inter-governmental organisation in which Malaysia is a member, or private provider of public services in Malaysia, to arrest or detain an aircraft under Malaysian laws for outstanding payments due to the Government of Malaysia.
- Chicago Convention 1944 – Civil Aviation Act 1969 (as amended by the Civil Aviation (Amendment) Act 2017)  
Part II of the Civil Aviation Act 1969 (as amended by the Civil Aviation (Amendment) Act 2017) gives effect to the provisions of the Chicago Convention 1944. However, the Malaysian Minister of Transport is conferred with the authority to make additional regulations relating to the administration and regulatory affairs of the civil aviation industry without prejudice to the provisions of the Chicago Convention 1944 and the Civil Aviation Act 1969 (as amended by the Civil Aviation (Amendment) Act 2017).

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

Malaysia is a signatory to over 70 Double Tax Treaties/Agreements with other countries, and is in the midst of negotiations with 25 more countries. These Double Tax Treaties/Agreements generally reduce the payable rates of withholding taxes for asset leasing and reduced tax for profits gained through the disposal of property.

In the Federal Territory of Labuan, Malaysia, a separate taxation regime is applicable under the Labuan Business Activity Tax Act 1990 and the Labuan Business Activity Tax (Requirement for Labuan Business Activity) Regulations 2018 for businesses registered in Labuan under the Labuan Companies Act 1990. Some of the taxation benefits under the Labuan Business Activity Tax (Requirement for Labuan Business Activity) Regulations 2018 are as follows:

- Withholding tax is not applicable for rentals, fees, interests or royalties paid to a lessor registered under the Labuan Companies Act 1990 by a Malaysian company.
- Tax deductions are available for lease rental paid by a Malaysian company to a Labuan company.
- No tax is imposed for capital gains, wealth, stamp duty or import duty.

There is no specific tax provision on the disposal of aircraft.

### 3 Litigation and Dispute Resolution

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

The rights of a creditor to detain an aircraft or create a lien over the aircraft due to unpaid debts can be found in both aviation-specific legislation/regulation and also under common law.

1. Civil Aviation Regulations 2016 (read together with the Civil Aviation (Amendment) Regulations 2018)  
Part XXV of the Civil Aviation Regulations 2016 provides the right of the detention of aircraft by the Director-General of CAAM if there are payment defaults on any fees or charges imposed by CAAM. Apart from detention of aircraft, the Director-General of CAAM also has the authority to deregister or sell an aircraft with leave of court if the outstanding amount remains unpaid more than six months after the detention.
2. International Interest in Mobile Equipment (Aircraft) Act 2006  
Malaysia ratified the Convention on International Interests on Mobile Equipment (Cape Town Convention 2001) under the First Schedule of the International Interest in Mobile Equipment (Aircraft) Act 2006. Article 39 of the Cape Town Convention 2001 provides the following non-consensual rights having priority without the need of registration which allows for the lien of aircraft:
  - Liens in favour of airline employees for unpaid wages.
  - Liens or other rights of an authority of Malaysia relating to taxes or other unpaid charges connected to the use of the aircraft, and owed by the owner or operator of the aircraft.
  - Liens in favour of repairers of the aircraft in their possession to the extent of service or services performed on and value added to that aircraft object.

Malaysia has made a further declaration that the Cape Town Convention 2001 shall not affect its rights or any entity thereof, or any intergovernmental organisation in which Malaysia is a member, or private provider of public services in Malaysia, to arrest or detain an aircraft under Malaysian laws for outstanding payments due to the Government of Malaysia.

3. Income Tax Act 1967  
Under Section 105 of the Income Tax Act 1967, the Director-General of the Malaysian Inland Revenue Board, with the approval of the Ministry of Finance, has the authority to direct customs authorities to refuse clearance of any aircraft wholly or partly owned or chartered by persons whose income tax remains due.
4. Sale of Goods Act 1957  
Chapter V of the Sale of Goods Act provides a seller the right to retain any goods, which would include aircraft, until payment for the purchase has been made.
5. Specific Relief Act 1950  
An aircraft can be injuncted under Part III of the Specific Relief Act 1950 in order to restrain any disposal of the aircraft pending the execution or enforcement of a judgment debt obtained by a creditor.
6. Rules of Court 2012  
Writ of Seizure and Sale is a mode of enforcement/execution that is available to a creditor whereby an aircraft, as a moveable property, can be seized and sold by way of an auction to satisfy a judgment debt.

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

With the ratification of the Cape Town Convention 2001 under the First Schedule of the International Interest in Mobile Equipment (Aircraft) Act 2006, a self-help remedy is available to a lessor/financier of an aircraft, without a prior court order being obtained, mandating or authorising the repossession of the aircraft. This self-help remedy, however, requires the consent of the debtor/aircraft owner before it can be exercised.

Apart from the provisions under the Cape Town Convention 2001, a self-help remedy is not available to a lessor/financier in enforcing its rights under whatever lease or finance agreement, as such enforcement is subject to an action being brought in the Malaysian courts.

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

The Malaysian court structure is comprised of: the Federal Court – being the apex court; the intermediary Court of Appeal; two High Courts of coordinate jurisdiction – one for West Malaysia (the High Court of Malaya) and one for East Malaysia (the High Court of Sabah and Sarawak); and the subordinate courts (the Sessions and Magistrates' Courts).

For civil actions, the jurisdiction of the courts is based on monetary jurisdiction whereby the monetary jurisdiction of the Magistrates and Sessions' courts is limited to MYR100,000 and MYR1 million, respectively. There is no limit on the jurisdiction of the High Courts as far as the monetary amount and

subject matter are concerned. For criminal actions, the jurisdiction of the courts is dependent on the penal offence and punishment. The Magistrates' Courts have jurisdiction to hear criminal offences with fines and imprisonment of less than MYR10,000 and five years' imprisonment, respectively, whilst the Sessions Court can hear all criminal offences where the offence is not subject to the death penalty. Where the offence is punishable by death, the High Court has jurisdiction.

Both civil and criminal actions may be initiated in the Magistrates' Court, the Sessions Court or the High Court wherein appeals would be heard in the High Court or Court of Appeal (as the case may be) and finally by the Federal Court upon the granting of leave to appeal if the threshold requirements for leave are met.

There are no special courts that specifically deal with aviation disputes.

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

The Malaysian Rules of Court 2012 provide the requirement and procedural aspects of service of court proceedings and distinguish the requirements and procedures for service on both domestic airlines/parties and non-domestic airlines/parties.

For service of court proceedings to domestic airlines/parties, the Malaysian Rules of Court 2012 provide that service is to be made either by way of personal service or through prepaid A.R. registered post to the last known address, if it is an individual, or to the registered address, if it is a company.

For service of court proceedings to non-domestic airlines/parties, the first essential requirement is to determine if the non-domestic airline/party has a branch office in Malaysia. If there exists a branch office within Malaysian jurisdiction, service of court proceedings would be similar to that of a domestic airline/party. In a situation where there exists no Malaysian branch office, the service of court proceedings outside of Malaysian jurisdiction requires leave of court, and subject to the following requirements:

1. The cause of action, subject matter or parties to the suit is/are related and connected to Malaysia in any way.
2. Enforcement of an arbitral award/judgment subject to the Reciprocal Enforcement of Judgments Act 1958.

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

The courts or arbitral tribunals in Malaysia are vested with the authority to make a myriad of common law and civil remedies that are provided under the Rules of Court 2012, Subordinate Courts Act 1948, Specific Relief Act 1950 and the Arbitration Act 2005.

- Interim orders such as orders for interim payment and interim injunctions to preserve the subject matter of a suit.
- Final judgments, such as judgments made through summary judgment process, arbitration or full trial, the remedies of which can range from arbitral awards, damages, declaratory reliefs, specific performance and injunction.

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

Under the Malaysian court structure, rights of appeal exist and are dependent on the level of court the decision was first made, i.e. the original jurisdiction of the subject matter.

#### Magistrates' Court

For matters which the Magistrates' Court had original jurisdiction, an appeal can be made to the High Court. A second and final right to appeal can be made to the Court of Appeal, but this right can only be exercised after leave is granted by the Court of Appeal due to the threshold monetary limit of MYR250,000 for subject matters in dispute.

#### Sessions Court

For matters which the Sessions Court had original jurisdiction, the first appeal is to be made to the High Court. A second and final right to appeal can be made to the Court of Appeal, but this right can only be exercised without leave first being obtained from the Court of Appeal if the threshold monetary limit of MYR250,000 has been satisfied.

#### High Court

For matters which the High Court had original jurisdiction, an appeal can be made to the Court of Appeal. For the second and final right to appeal to the Federal Court, the subject matter appeal must satisfy the threshold appeal requirements under Section 96 of the Courts of Judicature Act 1964 before leave to appeal is granted by the Federal Court.

Under the Malaysian Arbitration Act 2005, there is no right of appeal for an aggrieved party against a decision of an arbitral tribunal. However, a limited right does exist for parties to set aside the arbitral award by way of application to the High Court, and only on specific appeal grounds as provided for under Section 37 of the Arbitration Act 2005.

### 3.7 What rights exist generally in law in relation to unforeseen events which might enable a party to an agreement to suspend or even terminate contractual obligations (in particular payment) to its contract counterparties due to *force majeure* or frustration or any similar doctrine or concept?

#### Contractual Terms & Clauses

There are several boilerplate clauses that usually exist in a commercial contract between parties that can be relied on for the suspension or termination of parties' contractual obligations. One such clause is the *force majeure* clause, which is a contractual provision that anticipates non-performance of the contract due to a specific event occurring that is beyond the parties' control. Though a *force majeure* clause, on the face of it, allow parties to be free of their contractual obligations once it has been triggered, there are, however, several factors that must first be established before it is used to terminate parties' contractual obligations:

- The trigger event that caused the non-performance of the contract is specifically listed as a *force majeure* event. For example, if a party wishes to rely on the COVID-19 pandemic as a *force majeure* event, the word "epidemic" or "health pandemic" should be included as a trigger event.
- The trigger event prevented, hindered, stopped or delayed the performance of the contract.
- Reasonable steps have been taken to avoid or mitigate the event and all anticipated consequences.

Generally, for leasing agreements, a standard "Net Lease" or a "Hell or Highwater" clause is included as part of a leasing agreement. A Net Lease obliges a lessee to continue with lease payments unconditionally throughout the agreed leasing period, irrespective of any event or circumstances. There are limited exceptions to the Net Lease clause and any suspension of payment relies on the negotiations of the parties.

### Contracts Act 1950

Under Section 57(2) of the Contracts Act 1950, an agreement to do something which later becomes impossible or unlawful to do can be deemed as frustrated and become void. The following are the requirements that must first be met before reliance can be made on Section 57(2):

- The event relied on that rendered the contract impossible or illegal was not contemplated between the parties and is not provided for under the contract.
- The event relied on was not due to the actions or responsibility of the party.
- The event relied on has now rendered the contractual obligations radically different than what was initially undertaken.

## 4 Commercial and Regulatory

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

Antitrust law in Malaysia is governed by the Competition Act 2010, which prohibits anti-competitive agreements and conduct that amounts to abuse of a dominant position. Merger control, however, was not provided for under the Competition Act 2010.

Part IV of the Malaysian Aviation Commission Act 2015 generally adopts and incorporates the antitrust provision under the Competition Act 2010 and additionally provides for merger control rules.

Section 49 of the Malaysian Aviation Commission Act 2015 prohibits anti-competitive agreements which have the objective or effect of lessening, preventing or distorting competitors in any aviation service market.

Merger control provisions are found in Section 54 of the Malaysian Aviation Commission Act 2015, which prohibits mergers resulting (or may be expected to result) in a substantive lessening of competitors in any aviation service market.

The Malaysian Aviation Commission has also published the Guidelines on Substantive Assessment of Mergers and the Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger to regulate such mergers.

In essence, a party involved in a merger or anticipated merger is not compelled to notify the Commission of the merger. The Malaysian Aviation Commission notification procedures are voluntary.

The notification provisions are set out in Sections 55 and 56 of the Malaysian Aviation Commission Act 2015 and the Guidelines on Substantive Assessment of Mergers and the Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger.

If a merger or anticipated merger is not notified to the Malaysian Aviation Commission and such merger raises competition concerns, the Malaysian Aviation Commission is empowered under Section 83 of the Malaysian Aviation Commission Act 2015 to investigate to determine if the prohibition in Section 54 of the Malaysian Aviation Commission Act 2015 is infringed.

Under the Notification Guidelines, the Malaysian Aviation Commission has general powers to investigate anticipated mergers and mergers which they have reason to suspect has or may result in a substantial lessening of competition (SLC) in any aviation service market whether or not this falls within the threshold set under the pertinent Guidelines.

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

One of the Guidelines issued pursuant to Section 65 of the

Malaysian Aviation Commission Act 2015 is the Guidelines of Aviation Source Market Definition. Under these Guidelines, the "relevant aviation source market" is identified and defined by adopting and applying the hypothetical Monopolist Test to determine the service market and the geographical market.

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

The Malaysian Aviation Commission Act 2015 provides for a notification system whereby any party involved in a merger either notifies the Commission or applies to seek its clearance. This is provided under Sections 55 and 56 of the Malaysian Aviation Commission Act 2015.

The Guidelines on Notification on Application Procedure are issued by the Malaysian Aviation Commission under Section 65 of the Malaysian Aviation Commission Act 2015 and it also regulates the notification process.

As for antitrust immunity, or relief of liability where the merger agreement is prohibited under Section 49 of the Malaysian Aviation Commission Act 2015, such relief or immunity is prescribed by Section 50 of the Malaysian Aviation Commission Act 2015.

The relief to liabilities and immunities may be granted through:

- (a) An individual exemption under Section 51.
- (b) Block exemption under Section 52.
- (c) Invoking Section 50 as a defence to infringement proceedings if:
  - (i) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
  - (ii) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
  - (iii) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
  - (iv) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the aviation services.

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

As indicated earlier, the Competition Act 2010 provides no statutory rules on merger control, particularly those that will impact or unwind the merger agreement.

However, merger activities in two industries have statutory merger control provisions, namely: the aviation sector (provided by the Malaysian Aviation Commission Act 2015); and the Communication and Multimedia sector (provided by the Communication and Multimedia Act 1998).

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

The notification regime under the Malaysian Aviation Commission Act 2015 for a merger or anticipated merger is voluntary. The parties to the merger would self-assess to determine if the merger would result in SLC.

Under the Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger, the notification and application on an anticipated merger or merger is to be made to the Malaysian Aviation Commission together with

information and supporting documents detailed in the notification and application form. Some of the details required are:

- Details of the parties to the merger.
- Details of the merger.
- Details of the relevant aviation service market.
- Analysis of the competitive effects of the merger.

Notification to the Malaysian Aviation Commission on anticipated mergers can be made when parties to the merger have a *bona fide* intention to proceed with the anticipated merger, the details of the anticipated merger are available and news of the anticipated merger has been, or may be, made public.

For mergers that have already been made, notification can be made by parties to the merger at any time but they are encouraged to make the notification as soon as possible after the merger has been completed. Although there are no specific sanctions under the Malaysian Aviation Commission Act 2015, if merger parties fail to notify and file the merger, the Malaysian Aviation Commission has the right to impose a fine if, in their final decision, they find that there is an intentional or negligent infringement.

Currently, there are no charges or fees imposed for filing of a notification of an anticipated merger or merger to the Malaysian Aviation Commission. The time frame for any clearance of mergers by the Malaysian Aviation Commission is on a case-by-case basis.

Although the merger regime under the Malaysian Aviation Commission Act 2015 is non-suspensory and parties to a merger can choose to proceed on the merger before clearance is given by the Malaysian Aviation Commission, the Malaysian Aviation Commission nevertheless has the power to unwind mergers and impose fines if the merger is found to have infringed the relevant Act.

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

With the advent of the COVID-19 pandemic, the Malaysian government has issued several financial aid/package programmes to assist domestic air operators and airports.

##### Pribatin Rakyat Economic Stimulus Package

The *Pribatin Rakyat* Economic Stimulus Package provides electricity bill discounts of 15% for six months for industries most affected by the impact of COVID-19, domestic airlines offices being one of them.

The *Pribatin Rakyat* Economic Stimulus Package also provides six months' rebates for airport premises, rental, leasing and parking charges.

##### Wage Subsidy Programme

The Malaysian government had implemented a MYR13.8 billion Wage Subsidy Programme which subsidises an employee's salary up to MYR1,200 for employees who earn less than MYR4,000 per month. This Wage Subsidy Programme is available to domestic air operators and airports.

##### Network Reconnecting Programme

Malaysia Airports Holdings Berhad, a state-controlled entity, will implement a Network Reconnecting Programme as an incentive for existing airlines operating in any of the airports in Malaysia operated by Malaysia Airports Holdings Berhad from 1 July 2021 to 31 December 2021. Domestic airlines will receive a 6% discount on gazetted PSC for international services, whilst non-domestic airlines will receive a 50% discount on landing charges.

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

Through the Rural Air Services agreement entered between the Malaysian government and MASWings Sdn Bhd, a subsidiary of Malaysia Airlines Berhad, air services are operated and carried out for particular routes in West Malaysia. The costs of the flight operations for these routes are fully subsidised by the Malaysian government in the form of subsidies and aircraft lease rental.

As the Rural Air Services provided by MASWings are non-economic, national services provided to the rural and remote communities in West Malaysia, these subsidies are privately awarded by the Malaysian government and are not open for any public application.

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

The main regulatory instrument for the acquisition, retention and use of personal data is the Personal Data Protection Act 2010. The Personal Data Protection Act 2010 governs the collection, retention and use of personal data and it applies to entities established in Malaysia, and entities that are not established in Malaysia but process relevant personal data in Malaysia.

There is no specific provision under the Personal Data Protection Act 2010 concerning retention of passengers' data by both airlines and airports and as such, the general provisions concerning personal information of individuals would apply. The rights available to an individual under the Personal Data Protection Act 2010 are, *inter alia*, as follows:

- The right to access personal data stored.
- The right to correct misinformation of personal data stored.
- The right to withdraw consent or limit the processing or retention of personal data.

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

There is no specific provision under the Personal Data Protection Act 2010 on obligations of airlines in the event of data loss and the general provisions under the Personal Data Protection Act 2010 would apply to airlines.

The Personal Data Protection Act 2010 provides that a Data User (any person which processes, has control over, or authorises the processing of any personal data) is to take reasonable steps to ensure, *inter alia*, that the data processed is protected from loss. Failure of a Data User to maintain sufficient technical and organisational security in the processing of the data resulting in data loss would result in fines and imprisonment.

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

Intellectual property and data in Malaysia are governed by the following statutes:

- Trade Marks Act 2019.
- Patents Act 1983.
- Industrial Designs Act 1996.

- Copyright Act 1987.
- Geographical Indications Act 2000.
- Layout Designs of Integrated Circuits Act 2000.

With the ratification of the Madrid Protocol by Malaysia under the Trade Marks Act 2019, a trademark owner who has filed an application under the Madrid System would enjoy trademark protection in Malaysia and in other jurisdictions which have similarly acceded to the Madrid Protocol.

Apart from the Madrid System for the protection of trademarks, the Intellectual Property Corporation of Malaysia provides protection for patents, industrial designs and geographical indications. For the protection of copyright and layout designs, these protections are automatic under the Copyright Act 1987 and Layout Designs of Integrated Circuits Act 2000, respectively, and no formal application is required to be made to the Intellectual Property Corporation of Malaysia.

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

The sole consumer protection law specific to the commercial airline industry, which includes boarding rights and cancellation of flights, is the Malaysian Aviation Commission Act 2015 and its accompanying Malaysian Aviation Consumer Protection Code 2016, which has been amended by the Malaysian Aviation Consumer Protection (Amendment) Code 2019.

For denial of boarding, a passenger's rights can be found in paragraph 11 and the First Schedule of the Malaysian Aviation Consumer Protection Code 2016; the rights accorded are as follows:

- The right to meals, limited telephone calls and internet access.
- The right to hotel accommodation.
- The right to transport between the airport and accommodation.
- The right to choose between reimbursement/refund of the ticket price or re-routing of the flight.

For cancellation of flights, paragraph 12 and the First Schedule of the Malaysian Aviation Consumer Protection Code 2016 provide a passenger the right to choose between reimbursement/refund of the ticket price or re-routing of the flight.

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

For late arrival and departure of flights, the Malaysian Aviation Commission has the right to impose a financial penalty for non-compliance with paragraph 12 of the Malaysian Aviation Consumer Protection Code 2016, which relates to flight delays and cancellation. The penalty imposed would be a fine not exceeding MYR200,000 for the first non-compliance, and an amount 10 times the financial penalty imposed for the first non-compliance for subsequent non-compliance.

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

Airport authorities in Malaysia are governed by the Civil Aviation Act 1969 and the Civil Aviation (Aerodrome Operations) Regulations 2016. The Civil Aviation (Aerodrome Operations) Regulations 2016 detail the obligations and responsibilities of airport authorities in the establishment, maintenance and operations of aerodromes. This includes adherence to Annex 14 of the Chicago Convention on the technical standards and specifications relating to the establishment of an aerodrome,

whilst Part IV of the Civil Aviation (Aerodrome Operations) Regulations 2016 details the obligations of airport authorities in the standard of operations and maintenance of airports.

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

The general consumer protection legislation in Malaysia is the Consumer Protection Act 1999 of the Ministry of Domestic Trade and Consumer Affairs. However, with the coming into force of the Malaysian Aviation Consumer Protection Code 2016, as amended by the Malaysian Aviation Consumer Protection (Amendment) Code 2019, passengers can directly lodge complaints relating to an airport operator's services to the Malaysian Aviation Commission.

Any complaints relating to aviation services will need to be made to the Malaysian Aviation Commission.

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

Malaysian air carriers use the following GDS platforms:

- Sabre Corporation.
- Amadeus/Navitaire.
- Travelport/Worldspan.

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

There are no specific ownership requirements for GDSs to operate in Malaysia. The general provisions of the Companies Commission of Malaysia Act 2001 and Companies Act 2016 would apply.

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

Vertical integration between air operators and airports is permitted in a form of common ownership. Some notable examples would be Malaysian Aviation Group and AirAsia Group which own several aviation-related enterprises such as air transportation services, ground and engineering services, aircraft leasing services, and talent development services.

Though vertical integration is permitted and is commonly practised between air operators and airports, certain conditions precedent are applicable to it. (See question 4.1 above.)

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

Under CAAM, there are two types of certificate available to airline operators: an AOC; and a Foreign AOC. For domestic airlines, the AOC is required before a further ASL can be issued by the Malaysian Aviation Commission. For foreign/non-domestic airlines, a Foreign AOC needs to be applied for.

However, for the commercial carriage of passengers, mail or cargo which include scheduled journeys involving a place in Malaysia, an ASL is required before such services can commence. An ASL can only be made by a Malaysian entity/person or a person/entity under the direct or indirect control of a Malaysian.

## 5 In Future

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

### National Transport Policy (2019–2030)

The Malaysia National Transport Policy was completed and launched on 17 October 2019 and covers a range of policies intended to increase and enhance the transport industry through economic competitiveness, inclusivity and accessibility to the public, and balances these aims with reducing the negative impact of the transport industry on the environment for the next 10 years.

The policies detailed in the National Transport Policy serve as a guide to the relevant ministries, agencies, state governments and local authorities to develop and implement the relevant laws, regulations and rules that achieve a common goal. Some policies related to the aviation industry are as follows:

- Ensure safety and security for aviation users is in accordance with international standards such as the Standards and Recommended Practices (**SARPS**) that have been set by the ICAO.

- Create a common database for all transport-related data in order to develop an integrated and market-driven aviation expansion plan.
- Implement a Global Market-Based Measure (**GMBM**) scheme in the form of the Carbon Offsetting and Reduction Scheme for International Aviation (**CORSIA**) to address any annual increase in total CO<sub>2</sub> emissions from international civil aviation.

### Malaysian Aviation Commission Economic Master Plan

The Malaysian Aviation Commission has proposed to the Ministry of Transport an Economic Master Plan on the development of an economically sustainable civil aviation sector. The proposal was made in line with the areas of the aviation sector that fall within the purview of the Malaysian Aviation Commission, which are passenger and cargo air transport, airport operations and ground handling services.

The Economic Master Plan provides several recommendations to the Malaysian Aviation Commission, the main strategic points, which are, *inter alia*, as follows:

- Reducing governmental interference in commercial decision-making in the aviation sector.
- Greater commercialisation of the airport industry.
- Enforcing a sound and updated aviation-related competition law, i.e. applying competition law based on fair and free competition principles, and revising the Competition-related Guidelines.



**Saranjit Singh** was called to the Malaysian Bar in 1993 and is the Founder and Managing Partner of SARANJIT SINGH, Advocates & Solicitors. Saranjit has over 25 years of experience in the aviation sector acting for airlines and insurers on a wide range of contentious matters involving major aviation accidents including both MH370 and MH17, commercial contract and aviation product-liability, carriage of cargo, passenger claims and ground handling contracts and disputes, and other legal regulatory issues concerning the aviation and logistics industry. Saranjit also advises several domestic and international aviation entities on conditions of carriage, risk management, human resources contracts and bonds and regulatory matters concerning the aviation industry, and has appeared at all levels and tiers of the Malaysian courts.

**SARANJIT SINGH, Advocates & Solicitors**

Suite 51-3, Block D, Jaya One  
No. 72A, Jalan Universiti  
46200, Petaling Jaya  
Selangor  
Malaysia

Tel: +603 7957 9959  
Fax: +603 7957 9969  
Email: [saranjit@saranjit.com](mailto:saranjit@saranjit.com)  
URL: [www.saranjit.com](http://www.saranjit.com)



**Dhiya Damia Shukri** was called to the Malaysian Bar in 2015 and is a Junior Partner of SARANJIT SINGH, Advocates & Solicitors. Throughout her practice, Dhiya has assisted her senior colleagues in various trials and appeals at all levels of court and has conducted hearings and trials at the High Court, and appeals at the Court of Appeal. Dhiya jointly looks after and handles the aviation portfolio of the firm including matters concerning aviation accidents involving MH370 and MH17, aviation insurance claims and disputes on the carriage of passengers and cargo for both domestic and international airlines.

Dhiya's portfolio also includes overseeing the risk management and claims involving human capital agreements and bonds, including dispute resolution in industrial relations, and has provided various clients in the aviation industry advice on regulatory matters concerning MAVCOM, International Conventions, domestic regulations relating to civil aviation, conditions of carriage and e-commerce laws.

**SARANJIT SINGH, Advocates & Solicitors**

Suite 51-3, Block D, Jaya One  
No. 72A, Jalan Universiti  
46200, Petaling Jaya  
Selangor  
Malaysia

Tel: +603 7957 9959  
Fax: +603 7957 9969  
Email: [dhiya@saranjit.com](mailto:dhiya@saranjit.com)  
URL: [www.saranjit.com](http://www.saranjit.com)

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The Firm has been involved in multiple domestic and international aviation accidents & insurance litigation, contentious third-party, passenger and cargo claims against various airlines, contractual disputes involving maintenance agreements and aircraft leases, and also provides corporate advice for non-contentious matters involving aviation commercial

agreements, risk management, conditions of carriage, civil aviation regulations and Conventions, and their interplay with local laws and enforcement, and other aviation-related matters.

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