

韓國에서의 航空法 및 航空保險 發展推移와 當面課題*

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》 要 約 《

韓國에서의 航空法과 航空保險은 다소 새로운 분야이나, 1970년대 및 1980년대의 경제성장에 힘입어 괄목할 발전을 이루었으며, 國際航空運送에 있어서도 韓國은 중심적 위치로 부상되고 있다. 여기에서 이와 관련한 航空法規의 發展推移와 懸案問題를 언급하고 航空保險의 現況에 대하여 언급하기로 한다.

I. 序 文

II. 航空法 關聯

1. 航空法 體系
2. 航空社 責任
3. 懸案問題
 - i) Warsaw Convention 適用
 - ii) 航空社 運送約款
 - iii) Wilful Misconduct 解釋
4. 航空法 改正 및 航空運送契約法 制定 關聯

* 본 내용은 1991년 10월 30일 Bangkok에서 있었던 “The Asia-Pacific Insurance Conference”에서 주제 발표한 “Legal and Insurance Developments in Aviation in Korea”를 요약 정리한 것으로, 航空法 改正으로 인해 Aviation law 내용중 Regulatory Framework부분과 New Development in Aviation Regulation and Carrier Liability부분은 改正航空法の 내용과 相異가 있을 수 있음.

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Ⅲ. 航空保險 關聯

1. 航空保險 概要 및 航空機 付保 現況
2. 航空關聯 產業의 必要保險 付保 事項
3. 保險約款 및 再保險
4. 懸案 問題
 - i) 製造物 責任
 - ii) 戰爭保險

Ⅳ. 結 語

위에서 언급한 航空法規 및 航空保險의 當面課題의 해결과 관련하여, Warsaw Convention과 Montreal Additional Protocol No. 3 가입 여부 및 製造物 責任의 수용 여부에 대한 전반적인 검토가 필요하다.

LEGAL AND INSURANCE DEVELOP- MENTS IN AVIATION IN KOREA

Tae Hee Lee*

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I. Introduction

Aviation law and insurance is a relatively new field of interest in Korea. Domestic airline service only began in 1948, international service did not begin until 1954, and domestic aviation insurance did not exist until 1962.

The field is, however, growing in size, importance and in the extent of its regulation. At present, two international carriers, Korean Air Lines (“KAL”) and Asiana Airlines (“Asiana”), are based in Korea. KAL services forty-five cities in twenty-four countries around the world, and Asiana flies to nine cities in Japan and Southeast Asian countries. Twenty-six foreign airlines offering approximately three hundred flights a week compete in the Korean air transportation market.

In order to react to new developments created by the increased competition in Korean-based aviation today, the Korean government is currently in the process of reorganizing the laws regulating the aviation industry. Problems arising from Korean participation in the Hague Protocol only

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and not in other international conventions, for instance, have forced a recent reevaluation of the need for greater Korean participation in the international regulatory regimes. Also, the problems arising from the lack of diversification within the Korean aviation insurance market and the gradual easing of the government's strict control imposed on the insurance industry will probably force Korean-based airlines to restructure their insurance needs.

This paper will outline primarily those laws regulating aviation in Korea, and will discuss some major issues concerning aviation liability and aviation insurance.

II. Aviation Law

1. Regulatory Framework

The Korean Aviation Act regulates air transportation services by prescribing both administrative regulations and penal provisions. The Aviation Act also promotes safety and order in the air in compliance with the standards and procedures adopted in the 1944 Convention on International Civil Aviation, of which Korea is a member, and by which the Aviation Act and its enforcement ordinance are interpreted.

The Aviation Act regulates the establishment of airlines, aircraft registration, maintenance, operations and air navigation safety facilities of all aircraft and aviation concerns in Korea, including foreign aircraft and foreign companies operating commercial air transportation businesses in Korea. The Aviation Act provides that airlines must not only be licensed by the Ministry of Transportation but must also obtain authorization for every contemplated flight route, operations and maintenance manuals, fare and freight charge, and conditions of carriage. Air transportation services, air cargo-transport agency services and aircraft ground handling and re-

lated services should also be licensed by the Ministry of Transportation, and are regulated by Enforcement Ordinances issued by the Ministry pursuant to the Aviation Act. The Aviation Act also allows the Ministry of Transportation to regulate these airline-related businesses as and when the Ministry deems necessary for security, public interest, safety, and for the sound development of air transportation services.

2. Carrier Liability

No specific domestic laws govern carrier liability, but in Korea international treaties are accorded the same effect as domestic law. The Hague Protocol, as the only international treaty to which Korea is a signatory, preempts the domestic civil and commercial laws establishing a carrier's liability. General tort principles under Korean civil law, however, are used in order to determine the existence and extent of carrier liability.

In general, compensation for the death or injury of a passenger is assessed by totalling the victim's medical expenses, loss of (expected) income, damages for property, pain and suffering of the victim and/or the victim's family, funeral expenses, and other costs resulting from death or injury. However, as to the special damage provided in the civil Code, the carriers provide in their conditions of carriage that they are not liable for such damage including consequential damage.

Punitive and exemplary damages are not recognized under Korean law. Korean legal principles regard such damages as being irrelevant to its concept of the basic principles of compensation.

With regards to liability of aircraft owners to third parties on the ground, Korea is not a signatory to the 1952 Rome Convention, and in Korea there is no specific law or regulation regarding aircraft liability to such persons. Therefore, such disputes should be resolved in accordance with general tort principles under the laws of the state in which the accident occurred.

For example, Korean laws provide that the operator of the aircraft, as wrongdoer, bears unlimited liability to the injured party, and as victim such party must bear the burden of proof regarding the wrongdoer's intentional act or negligence.

3. Current Issues

i) Application of the Warsaw Convention

Whether or not to apply the Warsaw Convention or the Hague Protocol to one-way air carriage between a state which is a party only to the Warsaw Convention and a state which is a party only to the Hague Protocol is of particular importance in Korea. Specifically, Korea is a signatory only to the Hague Protocol, but is involved in a great deal of air transportation to and from the United States, a party only to the Warsaw Convention.

The Supreme Court of Korea has held that parties to the Warsaw Convention were intended to be parties to the Hague Protocol, whether they actually signed it or not. The effect of such decision is that the United States and Korea are considered to be in a treaty relationship based on the entire Warsaw Convention, as amended by the Hague Protocol, even though neither nation is a signatory to the same instrument as the other.

The Federal District Court of Washington, D.C. also considered this issue, but reached a slightly different conclusion. The U.S. court held that the United States and Korea are parties to the same treaty only with respect to the "unamended portions of the Warsaw Convention."

In order to resolve the controversy over this issue, the Korean government has considered becoming a party to the original Warsaw Convention. Further steps contemplated by the Korean government in order to meet the international standards of membership to this convention are discussed below.

ii) Conditions of Carriage

The Hague Protocol provides that a carrier's liability to passengers and cargo is limited to a specified amount of money per passenger and per kilo of baggage, unless the liability arises as a result of the carrier's willful misconduct. Korean carriers have adopted these limitations, without the proviso relating the carrier's willful misconduct, in their contracts for both international and domestic flight service notwithstanding that the Hague Protocol only controls certain international flights and is not applicable to domestic flights. It is important to note that, in this context, that there are no laws justifying the provision of a liability limitation in the carriers conditions of domestic carriage notwithstanding that such conditions of carriage have been ratified by the government.

Under the Korean General Condition Regulation Act, however, such limitations of liability may be contrary to Korean public policy, and therefore null and void, if the conditions of carriage are seen to unfairly transfer the burden of risk from the carrier to the consumer. For example, in 1989 the General Conditions Review Board, established pursuant to the Korean General Condition Regulation Act to screen adhesion contracts to ensure consumer protection, rendered a decision nullifying a liability limitation clause which had provided for a maximum of USD 75,000 in damages on domestic flight service. The Board reasoned that this amount was unfair in light of the higher liability limitation on international flights and was also contrary to Korean public policy. The carriers thus needed to increase their liability limitation to SDR 100,000. Hence, the enforceability of Korean contracts effecting such limitations of liability on flights not subject to the Hague Protocol is still uncertain. Further, when the willful misconduct of the carrier is proved, these problems are exacerbated.

iii) Interpretation of Wilful Misconduct

The Hague Protocol and the Warsaw Convention Prescribe that liability

will not be limited if a claim seeking damages is grounded in the willful misconduct of the carrier. Because Korea has no legal concept of "Willful misconduct", an important question has arisen regarding how to interpret this concept. No Supreme Court decision has considered this issue, but an Appellate Court has defined willful misconduct in an air crash case as being an intentional or "quasi-intentional" act or omission. In a case concerning lost baggage, however, another Appellate Court defined willful misconduct more broadly and applied a standard of gross negligence.

At present, there exists a difference of opinion in Korea as to whether willful misconduct encompasses gross negligence. Because of this difference, the Korean government is attempting to establish a definition of willful misconduct for subsequent incorporation in the proposed Air Transport Contract Act discussed below.

4. New Developments in Aviation Regulation and Carrier liability

The Korean government has recently been considering modifying the Aviation Act to provide for further regulation of the allocation of routes, quantity of transport allowed, and direct and indirect involvement in all commercial agreements concluded between Korean and foreign carriers. Further, the government is considering establishing an Aviation Policy Review Committee a special committee to control aviation policy as well as an Air Accident Investigation Committee to investigate accidents. The Korean government has recently permitted the cancellation of an aircraft registration when the aircraft has been leased to another country, thereby facilitating the aircraft lease. The government is also considering imposing in the near future a special tax on the aviation industry for noise pollution.

To resolve the carrier liability limitation issue, the government is now considering becoming a party to the original Warsaw Convention and to the Montreal Additional Protocols. It is also in the process of formulating

the so-called Air Transport Contract Act as a special law designed to upgrade Korean aviation contracts to meet international standards. The government plans to incorporate the principles of basic liability, limited liability, and presumption of carrier negligence described in the Warsaw Convention and the Hague Protocol. It plans to provide that willful misconduct will be strictly prescribed as "intentional or quasi-intentional" and not merely as gross negligence." However, there is a strong argument circulating in the Korean legal community that willful misconduct should encompass gross negligence. The act also plans to provide for a carriers' liability limitation of SDR 100,000. But, certain legal commentators have suggested that this figure should be raised to SDR 200,000 in consideration of the present standard of living in Korea. The Statute of Limitations will be maintained at its present two years.

In adopting the principle of liability as stipulated in the above Act, a real discrepancy will arise when the government ratifies the Montreal Additional Protocol No. 3, which provides for the principle of "absolute liability." In order to resolve such discrepancy, the principle of liability will have to be modified to be compatible with that of the Montreal Additional Protocol. Another problem incurred if the government ratifies Montreal Additional Protocol No. 3 will be that such protocol encompasses the principle of "strict liability".

III. Aviation Insurance

1. General Overview

In Korea, aviation insurance was not available domestically until 1962 because at that time the only Korean carrier was Korean National Airlines, and it entrusted its hull insurance to foreign insurers. In 1962, however, a domestic insurance company began writing various kinds of avia-

tion insurance when KAL was established by the government.

Currently, there are 191 aircraft insured in the Korean insurance market, including 58 wide bodied aircraft, 35 narrow bodied aircraft, 39 light aircraft, 57 helicopters and 2 airships. Many domestic insurers continue to regard the Korean marketplace as being incapable of allowing for full diversification of risk. Korean insurers therefore reinsure 95% of their insurance in the overseas market, and 5% in the Korean market. The insurance premium rates used are generally those suggested by London underwriters or other overseas reinsurers.

2. Insurance Requirements

Under the Korean Aviation Business Promotion Act, all operators of private aircraft and air transport businesses are required to carry liability insurance, including hull-all-risk, general risk, war risk and crew personnel accident insurance.

The Act prescribes that carriers shall maintain insurance coverage at least to the extent necessary to cover the liability limitation specified in international treaties to which the Republic of Korea is a signatory. Presently, all carriers maintain the minimum amount of insurance up to treaty limitations.

Air cargo agents, air travel agents, airport operators, and aircraft maintenance personnel are not required to carry insurance under the Act, but in practice most of them carry some amount of insurance through contracts with private insurers.

3. Insurance Regulations

Pursuant to the Korean Insurance Business Act, all aviation insurance contract provisions must be approved by the Ministry of Finance. As insurance contract provisions used internationally have become standard-

ized, the Ministry of Finance has approved international aviation insurance contracts conforming to those standardized forms almost automatically, in the period of time following the submission of applications without further scrutiny. Now that the terms of Korean insurance contracts are almost always identical to those employed in the London market, their usage has become almost mandatory and therefore serves to self-regulate the aviation insurance industry.

The Korea Reinsurance Corporation was established in 1963 to help the Korean insurance industry move through its developmental stage. The government adopted a regulation providing that some portion of all insurance policies written for Korean aviation must be written through the Korea Reinsurance Corporation. Until recently, therefore, all aviation insurance needed to be re-insured first by the Korea Reinsurance Corporation. Because of this regulation, the Korea Reinsurance Corporation has in the past played a significant role in protecting the domestic insurance industry from being excessively affected by the international market.

In 1990, however, the government committed itself to an open reinsurance policy, and placed the Korean insurance market squarely within the international marketplace. Now the market has opened and the Korean insurers need not go through the Korea Reinsurance Corporation to re-insure their policies.

4. Current Issues

i) New Developments

As a result of the economic growth of Korea, increased concern about consumer protection is changing the nature of Korean aviation insurance. The Korea General Condition Regulation Act and the Consumer Protection Act will be strictly enforced to protect consumers, and the amount of liability damages allotted for passenger claims will likely increase. Conse-

quently, aviation insurance premiums will also likely increase.

Further, as the Korean aviation industry moves into new areas of aviation business such as aircraft manufacture, these developments will prompt the Korean aviation insurance industry to develop and make available a wider and more sophisticated range of coverage to meet new demands, particularly with respect to products liability, the area which remains unaddressed by current Korean law.

ii) War Risk Exposure

Until now, Korean Carriers paid relatively high war risk rates. These high war risk rates were due primarily to the downing of KE007 by the Soviets in 1983, and of the sabotage of KE858 by North Korean terrorists in 1987.

With the improved political and economic climate throughout the world resulting from the end of the Cold War, including relations between Republic of Korea and Russia, the People's Republic of China, as well as North Korea, it is expected that the war risk policy rates charged to Korean carriers will likely decrease.

IV. Conclusions

In Korea, Aviation law is a highly regulated field. It is governed both by domestic laws and by international treaties. The introduction of a second Korea-based commercial airline has increased the perceived need for such regulation and will probably result in the promulgation of additional regulations in the future. Further, at present Korea belongs only to the Hague Protocol, but in order to better adapt to the greater internationalization of the Korean based airlines Korea has to consider joining the original Warsaw Convention and, at some point, the Montreal Additional Protocols as well.

As discussed above, concerns with consumer protection and product liability in Korea are expected to receive more attention in the future. Consequently, the need for greater amounts of insurance will increase and force the Korean aviation insurance market to diversify. Meanwhile, world developments make war risk policies more affordable for Korean based airlines.

Aviation and aviation insurance are newly developed industries in Korea. But as Korea grows and gains in international importance its aviation and aviation insurance industries will grow alongside her in both size and sophistication, and the legal framework will respond to those needs accordingly.