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# THE AVIATION LAW REVIEW

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EDITOR  
SEAN GATES

LAW BUSINESS RESEARCH

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# THE AVIATION LAW REVIEW

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Editor  
SEAN GATES

LAW BUSINESS RESEARCH LTD

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# EDITOR'S PREFACE

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This inaugural edition of *The Aviation Law Review* contains the views and observations of leading aviation lawyers in a significant number of jurisdictions, from every region of the world. Aviation law is a truly global discipline and covers a wide range of subjects from disaster to finance, contract law to criminal prosecutions, and competition law to brand protection.

Practitioners who have managed to focus on the industry as a whole continue to prosper and their aviation-specific experience sets them apart from those general practitioners suffering from a downturn in other areas of international law. For those of us involved with the industry in this way, the varying aspects of aviation law still provide a level of satisfaction that is difficult to attain in other practice areas and keep us engaged with – even addicted to – what remains the most exciting, frustrating, but ultimately compelling international industry.

Areas of particular activity in international aviation currently include handling the plethora of rules emanating from the European Commission regulating the operations of airlines. These regulations are often poorly drafted, frequently result from inadequate consultation with the industry, and, on top of that (as has been seen with the EU Regulation 261 provisions), may then, in effect, be redrafted by expansive decisions of the European Court of Justice. While lawyers engaged in this area might be grateful to the officials and judges of the European institutions for their efforts, from an industry perspective perhaps a little more careful consideration and greater reluctance among ECJ judges to make aviation regulations more onerous for airlines would make the European project less likely to attract the opprobrium of the industry.

Similar thoughts might be expressed about the failure of the European Union to institute a truly first-class accident investigation body in its recent Accident Investigation Regulation. Practitioners will be aware of the significant differences in the quality of investigation boards across Member States, with the worst, many in the industry feel, not fit for purpose. The European Commission had an opportunity with the recent Regulation to lift the quality of investigations throughout the system. This would have been comparatively easily achieved by merging the best and training the worst, and by

instituting a Regulation that clarified the responsibilities of investigators and enshrined the separation of investigations from criminal inquiries. The failure to do so ensures that aviation lawyers will continue to be called on to assist aviation businesses based in Europe and further afield who may face, in the worst scenario, incompetent investigations and vengeful prosecutions.

I wish to thank all of the contributors for their support of this inaugural volume of *The Aviation Law Review*. All have devoted significant resources to their contributions, which merit the full attention of the reader. I number them all among my colleagues and genuinely appreciate their willingness to support this publication.

**Sean Gates**

Gates Aviation LLP

London

July 2013

## Chapter 14

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# JAPAN

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

### I INTRODUCTION

Following decades of consistent growth, which at one time made Japan the second-largest aviation market in the world, the Japanese aviation market has remained largely stable since the mid-2000s. According to the Ministry of Land, Infrastructure, Transport and Tourism ('MLIT'), in 2011, Japanese airports handled 53,220,000 international passengers, 77,590,000 domestic passengers, 2,869,000 tons of international cargo and 896,000 tons of domestic cargo.<sup>2</sup>

Tokyo is the key hub of the aviation market in Japan: 62.8 per cent of international passengers used either Tokyo-Narita Airport ('Narita') or Tokyo-Haneda Airport ('Haneda'), while 66.5 per cent of domestic passengers used Haneda, 67.6 per cent of the international cargo handled went through Narita or Haneda and 77.1 per cent of the domestic cargo handled went through Haneda.

International aviation into and out of Japan is handled by both Japanese and foreign carriers, with foreign carriers having a very large market share. In 2011, Japanese carriers carried 12,158,000 international passengers (22.8 per cent of overall international passengers) and 1,057,000 tons of international cargo (36.8 per cent of overall international cargo).<sup>3</sup>

In contrast, domestic aviation in Japan is limited to Japanese carriers and is dominated by two major network carriers. In 2010, 48.3 per cent of all domestic passengers were carried by All Nippon Airways ('ANA') and 33.0 per cent were carried by Japan Airlines ('JAL'). A number of smaller domestic carriers comprised the remainder,

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1 Tomohiko Kamimura is an associate at Squire Sanders Miki Yoshida Gaikokuho Kyodo Jigyō Horitsu Tokkyō Jimusho (the Tokyo office of Squire Sanders).

2 [www.mlit.go.jp/koku/koku\\_fr1\\_000001.html](http://www.mlit.go.jp/koku/koku_fr1_000001.html) (last visited 27 June 2013).

3 [www.mlit.go.jp/k-toukei/11/annual/24\\_suihyo-rekinen.pdf](http://www.mlit.go.jp/k-toukei/11/annual/24_suihyo-rekinen.pdf) (last visited 27 June 2013).

the largest of these being Skymark Airlines (5.6 per cent) and Air Do (3.2 per cent). Three new low-cost carriers ('LCCs') – Peach Aviation, Jetstar Japan and AirAsia Japan – started operations in 2012 and are not included in the statistics above.

Access to the Japanese aviation market has undergone gradual deregulation. In 1985 JAL's monopoly of international flights among Japanese airlines was abolished and as well as assignment of domestic routes by the Ministry of Transport (the predecessor of MLIT), allowing Japanese carriers to compete with their peers in the same routes. JAL was fully privatised in 1987. In 2000, a reform of the Civil Aeronautics Act<sup>4</sup> regarding Japanese carriers (1) replaced route-based operation licences with operator-based licences,<sup>5</sup> (2) replaced advanced approval of airfare with an advance notification system,<sup>6</sup> and (3) allowed carriers to determine their own routes and scheduling.<sup>7</sup>

Further, Japan pushed forward its open skies policy and entered bilateral open skies agreements, beginning with the Japan–US Open Skies Agreement in 2010. As of June 2013, Japan has open skies agreements with 23 countries or regions, which cover 91 per cent of the international passengers flying into and out of Japan. Under most of the 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. One remaining exception is for slot allocation at Haneda; Narita was also subject to slot restrictions until additional capacity became available in April 2013.

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

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

The key regulator of the Japanese aviation market is MLIT, 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. MLIT has also been given licensing and approval authority under the Civil Aeronautics Act, including licensing of

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4 An unofficial English translation of the Civil Aeronautics Act may be found at [www.japaneselawtranslation.go.jp/law/detail/?ft=2&yo=%E8%88%AA%E7%A9%BA%E6%B3%95&x=0&y=0&re=02&ky=&page=1](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&yo=%E8%88%AA%E7%A9%BA%E6%B3%95&x=0&y=0&re=02&ky=&page=1) (last visited 27 June 2013).

5 Article 100 of the Civil Aeronautics Act.

6 Article 105 of the Civil Aeronautics Act.

7 Article 107-2 of the Civil Aeronautics Act.

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 and Narita.

## 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. Damages incurred by passengers or cargo consignors typically result in contractual liability of the carrier, whereas third-party damages typically result in tort liability.

There is no dedicated legislation governing liability in the aviation market in Japan. Japan is a party to the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 ('the Warsaw Convention') as amended by the Hague Protocol of 1955, the Montreal Protocol No. 4 of 1975 and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 ('the Montreal Convention'). These treaties, as applicable, directly govern the liability related to international carriage, in addition to general domestic laws, such as the Civil Code,<sup>8</sup> the Commercial Code, the Code of Civil Procedure<sup>9</sup> and the Act on General Rules for Application of Laws.<sup>10</sup> The Warsaw Convention and the Montreal Convention are applicable to international carriage only, so liability related to domestic carriage is governed by domestic laws, such as the Civil Code, the Commercial Code and the Code of Civil Procedure.

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

Conditions of carriage, as established by the carriers, are important aspects of contractual liability. Under the Civil Aeronautics Act, Japanese carriers are required to establish conditions of carriage and obtain approval from MLIT.<sup>11</sup> The conditions of carriage must stipulate matters related to liabilities, including compensation for

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8 An unofficial English translation of the Civil Code may be found at [www.japaneselawtranslation.go.jp/law/detail/?re=02&cyo=%E6%B0%91%E6%B3%95&ft=2&ky=&page=2](http://www.japaneselawtranslation.go.jp/law/detail/?re=02&cyo=%E6%B0%91%E6%B3%95&ft=2&ky=&page=2) (last visited 27 June 2013).

9 An unofficial English translation of the Code of Civil Procedure may be found at [www.japaneselawtranslation.go.jp/law/detail/?re=02&cyo=%E6%B0%91%E4%BA%8B%E8%A8%B4%E8%A8%9F%E6%B3%95&ft=2&ky=&page=1](http://www.japaneselawtranslation.go.jp/law/detail/?re=02&cyo=%E6%B0%91%E4%BA%8B%E8%A8%B4%E8%A8%9F%E6%B3%95&ft=2&ky=&page=1) (last visited 27 June 2013).

10 An unofficial English translation of the Act on General Rules for Application of Laws may be found at [www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=%E6%B3%95%E3%81%AE%E9%81%A9%E7%94%A8&x=0&y=0&ky=&page=1](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=%E6%B3%95%E3%81%AE%E9%81%A9%E7%94%A8&x=0&y=0&ky=&page=1) (last visited 27 June 2013).

11 Article 106 of the Civil Aeronautics Act.



damages.<sup>12</sup> Foreign carriers are required to attach their conditions of carriage upon application to MLIT for permission to operate international routes to and from Japan. There are no detailed requirements for conditions of carriage of foreign carriers, as it is understood that foreign carriers are subject to the regulation of the aviation authority in the aircraft's state of registration.

**i International carriage**

Japan ratified the Warsaw Convention in 1953, which limits carriers' liabilities for injury, death or damage up to 125,000 gold francs. Japan then ratified the Hague Protocol in 1967, which doubled the liability limitation to 250,000 gold francs. In 2000, Japan ratified the Montreal Protocol No. 4 and the Montreal Convention concurrently. The Montreal Protocol No. 4 amends the Warsaw Convention and primarily pertains to cargo liability. The Montreal Convention established a two-tiered liability regime, under which the carrier is strictly liable up to 100,000 special drawing rights ('SDR')<sup>13</sup> for death or injury of passengers, and liable for damages over 100,000 SDR based on fault. The Montreal Convention became effective in 2003.

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

It is understood and 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**

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

**iii General aviation regulation**

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

**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.

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

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

Although it is not a legal obligation, Japanese carriers typically provide compensation for delay and cancellation of flights and carriage of disabled passengers on a voluntary basis.

The Consumer Contract Act<sup>14</sup> is applicable to contracts between a consumer and a business operator ('consumer contracts'), and is therefore applicable to the conditions of carriage between passengers and carriers. Under the Act, consumers may cancel consumer contracts if there is a major misrepresentation on the part of a business operator. In addition, clauses in consumer contracts are void if such clauses (1) totally exempt a business operator from its liability to compensate a consumer for damages on the part of a business operator, or (2) partially exempt a business operator from its liability to compensate a consumer for damages caused by intentional acts or gross negligence of a business operator.

#### v Other legislation

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade ('the Anti-Monopoly Act')<sup>15</sup> is applicable to any private monopolisation, unreasonable restraint of trade or unfair trade practices in the aviation market, and is discussed further in Section VI, *infra*.

The Product Liability Act ('the PL Act')<sup>16</sup> is applicable when damages are caused by a defect in a product, such as aircraft, engines and components.

The Act for Prevention of Disturbance from Aircraft Noise in the Vicinity of Public Airports and related ordinances provide noise standards. Violation of the noise standards may result in the relevant flight crew being subject to criminal fines.<sup>17</sup>

### III LICENSING OF OPERATIONS

#### i Licensed activities

The operation of air transport services requires a licence from MLIT.<sup>18</sup> 'Air transport services' are specifically defined as any business using aircraft to transport passengers or cargo for remuneration upon demand.<sup>19</sup> The applicant must:

14 An unofficial English translation of the Consumer Contract Act may be found at [www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=%E6%B6%88%E8%B2%BB%E8%80%85%E5%A5%91%E7%B4%84%E6%B3%95&cx=0&y=0&ky=&page=1](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=%E6%B6%88%E8%B2%BB%E8%80%85%E5%A5%91%E7%B4%84%E6%B3%95&cx=0&y=0&ky=&page=1) (last visited 27 June 2013).

15 An unofficial English translation of the Anti-Monopoly Act may be found at [www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=%E7%A7%81%E7%9A%84%E7%8B%AC%E5%8D%A0&cx=0&y=0&ky=&page=1](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=%E7%A7%81%E7%9A%84%E7%8B%AC%E5%8D%A0&cx=0&y=0&ky=&page=1) (last visited 27 June 2013).

16 An unofficial English translation of the PL Act may be found at [www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=%E8%A3%BD%E9%80%A0%E7%89%A9%E8%B2%AC%E4%BB%BB&cx=0&y=0&ky=&page=1](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=%E8%A3%BD%E9%80%A0%E7%89%A9%E8%B2%AC%E4%BB%BB&cx=0&y=0&ky=&page=1) (last visited 27 June 2013).

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

18 Article 100 of the Civil Aeronautics Act.

19 Article 2 of the Civil Aeronautics Act.

- a* have an operation plan that is suitable for ensuring transport safety;
- b* have other appropriate plans for operations of the relevant services;
- c* be able to conduct the relevant services properly;
- d* if the applicant intends to engage in international air transport services, it must have a plan conforming to the air navigation agreements or other agreements applicable to the foreign countries concerned; and
- e* conform with the ownership rules described in detail in subsection ii, *infra*.<sup>20</sup>

The operational and maintenance facilities of the operator must undergo and pass an inspection by MLIT.<sup>21</sup> The operation manual and maintenance manual of the operators must conform to the ordinances of MLIT and be approved by MLIT.<sup>22</sup> Conditions of carriage of the operators must also be approved by MLIT. Domestic routes involving certain congested airports, including Haneda, Narita, Osaka-Itami Airport and Osaka-Kansai Airport are subject to approval by MLIT.<sup>23</sup>

The operation of aerial work services also requires licensing from MLIT.<sup>24</sup> 'Aerial work services' is defined as any business using aircraft other than for the transport of passengers or cargo for remuneration upon demand.<sup>25</sup> Aerial work services typically include flight training, insecticide spraying, photography, advertising and news gathering.

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

- a* aircraft design and inspection of completed designs;
- b* aircraft manufacturing and inspection of aircraft;
- c* maintenance of aircraft and inspection of performed maintenance;
- d* maintenance or alteration of aircraft;
- e* component design and inspection of completed designs;
- f* component manufacturing and inspection of completed components; and
- g* repair or alteration of components.<sup>26</sup>

Once approved, the organisation will be recognised as an approved organisation (*nintei jigyo-jo*).

Radio transmission is separately regulated by the Ministry of Internal Affairs and Communications ('MIC') under the Radio Act.<sup>27</sup> Operators must obtain licences from MIC in order to establish radio stations, including aircraft radio stations.

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20 Article 101 of the Civil Aeronautics Act.

21 Article 102 of the Civil Aeronautics Act.

22 Article 104 of the Civil Aeronautics Act.

23 Article 107-3 of the Civil Aeronautics Act.

24 Article 123 of the Civil Aeronautics Act.

25 Article 2 of the Civil Aeronautics Act.

26 Article 20 of the Civil Aeronautics Act.

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

**ii Ownership rules**

An operator of air transport services may not be:

- a* a foreign individual, a foreign state or public entity or an entity formed under a foreign law (collectively, 'foreigners');
- b* an entity of which a representative is a foreigner, of which more than one-third of the officers are foreigners or of which more than one-third of the voting rights are held by foreigners;
- c* a person whose licence for air transport services or aerial work services was revoked within the past two years;
- d* a person who has been sentenced to a penalty of imprisonment or a more severe punishment for violation of the Civil Aeronautics Act within the past two years;
- e* an entity of which an officer falls under (c) or (d) above; or
- f* a company whose holding company or controlling company falls under (b) above.<sup>28</sup>

Separately, aircraft owned by any person (individual or entity) falling under (a) or (b) may not be registered in Japan.<sup>29</sup>

**iii Foreign carriers**

Foreign carriers must obtain permission from MLIT in order to operate international routes to and from Japan.<sup>30</sup> Foreign carriers that intend to obtain permission must submit an application to MLIT describing their corporate information, operation plans (including the origin, intermediate stops, destination and airports to be used along the routes and distance between each point), aircraft information, frequency and schedule of service, outline of facilities for maintenance and operational control, outline of plans for the prevention of unlawful seizure of aircraft and the proposed commencement date of operation, accompanied by evidence of permission of the foreign carrier's home country regarding the services on the proposed route and its incorporation documents, most recent profit and loss statement and balance sheet and conditions of carriage.<sup>31</sup> MLIT will review the application considering, *inter alia*, 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 MLIT. A foreign carrier that intends to obtain such permission must submit an application to MLIT describing, among other specifics, the necessity to operate on domestic routes.

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

29 Article 4 of the Civil Aeronautics Act.

30 Article 129 of the Civil Aeronautics Act.

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

#### IV SAFETY

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

MLIT is responsible for granting airworthiness certifications for aircraft. Upon an application for airworthiness certification, MLIT inspects the design, manufacturing process and current conditions, and if the aircraft complies with the standards specified in the Civil Aeronautics Act and the related ordinances, MLIT grants aircraft certification.<sup>32</sup>

Maintenance of or alteration to any aircraft to be used for air transport services must be performed and certified as an approved organisation (*nintei jigyo-jo*).

MLIT is also responsible for personnel licensing. MLIT holds examinations in order to determine whether a person has the aeronautical knowledge and aeronautical proficiency necessary for performing as aviation personnel, and grants competence certification upon passing.<sup>33</sup> Medical certification, English proficiency certification (for international flights) and/or instrument flight certification (for instrument flights), as applicable, are also required. A person without a pilot competence certificate of the relevant category may undergo flight training only under a flight instructor certified by MLIT.<sup>34</sup>

A pilot in command is required to report to MLIT upon accidents, and if the pilot in command is unable to report, the operator of the aircraft is required to report.<sup>35</sup> A pilot in command is also required to report to MLIT if he or she has recognised that there was danger of an accident.<sup>36</sup>

Japanese carriers are required to prepare safety management manuals, operation manuals and maintenance manuals in accordance with the Civil Aeronautics Act,<sup>37</sup> and to conduct operations and maintenance in accordance therewith.<sup>38</sup>

#### V INSURANCE

Under the Civil Aeronautics Act, there is no particular requirement for air carriers, aircraft operators or foreign carriers to carry insurance. In practice, however, carriers typically purchase various types of aviation insurance including hull all-risk insurance, hull war risk insurance and liability insurance.

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32 Article 10 of the Civil Aeronautics Act.

33 Article 29 of the Civil Aeronautics Act.

34 Article 34 of the Civil Aeronautics Act.

35 Article 76 of the Civil Aeronautics Act.

36 Article 76-2 of the Civil Aeronautics Act.

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

38 Article 157 of the Civil Aeronautics Act.

MLIT may order a Japanese carrier to purchase liability insurance to cover aircraft accidents if it finds that the carrier's business adversely affects transportation safety, customer convenience or any other public interest.<sup>39</sup> MLIT may also advise applicants to purchase insurance upon their application for an air transport services licence; such advice is not binding on the applicant, but failure to follow such advice may have a detrimental impact on the review of the application.

The Montreal Convention came in effect for Japan in 2003. Under the Convention, state parties must require their carriers to maintain adequate insurance covering their liability. A carrier may be required by the state party to furnish evidence that it maintains adequate insurance covering its liability under the Convention.<sup>40</sup>

## VI COMPETITION

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

The Anti-Monopoly Act restricts three types of activity: private monopolisation, unreasonable restraint of trade and unfair trade practices.<sup>41</sup>

'Private monopolisation' means such business activities by which a business operator, individually or by combination or conspiracy with other business operators, or by any other manner, excludes or controls the business activities of other business operators, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.<sup>42</sup>

'Unreasonable restraint of trade' means such business activities by which any business operator, by contract, agreement or any other means irrespective of its name, in concert with other business operators, mutually restricts or conducts its business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.<sup>43</sup>

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

- a* unjust treatment of other business operators;
- b* dealing with unjust consideration;
- c* unjustly inducing or coercing customers of a competitor to deal with oneself;
- d* dealing with another party on such conditions as will unjustly restrict the business activities of said party;

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39 Article 112 of the Civil Aeronautics Act.

40 Article 50 of the Montreal Convention.

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

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

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

- 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 business operator is a corporation, unjustly inducing, instigating or coercing a stockholder or a director of such corporation to act against the interests of such corporation.<sup>44</sup>

Acts that constitute Private Monopolisation or Unreasonable Restraint of Trade may result in elimination order by the JFTC, penalty payment order by the JFTC, civil action and/or, subject to accusation by the JFTC, criminal punishment. Criminal punishment includes imprisonment of individuals and/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 and/or civil action (including injunction).

The Civil Aeronautics Act provides exemptions from the Anti-Monopoly Act for agreements approved by MLIT related to (1) joint management on low-demand routes essential for local residents' lives, and (2) joint carriage, fare agreements and the like on international routes for the purpose of public convenience.<sup>45</sup> The latter may include IATA fare-setting agreements, carriers' fare-setting agreements, code-sharing agreements, pool agreements, interlining agreements and frequent flyer programme agreements. The JFTC held a series of discussions to repeal such exemptions from 2007 to 2008, but, to date, the exemptions have not been repealed.

In practice, MLIT has recently approved exemptions for a number of business coordination and revenue-sharing agreements between major airlines, including the trans-Pacific joint venture between ANA, United Airlines and Continental Airlines (now a part of 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.

## **VII ESTABLISHING LIABILITY AND SETTLEMENT**

### **i Procedure**

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

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

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

45 Article 110 of the Civil Aeronautics Act.

- 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 respect to a case against a business operator in relation to a consumer contract, the plaintiff is a consumer resident in Japan.<sup>46</sup>

Although parties may agree to jurisdiction by contract in some cases, any agreement in a consumer contract to resolve disputes in a country in which the consumer does not reside would be invalid by the effect of the Code of Civil Procedure.<sup>47</sup> Furthermore, under the Montreal Convention, under certain conditions therein, a passenger may bring action before the courts in which, at the time of the accident, the passenger had their principal and permanent residence.

The timeline for litigation in Japan is as follows:

- a* court-ordered preservation of evidence, 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 with respect to a consumer contract may be revoked by a consumer by effect of the Arbitration Act.<sup>48</sup>

The statute of limitations for a claim is generally 10 years from when the claim became exercisable.<sup>49</sup> There is a shorter statute of limitations for a claim pertaining to commercial activity, which is five years from when the claim became exercisable,<sup>50</sup> and for a claim pertaining to transportation of passengers or freight, which is one year from when the claim became exercisable.<sup>51</sup> The statute of limitations for a tort claim is three years from the time when the claimant became aware of the damages and the perpetrator, or 20 years from the tortious act, whichever comes earlier.<sup>52</sup>

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

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

48 Article 3 of the Arbitration Act. An unofficial English translation of the Arbitration Act may be found at: [www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf](http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf).

49 Article 167 of the Civil Code.

50 Article 522 of the Commercial Code.

51 Article 174 of the Civil Code.

52 Article 724 of the Civil Code.



If there is an identical claim against two or more persons, or if claims against two or more persons are based on the same factual or statutory cause, such persons may be sued as co-defendants.<sup>53</sup> In the context of a typical aviation case such as a claim for damages following an accident, the carrier, owner, pilots and manufacturers may be joined in actions for compensation as co-defendants.

If two or more persons caused damages by their joint tortious acts, each of them would be jointly and severally liable to compensate for the full amount of those damages.<sup>54</sup> According to court precedents, liability is allocated internally among the joint tortfeasors in proportion to each tortfeasor's fault. A joint tortfeasor may require other joint tortfeasors to reimburse any paid portion allocated to such other joint tortfeasors.

## ii Carriers' liability towards passengers and third parties

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

- a* the right or legally protected interest of the claimant;
- b* the wrongful act of the defendant;
- c* the defendant's intent or negligence with respect to the wrongful act;
- d* the invasion of the right or legally protected interest of the claimant and the amount of damages caused thereby; and
- e* the causal relationship between the wrongful action and the damages.<sup>55</sup>

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

Under the Montreal Convention, operators have strict liability up to 113,100 SDR for death or bodily injury of passengers, which means that the operator cannot further exclude or limit its liability.<sup>56</sup> Where damages of more than 113,100 SDR are sought, operators may avoid liability by demonstrating that such damages were not due to their negligence or was attributable to a third party. There are liability limits to certain types of damages: 19 SDR per kilogram with respect to the destruction, loss, damage or delay of cargo; 4,694 SDR with respect to delay in the carriage of passengers; and 1,131 SDR with respect to destruction, loss, damage or delay of passenger baggage.

## iii Product liability

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

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53 Article 38 of the Code of Civil Procedure.

54 Article 719 of the Civil Code.

55 Article 709 of the Civil Code.

56 Article 21 of the Montreal Convention.

The PL Act defines ‘manufacturer’ to include any person who manufactured, processed, or imported the product in the course of trade and any person who provides their name, trade name or trademark or otherwise indicates themselves as the manufacturer on product, or who otherwise makes a representation on the product that holds themselves out as its substantial manufacturer.<sup>57</sup>

In order to establish a product liability claim, the plaintiff should 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 damages caused thereby; and
- e* a causal relationship between the defect and the damages.

In this regard, a ‘defect’ means a lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable usage of the product, the time the manufacturer delivered the product and any other relevant information. A manufacturer may be exempt from product liability if it demonstrates that the defect in the product was not foreseeable from scientific or technological knowledge at the time of delivery of the product.<sup>58</sup>

There is no special legislation covering owners’ liability.

#### iv Compensation

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

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

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

Those incapacitated in accidents may apply for a physical disability certificate from the local prefectural government,<sup>59</sup> and those certified as such may receive various forms of support from national and municipal governments as well as from private businesses, such as social welfare allowance, discounts on utility charges, discounts on transportation fares, exemption or relief of tax on income, nursing services and provision of assistance devices. The system is generally not designed for support providers to recover costs from third parties.

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57 Article 2(3) of the PL Act.

58 Article 4 of the PL Act.

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

## VIII THE YEAR IN REVIEW

Japan saw a major influx of LCCs in 2012, pioneered by Peach Aviation (March 2012), followed by Jetstar Japan (July 2012) and AirAsia Japan (August 2012). All three LCCs were founded as joint ventures between Japanese network carriers and foreign firms. However, AirAsia announced that it would exit its investment in AirAsia Japan in 2013, making the airline a wholly-owned subsidiary of joint venture partner ANA. Both Narita and Kansai airports opened new terminal facilities to accommodate these LCCs.

On 19 September 2012, JAL was relisted on the Tokyo Stock Exchange, two and a half years following its bankruptcy on 19 January 2010. The Enterprise Turnaround Initiative Corporation of Japan, a state-backed entity established to support rehabilitation of local enterprises, injected ¥350 billion into JAL in 2010, following the effective write-off of JAL's stock and partial forgiveness of its debt by banks (worth ¥521.5 billion). After implementing a turnaround plan including reduction of workforce, concentration on core businesses, retirement of fuel-consuming Boeing 747-400 and 767-200 aircraft and cessation of unprofitable routes, the public offering of JAL stock raised ¥663 billion, generating around ¥300 billion for the national treasury. However, its rival ANA criticised the bailout as creating an unfair playing field.

New open skies agreements were reached in 2012 between Japan and the United Kingdom, New Zealand, Sri Lanka, Finland, France, the People's Republic of China,<sup>60</sup> the Netherlands, Sweden, Denmark, Norway and Thailand.

## IX OUTLOOK

In accordance with MLIT's policy to strengthen the Tokyo metropolitan area's airports, slot capacity is gradually being increased at both Haneda and Narita. As of June 2013, the number of annual slots of Haneda is 410,000 (60,000 of which are for international flights) and the number of annual slots of Narita is 270,000. MLIT plans to increase the number of annual slots to 447,000 (90,000 of which for international flights) for Haneda in the first quarter of 2014 and 300,000 for Narita by the first quarter of 2015.

MLIT is concurrently pushing forward its open skies policy by, for example, opening up the fifth freedom of the air (the privilege to put down passengers, mail and/or cargo taken on in a third country and the privilege to take on passengers, mail and/or cargo destined for a third country). Long-haul flights at Haneda, which are limited to overnight hours as of June 2013, will also be allowed during the daytime beginning in 2014, subject to applicable restrictions under bilateral agreements.

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<sup>60</sup> Initially excluding flights to and from Beijing, Shanghai, Narita and Haneda, which are to be discussed at a later date.

## Appendix 1

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Tomohiko Kamimura is an associate of Squire Sanders Miki Yoshida Gaikokuho Kyodo Jigyo Horitsu Tokkyo Jimusho (the Tokyo office of Squire Sanders). His practice focuses on aviation, aviation finance, banking and finance, aviation, mergers and acquisitions, and cross-border commercial transactions. He also has experience in employment matters, governance and compliance, corporate crisis management and litigation. Mr Kamimura has represented a number of Japanese and foreign airlines on regulatory, aviation finance, M&A and investigation matters. In aviation financing matters, he has also represented banks, leasing companies and equity investors. Mr Kamimura is listed in the 2013 edition of *The International Who's Who of Aviation Lawyers*. Mr Kamimura is admitted to practise in Japan and is a member of the Daini Tokyo Bar Association. He is a native speaker of Japanese and is fluent in English, as he spent his childhood in the United States.

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