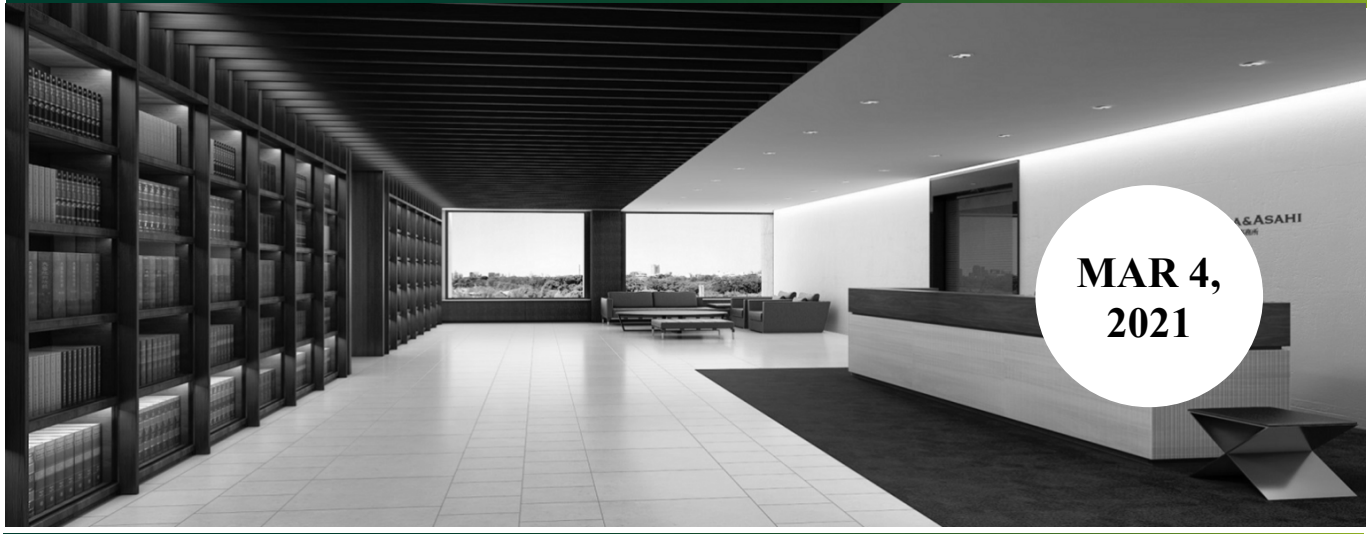


Finance Law Newsletter



Japan Eases Airline Slot Usage Requirements in Pandemic Response

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1. Introduction

The Ministry of Land, Infrastructure and Transport (“MLIT”) released the "Support Measures Package for Strengthening the Management Base of Airlines and Airports in the Corona Era (Revision)" on 21 December 2020, which included the following five groups of measures:¹

- (i) Measures for maintaining and securing the aviation network
- (ii) Measures facilitating response to funding demands and maintenance of employment levels
- (iii) Emergency measures to ensure the stable and smooth recovery of the air transportation sector
- (iv) Measures to support transition of airline and airport-related companies into sustainable business structures in the Corona era and beyond, including:
 - 1) Measures to support efforts for improving profitability
 - 2) Measures to support efforts for reducing costs
- (v) Measures to maintain and reinforce airport-related businesses that support aviation networks

In this Newsletter, we explain why the current business environment surrounding airline companies (and by extension, airports and aviation networks) is extremely severe and why, from a legal perspective, the support measures in group (iii) (hereinafter “the measure”), in particular the portions related to ‘slot usage’ (defined below), are essential for realizing post-Corona growth in both the airline industry and the nation at large.

¹ Following upon its release of the original “Support Measures Package for Strengthening the Management Base of Aircraft and Airports in the Corona Era” on 28 October 2020.

2. Releasing airlines from minimum slot usage requirements as an emergency measure

To grasp the significance of the measure, it is necessary to understand the elements and context; to this end and described further below, a ‘slot’ is considered as an opportunity for an aircraft to use the runways of a particular airport for take-offs and landings and as such their usage must be coordinated to ensure the safety and efficiency of airline services and the fair treatment of the industry participants. According to Japan Schedule Coordination² (“JSC”), which coordinates the schedules of Japanese airlines and foreign airlines that take-off and land at Narita International Airport and other major airports in Japan, the Worldwide Airport Slot Guidelines³ (“WASG”) stipulate a priority principle called “historic precedence.” Under this principle, if an airline operates 80% or more of its planned flights in the summer or winter of a given year, the same slots will be secured for their use in the same period of the following year. If an airline fails to meet the minimum 80% usage requirement, it can lose historic precedence in the same season the following year. Article 8.6 of the WASG dubs such rule as the “Use it or Lose it Rule”⁴ (hereinafter the “U/L Rule”).

Within the measure, releasing airlines from the U/L Rule at congested airports is deemed of high necessity to ensure the stable and smooth restoration of air transportation. Further recognizing this fact, the measure stipulates that flight cancellations during the 2020 summer and winter timetables, due to the impacts of the corona virus, will be not treated as ‘non-utilization’ of slots.

3. Coordinating slots (application of the U/L Rule)

There is no clear definition of “slot” in Japanese law, however, much as in the generally accepted conception noted above, it is viewed as an opportunity for an aircraft to use the runways of a particular airport for take-offs and landings.⁵ In this regard and with respect to the legal nature of slots, the Sub-Committee of the Japan Civil Aviation Bureau, in Material 1 of their Fifth Session (hereinafter “Sub-Committee Materials”), note that slot precedents should be respected to some extent as “expected rights” based on customary practice, but that they do not grant airlines legal rights.

When an airline desires a slot for an international flight at a major airport in Japan, it needs to submit a request for the desired slot to the JSC.⁶ The JSC then carries out slot allocations based on consideration of the whole of such requests, the U/L Rule (if applicable), and the airport congestion designations assigned by the International Air Transport Association (hereinafter “IATA”). Among the IATA designations, airports where there is potential for congestion, such as Kansai International Airport and the New Chitose Airport, are described as “Level 2”, while those with the highest levels of congestion, such as the Narita and Tokyo international airports, are

² Organized under the Japan Aeronautic Association commissioned by MLIT.

³ A global set of guidelines coordinating landings and take-offs issued by the International Air Transport Association, Airports Council International (ACI) and the Worldwide Airport Coordinators Group.

⁴ Japan Schedule Coordination Website (<http://www.schedule-coordination.jp/jpn/tejun/index.html>)

⁵ According to a report by the Air Transport Policy Council (9 April 1998), for example, the subcommittee materials presented in the body explain slots as “opportunities for aircraft to use the relevant aerodrome, air navigation facilities, air traffic control, etc., every time they take off from or land at the aerodrome.”

⁶ Previously, Japan Airlines had been commissioned to carry out coordination on international flights, but in light of the fact that slot coordination by third-party organizations has been common in other countries, it was decided to commission the Japan Aeronautical Association in 2007.

described as “Level 3”,⁷⁸ which is the only designation that necessitates application of the U/L Rule.⁹

In coordinating slot usage, however, the WASG provides certain exceptions to the U/L Rules, such as a) “Interruption of the air services of the airline due to unforeseeable and unavoidable causes outside the airline’s control, for example a closure of an airport or airspace or severe weather” (WASG 8. 8.1a), or b) “Action intended to affect these services that prevents the airline from carrying out operations as planned - for example, industrial action or strikes” (WASG 8. 8.1b). Under these circumstances, unused slots will be considered as “operated” (WASG 8. 8.1), which has the practical consequence of maintaining the effected airlines historic precedence.

Nevertheless, it is considered that the WASG 8.1 exemption does not apply to the cancellation of flights due to the spread of contagious disease. Therefore, if flights are cancelled due to COVID-19, slots are considered unused, and such cancellations increase the probability that each airline will lose its historic precedence in the next equivalent season. Therefore, when COVID-19 began to spread around the world, it was said that airlines continued to operate unprofitable flights (with almost no passengers) to avoid losing slots through application of the U/L Rule. In addition to squeezing the airline industry, these issues are also viewed as problematic from the standpoint of curbing greenhouse gas emissions.

On 2 March 2020, IATA requested that governments around the world suspended the U/L Rule.¹⁰ In response, aviation authorities in various countries and jurisdictions, including the U.S. and EU, have continuously announced the introduction and extension of special treatments in respect of application of the U/L Rule.¹¹

The measure taken by MLIT is in line with the worldwide trend, and is expected to be meaningful as a support measure, allowing struggling airlines to manage challenges brought about by the spread of COVID-19 by avoiding difficulties, at least in terms U/L Rule application.

⁷ JSC website (<http://www.schedule-coordination.jp/jpn/faqs/index.html#07>)

⁸ Note that Level 1 is defined as “[airports] where the capacity of the [...] infrastructure is generally adequate to meet the demands of airport users at all times”; Level 2 is defined as “[an airport] where there is potential for congestion during some periods of the day, week, or season, which can be resolved by schedule adjustments mutually agreed between the airlines and facilitator” (WASG 4.1); Level 3 is defined as “a) Demand for airport infrastructure significantly exceeds the airport’s capacity during the relevant period; b) Expansion of airport infrastructure to meet demand is not possible in the short term; c) Attempts to resolve the problem through voluntary schedule adjustments have failed or are ineffective; and d) As a result, a process of slots allocation is required whereby it is necessary for all airlines and other aircraft operations to have a slot allocated by a coordinator in order to arrive or depart at the airports during the periods when slot allocation occurs” (WASG 5.1)

⁹ After coordinating these schedules, each airline applies to MLIT for authorization of a planned timetable, which is confirmed as a ‘final timetable’ after such authorization. The schedule sets the planned number of flights to which the U/L Rules will be applied. The approval of the MLIT is required for the final schedule (business plan) of international flights for domestic air carriers (Article 101 and 109 of the Aviation Law) and foreign air carriers (Article .129 and Article 129-3 of the Aviation Law)

¹⁰ IATA website (<https://www.iata.org/en/pressroom/pr/2020-03-02-01/>)

¹¹ For example, 85 FR 15018 “Orders Limiting Operations at John F. Kennedy International Airport and New York LaGuardia Airport; High Density Traffic Airports Rule at Ronald Reagan Washington National Airport”(https://www.federalregister.gov/documents/2020/03/16/2020-05278/orders-limiting-operations-at-john-f-kennedy-international-airport-and-new-york-laguardia-airport), and REGULATION (EU) 2020/459 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 March 2020 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R0459>).

4. Other opinions and the future

Policies releasing airlines from the minimum slot usage requirement of the U/L Rule have been recognized in countries around the world, and there has been widespread acceptance of movements to allow airlines to operate more flexibly, but doubts remain about the significance of such treatment. For example, the Airports Council International Europe (ACIE) is calling for caution when making such judgements could jeopardize air connectivity and economic recovery in the Post-COVID-19 era. Specifically, the ACIE warns EU countries that “slots must not be covered by waivers when an airline publicly announces that it will cease or significantly reduce its services at an airport. Airlines that are ready and able to operate to support the recovery must not be blocked from entering airports by airlines having confirmed they will exit these markets but continue to hold slots”.¹²

As it has been pointed out that the waiver of the minimum slot usage requirement of the U/L Rule can have negative consequences on air connectivity and economic recovery, it will be necessary to keep a close eye on how each country will apply the U/L Rule from now on and promote utilization of the airport capacity, which in many senses could be considered a public good, and rescue airlines suffering from the impacts of the COVID-19 pandemic.

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¹² ACI Europe website (<https://www.aci-europe.org/media-room/260-airports-call-for-data-driven-approach-to-establishing-the-post-covid-aviation-landscape.html>)