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# THE AVIATION LAW REVIEW

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THIRD EDITION

EDITOR  
SEAN GATES

LAW BUSINESS RESEARCH

# THE AVIATION LAW REVIEW

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Third Edition

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## EDITOR'S PREFACE

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*The Aviation Law Review* has become a compulsory purchase for the libraries of those with commercial, legal or academic interest in international aviation law, contributing a unique perspective on these subjects from experts in many countries around the world. In this edition there are several helpful contributions on the approach of different jurisdictions to aircraft registration, made easier now in the United Kingdom following its recent accession to the Cape Town Convention. There are also highly insightful contributions from a number of new jurisdictions, including Colombia, the Isle of Man, the Cayman Islands and Singapore, further extending the reach of the *Review*.

This might be regarded as the year of the drone! With a number of alternative acronyms proposed by a variety of organisations, the remotely piloted unmanned aerial vehicle (UAV) is clearly on its way to becoming ubiquitous. Having been developed primarily for military purposes, it seems likely that its commercial uses will expand from aerial photography to aerial delivery courtesy of Amazon and beyond. While regulatory developments are continuing apace with these vehicles, not all of these are aligned. It is to be hoped that an international body representing the needs of operators will be formed so as to avoid a patchwork of conflict in the regulatory arena. No adequate resolution has yet been found to the vexed issue of the appropriate minimum insurance requirement for UAVs; progress in this matter will be an essential requirement given their potential for damage. The difficulties here include establishing ownership and the viability of small businesses faced with substantial, though arguably realistic, insurance premium demands.

There have been a number of significant decisions in different courts around the world in the preceding year and there are two startling examples of this in relation to airlines' liability to passengers. In the case of *Casey v. Pel Air* in the Supreme Court of New South Wales, the Court held that post-traumatic stress disorder (PTSD) is compensable under the Montreal Convention as bodily injury. The facts of the case are truly appalling and underline the truism that bad facts will never make good law. One has to wonder why, given that all other claims by the passenger were agreed, it was decided that this element of the claim should be resisted. This is an alarming development for carriers and

their insurers, who can expect to receive claims of this sort in Australia every time there is a hard landing or mid-air turbulence. Other jurisdictions will take note of the judicial view that PTSD is evidenced by physiological changes in the brain, opening the issue up for argument in every country where courts have hitherto found in favour of carriers. This was a hard-fought issue at the drafting stages of the Montreal Convention 1999 and the victories won there would seem to have been lost in this decision.

There seems little doubt there is a tide in the affairs of toxic cabin claims that is rising so far as employees are concerned, as represented in litigation in various jurisdictions around the world. The few attempts by passengers to launch such claims have foundered on the difficulty of establishing a probable link between the event and the illness. The current litigation can be expected to fortify passengers with illnesses that might be said to flow from exposure to the elements of 'toxic air', and will encourage plaintiff lawyers to redouble their efforts in pursuit of claims.

The Germanwings accident has electrified debate in a number of areas concerning the legal regulation of aviation. In a recent briefing by the French prosecutor, consideration is clearly being given to the possibility of criminal prosecutions arising out of the accident and the circumstances in which the co-pilot was allowed to continue to fly notwithstanding his serious and worsening psychological condition. Latest reports indicate numerous doctors had seen him and recommended that he stop flying but were constrained from advising his employer by privacy laws in Germany and Europe. Criminal prosecutions in France following aircraft accidents are unremarkable and it seems likely that this investigation will continue with serious consideration being given to criminal redress. The accident itself has again triggered the debate concerning whether cockpit doors should be locked during flight. The events of 9/11 were the trigger for the decision to lock cockpit doors. Both before and after that event, however, there have been numerous events of pilot incapacity and suicide. Different airlines have taken steps to ensure that when one of two pilots must leave the cockpit the other should not be left alone, but whether a determined pilot would be inhibited practically by a second person in the cockpit will be the subject of further debate and probably further rule-making.

Once again I would like to extend my thanks to the many contributors to this volume and welcome those who have joined the group. Their studied, careful and insightful contributions are much appreciated.

**Sean Gates**

Gates Aviation Limited

London

July 2015

## Chapter 19

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# JAPAN

*Tomohiko Kamimura*<sup>1</sup>

### I INTRODUCTION

The Japanese aviation market has been steadily recovering from the drop after the Great East Japan Earthquake in 2011. According to the Ministry of Land, Infrastructure, Transport and Tourism (MLIT), in 2013, Japanese airports handled 63,290,000 international passengers, 92,490,000 domestic passengers, 2,934,000 tons of international cargo and 935,000 tons of domestic cargo.<sup>2</sup>

Tokyo is the key hub of the aviation market in Japan. In 2012, of international passengers to and from Japan, 61.4 per cent used either Narita International Airport (Narita) or Tokyo International Airport, also known as Haneda Airport (Haneda). Of domestic passengers, 62.6 per cent used Haneda. As to cargo, 68.4 per cent of international cargo went through Narita or Haneda, and 78.4 per cent of domestic cargo went through Haneda.<sup>3</sup>

International aviation into and out of Japan is handled by both Japanese and non-Japanese carriers, with non-Japanese carriers having a larger market share. In 2012, Japanese carriers carried 14,858,000 international passengers (23.5 per cent of all international passengers) and 1,203,615 tons of international cargo (41 per cent of international cargo overall).<sup>4</sup>

In contrast, domestic aviation in Japan is limited to Japanese carriers and is almost a duopoly by two major network carriers, All Nippon Airways (ANA) and Japan Airlines (JAL). During FY 2014 (April 2014 through March 2015), ANA carried

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1 Tomohiko Kamimura is an attorney at Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho (the Tokyo office of Squire Patton Boggs).

2 [www.mlit.go.jp/koku/koku\\_tk1\\_000013.html](http://www.mlit.go.jp/koku/koku_tk1_000013.html) (last visited 24 June 2015).

3 Id.

4 [www.mlit.go.jp/k-toukei/11/annual/24\\_suihyo-rekinen.pdf](http://www.mlit.go.jp/k-toukei/11/annual/24_suihyo-rekinen.pdf) (last visited 24 June 2015).

43,301,771 domestic passengers (46.8 per cent of domestic passengers overall) and JAL and its subsidiary Japan Transocean Air together carried 29,483,315 domestic passengers (31.9 per cent). A number of smaller domestic carriers followed, the largest of these being Skymark Airlines carrying 6,751,136 domestic passengers (7.3 per cent) and Air Do carrying 1,915,547 domestic passengers (2.1 per cent). Low-cost carriers, which started Japanese domestic operations in 2012, comprised much of the remainder, the largest of these being Jetstar Japan carrying 4,192,782 domestic passengers (4.5 per cent) and Peach Aviation carrying 2,508,469 domestic passengers (2.7 per cent).<sup>5</sup>

Access to the Japanese aviation market has undergone gradual deregulation. In 1985 JAL's monopoly of international flights among Japanese airlines was abolished. At the same time, the assignment of domestic routes by the Ministry of Transport (the predecessor of MLIT) was also abolished, allowing Japanese carriers to compete with their peers on the same routes. JAL was fully privatised in 1987. In 2000, a reform of the Civil Aeronautics Act<sup>6</sup> regarding Japanese carriers (1) replaced route-based operation licences with operator-based licences,<sup>7</sup> (2) replaced advance approval of airfare with an advance notification system,<sup>8</sup> and (3) allowed carriers to determine their own routes and scheduling.<sup>9</sup>

Further, Japan pushed forward its 'open skies' policy and entered bilateral open skies agreements, beginning with the Japan-US Open Skies Agreement in 2010. As of December 2014, Japan has open skies agreements with 27 countries or regions, which cover 94 per cent of the international passengers flying into and out of Japan.<sup>10</sup> Under most bilateral open skies agreements, both Japanese and counterparty state carriers are entitled to decide their preferred routes and scheduling without obtaining specific approval from the other state's government. The major exception is for slot allocation at Haneda.

Japan is a party to the International Air Services Transit Agreement, 1944, in which the first freedom of the air (the privilege to fly across a foreign country without landing) and the second freedom of the air (the privilege to land for non-traffic purposes) are granted to other contracting states. In contrast, Japan is not a party to the International Air Transport Agreement, 1944, regarding the third freedom of the air (the privilege to put down passengers, mail or cargo taken on in the home country), the fourth freedom of the air (the privilege to take on passengers, mail or cargo destined for the home country) and the fifth freedom of the air (the privilege to put down passengers,

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5 [www.mlit.go.jp/koku/h26zigyo\\_bf\\_14.html](http://www.mlit.go.jp/koku/h26zigyo_bf_14.html) (last visited 24 June 2015).

6 An unofficial English translation of the Civil Aeronautics Act may be found at [www.japaneselawtranslation.go.jp/law/detail/?id=37&cvm=04&re=02&new=1](http://www.japaneselawtranslation.go.jp/law/detail/?id=37&cvm=04&re=02&new=1) (last visited 24 June 2015).

7 Article 100 of the Civil Aeronautics Act.

8 Article 105 of the Civil Aeronautics Act.

9 Article 107-2 of the Civil Aeronautics Act.

10 [www.mlit.go.jp/common/001081137.pdf](http://www.mlit.go.jp/common/001081137.pdf) (last visited 24 June 2015).



mail or cargo taken on in a third country and the privilege to take on passengers, mail or cargo destined for a third country). The third, the fourth and the fifth freedoms are typically addressed in bilateral air transport agreements between Japan and other states.

Japan is not a party to the Convention on International Interests in Mobile Equipment (the Cape Town Convention).

The key regulator of the Japanese aviation market is MLIT. MLIT has been given overall supervisory power over the aviation market under the Act for Establishment of the Ministry of Land, Infrastructure, Transport and Tourism. MLIT has also been given licensing and approval authority under the Civil Aeronautics Act, including licensing of air transport services, approval of operation manuals and maintenance manuals, approval of the conditions of carriage and slot allocation at congested airports such as Haneda.

## II LEGAL FRAMEWORK FOR LIABILITY

Carriers are liable for damages regarding passengers, baggage, mail and cargo, and for third-party damages attributable to their carriage. Damage incurred by passengers or cargo consignors typically results in contractual liability of the carrier, whereas third-party damage typically results in tort liability.

There is no dedicated national legislation governing liability in the aviation market in Japan. Thus, in principle, general statutes such as the Civil Code,<sup>11</sup> the Commercial Code,<sup>12</sup> the Code of Civil Procedure<sup>13</sup> and the Act on General Rules for Application of Laws<sup>14</sup> apply to liability matters. However, a couple of international treaties are applicable to liability matters related to international carriage. Such treaties include the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (the Warsaw Convention) as amended by the Hague Protocol of 1955, the Montreal Protocol No. 4 of 1975 and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (the Montreal Convention), to which Japan is a party. These treaties are directly applicable without implementing legislation. To be clear, the Warsaw Convention and the Montreal Convention are applicable to international carriage only, so liability related to domestic carriage is governed by general domestic laws.

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11 An unofficial English translation of the Civil Code may be found at [www.japaneselawtranslation.go.jp/law/detail/?id=2057&cvm=04&re=02&new=1](http://www.japaneselawtranslation.go.jp/law/detail/?id=2057&cvm=04&re=02&new=1) (last visited 24 June 2015).

12 An unofficial English translation of the Commercial Code may be found at [www.japaneselawtranslation.go.jp/law/detail/?id=2135&cvm=04&re=01&new=1](http://www.japaneselawtranslation.go.jp/law/detail/?id=2135&cvm=04&re=01&new=1) (last visited 24 June 2015).

13 An unofficial English translation of the Code of Civil Procedure may be found at [www.japaneselawtranslation.go.jp/law/detail/?id=2092&cvm=04&re=02&new=1](http://www.japaneselawtranslation.go.jp/law/detail/?id=2092&cvm=04&re=02&new=1) (last visited 24 June 2015).

14 An unofficial English translation of the Act on General Rules for Application of Laws may be found at [www.japaneselawtranslation.go.jp/law/detail/?id=1970&cvm=04&re=02&new=1](http://www.japaneselawtranslation.go.jp/law/detail/?id=1970&cvm=04&re=02&new=1) (last visited 24 June 2015).

The Civil Aeronautics Act governs aviation regulation generally. The Civil Aeronautics Act was enacted to conform to the Convention on International Civil Aviation of 1944 (the Chicago Convention) and the standards, practices and procedures adopted as annexes thereto. Violations of the Civil Aeronautics Act may result in criminal liability.

Conditions of carriage, as established by the carriers, are important sources of contractual liability. Under the Civil Aeronautics Act, Japanese carriers are required to establish conditions of carriage and obtain approval from MLIT.<sup>15</sup> The conditions of carriage must stipulate matters related to liabilities, including compensation for damage.<sup>16</sup> Foreign carriers are required to attach their conditions of carriage upon application to MLIT for permission to operate international routes to and from Japan. There are no detailed requirements for conditions of carriage of foreign carriers, as foreign carriers are subject to the regulation of the aviation authority in the aircraft's state of registration.

#### **i International carriage**

Japan ratified the Warsaw Convention in 1953, which limits carriers' liabilities for injury, death or damage up to 125,000 gold francs. Japan then ratified the Hague Protocol in 1967, which doubled the liability limitation to 250,000 gold francs. In 2000, Japan ratified the Montreal Protocol No. 4 and the Montreal Convention. The Montreal Protocol No. 4 amends the Warsaw Convention and primarily pertains to cargo liability. The Montreal Convention established a two-tiered liability regime, under which the carrier is strictly liable up to 100,000 special drawing rights (SDR)<sup>17</sup> for death or injury of passengers, and liable for damages over 100,000 SDR based on fault. The Montreal Convention became effective in 2003.

Japan is not a party to the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (or the Rome Convention of 1952) or the Montreal Protocol of 1978 related thereto.

It is backed by a court precedent that ratified international treaties are accorded a higher status than domestic legislation, and are immediately applicable even without implementing legislation.

#### **ii Internal and other non-convention carriage**

General statutes such as the Civil Code, the Commercial Code and the Code of Civil Procedure are applicable. There is no dedicated legislation governing liability in connection with internal carriage or carriage to which the international treaties do not apply.

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15 Article 106 of the Civil Aeronautics Act.

16 Article 218 of the Ordinance for Enforcement of the Civil Aeronautics Act.

17 Special drawing rights are an international reserve asset created by the IMF based on a number of key international currencies.

### iii General aviation regulation

General statutes such as the Civil Code, the Commercial Code and the Code of Civil Procedure are applicable. There is no dedicated legislation governing liability in connection with general aviation.

### iv Passenger rights

There is no dedicated legislation governing compensation for delay or cancellation of flights or carriage of disabled passengers. Japanese carriers are required to include matters related to liability in their conditions of carriage; however, it is not a requirement to cover compensation for delay or cancellation of flights or carriage of disabled passengers. Although it is not a legal obligation, Japanese carriers typically provide compensation for delay and cancellation of flights and carriage of disabled passengers on a voluntary basis.

The Consumer Contract Act<sup>18</sup> is applicable to contracts between a consumer and a business operator (consumer contracts), and is therefore applicable to the conditions of carriage between passengers and carriers. Under the Act, consumers may cancel consumer contracts if there is a major misrepresentation on the part of a business operator. In addition, clauses in consumer contracts are void if such clauses (1) totally exempt a business operator from its liability to compensate a consumer for damages on the part of a business operator, or (2) partially exempt a business operator from its liability to compensate a consumer for damages caused by intentional acts or gross negligence of a business operator.

### v Other legislation

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (the Anti-Monopoly Act)<sup>19</sup> is applicable to any private monopolisation, unreasonable restraint of trade or unfair trade practices in the aviation market, and is discussed further in Section VI, *infra*.

The Product Liability Act (the PL Act)<sup>20</sup> is applicable when damages are caused by a defect in a product, such as aircraft, engines and components.

The Act for Prevention of Disturbance from Aircraft Noise in the Vicinity of Public Airports and related ordinances provide noise standards. Violation of the noise standards may result in the relevant flight crew being subject to criminal fines.<sup>21</sup>

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18 An unofficial English translation of the Consumer Contract Act may be found at [www.japaneselawtranslation.go.jp/law/detail/?id=2036&vm=04&re=02](http://www.japaneselawtranslation.go.jp/law/detail/?id=2036&vm=04&re=02) (last visited 24 June 2015).

19 An unofficial English translation of the Anti-Monopoly Act may be found at [www.japaneselawtranslation.go.jp/law/detail/?id=2085&vm=04&re=02](http://www.japaneselawtranslation.go.jp/law/detail/?id=2085&vm=04&re=02) (last visited 24 June 2015).

20 An unofficial English translation of the PL Act may be found at [www.japaneselawtranslation.go.jp/law/detail/?id=86&vm=04&re=02](http://www.japaneselawtranslation.go.jp/law/detail/?id=86&vm=04&re=02) (last visited 24 June 2015).

21 Article 44 of the Act for Prevention of Disturbance from Aircraft Noise in the Vicinity of Public Airports.

### III LICENSING OF OPERATIONS

#### i Licensed activities

The operation of air transport services requires a licence from MLIT.<sup>22</sup> 'Air transport services' are specifically defined as any business using aircraft to transport passengers or cargo for remuneration upon demand.<sup>23</sup> The applicant must:

- a* have an operation plan that is suitable for ensuring transport safety;
- b* have other appropriate plans for operations of the relevant services;
- c* be able to conduct the relevant services properly;
- d* if the applicant intends to engage in international air transport services, it must have a plan conforming to the air navigation agreements or other agreements applicable to the foreign countries concerned; and
- e* conform with the ownership rules described in detail in Section III.ii, *infra*.<sup>24</sup>

The operational and maintenance facilities of the operator must undergo and pass an inspection by MLIT.<sup>25</sup> The operation manual and maintenance manual of the operators must conform to the ordinances of MLIT and be approved by MLIT.<sup>26</sup> Conditions of carriage of the operators must also be approved by MLIT. Domestic routes involving certain congested airports, including Haneda, Narita, Osaka (Itami) Airport and Kansai Airport are subject to approval by MLIT.<sup>27</sup>

The operation of aerial work services also requires licensing from MLIT.<sup>28</sup> 'Aerial work services' is defined as any business using aircraft other than for the transport of passengers or cargo for remuneration upon demand.<sup>29</sup> Aerial work services typically include flight training, insecticide spraying, photography, advertising and newsgathering.

Organisations must be approved by MLIT for the specific activity to conduct any of the following activities:

- a* aircraft design and inspection of completed designs;
- b* aircraft manufacturing and inspection of aircraft;
- c* maintenance of aircraft and inspection of performed maintenance;
- d* maintenance or alteration of aircraft;
- e* component design and inspection of completed designs;
- f* component manufacturing and inspection of completed components; and
- g* repair or alteration of components.<sup>30</sup>

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22 Article 100 of the Civil Aeronautics Act.

23 Article 2 of the Civil Aeronautics Act.

24 Article 101 of the Civil Aeronautics Act.

25 Article 102 of the Civil Aeronautics Act.

26 Article 104 of the Civil Aeronautics Act.

27 Article 107-3 of the Civil Aeronautics Act.

28 Article 123 of the Civil Aeronautics Act.

29 Article 2 of the Civil Aeronautics Act.

30 Article 20 of the Civil Aeronautics Act.

Once approved, the organisation will be recognised as an approved organisation.

Radio transmission is separately regulated by the Ministry of Internal Affairs and Communications (MIC) under the Radio Act.<sup>31</sup> Operators must obtain licences from MIC to establish radio stations, including aircraft radio stations.

**ii Ownership rules**

An operator of air transport services may not be:

- a* a foreign individual, a foreign state or public entity or an entity formed under a foreign law (collectively, foreigners);
- b* an entity of which a representative is a foreigner, of which more than one-third of the officers are foreigners or of which more than one-third of the voting rights are held by foreigners;
- c* a person whose licence for air transport services or aerial work services was revoked within the past two years;
- d* a person who has been sentenced to a penalty of imprisonment or a more severe punishment for violation of the Civil Aeronautics Act within the past two years;
- e* an entity of which an officer falls under (c) or (d) above; or
- f* a company whose holding company or controlling company falls under (b) above.<sup>32</sup>

Separately, aircraft owned by any person (individual or entity) falling under (a) or (b) may not be registered in Japan.<sup>33</sup>

**iii Foreign carriers**

Foreign carriers must obtain permission from MLIT to operate international routes to and from Japan.<sup>34</sup> Foreign carriers that intend to obtain permission must submit an application to MLIT describing their corporate information, operation plans (including the origin, intermediate stops, destination and airports to be used along the routes and distance between each point), aircraft information, frequency and schedule of service, outline of facilities for maintenance and operational control, outline of plans for the prevention of unlawful seizure of aircraft and the proposed commencement date of operation, accompanied by evidence of permission of the foreign carrier's home country regarding the services on the proposed route and its incorporation documents, most recent profit and loss statement and balance sheet and conditions of carriage.<sup>35</sup> MLIT will consider, among other things, compliance by the foreign carrier with its home country laws, the applicable bilateral agreement and relationship, reciprocity, safety, protection of customers and third parties and prevention of name-lending.

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31 An unofficial English translation of the Radio Act may be found at: [www.soumu.go.jp/main\\_sosiki/joho\\_tsusin/eng/Resources/laws/2003RL.pdf](http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Resources/laws/2003RL.pdf) (last visited 24 June 2015).

32 Paragraph 5 of Article 101 of the Civil Aeronautics Act.

33 Article 4 of the Civil Aeronautics Act.

34 Article 129 of the Civil Aeronautics Act.

35 Article 232 of the Ordinance for Enforcement of the Civil Aeronautics Act.

Foreign carriers are not allowed to operate on domestic routes unless specifically permitted by MLIT. A foreign carrier that intends to obtain such permission must submit an application to MLIT describing, among other specifics, the necessity to operate on domestic routes.

#### **IV SAFETY**

The Civil Aeronautics Act, enacted in conformity with the Chicago Convention, governs the safety requirements for operators.

MLIT is responsible for granting airworthiness certifications for aircraft. Upon an application for airworthiness certification, MLIT inspects the design, manufacturing process and current conditions, and if the aircraft complies with the standards specified in the Civil Aeronautics Act and the related ordinances, MLIT grants aircraft certification.<sup>36</sup>

Maintenance of or alteration to any aircraft to be used for air transport services must be performed and certified as an approved organisation.

MLIT is also responsible for personnel licensing. MLIT holds examinations to determine whether a person has the aeronautical knowledge and aeronautical proficiency necessary for performing as aviation personnel, and grants competence certification upon passing.<sup>37</sup> Medical certification, English proficiency certification (for international flights) and instrument flight certification (for instrument flights) are also required. A person without a pilot competence certificate of the relevant category may undergo flight training only under a flight instructor certified by MLIT.<sup>38</sup>

A pilot in command is required to report to MLIT upon accidents, and if the pilot in command is unable to report, the operator of the aircraft is required to report.<sup>39</sup> A pilot in command is also required to report to MLIT if he or she has recognised that there was danger of an accident.<sup>40</sup>

Japanese carriers are required to prepare safety management manuals, operation manuals and maintenance manuals in accordance with the Civil Aeronautics Act,<sup>41</sup> and to conduct operations and maintenance in accordance therewith.<sup>42</sup>

#### **V INSURANCE**

International carriers are required to maintain adequate insurance covering their liability under the Montreal Convention. The Montreal Convention, which came into effect for Japan in 2003, stipulates that state parties shall require their carriers to maintain

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36 Article 10 of the Civil Aeronautics Act.

37 Article 29 of the Civil Aeronautics Act.

38 Article 34 of the Civil Aeronautics Act.

39 Article 76 of the Civil Aeronautics Act.

40 Article 76-2 of the Civil Aeronautics Act.

41 Articles 103-2 and 104 of the Civil Aeronautics Act.

42 Article 157 of the Civil Aeronautics Act.

adequate insurance covering their liability under the convention, and that a carrier may be required by the state party to furnish evidence that it maintains adequate insurance covering its liability under the Convention.<sup>43</sup>

On the other hand, with regard to domestic carriers, there is no particular requirement for carriers to carry insurance. Nonetheless, carriers do carry aviation insurance including hull all-risk insurance, hull war risk insurance and liability insurance.

MLIT may order a Japanese carrier to purchase liability insurance to cover aircraft accidents if it finds that the carrier's business adversely affects transportation safety, customer convenience or any other public interest.<sup>44</sup> MLIT may also advise applicants to purchase insurance upon their application for an air transport services licence; such advice is not binding on the applicant, but failure to follow such advice may have a negative impact on the review of the application.

Japanese insurance companies together form the Japanese Aviation Insurance Pool (JAIP). When a JAIP member insurance company underwrites aviation insurance, its liability is allocated to each of the member insurance companies. The allocated liability is further reinsured in the international reinsurance market. The insurance premium payable would be determined by JAIP rather than individual underwriters to ensure that the premium would not differ from one underwriter to another. JAIP is generally exempted from the Anti-Monopoly Act.<sup>45</sup>

## **VI COMPETITION**

The aviation industry is subject to the Japanese Anti-Monopoly Act and the competition legislation applicable to all industries. The Japan Fair Trade Commission (JFTC) is responsible for regulating and enforcing competition and fair trade policies.

The Anti-Monopoly Act restricts three types of activity: private monopolisation, unreasonable restraint of trade and unfair trade practices.<sup>46</sup>

'Private monopolisation' means such business activities by which a business operator, individually or by combination or conspiracy with other business operators, or by any other manner, excludes or controls the business activities of other business operators, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.<sup>47</sup>

'Unreasonable restraint of trade' means such business activities by which any business operator, by contract, agreement or any other means irrespective of its name, in concert with other business operators, mutually restricts or conducts its business

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43 Article 50 of the Montreal Convention.

44 Article 112 of the Civil Aeronautics Act.

45 Article 101 of the Insurance Services Act.

46 Articles 3 and 19 of the Anti-Monopoly Act.

47 Paragraph 5 of Article 2 of the Anti-Monopoly Act.

activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.<sup>48</sup>

‘Unfair trade practices’ means any of the following acts that tend to impede fair competition and that are further described in the Anti-Monopoly Act or designated by the JFTC:

- a* unjust treatment of other business operators;
- b* dealing with unjust consideration;
- c* unjustly inducing or coercing customers of a competitor to deal with oneself;
- d* dealing with another party on such conditions as will unjustly restrict the business activities of said party;
- e* dealing with another party by unjust use of one’s bargaining position; and
- f* unjustly interfering with a transaction between a business operator in competition within Japan with oneself or a corporation of which oneself is a stockholder or an officer and another transaction counterparty; or, where such a business operator is a corporation, unjustly inducing, instigating or coercing a stockholder or a director of the corporation to act against the interests of the corporation.<sup>49</sup>

Acts that constitute private monopolisation or unreasonable restraint of trade may result in an elimination order by the JFTC, a penalty payment order by the JFTC, civil action or, subject to accusation by the JFTC, criminal punishment. Criminal punishment includes imprisonment of individuals or criminal fines imposed on individuals as well as corporations. Violation of the restriction of unfair trade practices may result in an elimination order by the JFTC or civil action (including injunction).

The Civil Aeronautics Act provides exemptions from the Anti-Monopoly Act for agreements approved by MLIT related to (1) joint management on low-demand routes essential for local residents’ lives, and (2) joint carriage, fare agreements and the like on international routes for the purpose of public convenience.<sup>50</sup> The latter at one time included International Air Transport Association (IATA) fare-setting agreements, carriers’ fare-setting agreements, code-sharing agreements, pool agreements, interlining agreements and frequent-flyer programme agreements. The JFTC held a series of discussions to repeal such exemptions from 2007, and IATA fare-setting agreements and carriers’ fare-setting agreements including specific fare or level of fare were decided not to be approved as exceptions after 2011.

Instead, MLIT has approved exemptions for a number of business coordination and revenue-sharing agreements between major airlines, including the trans-Pacific joint venture between ANA, United Airlines and Continental Airlines (now merged with United Airlines) in 2011, the trans-Pacific joint venture between JAL and American Airlines in 2011, the Japan–Europe joint venture between ANA and Lufthansa in 2011 (adding Swiss International Air Lines and Austrian Airlines in 2012) and the Japan–

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48 Paragraph 6 of Article 2 of the Anti-Monopoly Act.

49 Paragraph 9 of Article 2 of the Anti-Monopoly Act.

50 Article 110 of the Civil Aeronautics Act.



Europe joint venture between JAL and International Airlines Group (the parent company of British Airways and Iberia) in 2012 (adding Finnair in 2013). MLIT also approved exemptions for cargo joint ventures, between ANA and Lufthansa Cargo in 2014 and between ANA and United Airlines in 2015.

## VII ESTABLISHING LIABILITY AND SETTLEMENT

### i Procedure

The forum used to settle contractual liabilities depends on the underlying contract and the governing laws and treaties. Dispute resolution clauses in the underlying contract may in some cases be considered invalid by the effect of compulsory provisions of the governing laws or treaties. The forum used to settle non-contractual liabilities depends on the governing laws and treaties.

According to the Code of Civil Procedure, the national legislation governing civil procedure in Japan, the defendant is generally subject to the authority of the Japanese courts when, for example:

- a* the defendant's residence or the place of business is in Japan;
- b* the place of performance of a contractual obligation is in Japan;
- c* the place of tort is in Japan; or
- d* with regard to a case against a business operator in relation to a consumer contract, the plaintiff is a consumer resident in Japan.<sup>51</sup>

Although parties may agree to a jurisdiction by contract in some cases, any agreement in a consumer contract to resolve disputes in a country in which the consumer does not reside would be invalid by the effect of the Code of Civil Procedure.<sup>52</sup> Furthermore, under the Montreal Convention, under certain conditions therein, a passenger may bring action before the courts in which, at the time of the accident, the passenger had their principal and permanent residence.

The timeline for litigation in Japan is as follows:

- a* court-ordered preservation of evidence, upon request and if necessary;
- b* commencement of litigation;
- c* oral argument procedures;
- d* examination of evidence;
- e* final judgment; and
- f* enforcement of the judgment, if necessary.

The plaintiff may abandon its claim by admitting that the claim is groundless, the defendant may admit the claim or the parties may settle the claim during the course of litigation proceedings.

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51 Articles 3-2, 3-3 and 3-4 of the Code of Civil Procedure.

52 Article 3-7 of the Code of Civil Procedure.

Arbitration is an alternative form of dispute resolution. If there is an arbitration agreement, the parties are required to resolve their disputes specified in the agreement through the agreed arbitration process. An arbitration agreement in respect of a consumer contract may be revoked by a consumer by effect of the Arbitration Act.<sup>53</sup>

The statute of limitations for a claim is generally 10 years from when the claim became exercisable.<sup>54</sup> There is a shorter statute of limitations for a claim pertaining to commercial activity, which is five years from when the claim became exercisable,<sup>55</sup> and for a claim pertaining to transportation of passengers or freight, which is one year from when the claim became exercisable.<sup>56</sup> The statute of limitations for a tort claim is three years from the time when the claimant became aware of the damage and the perpetrator, or 20 years from the tortious act, whichever comes earlier.<sup>57</sup>

If there is an identical claim against two or more persons, or if claims against two or more persons are based on the same factual or statutory cause, such persons may be sued as co-defendants.<sup>58</sup> In the context of a typical aviation case such as a claim for damages following an accident, the carrier, owner, pilots and manufacturers may be joined in actions for compensation as co-defendants.

If two or more persons caused damage by their joint tortious acts, each of them would be jointly and severally liable to compensate for the full amount of that damage.<sup>59</sup> According to court precedents, liability is allocated internally among the joint tortfeasors in proportion to each tortfeasor's fault. A joint tortfeasor may require other joint tortfeasors to reimburse any paid portion allocated to such other joint tortfeasors.

## ii Carriers' liability towards passengers and third parties

In a typical tort claim, the operator's liability to passengers and third parties is established by demonstrating:

- a* the right or legally protected interest of the claimant;
- b* the wrongful act of the defendant;
- c* the defendant's intent or negligence with respect to the wrongful act;
- d* the invasion of the right or legally protected interest of the claimant and the amount of damages caused thereby; and
- e* the causal relationship between the wrongful action and the damages.<sup>60</sup>

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53 Article 3 of the supplementary provisions of the Arbitration Act. An unofficial English translation of the Arbitration Act may be found at: [www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf](http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf) (last visited 24 June 2015).

54 Article 167 of the Civil Code.

55 Article 522 of the Commercial Code.

56 Article 174 of the Civil Code.

57 Article 724 of the Civil Code.

58 Article 38 of the Code of Civil Procedure.

59 Article 719 of the Civil Code.

60 Article 709 of the Civil Code.

The liability under the Civil Code is fault-based, meaning that the defendant's intent or negligence must be demonstrated.

Under the Montreal Convention, operators have strict liability up to 113,100 special drawing rights (SDR) for death or bodily injury of passengers, which means that the operator cannot further exclude or limit its liability.<sup>61</sup> Where damages of more than 113,100 SDR are sought, operators may avoid liability by demonstrating that the harm suffered was not due to their negligence or was attributable to a third party. There are liability limits to certain types of damages: 19 SDR per kilogram in respect of the destruction, loss, damage or delay of cargo; 4,694 SDR in respect of delay in the carriage of passengers; and 1,131 SDR in respect of destruction, loss, damage or delay of passenger baggage.

### iii Product liability

The PL Act was enacted in 1994 to introduce the concept of strict liability on the part of product manufacturers, replacing the traditional concept of fault-based liability. Liability that is not provided in the PL Act remains subject to the Civil Code liability provisions outlined above.

The PL Act defines 'manufacturer' to include any person who manufactured, processed, or imported the product in the course of trade and any person who provides their name, trade name or trademark or otherwise indicates themselves as the manufacturer on the product, or who otherwise makes a representation on the product that holds themselves out as its substantial manufacturer.<sup>62</sup>

To establish a product liability claim, the plaintiff must demonstrate:

- a* that the defendant is a manufacturer;
- b* that the product the manufacturer provided had a defect;
- c* the invasion on the plaintiff's life, body or property;
- d* the amount of damage caused thereby; and
- e* a causal relationship between the defect and the damage.

In this regard, a 'defect' means a lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable usage of the product, the time the manufacturer delivered the product and any other relevant information. A manufacturer may be exempt from product liability if it demonstrates that the defect in the product was not foreseeable from scientific or technological knowledge at the time of delivery of the product.<sup>63</sup>

There is no special legislation covering owners' liability.

### iv Compensation

Compensation under Japanese law in connection with breach of contract or tort is limited to the actual damage caused. Punitive damages or exemplary damages are not recognised.

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61 Article 21 of the Montreal Convention.

62 Article 2(3) of the PL Act.

63 Article 4 of the PL Act.

A typical damages award would include (1) incurred monetary damage including medical fees, nurse fees, funeral fees and legal fees; (2) lost earnings due to an injury, permanent disability or death; and (3) consolation for mental suffering in relation to an injury, permanent disability or death.

In practice, a mortality table is often utilised, especially in cases of death or permanent disability. The age, gender and the actual earnings of the victim are the key elements considered in calculating damages.

Those incapacitated in accidents may apply for a physical disability certificate from the local prefectural government,<sup>64</sup> and those certified as such may receive various forms of support from national and municipal governments as well as from private businesses, such as social welfare allowance, discounts on utility charges, discounts on transportation fares, exemption or relief of tax on income, nursing services and provision of assistance devices. The system is generally not designed for support providers to recover costs from third parties.

## VIII THE YEAR IN REVIEW

In March 2014, Haneda increased the slots for international flights from 60,000 to 90,000 per year, and removed its ban on daytime long-haul international flights. As a result, new daytime routes to Europe, North America and Southeast Asia were launched. Japan and the United States did not reach an agreement with regard to the daytime slot allocations at Haneda. To date, daytime routes between Haneda and the United States have not been launched. The slots that were anticipated to be used for US routes have been tentatively given to international charter flights.

With the increase of slots available at Haneda in 2014, MLIT issued an administrative guidance to airlines starting daytime international services there to maintain Narita services to those countries to which the airlines start new Haneda services. The administrative guidance is not legally binding, but, reportedly, airlines took it very seriously because MLIT has a great deal of authority over the aviation industry. However, the airlines appear to be slowly walking away from strict obedience to this administrative guidance. In February 2015, Virgin Atlantic ceased operation of its Narita–London service, which was code-shared with ANA, leaving ANA with its Haneda–London service but no Narita service to the United Kingdom. Further, in June 2015, ANA announced it will cancel its Narita–Paris services, which will leave ANA with Haneda–Paris service, but no Narita service to France.

Skymark Airlines, the third largest airline in Japan, filed for bankruptcy protection in January 2015. Prior to the filing, Skymark had been suffering a huge loss of cash, partly because of the yen's steep fall, combined with a lack of hedges to protect itself from sharp currency fluctuations, and partly from its position of being caught in the middle between full-service carriers (ANA and JAL) and low-cost carriers (Jetstar Japan, Peach Aviation, etc.). In July 2014, Airbus cancelled Skymark's order of six A380s and demanded payment of a cancellation fee, reportedly \$700 million. The bankruptcy proceeding

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64 Article 15 of the Act for the Welfare of Persons with Physical Disabilities.

Skymark selected is a rehabilitation proceeding, under which Skymark can continue to operate. As of June 2015, two competing rehabilitation plans have been submitted to the bankruptcy court, one by Skymark having ANA as sponsor, and another by Intrepid, a major Skymark creditor. The rehabilitation plan must be approved by both a majority of the number of eligible creditors and the eligible creditors holding a majority of debt.

## IX OUTLOOK

The Commercial Code (Transportation, Maritime) Subcommittee of the Legislative Council of the Ministry of Justice, which has been discussing the modernisation of the transportation and maritime sections of the Commercial Code, issued an interim report in March 2015.<sup>65</sup> The report covers a broad range of topics, but here are the key points related to aviation:

- a* the establishment of a common regulation that covers land, maritime, and air transportation (the existing Commercial Code covers land and maritime transportation separately and does not cover air transportation) is recommended;
- b* the introduction of consignors' responsibility to report any dangerous goods in freight is recommended;
- c* the existing rule of rebuttable presumption of carrier's negligence rule upon loss, damage, or delay of freight, which is applicable to land and maritime transportation only, is now recommended for expansion to air transportation (the introduction of a strict liability rule, as stipulated in the Montreal Convention, is rejected);
- d* the introduction of liability limitation rules, as stipulated in the Montreal Convention, is rejected;
- e* changing the existing one-year statute of limitations regarding damages relating to freight transportation (or five-year statute of limitations if a carrier had knowledge of the damage) to a one-year period of exclusion (under which a claimant would lose its claim unless a court action is initiated within one year) is recommended;
- f* whether or not to expand the coverage of carriers' liability mitigation clauses to their employees was not concluded and is left open for future discussion;
- g* whether or not to stipulate a consignee's legal status upon loss of freight was not concluded and is left open for future discussion (under the existing Commercial Code, the consignee does not receive the right to the transportation contract until the freight arrives at the destination, so the consignee cannot claim damages from the carrier unless the right to the transportation contract is specifically assigned from the consignor to the consignee); and,
- h* the introduction of a damages rule applicable to the loss or damage of freight during a transport combining land, maritime or air carriage, under which the laws applicable to the mode of transport would govern the damages claim, is recommended.

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65 [www.moj.go.jp/shingi1/shingikai\\_syoho.html](http://www.moj.go.jp/shingi1/shingikai_syoho.html) (last visited 24 June 2015).

Public comments on the interim report were gathered between April and May 2015. The subcommittee plans to consider the public comments and issue a final report. The timescale for publishing the final report and submitting a bill based thereon would depend on the priorities of the party in power and is not decided yet, but this could possibly be in a few years.

In June 2014, an MLIT committee revealed an interim report that illustrated a two-step plan to expand take-off and landing slots at Tokyo's two airports, Haneda and Narita. The first step is targeted for before 2020, which is when the summer Olympics will take place in Tokyo. The first step involves the readjustment of runway operations and flight paths in Haneda, as well as the readjustment of flight control and installation of rapid-exit taxiways in Narita, which adds up to 40,000 landing and take-off slots at each of the two airports. The second step is targeted for after 2020 and involves the construction of additional runways at both Haneda and Narita.<sup>66</sup> MLIT is going to hold a series of briefing sessions about the functional enhancement of Haneda in various neighbourhoods, most of which are under proposed new flight paths, from July 2015.

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66 [www.mlit.go.jp/koku/koku\\_tk6\\_000002.html](http://www.mlit.go.jp/koku/koku_tk6_000002.html) (last visited 24 June 2015).

## Appendix 1

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