

THE AVIATION LAW  
REVIEW

NINTH EDITION

Editor  
Sean Gates

THE LAWREVIEWS

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REVIEW

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# PREFACE

*The Aviation Law Review* continues to be among the most successful publications offered by The Law Review, with the online version massively increasing its reach within the industry not only to lawyers but to all those involved in the various aspects of management touched by laws and regulations that, from certain jurisdictions, flow like a river in full spate. Now that subscribers to Bloomberg Law and Lexus Nexus have access online, that of course has also significantly increased the readership.

This year I welcome a new contribution from Turkey, and extend my thanks and gratitude to all of our contributors for their continued support. I would emphasise to readers that the contributors donate very considerable time and effort to make this publication what it has succeeded in being; the premier annual review of aviation law. All contributors are carefully selected based on their knowledge and experience in aviation law. We are fortunate indeed that they recognise the value of the contribution they make and the value of the *Review* that it enables.

Notwithstanding the risks posed by new variants, at the time of going to press at least the threats posed by covid-19 to the world and the aviation business sector seem to be beginning to recede in some parts of the world, while others continue to languish where vaccinations have yet to become available, and where vaccine hesitancy is encouraged from dark alleys in social media up to the level of irresponsible political figures around the world. The damage wrought on aviation has been particularly severe consequent upon the grounding of airlines, the closure of airspace and the uncertainty as to when, and to where, flights may safely be taken. So far as lessors are concerned, attempts by lessees to moderate their financial exposure by reliance upon the pandemic by arguing that contracts have thereby been frustrated have been denied in several courts. As yet, no decisions have crossed my desk regarding operating leases, and decisions in respect of them will, of course, depend upon the terms of those leases. While there have been some bankruptcies, the majority of carriers have managed to cling on to financial life by virtue of reliance on governmental support, although this has not been routinely and equally available throughout the world.

In last year's preface I referenced the difficulties encountered by Boeing with regard to the damage to its reputation as well as the reputation of the Federal Aviation Administration (FAA) following the 737 MAX grounding. It was eventually, after extensive modification, declared safe to fly, but then came under renewed scrutiny six months later as a result of a potential electrical problem that led to the renewed grounding of more than 100 aeroplanes belonging to 24 airlines around the world in April 2021. The practice of the major aviation authorities around the world of accepting the type certificates of other regulators appears likely to be the most enduring victim of this debacle, with airworthiness authorities under very considerable pressure to make sure for themselves they are satisfied with the certification



of aircraft manufactured in other countries. The European Air Safety Authority has been under a particular spotlight in this respect and, according to European Aviation Safety Agency (EASA) Executive Director Patrick Ky:

*we have a bilateral safety agreement (between EASA and the FAA) that was signed some time ago, under which the direction had been taken to reduce more and more the level of involvement of EASA on FAA-approved projects. Of course, given those tragedies for which we have seen, we have stopped this trend and we will increase our level of involvement and our independent review of US projects in order to build our own safety assessment of those projects.*

The impact of Brexit on aviation continues to be worked out, although the EU–UK agreement on the subject came into force alongside the trade agreement in 26 pages of the 1,449-page text. The agreement provides in broad measure that traffic rights between the UK and EU are preserved, cabotage rights are removed, cargo fifth freedoms are permitted allowing cargo to be on carried from one European destination to a third country, and vice versa, subject to bilateral agreements between the UK and the individual Member States of the EU. Ownership and control restrictions require that airlines must be owned and effectively controlled by nationals in their headquarters and that airlines must have their principal place of business in their own territory and hold an air operator's certificate from the competent authority in their own jurisdiction. There is an exception to this in that UK airlines are permitted to be effectively controlled by nationals of the EU, the European Economic Area or Switzerland. This ownership provision is echoed in the UK–US bilateral agreement permitting UK airlines to be owned by EU nationals while operating from the UK to the US. Clearly, the principal beneficiary of these provisions is British Airways, owned by IAG headquartered in Spain, which also owns other EU airlines.

The UK is no longer part of EASA, but there is close coordination between the Civil Aviation Authority of the UK and EASA as well as mutual recognition of licences.

The EU–UK agreement also touches upon the thorny and troublesome issue of EU 261 in that it aims for a high level of consumer protection and cooperation between the EU and the UK in this area. The European Union (Withdrawal) Act 2018 provides that regulations such as EU 261 are automatically incorporated into UK law, being known as retained EU law, unless and until they are revoked by an Act of Parliament. The regulation itself, therefore, continues to apply unless and until it is changed by the UK Parliament. That power does seem currently unlikely to be exercised among the myriad issues falling to be addressed by the newly empowered Parliament, although the opportunity may arise if the long-promised review of EU 261 in Europe is finally brought forward by the Commission for decision, when the issue could at least be debated. One can but hope that the regulation will be made more compliant with the terms of its preamble and original content before it is subjected to the legislative whims and activist fancies of the European Court of Justice (ECJ). However, decisions made up until 31 December 2020 will be retained in the UK and will be binding at least at first instance level, with limited powers given to the Court of Appeal and the Supreme Court to depart from past case law. Decisions after December 2020 will not be binding but will continue to be persuasive. The extent to which the UK will depart from ECJ case law has already been reviewed in two Court of Appeal cases, *Tuneln v. Warner* and *Lipton v. BA Cityflyer*. The Court of Appeal held that the power to depart from ECJ decisions should be used as an exception only, and that in the first case actually applied to a post-Brexit ECJ ruling in reaching its decision. In *Lipton*, the Court set out a list of matters to be considered

in determining its approach. These early decisions seem at least to indicate that the Court of Appeal and Supreme Court will require significant reasons to exercise their inherent power to depart from the law promulgated by the ECJ.

In the meantime it is clear that the Court of Justice of the European Union continues on its rampage against the safety, security and financial viability of aviation by its latest decision on the subject in the case of *Air Help v. SAS* of 23 March 2021. In this case, the Court has held, against the recommendation of its Attorney General, that a strike organised by a trade union of the staff of an air carrier that is intended in particular to secure pay increases does not fall within the concept of an extraordinary circumstance capable of releasing the airline from its obligation to pay compensation for cancellation or non-delay in respect of the flights concerned. The Court relied on its earlier decisions to the effect that in order to qualify as extraordinary, the event must not be inherent in the normal exercise of an air carrier's activity, and must be beyond its actual control, because the regulation has to be strictly interpreted to afford a high level of protection for air passengers and because the exemption from the obligation to pay compensation is a derogation from the principal that air passengers have the right to compensation.

As so frequently in the past, the Court has made these comments by ignoring some elements of the preamble to the regulation in favour of others, and misinterpreting other elements of the preamble so as to make the payment of pocket money to passengers take priority over the obligation imposed on Member States to procure general compliance by air carriers with the regulation and appoint an appropriate body to carry out enforcement tasks. In other words, states should make sure operators do not wrongly delay or cancel flights, with compensation being paid in the limited circumstances set out in the regulation, and not as a device to punish errant carriers or to jeopardise their financial viability. It cannot be said too often that the payment of compensation does not protect passengers and can be carried to extremes and, as in this case, actually jeopardise connectivity and safety.

In an act of particular judicial gymnastics in its *SAS* decision, the ECJ held that Preamble 14, which specifically states that extraordinary circumstances 'may, in particular, occur in cases of . . . strikes that affect the operation of an operating air carrier', did not assist *SAS* in the current case because a strike, as one of the ways in which collective bargaining may manifest itself, must be regarded as an event inherent in the normal exercise of the employer's activity and that, therefore, a strike whose objective is limited to obtaining an increase in pilots' salaries is an event that is inherent in the normal exercise of that undertaking's activity. The Court also, extraordinarily, held that 'since a strike is foreseeable for the employer, it retains control over events in as much as it has, in principle, the means to prepare for the strike and, as the case may be, mitigate its consequences'. In a continuing feat of legerdemain, the Court held that just because a carrier may have to pay compensation to passengers for cancellations or delays does not mean that the carrier has to accept without discussion strikers' demands. The air carrier 'remains able to assert the undertaking's interests, so as to reach a compromise that is satisfactory for all the social partners'. The effect of the decision, of course, is to hand to unions a weapon in their armoury of almost nuclear capacity to destroy the undertaking altogether unless its demands are met, since failure to comply leads to what are increasingly becoming ruinous levels of obligations to pay 'compensation' to passengers in respect of cancelled flights. It is becoming increasingly difficult to escape the conclusion that the ECJ has a covert purpose of the destruction of the airline industry in Europe, but it is hopefully difficult to imagine that this decision is one that the UK Court of Appeal would follow without demur.

Airlines in Europe need to stand together to resist the continued assault of the regulation on their very existence, for without such unity, to paraphrase Aesop, division can only produce disaster.

Once again, many thanks to all our contributors to this volume including, in particular, those who have joined the group to make *The Aviation Law Review* the go-to resource.

**Sean Gates**

Gates Aviation Ltd

London

July 2021

# JAPAN

*Tomohiko Kamimura and Miki Kamiya*<sup>1</sup>

## I INTRODUCTION

Before the steep drop in demand caused by covid-19, the Japanese aviation market experienced continuous growth for a decade, especially in the number of international passengers. Passenger numbers, however, started to drop from February 2020, and the impact of covid-19 is still ongoing. According to the Ministry of Land, Infrastructure, Transport and Tourism (MLIT), during the 2019 financial year (April 2019–March 2020),<sup>2</sup> Japanese airports handled 92.70 million international passengers, 218.82 million domestic passengers (counted twice, upon departure and arrival), 3,699,245 tonnes of international cargo and 1,540,471 tonnes of domestic cargo (counted twice, upon departure and arrival), all numbers that showed a fall compared to the figures for the 2018 financial year.

Tokyo is the key hub of the aviation market in Japan. During the 2019 financial year, of the international passengers going to and from Japan, 52.7 per cent (48.90 million passengers) used either Narita International Airport (Narita) or Haneda Airport (Haneda), the two airports in the Tokyo region. Of domestic passengers, 29.7 per cent (64.88 million passengers) used Haneda. As to cargo, 70.5 per cent (2,607,632 tonnes) of international cargo went through Narita or Haneda, and 41.2 per cent (634,679 tonnes) of domestic cargo went through Haneda.

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. During the 2019 financial year, Japanese carriers carried 21.43 million international passengers (23.1 per cent of all international passengers) and 1,459,020 tonnes of international cargo (39.44 per cent of international cargo overall).

In contrast, domestic aviation in Japan is limited to Japanese carriers and is largely a duopoly by two major network carriers, All Nippon Airways (ANA) and Japan Airlines (JAL). During the 2019 financial year, ANA carried 43,033,796 domestic passengers (43.4 per cent of domestic passengers overall), and JAL together with its subsidiary Japan Transocean Air carried 32,619,266 domestic passengers (32.9 per cent). A number of smaller domestic carriers followed, the largest of these being Skymark Airlines, carrying 7,569,003 domestic passengers (7.6 per cent). Low-cost carriers, which started Japanese domestic operations in 2012, comprised much of the remainder, the largest of these being Jetstar

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1 Tomohiko Kamimura and Miki Kamiya are attorneys at Squire Gaikokuho Kyodo Jigyō Horitsu Jimusho.

2 The official figures for the 2020 financial year (April 2020 to March 2021) have not been published yet. The figures from the 2019 financial year set out in this chapter only partially reflect the impact of covid-19.

Japan, a joint-venture by JAL, Australia's Qantas and Tokyo Century, carrying 5,273,848 domestic passengers (5.3 per cent), and Peach Aviation, an affiliate of ANA, carrying 3,985,251 domestic passengers (4 per cent).

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 the 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 regarding Japanese carriers replaced route-based operation licences with operator-based licences, replaced advance approval of airfares with an advance notification system, and allowed carriers to determine their own routes and scheduling.

Further, Japan has pushed forward with its open skies policy and entered bilateral open skies agreements, beginning with the Japan–US Open Skies Agreement in 2010. As of September 2017, Japan has open skies agreements with 33 countries and regions, which cover 96 per cent of the international passengers flying into and out of Japan. 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, with a notable exception of slot allocation at Haneda.

Japan is a party to the International Air Services Transit Agreement 1944, under 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, 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, fourth and 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 (Cape Town Convention).

The key regulator of the Japanese aviation market is the MLIT, which has been given overall supervisory power over the aviation market under the Act for Establishment of the Ministry of Land, Infrastructure, Transport and Tourism. The 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, the Commercial Code, the Code of Civil Procedure and the Act on General Rules for Application of Laws 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 (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 (Montreal Convention), to which Japan is a party. These treaties are directly applicable without implementing legislation. 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.

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 (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 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 the MLIT. The conditions of carriage must stipulate matters related to liabilities, including compensation for damage. Foreign carriers are required to attach their conditions of carriage upon application to the 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 an 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) 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 international treaties do not apply.

### **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 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 totally exempt a business operator from its liability to compensate a consumer for damages on the part of a business operator, or partially exempt a business operator from its liability to compensate a consumer for damage 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 (Anti-Monopoly Act) 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.

The Product Liability Act (PL Act) is applicable when damage is 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.

### **III LICENSING OF OPERATIONS**

#### **i Licensed activities**

The operation of air transport services requires a licence from the MLIT. Air transport services are specifically defined as any business using aircraft to transport passengers or cargo for remuneration upon demand. 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, 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.

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

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

Organisations must be approved by the MLIT for a 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.

Radio transmission is separately regulated by the Ministry of Internal Affairs and Communications (MIC) under the Radio Act. 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, 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.

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

## **iii Foreign carriers**

Foreign carriers must obtain permission from the MLIT to operate international routes to and from Japan. An application for this permission must describe 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, an outline of facilities for maintenance and operational control, an 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. The 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.

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

The MLIT is responsible for granting airworthiness certifications for aircraft. Upon an application for airworthiness certification, the 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, the MLIT grants aircraft certification.

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

The MLIT is also responsible for personnel licensing. The 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. 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 the MLIT.

A pilot in command is required to report to the MLIT if an accident occurs, and if he or she is unable to report, the operator of the aircraft must do so instead. A pilot in command is also required to report to the MLIT if he or she has recognised that there was danger of an accident.

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

#### **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 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.

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.

The 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. The 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 the JAIP rather than individual underwriters to ensure that the premium would not differ from one underwriter to another. The JAIP is generally exempted from the Anti-Monopoly Act.

## **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.

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.

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 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.

Unfair trade practices include any of the following acts that tend to impede fair competition, and 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 under 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.

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 an 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 an injunction).

The Civil Aeronautics Act provides exemptions from the Anti-Monopoly Act for agreements approved by the MLIT related to joint management on low-demand routes essential for local residents' lives; and joint carriage, fare agreements and the like on international routes for the purpose of public convenience. 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. However, 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, the MLIT has approved exemptions for a number of business coordination and revenue-sharing agreements between 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–Europe joint venture between JAL and International Airlines Group (the parent company of British Airways and Iberia) in 2012 (adding Finnair in 2013). The MLIT also approved exemptions for cargo joint ventures between ANA and Lufthansa Cargo in 2014 and between ANA and United Airlines in 2015.

## **VII WRONGFUL DEATH**

When a person or entity is responsible for causing wrongful death, the types of damages usually payable under Japanese law are medical expenses, nursing expenses, the deceased person's pain and suffering, the deceased's lost earnings, funeral and burial expenses, and legal fees. Successors may inherit the right to such damages in accordance with the law or will, as applicable. In addition, the next of kin of the deceased may be entitled to their own pain and suffering, and this type of damage is often used by courts to compensate family survivors for their financial losses. Punitive damages are not awarded under Japanese law.

Lost earnings are calculated by subtracting the deceased's estimated annual living expense from his or her annual income, further multiplying the difference by the number of remaining workable years, and applying the statutory discount rate. The statutory discount rate is currently 3 per cent, which rate is to be reviewed every three years.

## **VIII 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 any 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.

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 effect of the Code of Civil Procedure. 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.

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.

The statute of limitations for a claim is generally 10 years from when a claim became exercisable or five years from when the claimant became aware that the claim became exercisable. The statute of limitations for a tort claim is three years (or five years if the tort claim is caused by death or injury) from the time when the claimant became aware of the damage and the perpetrator, or 20 years from the tortious act, whichever comes earlier.

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. 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 have 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. 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 towards 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 damage.

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. Where damages of more than 113,100 SDR are sought, operators may avoid liability by demonstrating that the harm suffered was not owing to their negligence or was attributable to a third party. There are liability limits to certain types of damages: 19 SDR per kilogramme 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 for in the PL Act remains subject to the Civil Code liability provisions outlined above.

The PL Act defines a manufacturer to include any person who has manufactured, processed or imported a product in the course of trade, and any person who provides his or her name, trade name or trademark, or otherwise indicates him or herself as the manufacturer, on the product, or who otherwise makes a representation on the product that holds him or herself out as its substantial manufacturer.

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 under the scientific or technological knowledge available at the time of delivery of the product.

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.

A typical damages award would include incurred monetary damage, including medical fees, nurse fees, funeral fees and legal fees; lost earnings owing to an injury, permanent disability or death; and 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 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, 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 from 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.

Although post-accident family assistance is being discussed in study groups, including those led by the MLIT, there is not yet any law regulating the subject.

## **IX DRONES**

The flight of drones was generally unregulated in Japan until the Civil Aeronautics Act was amended to introduce a regulation focused on drones, which came into effect on 10 December 2015. Under the amended Civil Aeronautics Act, permission from the MLIT is required to fly an unmanned aircraft (namely an aeroplane, rotorcraft, glider or airship that cannot accommodate any person onboard and can be remotely or automatically piloted, excluding those lighter than 200 grammes) in certain areas including airspace more than 150 metres above ground level; airspace around airports; and airspace above densely inhabited districts. Unless specifically approved by the MLIT, the operation of unmanned aircraft is subject to additional restrictions, such as operation in the daytime, operation within the visual line of sight, and keeping a distance of over 30 metres from persons and properties.

Further regulation of drones was introduced after an incident in which an unidentified drone was found on the roof of the Prime Minister's official residence. Effective 7 April 2016, it is now prohibited to fly drones around and over key facilities, including the national Diet building, the Prime Minister's office and official residence, national government buildings, the Supreme Court, the Imperial Palace, certain foreign diplomatic establishments, designated defence-related facilities, nuclear sites and other facilities designated from time to time. Examples of facilities designated from time to time include sites hosting the 2020 Tokyo Olympic and Paralympic Games.<sup>3</sup> Contrary to the Civil Aeronautics Act, which is overseen by the MLIT, the prohibition on the flight of drones around and over key facilities is overseen by the National Police Agency.

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3 Postponed until 2021.

## **X VOLUNTARY REPORTING**

As the result of a reform in 2014, the Voluntary Information Contributory to Enhancement of the Safety (VOICES) programme collects voluntarily submitted aviation safety incident and situation reports from pilots, controllers and others. The programme was established by the MLIT but is operated by a third-party body, the Association of Air Transport Engineering and Research, in an effort to mitigate concerns that voluntary reporting may be used against reporters by the supervisory arm of the MLIT. The VOICES programme anonymises all voluntary reporting it has received, and discards any information that may identify reporters. The supervisory arm of the MLIT has confirmed it will not access any information that may identify reporters, and that it will not demand that a programme operator provide such information. While the anonymisation and discarding of identifiable information would usually provide comfort to reporters, there is no formal structure to prevent reports being used by claimants in injury and wrongful death actions, or prosecutors.

## **XI THE YEAR IN REVIEW**

The outbreak of covid-19, which continued from 2020 into 2021, caused the national government to request all people in Japan to practice social distancing and to avoid non-essential travel or travelling abroad in general. Ten prefectures, including Tokyo, were under a third state of emergency as of June 2021. Early figures suggest that the number of international passengers carried by domestic carriers fell by more than 80 per cent, domestic passengers by more than 50 per cent, international cargo carried by domestic carriers by more than 10 per cent and domestic cargo by more than 35 per cent in the 2020 financial year (April 2020–March 2021) compared to the 2019 financial year. Passenger numbers have been slowly recovering in 2021 compared to 2020, in particular for domestic flights; however, reportedly, approximately 95 per cent of international flights and approximately 63.5 per cent of domestic flights were reduced in the ‘Golden Week’ holidays in 2021 compared to 2019.

## **XII OUTLOOK**

The government decided to introduce a registration system for drones at the Cabinet meeting on 28 February 2020. The summary of the registration system is as follows:

- a* owners of drones have to register some information online with the government, such as the name of the owner or the users, drone serial number and telephone number, immediately after purchase;
- b* ID plates issued by the government after the registration must be attached to all drones; and
- c* drones must transmit their ID numbers via radio to notify information about the owner to the police.

The registration requirements are planned to be implemented in 2022, subject to the approval of the National Diet.

On 4 June 2021, a bill to amend the Civil Aeronautics Act was approved by the National Diet; its effective date has not yet been decided. The amendment is aimed at supporting

airlines during the covid-19 epidemic, and at strengthening aviation security measures and promoting the use of drones. The summary of the amendment is as follows:

- a* if the air transportation business continues to be seriously affected by the covid-19 epidemic on a global scale, which may hinder the security of the air network, the MLIT shall formulate the air transport business infrastructure strengthening policy and provide support to airlines to maintain the route network to ensure passengers' convenience. The policy is planned to include support of ¥120 billion for airline companies in 2021, such as support for a reduction in airport charges. Airlines subject to the policy will formulate the air transport business infrastructure reinforcement plan in line with this policy and regularly report the progress of the plan to the government;
- b* to strengthen aviation security measures, passengers are legally required to undergo security inspections and baggage inspections. The authority for security staff is also clarified in law. In addition, to prevent hijacking and terrorism, the MLIT has formulated the Basic Policy for Prevention of Harmful Acts to clarify the roles and strengthen the cooperation of related parties such as airlines and airport companies;
- c* to strictly guarantee the safety of drones, the MLIT will establish a system to certify the safety of a drone (drone certification system) and a system to certify the skills of drone pilots (drone pilot licence system). If a person with a drone pilot licence operates a certified drone with the prior permission or approval by the MLIT, an unassisted non-visual flight over manned areas (level 4 flight) becomes possible. As for the drone certification system, the government will establish safety standards for drones, and inspect the design and manufacturing process of the manufactured drones. As regards the drone pilot licence system, there are two types of licence: a first class licence, with which a pilot can operate a drone over manned areas, and a second class licence, with which the pilot can operate a drone over areas other than manned areas. The licence can be obtained by a person who is 16 years old or older and who has passed the written and field examination at an institution designated by the government. The licence is renewable every three years. A part of the examination can be exempted by taking a course at a private registration institution such as a 'drone school';
- d* if a person with a drone pilot licence operates a certified drone in accordance with the flight rules designated by the government, such as taking measures to control the entry of third parties under the flight path, permission or approval is not required in principle other than level 4 flight approval; and
- e* the drone pilot is required to report any accident to the government, such as personal injury, property damage, collision or contact with an aircraft. In addition, the Japan Transport Safety Board will investigate serious drone accidents.



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