

航空法—21世紀의 挑戰*

Michael Milde**

》 要 約 《

본 발표내용은 특히 다음 사항에 관하여 언급하고 있다.

1. 현재 시카고條約에 나타난 國際航空規程의 基本構造를 변경할 필요가 있는가?
2. 國際民間航空機構(ICAO)의 法務計劃에 있어서의 重要사항
 - (1) 장래의 航法體制(FANS)의 制度的·法的 問題
 - (2) 非安全目的을 위한 전세계적인 空中/地上通信의 法的 問題
 - (3) 海上法에 관한 UN條約과 시카고條約 및 기타 航空法과의 關係
 - (4) 航空管制機關의 責任
 - (5) 바르샤바條約體制的 檢討
3. 航空宇宙法 분야에 있어서의 전문적인 大學院 課程의 法律教育의 필요성 檢討

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** ICAO法務局長, 캐나다 맥길大學 航空宇宙法研究所長

AIR LAW AND THE CHALLENGES OF THE 21ST CENTURY*

Professor Dr. Michael Milde**

The community of scholars and practitioners in the field of air law is facing growing tasks and challenges commensurate with the technological, economic and political complexities of growing national and international aviation.

The technological evolution of aviation at the outset of the 21st century will be marked in the first place by tremendous quantitative growth more than doubling the present number of passengers carried by air to over 2 billion annually ; to accommodate this growing demand for air transport, the number of international airports has to grow proportionately, the traffic flow has to be streamlined to ease the current congestion in airways and at airports, the capacity of aircraft has to grow further. The subsonic aircraft are still expected to dominate the air transport field since the supersonic or even hypersonic technology-perfectly feasible and attainable from the technical point of view-would be prohibitive both economically and ecologically ; it would put excessive demands on energy consumption, the construction of the aircraft frame would require use of expensive compounds and materials and the price of such aircraft and its operating costs would not meet the needs of aviation for mass transport ; furthermore, the environmental concerns to protect the ecology from harmful effects of noise, sonic boom and engine emissions would tend to keep supersonic and

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* * Director, Legal Bureau, ICAO, Director, Institute of Air and Space Law, McGill University, Canada.

hypersonic technology as an exceptional option on a limited scale.

If the future civil aviation is to be an integral part of world economy and an instrument of international co-operation and interchange, it requires farsighted strategic management both domestically and internationally. Law is and will continue to be one of the principal tools in this process of management. The preparation, education and motivation of the human resources is a basic task of the management process ; nobody doubts the need to educate the present and future generations in the technological fields of aviation-design and operation of the aircraft to achieve safe, regular and economic air transport ; similarly, since the regulatory legal framework and its proper interpretation and application in the management process of civil aviation is indispensable for safety, regularity and economy of aviation and for the smooth and harmonious social interaction on the domestic and international levels, there should be growing awareness of the practical importance of air law, in its research, teaching and dissemination of knowledge at all levels, including the level of policy and economy decision makers. The Korean Association of Air Law could meaningfully contribute to this greater awareness of the role of air law in the management process and could become an intellectual “think tank” assisting the Government and industry in the development of strategic perspectives of civil aviation in the 21st century.

The main forum of the international community for the determination of aviation strategies and regulatory frameworks is the International Civil Aviation Organisation (ICAO) consisting currently of 164 States. Republic of Korea has been one of the early members of the Organisation and the time has come for it to assume a more assertive role in this international community to share Korea’s remarkable experience in the development of civil aviation with other States and participate more prominently in the formulation of global policies and legal regulation.

The focus of the regulatory activities of ICAO is the Council which, on the advice of the Air Navigation Commission and after wide consultations with States directly or through Divisional meetings and Panels, adopts international Standards and Recommended Practices for world-wide applica-

tion. Member States of the Council are elected every three years by a regular session of the Assembly from among the three groups of States defined in Article 50 of the Convention on International Civil Aviation : States of primary importance in international civil aviation, States providing major facilities for international civil aviation and, finally, States whose participation in the Council will safeguard equitable representation of all major areas of the world. Republic of Korea may qualify under any of these categories and a purposeful diplomatic preparation and consultations within the Asia/Pacific region as well as on an inter-regional basis is a necessary pre-requisite in the preparation for the next round of elections by the ICAO Assembly. The members of the Air Navigation Commission are chosen by the Council in the year following the election of the Council from among candidates of high qualification in air navigation disciplines whose names are proposed by States or groups of States. An increased participation of States(in the Council) and experts(in the ANC) from the Asia/Pacific region can hardly be accomplished within the current constitutional composition of the Council(33 member States) or ANC(15 members) without regional agreements or understandings concerning a system of "rotation" in the existing positions ; it is unlikely that the established geographic balance could be upset. The Assembly adopted, in 1989 and 1990, decisions under Article 94 of the Chicago Convention to amend the Convention and to increase the membership in the Council from 33 to 36 and in the ANC from 15 to 19 ; such increase in membership would permit reconsideration of the geographic set up but it will take many years before these amendments enter into force.

The law-making process in the proper sense(preparation of drafts of international multilateral instruments) has its focus in the ICAO Legal Committee. This Committee is a successor for the pre-war CITEJA(Comite Internationale Technique des Experts juridiques aeriens) and was created by resolution of the 1st ICAO Assembly in 1947 ; its current Constitution was approved by Assembly Resolution A7-5. The Committee is open to participation by all contracting States. The methods of work approved by the Committee itself, by the Council and by the Assembly contain recommen-

dations that States should be represented in the Sessions of the Committee by legal experts, that there should be continuity and stability in such representation and that there should be national groups of legal experts studying problems which are on the general work programme of the Legal Committee. The Korean Association of Air Law represents a reservoir of knowledge and expertise which could serve instantly, without extensive institutional arrangements, as a national Korean group of legal experts concentrating on the study of the subjects which are listed in the general work programme of the ICAO Legal Committee ; the studies and recommendations prepared by the Association could assist the Government in the formulation of its policies in the ICAO forum and members of the Association could serve as advisors or even delegates to the relevant ICAO meetings during which a co-ordinated international consensus is to be formulated. The larger the pool of Korean experts will become and the wider its co-operation with experts in the region and globally with fellow specialists in air law in the interchange and flow of ideas, the better benefit for the Government and industry of the country will follow.

The study and research in the field of current and future challenges in air law has to build on a solid basis of profound knowledge of the history and evolution of air law. A saying is attributed to the great Roman orator and politician M.T. Cicero that people who do not know their history do not know where from they are coming and where they are going. It is not possible to address, for instance, the current and future problems of the institutional and constitutional framework of the Chicago Convention without a profound analysis of its historical roots and evaluation of the conditions under which a particular consensus was reached in 1944 in Chicago and how the system evolved in the practical application and interpretation by States over the past decades ; similarly, an analysis of the unification of law in the "Warsaw" system of instruments on the regime of liability in international carriage by air, its current status and further steps to be taken by Governments, could be undertaken only with solid knowledge of the evolutionary steps in that unification of law, mass of jurisprudence illustrating the practical experience with the relevant instruments, their

advantages, weaknesses and the changing socio-economic conditions of aviation since 1929 when the foundations to the "Warsaw system" were laid.

The current list of priorities in the general work programme of the ICAO Legal Committee contains the following subjects which deserve urgent attention of air law specialists all over the world if the views and interests of all States are to be reflected in the final results of work achieved in the ICAO.

1. Institutional and Legal Problems of the Future Air Navigation Systems(FANS). These problems represent the most urgent challenge to air law at the present stage and will require very original thinking and solutions since there are no leading precedents for the legal regulation and institutional arrangements on global basis to make use of satellite-based technology for aeronautical communications, navigation and surveillance (CNS). While the technology exists today and is readily available to many States, its practical use is unthinkable on a narrow national basis ; the future systems will be meaningful only if they are available uniformly and for mutual benefit on a wide regional basis or even globally. Such a global framework has to be established, its institutions defined and its legal regulation agreed and approved. Institutions, facilities and services now provided on a national basis would become global in nature and this will require determination of the global standards of operation of the systems, principles of their universal availability without discrimination and at reasonable cost, determination of the acceptable or certified service providers making the systems available and responsible for their day-to-day operation(States, existing international organizations, new organizations, private industry?), legal status of the service users(States or State operated ATC agencies, private commercial agencies, airlines?), problems of financing and system of collection of user charges, problems of liability, etc. In the history of law-making within ICAO there was never a greater and more complex challenge to be faced by the legal experts than the problems of FANS. It is urgent to find generally acceptable solutions early so as not to delay the practical deployment and global use of FANS. Since the ICAO Legal Committee will address this problem at its Session in May 1992 in Montreal

and the Assembly of ICAO is expected to make important policy pronouncements on the subject in September-October 1992, it would be highly desirable for the Korean Association of Air Law to form a task group on the legal and institutional aspects of FANS without delay to assist the Government in formulating its policy position and contribute in a creative manner to the international community.

2. Closely connected with the overall problems of FANS is a narrower and more specific subject "Legal Problems of the Global Air/Ground Communications for Non-Safety Purposes". The study of this subject will have to find a legal solution enabling voice and data communications from an aircraft in flight for the private purposes(not related to the operation of the aircraft) of the passengers and airline ; such communications are technically feasible but their extension on a global basis is hampered by existing national legislations controlling or prohibiting wireless communications originating in their territory(including their air space) without special authorization or preserving the communication monopoly of their designated communications agency. A solution to this problem may be found either in the amendment of Article 30 of the Chicago Convention(although such solution would be very time consuming and hardly necessary or practicable) or by a new multilateral instrument ; however, a simple pragmatic solution would be to prepare model clauses to be inserted into existing and future bilateral agreements on air services or model unilateral statement permitting this type of communications on the basis of reciprocity. This subject could also be studied by a task group of the Korean Association of Air Law as a matter of priority because the ICAO Legal Committee is expected to have it on its agenda at the session in May 1992 in Montreal.

3. The subject "United Nations Convention on the Law of the Sea and its implications for the Chicago Convention, Annexes and other air law instruments" has been on the work programme of the ICAO Legal Committee for many years but substantive work was always pre-empted by other urgent priorities ; the 1982 UN Convention is a landmark unification of public international law and its preparation within the UN system took nearly 10 years ; the Convention will enter into force one year after ratifi-

cation by 60 States and that moment is rapidly approaching. Since the sea covers some 72% of the Earth's surface, the Convention will be of substantial importance for the determination of the legal status of the airspace above the different parts of the sea ; some of the innovative concepts of the Convention(e.g., the exclusive economic zone, regime of international straits and of the archipelagic waters) require appropriate interpretative determination with respect to the regime of the airspace superjacent to the specific parts of the sea. Again, Korea as a State of considerable maritime importance and interests should participate actively in the creative development of air law in this field and the Korean Association of Air Law could become a valuable focus of expertise.

4. The subject Liability of Air Traffic Control Agencies has also been on the Legal Committee's work programme for a considerable period of time without a meaningful progress because States do not feel that this problem is of major importance or that it requires an urgent international solution. Very few accidents have been attributed to a default on the part of the air traffic control system and even fewer such incidents were "international" in nature and the demand for unification of law in this field is low. However, only very few States have specific domestic legal regulation relating to the liability of ATC agencies and it would appear desirable for the ICAO Legal Committee to develop model or alternative models of such legislation for the guidance of States. Furthermore, the subject of ATC liability will soon assume a new dimension within the system of FANS if substantive ATC functions are performed on a regional or global basis rather than within the jurisdiction of one single State. An early attention of the lawyers within the Korean Association of Air Law to this involved problem would be well justified.

5. Review of the system of the Warsaw Convention is the most essential subject on the private law agenda of the ICAO Legal Committee and one of the longest history. This subject will not be actively addressed by the Committee before the important instruments of the system prepared by the Committee and adopted by Diplomatic Conferences under the auspices of ICAO in 1971 and 1975 enter into force. The initiative is now in the hands

of States who have been repeatedly urged by the ICAO Assembly to ratify as soon as practicable the Additional Protocol No. 3 of Montreal, 1975 and Montreal Protocol no. 4 of Montreal, 1975. These two instruments will contribute to substantive modernisation of the Warsaw Convention both in the carriage of passengers and cargo ; they will permit substitution of computerised data processing for the formal passenger ticket and air waybill, will replace the cumbersome system of liability based on fault with reversed burden of proof by a system of strict liability, the limits of liability for death, injury or delay of passengers will be substantially increased to reflect more closely the current economic realities and will be expressed in terms of the Special Drawing Right of the International Monetary Fund rather than by a gold clause which has lost its meaning as a yardstick of values in the fluctuating free market for gold. Both passengers and airlines stand to gain from this modernisation of the Warsaw system ; the only losers will be trial lawyers who are now getting rich on involved litigation procrastinated over years while the victims and their next of kin wait for years to be compensated. This matter had a slow progress because the United States, the chief architect of the modernised system, themselves have not ratified Protocols 3 and 4 ; however, the issue is in these days before the US Senate and ratification is expected ; furthermore, it is the declared intention of the US Government to denounce the original unamended instrument upon entry into force of the new system ; such a situation would leave all States not parties to the new system without any treaty relation with respect to transport to, from or through the US territory or with respect to passengers or shippers who can establish jurisdiction in the US territory ; the result would be difficult conflicts of law, conflicts of jurisdiction and danger of unlimited liability for the airlines of other States for which insurance would be next to impossible.

In addition to the subjects which are on the general work programme of the ICAO Legal Committee, there are numerous other legal challenges which call for urgent study. "Deregulation" seems to be a catchword in many discussions on aviation policy, yet practical experience would indicate that there is an urgent need for regulation of aviation industry if

competition is to survive and if the smaller national carriers are to be protected against the multinational "mega carriers" and their monopolistic tendencies. Again, one of the most remarkable developments of the end of the 20th century is the trend towards regional integration, initially economic and possibly political; "Europe 1992" is a most advanced example of this trend which will have serious impact on international civil aviation if the mutual conflicting interests of different groupings of States are not kept in acceptable balance with the interests of third States. The policy of European Community that agreements on air services between its members and other States are to be negotiated with the EC need not be accepted by such third States as long as the EC does not become a politically unified sovereign entity; similarly, the fifth-freedom traffic by third States between the Community members continues to be "international transport" under Article 96 of the Chicago Convention and cannot be considered "cabotage" by the dictum or fiat of the EC. It is important that competent legal advice should be available to the Governments in the complex negotiations necessitated by the new developments to protect the legitimate national interests. As "integration" is a visible phenomenon of our era, we must pay attention also to the legal consequences of the insidious process of "disintegration" which led to the recent demise of one of yesterday's superpowers; in the place of one solidly centralised power there are numerous successor entities, disintegration leads to practical tribalisation, creation of new sovereign airspaces, chaotic of laws, lack of centralised network of air traffic control, need to enter into new treaty relationships with new entities and new (privatised?) airlines. The recent history shows that ideological doctrines of economy, politics and law were maintained only by undemocratic force and cannot prevail in the face of historic and economic realities. In the field of management of civil aviation, including the process of management by law, this new situation presents countless challenges requiring urgent attention!

In the light of the tasks facing the legal profession in the development of civil aviation in the 21st century, the Korean Association of Air Law should also turn its attention to the need for solid national, regional and in-

ternational education programme at an advanced graduate level in the field of air law. The future challenges in the field of air law will require scores of highly specialised aviation lawyers and the time to start educating them has arrived. The Institute of Air and Space Law of McGill University in Montreal is open to the most mature students for study and research in close symbiosis with the ICAO facilities in Montreal ; however, before the students enter this advanced international level of their programme, they should obtain a solid basic specialisation in air law at their national institutions and associations of scholars and practitioners such as the Korean Association of Air Law.