

THE AVIATION LAW
REVIEW

SEVENTH EDITION

Editor
Sean Gates

THE LAWREVIEWS

THE AVIATION LAW
REVIEW

SEVENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in September 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Sean Gates

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Tommy Lawson

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Caroline Herbert

SUBEDITOR

Gina Mete

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2019 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at July 2019, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-048-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAET SGB STORLØKKEN AS

ANJARWALLA & KHANNA LLP

ASBZ ADVOGADOS

ASSEGAF HAMZAH & PARTNERS

CALLENDERS & CO

CLYDE & CO LLP

COLIN BIGGERS & PAISLEY

CONYERS

CUATRECASAS, GONÇALVES PEREIRA

DLA PIPER (CANADA) LLP

DQ ADVOCATES

F O AKINRELE & CO

FITZPATRICK & HUNT, PAGANO, AUBERT, LLP

GATES AVIATION LTD

GONDAR & ASOCIADOS

GRANDALL LAW FIRM (BEIJING)

IORDACHE PARTNERS

JAROLIM PARTNER RECHTSANWÄLTE GMBH

KENNEDYS

KROMANN REUMERT

LS LEXJUS SINACTA

MAPLES GROUP

PHOEBUS, CHRISTOS CLERIDES & ASSOCIATES LLC

RAJA, DARRYL & LOH

S HOROWITZ & CO

SCHILLER RECHTSANWÄLTE AG

SHAHID LAW FIRM

SINGHANIA & PARTNERS LLP

SMATSA – SERBIA AND MONTENEGRO AIR TRAFFIC SERVICES LLC

SQUIRE PATTON BOGGS

CONTENTS

PREFACE.....	vii
<i>Sean Gates</i>	
Chapter 1 ARGENTINA.....	1
<i>Ana Luisa Gondar</i>	
Chapter 2 AUSTRALIA.....	14
<i>Andrew Tulloch</i>	
Chapter 3 AUSTRIA.....	27
<i>Dieter Altenburger, Azra Dizdarevic and Georg Schwarzmann</i>	
Chapter 4 BAHAMAS	40
<i>Llewellyn V Boyer-Cartwright</i>	
Chapter 5 BELGIUM	50
<i>Dimitri de Bournonville and Kim Verhaeghe</i>	
Chapter 6 BERMUDA	60
<i>Julie McLean and Angela Atherden</i>	
Chapter 7 BRAZIL.....	69
<i>Guilherme Amaral, Nicole Villa, Renan Melo and Priscila Zanetti</i>	
Chapter 8 BRITISH VIRGIN ISLANDS	79
<i>Audrey M Robertson</i>	
Chapter 9 CANADA.....	83
<i>Laura Safrian QC and Prasad Taksal</i>	
Chapter 10 CAYMAN ISLANDS	95
<i>Wanda Ebanks, Shari McField and Barnabas Finnigan</i>	

Contents

Chapter 11	CHINA.....	107
	<i>Gao Feng</i>	
Chapter 12	CYPRUS.....	118
	<i>Christos Clerides and Andrea Nicolaou</i>	
Chapter 13	DENMARK.....	131
	<i>Jens Rostock-Jensen and Jakob Dabl Mikkelsen</i>	
Chapter 14	DOMINICAN REPUBLIC.....	141
	<i>Rhina Marielle Martínez Brea and Maria Pia Garcia Henriquez</i>	
Chapter 15	EGYPT.....	155
	<i>Tarek Badawy</i>	
Chapter 16	EUROPEAN UNION.....	166
	<i>Dimitri de Bournonville and Charlotte Thijsen</i>	
Chapter 17	FRANCE.....	186
	<i>Carole Sportes and Albertine Guez</i>	
Chapter 18	INDIA.....	199
	<i>Ravi Singhania and Rudra Srivastava</i>	
Chapter 19	INDONESIA.....	214
	<i>Eri Hertawan, Jesconiah Siabaan and Alvin Ambardy</i>	
Chapter 20	ISLE OF MAN.....	225
	<i>DQ Advocates</i>	
Chapter 21	ISRAEL.....	234
	<i>Eyal Doron and Hugh Kowarsky</i>	
Chapter 22	ITALY.....	249
	<i>Anna Masutti</i>	
Chapter 23	JAPAN.....	269
	<i>Tomobiko Kamimura and Miki Kamiya</i>	
Chapter 24	KENYA.....	281
	<i>Sonal Sejpal and Fred Mogotu</i>	

Contents

Chapter 25	MALAYSIA	298
	<i>Chong Kok Seng and Chew Phye Keat</i>	
Chapter 26	NIGERIA	314
	<i>Anthony Nkadi, Kemi Oluwagbemi and Omobola Bakare</i>	
Chapter 27	NORWAY	328
	<i>Hanne S Torkelsen</i>	
Chapter 28	PORTUGAL	340
	<i>Luís Soares de Sousa</i>	
Chapter 29	ROMANIA	351
	<i>Adrian Iordache and Raluca Danes</i>	
Chapter 30	RUSSIA	362
	<i>Alexandra Rodina</i>	
Chapter 31	SERBIA	374
	<i>Goran Petrović</i>	
Chapter 32	SWITZERLAND	392
	<i>Heinrich Hempel and Daniel Maritz</i>	
Chapter 33	UNITED KINGDOM	405
	<i>Robert Lawson QC and Jess Harman</i>	
Chapter 34	UNITED STATES	422
	<i>Garrett J Fitzpatrick, James W Hunt and Mark R Irvine</i>	
Appendix 1	ABOUT THE AUTHORS	449
Appendix 2	CONTRIBUTORS' CONTACT DETAILS	471

PREFACE

I am delighted to continue to be associated with *The Aviation Law Review*, of which this is the seventh edition. Aviation has from the outset been one of The Law Reviews' most successful publications; its readership has been vastly enhanced by making it accessible online to over 12,000 in-house counsel, as well as subscribers to Bloomberg Law and LexisNexis. This year I welcome a new contributor from Cyprus, as well as extending my thanks and gratitude to our seasoned contributors for their continued support. Readers will appreciate that contributors voluntarily donate considerable time and effort needed to make these contributions as useful as possible to readers. They are carefully selected for their knowledge and insights into their subject and we are fortunate to enjoy their support.

At the time of writing, the shocking B737 Max disaster story continues to unfold. The method of self-approval adopted by Boeing with the support of the FAA has been the subject of much criticism, the more so since approval by the FAA has routinely been followed by other regulators hitherto without serious challenge and because the FAA was the last substantial regulator to ground the type following the two fatal accidents. In an unprecedented break with previous practice, EASA has announced that it is conducting its own 'independent' review of the design of the Max and that 'completion of it was a prerequisite for return to service of the aircraft'. EASA itself had adopted the practice of reciprocal recognition. There can be no doubt they knew of its drawbacks. There are eerie parallels between this and the Helios 737 accident where Boeing incorporated a warning system that it had superseded in other models, notwithstanding warnings following other depressurisation incidents from European accident investigation boards and NASA itself! The complacency of both the manufacturer and the FAA following the two fatal accidents has left many aghast.

Inevitably following the news, plaintiffs are seeking a route to the US for their compensation claims and seeking to avoid the *forum non conveniens* rule that in principle directs such lawsuits back to the countries with jurisdiction over the carrier – usually with the requirement of full Boeing cooperation with the plaintiffs' alternative choice of jurisdiction and provision of all discovery that would otherwise be mandated in US litigation. The manufacturer will also be seeking an early agreement with the operators' insurers, and any other interested parties, to a settlement agreement to try to limit its own exposure to non-US jurisdictions. The shortcomings discovered in the regulator's own processes may, however, hamper Boeing's efforts to escape US judicial oversight, as may the involvement of the Federal Bureau of Investigation in the criminal investigation of the certification of the type, following the establishment of a grand jury investigation of the certification process. In the meantime, as a result of the grounding of the 737 Max, claims are mounting from operators that will dwarf the insurance coverage available (reportedly capped at US\$250 million). In the meantime, Boeing's loss of orders will redound to the benefit of Airbus and other

single-aisle aircraft manufacturers, as has been seen from orders announced at the Paris Air Show; notwithstanding the loyalty displayed by the International Airlines Group with regard to its order for 200 737 MAX aircraft.

It is hoped EASA will also reconsider its reliance on other regulators' type certificates, as well as any reliance it places on European manufacturers for type approval. The cost of adequate regulation in all jurisdictions must be met centrally, as was heavily recommended as long ago as 2000 in the Rand Institute's report 'Safety in the Skies' on the aviation accident investigation process.

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 converted into 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 – although the UK has signalled by means of a draft statutory instrument that it will not apply the EU majority ownership and control rules once the UK leaves the Union.

Another current project of note within Europe concerns the infamous EU Regulation 261/2004, which from its beginnings as an attempt to ensure fair treatment of passengers (or, as frequently rumoured, the reprisal of a snubbed EU Commissioner determined to show she was not to be ignored) has become, by virtue of the legislative inclinations of the Court of Justice of the European Union (CJEU), a monster devouring the assets and threatening the safety of European airlines. The Regulation has been grotesquely judiciously distorted since its adoption. The ECJ has devastated the balance of the regulation by destroying the defence of 'exceptional circumstances' as a defence to claims, as well as by applying a time limit for making claims of up to 10 years, and finally by eliding delay and cancellation in determining availability of compensation. This was achieved without any attempt to determine the financial impact on carriers who have seen regional routes in particular become inoperable due to cost resulting in losses of prized European connectivity. All this in return for the sake of a few hundred euros' 'compensation' to individuals for minor inconvenience and perhaps a misguided boost to the popularity of the nanny super state!

The regulation is being reviewed by the EU on the assumption that the UK is leaving, and that Spain will withdraw its blockade on this and other projects as a result. The Steer group has been commissioned to review and report back and has instigated a number of enquiries to various organisations as a result. The omens are not good. The review is being conducted of the effect of the regulation, but has consciously ignored regional carriers in its case studies and has been heavily weighted to claimants' associations whose *raison d'être* is the collection of fancy percentages on claims made.

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. The European Regions Airline Association continues, with other industry groups, to lobby for change. Local governments whose industry and regional connectivity is threatened by this project need to join forces with consumer associations interested in consumers' freedom of movement and industry interested in logistics to make their interest in continued connectivity heard.

The second European Aviation Environmental Report (EAER) was published this year and provides an updated assessment of the environmental performance of the aviation sector published in the first report of 2016. It reports that continued growth of the sector has

produced economic benefits and connectivity within Europe and is stimulating investment in novel technology but recognises that the contribution of aviation activities to climate change, noise and air quality impacts is increasing, thereby affecting the health and quality of life of European citizens. Countermeasures are being developed, but their combined effect has reportedly not kept pace with the recent strong growth in the demand for air travel, thereby leading to an overall increase in the environmental impact. If Member States would stop pandering to uninformed sectional national and labour interests to permit the true operation of the Single European Sky ATM Research (SESAR) programme the direction of travel would be altered overnight, but as usual incompetent short termism prevails in politics to the detriment of industry and the environment. It is hoped one day we will see an unfettered SESAR introduced, although the recent EU decision to prevent UK carriers from using carbon offsets does not suggest an overwhelming dedication to pollution reduction.

The tension between ‘just culture’ and the criminal law and their inherent incompatibility has been highlighted again by the convictions in Switzerland of three air traffic controllers in relation to separate incidents of conduct found by the Swiss court to have been negligent. One of the instances involved a separate conviction of the pilot of one of the affected aircraft. The incidents involved serious mistakes by air traffic control, which were corrected either by the controller or the affected pilots, so the Swiss law requirement of a ‘real collision risk’ seems unduly aggressively to have been applied in these cases. Criticisms of the Swiss courts aside regarding the convictions, the fact of prosecutions highlights again the ‘myth’ of ‘just culture’ as being a philosophy in actual practice, as opposed to a touching expression of faith dispelled by the reality that prosecutors and courts will recognise that some priority should be given to safety over criminalisation. Unnecessary prosecutions make confidential reporting an ever more risky approach for those at the sharp end of aviation.

Following the high-profile collapse of Monarch Airlines preceded by a number of other highly expensive forays by the state into the provision of private air transport, an airline insolvency review was established by the Chancellor to research better ways to deal with the collapse of airlines. The review has now reported. The obvious solution adopted elsewhere of using the assets of the insolvent airline to repatriate its customers is one of the alternatives recommended and it is hoped, notwithstanding the current stasis in legislation in the UK for other reasons, will be one given urgent attention. The creation of a special administration regime changing the purpose of an airline’s administration to the repatriation of its passengers as a first priority over payment of creditors and ensuring payments of salaries and costs during rescue efforts would enormously mitigate the cost otherwise imposed on taxpayers via the UK government’s current approach of arranging and paying for alternative air transport from other operators where inevitably the rates charged are at the highest end of the spectrum.

Illicit drone activity has been a significant feature of the past year and has resulted in the closure for significant periods of time of a number of major airports. Those incidents, including threats by environmental groups deliberately to use drones to close Heathrow Airport, highlight the fact that technology has got ahead of regulation and counter technology. Last year ICAO issued guidance material on safety management, seeking a ‘total system safety’ in which all users of the aviation environment operate within a fully integrated safety system. How that might affect rogue users is not clear given the ease with which operators can interfere with any inbuilt protections in the drone itself. Inevitably claims from passengers arise as a result of delays and equally inevitably, by virtue of the operation of EU261, airlines will continue to bear significant costs regardless of fault simply for caring for passengers. This may compel them at last to take seriously the prospects for claims against third parties such

as airport operators, air navigation service providers and conceivably the drone manufacturers themselves.

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 Ltd

London

July 2019

JAPAN

Tomohiko Kamimura and Miki Kamiya¹

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 2017 financial year (April 2017–March 2018), Japanese airports handled 93.33 million international passengers, 218.91 million domestic passengers (counted twice, upon departure and arrival), 4,130,453 tonnes of international cargo and 1,747,725 tonnes of domestic cargo (counted twice, upon departure and arrival).

Tokyo is the key hub of the aviation market in Japan. During the 2017 financial year, of the international passengers going to and from Japan, 52.1 per cent (48.62 million passengers) used either Narita International Airport (Narita) or Haneda Airport (Haneda), the two airports in the Tokyo region. Of domestic passengers, 30.3 per cent (66.41 million passengers) used Haneda. As to cargo, 68.7 per cent (2,835,616 tonnes) of international cargo went through Narita or Haneda, and 42.0 per cent (734,706 tonnes) of domestic cargo went through Haneda.

International aviation into and out of Japan is handled by both Japanese and non-Japanese carriers, with non-Japanese carriers having a larger market share. During the 2017 financial year, Japanese carriers carried 22.39 million international passengers (24.0 per cent of all international passengers) and 1,763,226 tonnes of international cargo (42.7 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 2017 financial year, ANA carried 44,252,322 domestic passengers (44.6 per cent of domestic passengers overall) and JAL together with its subsidiary Japan Transocean Air carried 32,484,124 domestic passengers (32.7 per cent). A number of smaller domestic carriers followed, the largest of these being Skymark Airlines carrying 7,223,683 domestic passengers (7.3 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 4,800,625 domestic passengers (4.8 per cent) and Peach Aviation, an affiliate of ANA, carrying 2,996,051 domestic passengers (3.0 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

¹ Tomohiko Kamimura and Miki Kamiya are attorneys at Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho. The information in this chapter was accurate as at July 2018.

time, the assignment of domestic routes by the Ministry of Transport (the predecessor of the MLIT) was also abolished, allowing Japanese carriers to compete with their peers on the same routes. JAL was fully privatised in 1987. In 2000, a reform of the Civil Aeronautics Act regarding Japanese carriers (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, fourth and fifth freedoms are typically addressed in bilateral air transport agreements between Japan and other states.

Japan is not a party to the Convention on International Interests in Mobile Equipment (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 DRONES

Flight of drones was generally unregulated in Japan until the Civil Aeronautics Act was amended to introduce a regulation focused on drones, which came into effect on 10 December 2015. Under the amended Civil Aeronautics Act, permission from the MLIT is required to fly an unmanned aircraft (namely, an aeroplane, rotorcraft, glider or airship which cannot accommodate any person onboard and can be remotely or automatically piloted, excluding those lighter than 200 grams) in certain areas including (1) airspace more than 150 metres above ground level; (2) airspace around airports; and (3) airspace above densely inhabited districts. Unless specifically approved by the MLIT, operation of unmanned aircraft is subject to additional restrictions, such as operation in the daytime, operation within the visual line of sight, keeping a distance of over 30 metres from persons and properties.

Further regulation of drones was introduced after an incident in which an unidentified drone was found on the roof of the Japanese Prime Minister's official residence. Effective 7 April 2016, it is prohibited to fly drones around and over key facilities, including the national Diet building, the Prime Minister's office and official residence, national government buildings, the Supreme Court, the Imperial Palace, certain foreign diplomatic establishments, designated defence-related facilities, nuclear sites, and other facilities designated from time to time. Examples of facilities designated from time to time include sites hosting the G20 summit meetings, the 2019 Rugby World Cup and 2020 Tokyo Olympic and Paralympic Games. Contrary to the Civil Aeronautics Act, which is overseen by the MLIT, the prohibition of flight of drones around and over key facilities is overseen by the National Police Agency.

X VOLUNTARY REPORTING

As the result of a reform in 2014, the Voluntary Information Contributory to Enhancement of the Safety (VOICES) programme collects voluntarily submitted aviation safety incident/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.

XI THE YEAR IN REVIEW

On 1 April 2019, an amendment of the Commercial Code came into effect to modernise the transportation and maritime sections therein. The key points related to aviation in the amendment 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.

XII OUTLOOK

Peach Aviation and Vanilla Air, low-cost carrier subsidiaries of ANA Holdings, which is the parent company of the full service carrier ANA, are in the midst of integration into a single low-cost carrier: Peach Aviation. It is reported that the integration will complete by March 2020, when Vanilla Air will merge into Peach Aviation.

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.

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



ISBN 978-1-83862-048-6