THE AVIATION LAW REVIEW

ELEVENTH EDITION

Editor
Sean Gates

THE LAWREVIEWS

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PREFACE

The Aviation Law Review continues to be among the most successful publications offered by The Law Reviews, 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 the complexity, mutual inconsistency and occasional judicial incomprehensibility of which provide an endless source of debate and dispute between industry participants and their legal advisers. The *Review* is a source of guidance internationally, and its provision of an introduction to experts in so many jurisdictions in this vital and complicated field is something of which we are justly proud.

This year I welcome new contributions from Belgium, Colombia, Germany and Nigeria, and I extend my thanks and gratitude to all our contributors for their continued support. I would emphasise to readers that the contributors donate very considerable time and effort to make this publication the premier annual review of aviation law. All contributors are carefully selected based on their knowledge and experience in aviation law, and we are fortunate indeed that they recognise both the value of the contribution they make and the further value it constitutes in the broader context of the *Review*.

Readers of the preface in earlier editions of *The Aviation Law Review* will be aware of the recurrent theme relating to the approach of the Court of Justice of the European Union (ECJ) to the interpretation of the EU Flight Compensation Regulation (Regulation 261) governing passengers' rights arising from delays to and the cancellation of flights, and in particular to the question as to what entitles an airline to avoid liability, which is mandated by the Regulation only in extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken.

In my last preface, I mentioned the case of *Airhelp Limited v. Laudamotion GmbH*, where the airline gave due notice to the passengers' travel agent, who omitted to pass it on. This was held not to be extraordinary even though agents routinely decline to give contact details to airlines preventing the airlines from acting otherwise. In its latest departure from reality, the court has just ruled that delay caused by the death of a copilot is not extraordinary, In the case of *TAP v. Flightright and Myflightright*, the facts are that on 17 July 2019, TAP, as operating air carrier, was to operate a flight from Stuttgart (Germany) to Lisbon (Portugal), with a departure scheduled at 6.05. On the same day, at 4.15, the copilot who was to operate the flight concerned was found dead in his hotel bed. Shocked by this event, the whole crew declared itself unfit to fly. As no replacement staff was available outside TAP's base, the 6.05 flight was cancelled. Subsequently, a replacement crew left Lisbon bound for Stuttgart at 11.25 and arrived there at 15.20. The passengers were then transported to Lisbon on a replacement flight scheduled at 16.40. Claims farmers bought the passengers' claims for

a fraction of their potential value and sued, which is itself an interesting reflection on the court's self-appointed mandate to protect passengers since these vultures are hardly in need of protection!

In the judgment, the court referred to earlier decisions where it held that the concept of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No. 261/2004 'refers to events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond that carrier's actual control; those two conditions are cumulative and their fulfilment must be assessed on a case-by-case basis'. The judgment pointed out that 'the objective of Regulation No 261/2004, set out in recital 1, of ensuring a high level of protection for passengers and, second, the fact that Article 5(3) of the regulation derogates from the principle that passengers have the right to compensation if their flight is cancelled, the concept of "extraordinary circumstances" within the meaning of that provision must be interpreted strictly.' Pausing here, this means that the court regards the first preamble as an instruction to give greater weight to the interests of passengers than to the interests of airlines, which is in itself offensive as a deliberate attack on the concept of equality before the law. It also equates the payment of compensation to protection of passengers. This ignores the passengers' interest in safety, connectivity and their societal interest in protecting the environment; all of which require airlines to have the balance sheets to enable them to invest in the industry instead of paying relatively small sums to large numbers of passengers, and even worse, large sums to parasitic claims farmers.

The court starts by:

> *determining whether the unexpected absence – due to illness or death of a crew member whose presence is essential to the operation of a flight – which occurred shortly before the flight's scheduled departure, is capable of constituting, by its nature or origin, an event which is not inherent in the normal exercise of the activity of the operating air carrier. In that regard, it must be held that measures relating to the staff of the operating air carrier fall within the normal exercise of that carrier's activities. That is true of measures relating to the working conditions and remuneration of the staff of such a carrier. Therefore, operating air carriers may, as a matter of course, be faced, in the exercise of their activity, with the unexpected absence, due to illness or death, of one or more members of staff whose presence is essential to the operation of a flight, including shortly before the departure of that flight. Accordingly, the management of such an absence remains intrinsically linked to the question of crew planning and staff working hours, with the result that such an unexpected event is inherent in the normal exercise of the operating air carrier's activity. It should be pointed out that where, as in the present case, the absence is due to the unexpected death of a member of staff whose presence is essential to the operation of a flight and which occurred shortly before the departure of that flight, such a situation, however tragic and final it may be, is no different, from a legal point of view, from that in which a flight cannot be operated because such a member of staff has unexpectedly fallen ill shortly before the departure of the flight. Thus, it is the very absence, due to illness or death, of one or more crew members, even if it was unexpected, and not the specific medical cause of that absence that constitutes an event inherent in the normal exercise of that carrier's activity, with the result that the carrier must expect such unforeseen events to arise in the context of planning its crews and the working hours of its staff.*

The proposition that events which are inherent to the exercise of an airline's activity cannot be unexpected has been established by other decisions of the court, originally in the deeply obscure decision of *Wallentin v. Alitalia*. It has led to bizarre and sometimes conflicting

decisions that are inherent in the deeply flawed reasoning of the court. In an absolute sense, anything that can happen to an airline in its operations is possible, and therefore by the court's logic, cannot be unexpected. In *Huzar v. Jet2.com*: 'Difficult technical problems arise as a matter of course in the ordinary operation of the carrier's activity. Some may be foreseeable and some not, but all are, in my view, properly described as inherent in the normal exercise of the carrier's activity. They have their nature and origin in that activity; they are part of the wear and tear.' Some decisions have, however, held that some events are not so protected. In *Van der Lans v. Koninklijke Luchvaart Maatschappij NV*, however, 'certain technical problems resulting, in particular, from hidden manufacturing defects affecting the safety of flights or acts of sabotage or terrorism may exempt air carriers from their obligation to pay compensation.' It is not remotely clear why, for example, unexpected manufacturing defects are not extraordinary but hidden manufacturing defects affecting the safety of flights or acts of sabotage or terrorism may be. In *Sturgeon v. Condor*, the court held 'such a (long) delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken', namely circumstances beyond the actual control of the air carrier, but the qualification of 'reasonable' there, ought to have meant that the court in *TAP* concluded, as is clear to anyone with a modicum of common sense, that it is not reasonable or commercially practical to require carriers to have standby crews at every outstation in case someone in the operating crew becomes ill.

The court attributes its acknowledged bias by reference to Preamble 1 to the Regulation without mentioning the offence that does to the fundamental proposition of equality in the law. Its increasingly unpredictable decisions on extraordinary circumstances make the outcome of litigation a gamble, though one where the dice are to a large extent loaded against carriers. The reliance on passenger protection, which is regularly cited, never considers what that protection is, but blindly assumes that any damage to an airline is worthwhile if an individual passenger can receive a few hundred euros, regardless of whether that inhibits safety, makes marginal routes uneconomic and prevents airlines from making the largest possible investment in environmental protection. These issues have for a long time been shirked by the Union, and of course taking free money away from pssengers is politically difficult, even though the Regulation as rewritten by the court is plainly unfit for purpose. The history of 261 might also be taken as an object lesson in the fundamental inadequacy of a judicial system without an appellate level, and a system which has no Constitutional Court to rein in the errors into which lower courts sometimes fall. Airlines in Europe need to stand united to resist the continued assault of Regulation 261 on their very existence, for without such unity, to paraphrase Aesop, division can only produce disaster. An industry-wide, coordinated and properly financed approach would seem to be an essential approach, coupled with consideration being given to constitutional challenges in appropriate EU countries where such remedies are available.

I have touched before on the legal issues thrown up by the illegal seizure by Russian operators of aircraft leased from Western lessors. If the confiscations are adjudged to be as a consequence of war risk, then war risk policies will be in play; if not, then all risk policies will be targeted. In any litigation between the parties this will be a significant issue since different insurers with different levels of exposure will be involved, although it has also to be observed that the largest aviation insurers will very likely have lines on both war and all risk policies. This poses a new set of problems. Generally, the market exposure to war is about half that to all risk, and within different companies covering both, there is a tension

as to whether financially they would be best served by the risk being a war risk with less exposure. Since the claims on both policies are handled within one organisation, there will clearly be a need for Chinese walls between the claims handlers to prevent any suggestion that they are favouring one policy over another. Why? Because the reinsurers of insurers on one policy will differ from those on the other, and the insurer owes a duty to act in the best interests of its reinsurers – hard to do when their respective best interests are in such stark conflict. The litigation between lessors and insurers continues in several jursdictions, and the complexity of the issues and the difficulties caused by conflict issues continue to ensure very full employment in the legal industry, which shows that every cloud has a silver lining!

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

Sean Gates
Gates Aviation Ltd
London
July 2023

Chapter 11

JAPAN

Tomohiko Kamimura, Miki Kamiya and Kaoru Tsuji[1]

I INTRODUCTION

The Japanese aviation market is recovering from its slowed state caused by the covid-19 pandemic. According to the Ministry of Land, Infrastructure, Transport and Tourism (MLIT), during the 2021 financial year (April 2021–March 2022),[2] Japanese airports handled 2.93 million international passengers, 102.1 million domestic passengers (counted twice, upon departure and arrival), 4,028,819 tonnes of international cargo and 987,404 tonnes of domestic cargo (counted twice, upon departure and arrival), all numbers that showed a gradual recovery compared to the figures for the 2020 financial year. In particular, the number of international passengers has risen to 175.4 per cent of the figure for the 2020 financial year, and the number of domestic passengers has risen to 141.5 per cent of the figure for the 2020 financial year.

Tokyo is the key hub of the aviation market in Japan. During the 2021 financial year, of the international passengers going to and from Japan, 87.9 per cent[3] (2.58 million passengers) used either Narita International Airport (Narita) or Haneda Airport (Haneda), the two airports in the Tokyo region. Of domestic passengers, 28.3 per cent (28.9 million passengers) used Haneda. As to cargo, 75.2 per cent (3,028,499 tonnes) of international cargo went through Narita or Haneda, and 40.6 per cent (401,026 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 2021 financial year, Japanese carriers carried 1.76 million international passengers (60.1 per cent[4] of all international passengers) and 1,763,893 tonnes of international cargo (43.8 per cent of international cargo overall).

In contrast, domestic aviation in Japan is limited to Japanese carriers and is largely a duopoly of two major network carriers, All Nippon Airways (ANA) and Japan Airlines (JAL). During the 2021 financial year, ANA carried 17,993,496 domestic passengers (37.3 per cent of domestic passengers overall), and JAL together with its subsidiary Japan Transocean Air carried 15,873,031 domestic passengers (32.9 per cent). A number of smaller domestic carriers followed, the largest of these being Skymark Airlines, carrying 4,167,503 domestic passengers (8.6 per cent). Low-cost carriers, which started Japanese domestic operations in

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2 The official figures for the 2022 financial year (April 2022 to March 2023) have not been published yet.

3 This figure is still highly affected by the impact of covid-19. It was 52.7 per cent for the 2019 financial year.

4 This figure is still highly affected by the impact of covid-19. It was 23.1 per cent for the 2019 financial year.

2012, comprised much of the remainder, the largest of these being Jetstar Japan, a joint venture by JAL, Australia's Qantas and Tokyo Century, carrying 2,920,432 domestic passengers (6.1 per cent), and Peach Aviation, an affiliate of ANA, carrying 4,275,567 domestic passengers (8.9 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 (SDRs) for death or injury of passengers, and liable for damages over 100,000 SDRs 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 they are 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 they have 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 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 the 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 fares or levels of fares, 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 their 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 SDRs 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 SDRs 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 SDRs per kilogramme in respect of the destruction, loss, damage or delay of cargo; 4,694 SDRs in respect of delay in the carriage of passengers; and 1,131 SDRs 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 their name, trade name or trademark, or otherwise indicates themself as the manufacturer, on the product, or who otherwise makes a representation on the product that holds themself 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 100 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. 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.

Effective 20 June 2022, all unmanned aircrafts weighing 100 grammes or more must be registered at the MLIT in principle. The registration fee is ¥890 to ¥2,400 per aircraft depending on the application method (e.g., online or on paper). The registration mark must be attached on the unmanned aircraft. The registration must be renewed every three years.

On the other hand, a legal measure was also implemented to bring out the economic value of drones in business. Effective 5 December 2022, a drone pilot licensing system was

introduced as a national qualification for drones. The purpose of obtaining this national qualification is to allow licence holders to fly drones in prohibited areas and times, to omit the hassle of applications and permissions, and to promote the effective use of drones in business.

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 2022, caused a significant fall of the number of passengers compared to the figures for the 2019 financial year and the impact has been ongoing. The number of passengers, however, has been gradually recovering from its damage for the 2021 financial year. In particular, as mentioned in Section I, the number of international passengers has risen to 175.4 per cent of the figure for the 2020 financial year, and the number of domestic passengers has risen to 141.5 per cent of the figure for the 2020 financial year. The numbers of international cargo and domestic cargo have also risen. Passenger numbers have been rapidly recovering in 2022 compared to the 2021 financial year; however, it is still far from the standard before the outbreak of covid-19.

XII OUTLOOK

The Japanese Ministry of Economy, Trade and Industry (METI) plans to mandate oil wholesalers to ensure that by 2030, 10 per cent of fuel supplied for international flights at Japanese airports comes from sustainable aviation fuel (SAF). Given the challenges of electrifying aircraft compared to cars, using SAF derived from plants and waste oil is considered vital in decarbonisation efforts. METI will propose the plan to a public-private discussion panel soon and aims to revise the Advanced Energy Supply Structures Act by 2023. The law will require oil wholesalers to ensure 10 per cent of aviation fuel sold comes from SAF. Penalties for non-compliance are under consideration. Airlines operating international flights in Japan will also be asked to declare a 10 per cent SAF usage in their decarbonisation business plans. The government envisages substituting approximately 1.7 million kilolitres per year, or 10 per cent of domestic aviation fuel consumption, with SAF. As the raw materials for SAF absorb carbon dioxide like plants, it is believed that SAF can reduce emissions by 70 to 90 per cent compared to regular jet fuel. This policy reflects the International Civil Aviation Organization's goal to reduce international flight emissions to net zero by 2050.

Appendix 1

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