THE AVIATION LAW REVIEW

SIXTH EDITION

Editor
Sean Gates

THE LAWREVIEWS

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PREFACE

The sixth edition of *The Aviation Law Review* marks the continuation of one of The Law Reviews' most successful publications; the readership of which has been vastly enhanced by making it accessible online since the fifth edition to over 12,000 in-house counsel as well as subscribers to Bloomberg Law and LexisNexis. This year I welcome new contributors from Egypt, Israel, Lebanon and Romania, as well as extending my thanks and gratitude to our seasoned contributors for their continued support. Readers will appreciate that contributors voluntarily donate the considerable time and effort needed to make these contributions as useful as possible to readers.

As this is written, news has come in of an aviation disaster in Cuba where an ageing 737 operated by Mexican carrier Global Air, on behalf of Cubana crashed during a domestic flight, killing 110 of the occupants. The Mexican carrier had assumed responsibility for the liabilities under its agreement with Cubana and reportedly insured the hull and liabilities in Russia. The accident will throw up familiar issues as to the extent to which Cubana audited the operation of Global Air, the latter having apparently been barred for safety reasons from operating in Guyana. Doubtless plaintiff lawyers from Florida will be gathering to secure instructions and seek routes out of Cuba's jurisdiction to maximise compensation, and questions will be asked about the adequacy of oversight of the operator given reports as to its operating history.

In the year since the last review was published, there have been some significant developments with regard to international air carrier liability, with both Russia and Thailand acceding to the Montreal Convention on air carrier liability of 1999 alongside Chad, Indonesia, Mauritius, Sudan and Uganda. Russia, which seems to have had a disproportionate share of recent aviation accidents (Socchi in 2016 and Saratov in 2018), will now face the challenge of persuading its domestic courts to apply the treaty, as they have, historically, awarded moral damages in the absence of bodily injury in Warsaw Convention cases. Thailand's accession brings one of the jurisdictions that has been most resistant to international regulation of carrier legal liability to passengers (ever since the Warsaw Convention of 1929) within the international family. International practitioners will also be aware of the historic resistance of Brazilian courts to the internationally accepted exclusivity of the Warsaw/Montreal system, with many Brazilian courts preferring to apply conflicting provisions of national law. The recent decision of the Brazilian Supreme Court upholding the supremacy of the Montreal Convention may mark a turning point in what has historically been a difficult country within which to defend aviation liability claims.

Inevitably, the European aviation legal scene continues to be dominated by Brexit where reassuring words, at least by regulators in the UK, have yet to be capped by any positive developments in terms of final agreements. This has led major carriers to focus on developing

European air operator certificates and some are also now ensuring they satisfy the European tests for majority ownership, which may cause interesting issues in the future for some of the low-cost carriers that heretofore have been able to operate from the UK – assuming always that the UK continues to apply majority ownership and control rules and that outmoded rule does not fall away.

The other seemingly inevitable development of note within Europe concerns the infamous EU Regulation 261, which from its humble beginnings as a modest attempt to ensure fair treatment of passengers has become, by virtue of the legislative inclinations of the Court of Justice of the European Union (CJEU), a monster devouring the assets of European airlines. Practitioners will be aware that one of the principal focuses of attack of the CJEU has been to decree that although airlines are entitled to a defence based on exceptional measures, nowadays in Europe there are no exceptions.

The latest decision defining extraordinary as ordinary is that of *Kruesemann v. TUI Fly* where the CJEU held that a wildcat strike by flight staff following a surprise announcement of a restructuring does not constitute an extraordinary circumstance releasing the airline from its obligation to pay compensation in the event of cancellation or long delay of flight. The court reasons that the risks arising from the social consequences that go with such measures are inherent in the normal exercise of the airline's activity. The decision is another in a long line of aviation decisions by the CJEU that underscore the proposition that in European jurisprudence, Orwellian doublethink is alive and well! As was made clear at a recent conference of the European Regions Airlines Association, the uninformed extrajudicial legislative impulses of the CJEU in this area threatens regional connectivity and the operation of routes that are only marginally profitable. It can hardly be appropriate to inhibit operations in the regions so as to provide passengers with compensation from events that in any right-thinking person's view would be regarded as outwith the reasonable control of the operator. The European Regions Airline Association continues with other industry groups to lobby for change, which, once Brexit takes effect and the Spanish veto on progress pending resolution to its satisfaction of the Gibraltar dispute falls away, may at last happen.

CJEU 261 decisions are not uniformly in favour of consumers. In May 2017, the Court held in *Marcela Pešková v Travel Service* that a collision between an aircraft and a bird may constitute extraordinary circumstances. The decision is contrary to the EU advocate general's 2016 opinion in the case, which stated that bird strikes do not constitute extraordinary circumstances. The ruling is inconsistent as it appears to contradict the consolidated consumer-friendly court's orientation regarding the interpretation of extraordinary circumstances, and though welcome to carriers and comporting with common sense, underlines that the CJEU does little to ensure the predictability of the court; which of course is in conflict with its own principle of legal certainty, in its supposedly mandatory General Principles of Law.

The year 2017 also posed a number of new old problems for aviation legal practitioners in the context of aviation liquidations; not least of Air Berlin, Alitalia and Monarch Airlines. The collapse of Monarch and the consequent costs incurred by the UK Department for Transport (DFT) posed another challenge to the funds held by the DFT to support passengers stranded in the event of airline collapse. The DFT has announced an independent airline insolvency review to determine whether its system is fit for purpose and adequate to protect passengers after having to repatriate 110,000 passengers following the collapse. The risk for operators is, of course, that the assets of the many will be used to repatriate the passengers

of the few at further and greater cost to the many, which has inevitably resulted in resistance from trade bodies including the International Air Transport Association.

In the regulatory world, the General Data Protection Regulation has been an immense boon to regulatory lawyers while burdening all industries including aviation. Numerous developments have also taken place with regard to unmanned aerial devices following a series of near misses around the world. At the same time, Amazon and Google are collaborating on package delivery by drone and Boeing is actively pursuing the goal of pilotless aircraft. Each of these developments has and will continue to produce new regulations, and developments in this area will continue to be followed closely in this Review.

Once again I would like to extend my thanks to the many contributors to this volume and welcome those who have joined the group. Their studied, careful and insightful contributions are much appreciated by all those who now refer to *The Aviation Law Review* as one of their frontline resources.

Sean Gates
Gates Aviation Limited
London
July 2018

Chapter 23

JAPAN

Tomohiko Kamimura and Miki Kamiya[1]

I INTRODUCTION

The Japanese aviation market is experiencing continuous growth, especially in the number of international passengers. According to the Ministry of Land, Infrastructure, Transport and Tourism (MLIT), during the 2016 financial year (April 2016–March 2017), Japanese airports handled 83.95 million international passengers, 212.42 million domestic passengers (counted twice, upon departure and arrival), 3,786,625 tons of international cargo and 1,768,923 tons of domestic cargo (counted twice, upon departure and arrival).

Tokyo is the key hub of the aviation market in Japan. During the 2016 financial year, of the international passengers going to and from Japan, 54.4 per cent (45.68 million passengers) used either Narita International Airport (Narita) or Haneda Airport (Haneda), the two airports in the Tokyo region. Of domestic passengers, 31.1 per cent (66.09 million passengers) used Haneda. As to cargo, 68.6 per cent (2,597,615 tons) of international cargo went through Narita or Haneda, and 41.5 per cent (733,368 tons) 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 2016 financial year, Japanese carriers carried 21.05 million international passengers (25.1 per cent of all international passengers) and 1,603,171 tons of international cargo (42.3 per cent of international cargo overall).

In contrast, domestic aviation in Japan is limited to Japanese carriers and is largely a duopoly by two major network carriers, All Nippon Airways (ANA) and Japan Airlines (JAL). During the 2016 financial year, ANA carried 43,053,462 domestic passengers (45.3 per cent of domestic passengers overall) and JAL carried 30,670,585 domestic passengers (32.3 per cent). A number of smaller domestic carriers followed, the largest of these being Skymark Airlines carrying 6,734,219 domestic passengers (7.1 per cent). Low-cost carriers, which started Japanese domestic operations in 2012, comprised much of the remainder, the largest of these being Jetstar Japan, a joint-venture by Australia's Qantas, JAL, Mitsubishi Corporation and Tokyo Century carrying 4,537,809 domestic passengers (4.8 per cent) and Peach Aviation, an affiliate of ANA, carrying 3,239,643 domestic passengers (3.4 per cent).

Access to the Japanese aviation market has undergone gradual deregulation. In 1985, JAL's monopoly of international flights among Japanese airlines was abolished. At the same time, the assignment of domestic routes by the Ministry of Transport (the predecessor of the MLIT) was also abolished, allowing Japanese carriers to compete with their peers on the

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

same routes. JAL was fully privatised in 1987. In 2000, a reform of the Civil Aeronautics Act regarding Japanese carriers (1) replaced route-based operation licences with operator-based licences, (2) replaced advance approval of airfare with an advance notification system, and (3) allowed carriers to determine their own routes and scheduling.

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 September 2017, Japan has open skies agreements with 33 countries or 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, in which the first freedom of the air (the privilege to fly across a foreign country without landing) and the second freedom of the air (the privilege to land for non-traffic purposes) are granted to other contracting states. In contrast, Japan is not a party to the International Air Transport Agreement 1944, regarding the third freedom of the air (the privilege to put down passengers, mail or cargo taken on in the home country), the fourth freedom of the air (the privilege to take on passengers, mail or cargo destined for the home country) and the fifth freedom of the air (the privilege to put down passengers, mail or cargo taken on in a third country and the privilege to take on passengers, mail or cargo destined for a third country). The third, the fourth and the fifth freedoms are typically addressed in bilateral air transport agreements between Japan and other states.

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

The key regulator of the Japanese aviation market is 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 (the Warsaw Convention) as amended by the Hague Protocol of 1955, the Montreal Protocol No. 4 of 1975 and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (the Montreal Convention), to which Japan is a party. These treaties are directly applicable

without implementing legislation. 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 (the Chicago Convention) and the standards, practices and procedures adopted as annexes thereto. Violations of the Civil Aeronautics Act may result in criminal liability.

Conditions of carriage, as established by the carriers, are important sources of contractual liability. Under the Civil Aeronautics Act, Japanese carriers are required to establish conditions of carriage and obtain approval from 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 the aircraft's state of registration.

i International carriage

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

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

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

ii Internal and other non-convention carriage

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

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 (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) 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 (the PL Act) 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.

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, it must have a plan conforming to the air navigation agreements or other agreements applicable to the foreign countries concerned; and
e conform with the ownership rules described in detail in Section III.ii.

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 the specific activity to conduct any of the following activities:

a aircraft design and inspection of completed designs;
b aircraft manufacturing and inspection of aircraft;
c maintenance of aircraft and inspection of performed maintenance;
d maintenance or alteration of aircraft;
e component design and inspection of completed designs;
f component manufacturing and inspection of completed components; and
g repair or alteration of components.

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, 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.

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 the permission must describe 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. The MLIT will consider, among other things, compliance by the foreign carrier with its home country laws, the applicable bilateral agreement and relationship, reciprocity, safety, protection of customers and third parties and prevention of name-lending.

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

IV SAFETY

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

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

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

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

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

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

V INSURANCE

International carriers are required to maintain adequate insurance covering their liability under the Montreal Convention. The Montreal Convention, which came into effect for Japan in 2003, stipulates that state parties shall require their carriers to maintain adequate insurance covering their liability under the convention, and that a carrier may be required by the state party to furnish evidence that it maintains adequate insurance covering its liability under the Convention.

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

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

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

VI COMPETITION

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

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

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

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

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

a unjust treatment of other business operators;

b dealing with unjust consideration;

c unjustly inducing or coercing customers of a competitor to deal with oneself;

d dealing with another party on such conditions as will unjustly restrict the business activities of said party;

e dealing with another party by unjust use of one's bargaining position; and

f unjustly interfering with a transaction between a business operator in competition within Japan with oneself or a corporation of which oneself is a stockholder or an officer and another transaction counterparty; or, where such a business operator is a corporation, unjustly inducing, instigating or coercing a stockholder or a director of the corporation to act against the interests of the corporation.

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

The Civil Aeronautics Act provides exemptions from the Anti-Monopoly Act for agreements approved by the 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. The latter at one time included International Air Transport Association (IATA) fare-setting agreements, carriers' fare-setting agreements, code-sharing agreements, pool agreements, interlining agreements and frequent-flyer programme agreements. The JFTC held a series of discussions to repeal such exemptions from 2007, and IATA fare-setting agreements and carriers' fare-setting agreements including specific fare or level of fare were decided not to be approved as exceptions after 2011.

Instead, 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. The 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 the family survivors for their financial losses. Punitive damages are not awarded under Japanese law.

Lost earnings are calculated by subtracting the deceased's estimated annual living expense from his or her annual income, further multiplying the difference by the number of remaining workable years, and applying the statutory discount rate. The statutory discount rate is currently 5 per cent. The legislature has recently resolved lowering the statutory discount rate to 3 per cent effective April 2020 and 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 the governing laws or treaties. The forum used to settle non-contractual liabilities depends on the governing laws and treaties.

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

a the defendant's residence or the place of business is in Japan;

b the place of performance of a contractual obligation is in Japan;
c the place of tort is in Japan; or
d with regard to a case against a business operator in relation to a consumer contract, the plaintiff is a consumer resident in Japan.

Although parties may agree to a jurisdiction by contract in some cases, any agreement in a consumer contract to resolve disputes in a country in which the consumer does not reside would be invalid by the effect of the Code of Civil Procedure. 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 the claim became exercisable. There is a shorter statute of limitations for a claim pertaining to commercial activity, which is five years from when the claim became exercisable, and for a claim pertaining to transportation of passengers or freight, which is one year from when the claim became exercisable. The statute of limitations for a tort claim is three years from the time when the claimant became aware of the damage and the perpetrator, or 20 years from the tortious act, whichever comes earlier.

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 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 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.

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

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

iii Product liability

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

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

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

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

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

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 (1) incurred monetary damage including medical fees, nurse fees, funeral fees and legal fees; (2) lost earnings owing 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, 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.

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 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/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 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 the programme operator provide such information. While the anonymisation and discard of identifiable information would usually provide comfort to the reporters, there is no formal structure to prevent the reports being used by claimants, in injury and wrongful death actions, or prosecutors.

X THE YEAR IN REVIEW

In March 2017, the '8.10 paper' regulating JAL, which emerged from corporate reorganisation in 2011, expired. The paper imposed disclosure and reporting requirements on the airline and put pressure on it to open new routes. Now JAL is able to make management decisions more freely, and after the expiry it was quick to open new routes between Haneda and New York, Narita and Melbourne, Narita and Kona, as well as to form new alliances with India's Vistara, Vietnam's VietJet, Mexico's Aeromexico and Hawaiian Airlines.

In April 2017, ANA Holdings, the parent company of ANA, added its stake in Peach Aviation, the second-largest low-cost carrier in Japan, from 38.7 per cent to 67 per cent, making it a consolidated subsidiary. In March 2018, ANA Holdings announced that it will integrate its two low-cost carrier subsidiaries, Peach Aviation and Vanilla Air, which is to be completed by March 2019.

XI OUTLOOK

On 18 May 2017, the National Diet passed a bill to modernise the transportation and maritime sections of the Commercial Code. The effective date is not yet decided. The key points related to aviation in the approved bill are as follows:

a the establishment of a common regulation that covers land, maritime and air transportation (the existing Commercial Code covers land and maritime transportation separately and does not cover air transportation);

b the introduction of consignors' responsibility to report any dangerous goods in freight;

c the existing rule of rebuttable presumption of carrier's negligence rule upon loss, damage or delay of freight, which is applicable to land and maritime transportation only, shall be expanded to air transportation (although the introduction of a strict liability rule, as stipulated in the Montreal Convention, is rejected);

d changing the existing one-year statute of limitations regarding damages relating to freight transportation (or five-year statute of limitations if a carrier had knowledge of the damage) to a one-year period of exclusion (under which a claimant would lose its claim unless a court action is initiated within one year);

e the carriers' liability mitigation clauses should also apply to their employees;

f a consignee shall have the same status as the consignor upon loss of freight (under the existing Commercial Code, a consignee does not have the rights under transportation contracts until freight arrives at destination. Therefore, a consignee cannot claim damages from the carrier unless the rights under the transportation contract is assigned from the consignor to the consignee); and

g the introduction of a damage rule applicable to the loss or damage of freight during a transport combining two or more of land, maritime or air carriage.

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

Appendix 1

ABOUT THE AUTHORS

TOMOHIKO KAMIMURA

Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho

Tomohiko Kamimura is an attorney at Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho (the Tokyo office of Squire Patton Boggs). His practice focuses on aviation, aircraft finance, banking and finance and cross-border commercial transactions. Mr Kamimura has represented a range of Japanese and foreign airlines on regulatory, aviation finance, M&A and investigation matters. In aircraft financing, he has represented banks, leasing companies and equity investors, in addition to airlines. Mr Kamimura is admitted to practise in Japan and in New York and is a member of Japan's Daini Tokyo Bar Association. He is a native speaker of Japanese and is fluent in English.

MIKI KAMIYA

Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho

Miki Kamiya is an attorney at Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho (the Tokyo office of Squire Patton Boggs). Her practice focuses on various corporate and regulatory matters including aviation, aircraft finance, M&A, and domestic and international transactions. Ms Kamiya has assisted airlines, air charter companies and banks in addition to the other business companies. Ms Kamiya is admitted to practise in Japan and is a member of Japan's Daiichi Tokyo Bar Association.

SQUIRE PATTON BOGGS

Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho
Ebisu Prime Square 16F
1-39 Hiroo 1-chome
Shibuya-ku
Tokyo 150-0012
Japan
Tel: +81 3 5774 1800
Fax: +81 3 5774 1818
tomohiko.kamimura@squirepb.com
miki.kamiya@squirepb.com

www.squirepattonboggs.com

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