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Subrogation of damage claims in Japan

Considerations in the context of the Haneda aircraft collision

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On January 2, 2024, a tragic incident occurred at Haneda airport in Japan, in which a commercial aircraft operated by JAL collided with an aircraft operated by the Japan Coast Guard. It was subsequently announced by JAL that the damage to the JAL-operated aircraft is expected to be covered by an aerospace insurance policy. Given the size of the risks involved, aerospace insurance tends to be underwritten by major global insurance companies or reinsured in the global insurance market. Additionally, subrogation of damage claims accruing to the insured can be complex. This is because multiple parties may be involved, including parties to the collision and passengers, as well as those involved in the operation of the airport. In some cases, the state, i.e., Japan in the present case, may also be involved.

In this newsletter, we will answer some common questions that may arise when an insured accrues a potential damage claim against Japan or one or more Japanese public entities.

Q. The insurance policy is not governed by Japanese law. Is Japanese law still relevant?

The terms contained in the insurance policy (including the subrogation clause) will be interpreted in accordance with the governing law specified in the policy. Japanese law, however, may still apply to relevant substantive rights. For example, if the rights of the insured airline operator were infringed in Japan, any possible tort claim would likely be governed by Japanese law.

Q. Does the principle of sovereign immunity exist under the laws of Japan?

No. Article 17 of the Constitution of Japan provides that Japan and Japanese public entities are liable for illegal acts by public servants. Based on this, the State Redress Act (Act No. 125 of October 27, 1947) was enacted to enable actions against them. An unofficial English translation of this Act by the Ministry of Justice can be accessed [here](#).

Q. What are the substantive requirements for bringing a damage claim under the State Redress Act?

Although various types of claims can be brought under this Act, the most basic of these is tort claims, as provided under Article 1, Paragraph 1. The substantive requirements under Article 1, Paragraph 1 are that: (i) a public employee who exercises the public authority of the State or of a public entity has (ii) in the course of their duties (iii) unlawfully (iv) caused loss or damage to another person (v) intentionally or negligently.

Q. What does “exercises the public authority of the State or of a public entity” mean?

This concept broadly covers actions that are neither (i) purely private economic activities nor (ii) concerning the placement and administration of public structures. (Acts falling under item (ii) are covered by Article 2 of the Act.) For example, instructions from air traffic controllers and the operation of aircraft by the State may both satisfy this requirement.

Q. To successfully bring a claim, is it necessary to specify which public servant’s negligence caused the accident?

Not in all cases. The Supreme Court of Japan has held that where the joint actions of two or more public servants were involved, under certain conditions, it is unnecessary to specify whose illegal and negligent action caused the damage. The conditions are that, first, the damage would not have occurred in the absence of one of the joint actions; and second, if the question of which public servant was at fault is disregarded, Japan (or the relevant Japanese public entity) would otherwise be subject to liability. The situation is more complex if one of the public servants was acting for Japan while the other was acting for another Japanese public entity, e.g., the Tokyo Metropolitan government, or if the public servants were acting for two different Japanese public entities. In such a case, the plaintiff will be required to specify the public servant whose actions caused the loss, to enable the Japanese courts to determine where to assign liability.

Q. What does it mean for an act to be “unlawful” or “negligent” under the State Redress Act?

There is some overlap between the requirements for unlawfulness and negligence, in that both may encompass a failure to exercise a duty of care. A duty of care in this context constitutes an occupational duty to both (i) not infringe upon other persons’ rights or legally protected interests and (ii) comply with relevant statutes. It is important to assess any potential case considering both of these aspects.

Q. What is the test for assessing causation and scope of damages under the State Redress Act? What categories of damages may be recoverable?

Causation is assessed both in terms of factual causation and legal causation. The latter determines the scope of damages recoverable. Legal causation can be established for “ordinary damages”, which are damages ordinarily arising under the relevant circumstances. Legal causation can also be established for damages that do not qualify as “ordinary damages” but were foreseeable by the tortfeasor at the time of the tortious action. If this test is satisfied, there is no limitation on the categories of damages which may be claimed. For example, lost profits may be recoverable.

Q. Is there a duty to mitigate under the State Redress Act?

Yes. Any failure to mitigate damages may be relevant to the assessment of comparative negligence that is typically carried out by a Japanese court, based on the parties’ submissions, when determining damages in a tort action. In other words, if an insured fails to mitigate its damages, a comparative negligence assessment could have the effect of reducing the insured’s recoverable damages.

Q. What is the statute of limitation applicable to a damage claim under the State Redress Act?

It is the shorter of (i) three years since the victim or its legal representative became aware of the damage and the identity of the tortfeasor or (ii) 20 years from the time of the tortious act. The three-year period runs from the time that the victim or its legal representative became aware of facts that are sufficient to bring a tort action.

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