

特別寄稿

Considerations for the 2009 Montreal Two New Air Law Conventions (Unlawful Interference and General Risk Conventions) by ICAO

Doo Hwan Kim*

국제민간항공기구에 의한 2009년 몬트리올 2개의 새로운 항공법조약 (불법방해 및 일반위험조약)에 대한 고찰

김두환*

ABSTRACT

오늘날 항공기사고는 우리나라뿐만 아니라 세계도처에서 때때로 발생되고 있다. 특히 항공기에 대한 갑작스러운 테로 공격 또는 일반 항공사고에 기인된 항공기의 추락 및 물건의 낙하로 인하여 지상에 있는 제3자에게 손해를 입히는 경우가 간혹 발생되고 있다. 이와 같은 항공사건에 있어 가해자(항공기 운항자)는 피해자(지상 제3자 등)에 대하여 불법행위책임을 부담하게 되는데 이러한 사건들을 해결하기 위하여 1952년의 개정로마조약과 1978년의 몬트리올의정서 등이 있음으로 본 논문에서는 이들 조약의 성립경위 및 주요내용과 개정이유 등을 간략하게 설명하였다.

특히 2001년 9월 11일에 뉴욕에서 발생한 이른바 항공기 납치에 의한 동시다발 테러 사건의 피해는 4대의 항공기에 탑승한 승객 및 승무원 266명이 전원 사망하였고 워싱턴에 있는 미국 방성청사에서의 사망 및 실종이 125명, 세계무역센터에서의 사망 및 실종이 약5,000여명에 달하는 막대한 피해가 발생되었다. 9/11참사사건은 지상에 있는 제3자의 인적 및 물적 손해가 거액에 달하였으므로 이에 따라 영국의 로이드보험 등 세계보험업계가 크게 손실을 입게 되어 항공보험을 기피하는 현상이 생겨나 법적인 문제점이 제기되었다.

국제민간항공기구(ICAO)에서는 9/11사태 이후 이와 같은 테로 사건의 법적대응책과 자구책을 마련하기 위하여 약 8년간의 심의 끝에 항공기에 대한 테로 공격(불법방해 행위)과 1952년 개정로마조약의 현대화(일반위험) 등 새로운 2개 조약을 2009년 5월 2일에 성립시켜 공표하였다. 상기 새로운 2개의 조약 중 첫째 조약은 항공기의 불법방해 행위에 기인된 제3자에 대한 손해 배상에 관한 조약 (Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft: 일명 불법방해조약이라고 호칭함: Unlawful Interference Convention)이고 둘째 조약은 항공기에 기인된 제3자에 대한 손해배상에 관한조약 (Convention on Compensation for Damage Caused by Aircraft to Third Parties: 일명 일반위험 조약이라고 호칭함: General Risk Convention) 이다. 본 논문에서는 이 새로운 2개 조약에 대한 ICAO가 주관한 성립경위와 주요 내용 및 필자의 논평을 제시하였고 이들 조약에 대하여 한국의 조속한 비준을 촉구하는 바이다.

Key Words : Unlawful Interference Convention (불법방해조약), Terror (테로), General Risk Convention (일반위험조약), Compensation for Damage(손해배상), Third Parties (제3자), Tort Liability (불법행위책임)

* 한국항공우주법학회 명예회장, 한국항공대학교 항공우주법학과 강사, 일본중앙학원대학 객원교수, 인도 Gujarat 국립법과대학교 명예교수
연락처, E-mail: doohwank3@kornet.net
서울시 종로구 평창동 174-5(110-847)

I . Introduction

The cruel terrorists attacked the World Trade Center

at New York and Pentagon building at Washington, D.C. on September 11, 2001. On that day, for the first time in history, aircraft were used as weapons of mass destruction, thus presenting a significant new threat to civil aviation. This problem is global and seriously affects the aviation safety, efficiency and regularity of international, as well as domestic civil aviation.

After the September 11 disaster, every country is trying so hard to safeguard civil aviation against terrorism. Internationally, every country is taking some measure to block the money channel which goes into terrorist groups. As aviation safety and security issues, especially preventing acts of unlawful interference, get more attention and become the major topic of world wide aviation community, establishment and implementation of comprehensive and systemic aviation safety and security program is strongly demanded ever before. The definition of acts of unlawful interference include the hijack of aircraft.

After the catastrophic losses of 11 September 2001 (9/11) and the impact and response of the aviation insurance market, however, ICAO quickly focused its effort on cases where the aircraft is unlawfully and deliberately used to inflict maximum possible damage and the insurance.

The International Civil Aviation Organization (ICAO) and its 190 Contracting States have urgently and continuously taken steps to intensify their work aimed at preventing and eliminating acts of terrorism. The ICAO has been carried out the important role in order to maintain the world peace, aviation safety and security in the international community as well as dedication of its safety and security since events of September 11. Terrorist are directed at States, not against individual airlines. In 2005 and 2006, insurance coverage effectively withdrew for damage to the aircraft hull caused by weapons of mass destruction(WMDs). On the liability side, the availability of insurance coverage for WMDs is soon expected to be restricted.

With strict liability regimes in effect in many jurisdictions, airlines are accountable to third parties in case of terrorist caused incidents, with or without insurance cover.¹⁾

The Special Group, Legal Commission, Legal Committee and Council of ICAO has been discussed for long time the amendment and renovation of the 1952 Rome Convention (Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface) in order to prevent and eliminate the terrorist's attack to the aircraft and to solve the problems of insurance since 2000.

The ICAO adopted two new air law conventions setting out international compensation and liability rules for damage caused by aircraft to third parties at a diplomatic conference hosted by it from April 20 to May 2, 2009.

The fight against the effects of terrorism and the improvement of the status of victims in the event of damage to third parties that may result either from acts of unlawful interference involving aircraft or caused by ordinary operation of aircraft, forms the cornerstone of the two conventions.

One legal instrument adopted by the Conference is "*the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*" (Unlawful Interference Convention).

It has the objective of providing compensation for damage to third parties as a result of acts of unlawful interference involving aircraft. At the heart of this new instrument is the creation of an International Civil Aviation

The other instrument, "*the Convention on Compensation for Damage Caused by Aircraft to Third Parties*" (General Risk Convention), modernizes the current legal framework provided for under the 1952 Rome Convention and related Protocol of 1978.

The Unlawful Interference Convention of 2009 was signed by six countries ① Congo, ② Côte d'Ivoire, ③ Ghana, ④ Serbia, ⑤ Uganda, ⑥ Zambia on May 2, 2009 and one country ⑦ Panama on June 15, 2009.²⁾

The General Risk Convention of 2009 was signed also by six countries ① Congo, ② Côte d'Ivoire, ③ Ghana, ④ Serbia, ⑤ Uganda, ⑥ Zambia on May 2, 2009, ⑦ Panama on June 15, 2009, ⑧ Chile on September 29, 2009 and ⑨ Nigeria on October 8, 2009.³⁾

1) ICAO Working Paper, A36-WP/74' LE/5 23/08/2007, at 2.

2) http://www.icao.int/icao/en/leb/2009_UICC.pdf

3) http://www.icao.int/icao/en/leb/2009_GRC.pdf

The aforementioned two Conventions deal with airline liability and compensation for third parties on the ground after a terrorist attack or an accident.

I would like to explain the history and background of the 1952 Rome Convention, the reasons of amendment for the 1952 Rome Convention, activities of ICAO on the modernization of the 1952 Rome Convention, main contents and author's comments for the abovementioned 2009 two new Air Law Convention in order as the followings.

II. The Main Contents

2.1 Historical Background of the 1952 Rome Convention and the 1978 Montreal Protocol

The Rome Convention on Surface Damage of 1933 was agreed to at the third International Conference on Private Air Law and was signed on May 29, 1933. It was designed to unify the rules of law on the subject of damage caused by aircraft to the third parties on the surface, and also dealt with the requirement that aircraft flying over foreign territory should be insured. The rules of the Rome Convention of 1933 were soon found to be lagging behind the rapid developments in aviation, and the Convention drew only a very limited number of ratification.⁴⁾

After the Second World War the matter was once again given attention, and at the instigation of the ICAO Legal Committee a sub-committee was established in 1947 to amend the Rome Convention and to determine which objections had in fact prevented states from ratifying.

A new Convention was, based upon Prof. S. Iuul, devised and finally approved at the Conference on Private International Law held in September of 1952.

It was opened for signature in October 1952. In 1952, the Convention on "Damage Caused by Foreign Aircraft to Third Parties on the Surface" was adopted at Rome, Italy. This Convention entered into force

globally on February 4, 1958.⁵⁾

The Rome Convention of 1952 is still in force, but it did not attract much ratification either. Only 49 States out of the ICAO 190 Member States⁶⁾ did in fact ratify in December, 2009 and that number did not even include major powers like the United States, the United Kingdom, Germany, Canada, and Japan.

In 1978 a Diplomatic Conference was convened by the Council of ICAO, where 58 States were represented, and where IATA and ILA also attended as observer.

A "Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface signed at Rome on 7 October 1952" was adopted at Montreal aiming at amending the Rome Convention of 1952.⁷⁾

Though Montreal Protocol of 1978 was signed by ICAO 14 Member States, but it was ratified by ICAO 12 Member States on December, 2007. But this Protocol entered into force globally on July 25, 2002.⁸⁾

2.2 Operator's Liability of the 1952 Rome Convention and the 1978 Montreal Protocol

According to preamble of the Rome Convention of 1952, the signatory States were "moved by a desire to ensure adequate compensation for persons who suffer damage caused by foreign aircraft on the surface, while limiting in a reasonable manner the extent of the liabilities incurred for such damage in order not to hinder the development of international civil air transport."

The Convention applies to damage caused on the surface of one Contracting State by aircraft in flight registered in another Contracting State. It imposes absolute liability on those responsible.

Liability exists regardless of fault on the part of

5) <http://www.icao.int/icao/en/leb/rome1952.pdf>

6) <http://www.icao.int/icao/en/leb/chicago.pdf>

7) Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Montreal, 23 September 1978; hereinafter cited as the 1978 Montreal Protocol.

8) <http://www.icao.int/icao/en/leb/MtlPr78.pdf>

4) I. H. Ph. Diederiks-Vershoor, *An Introduction to Air Law*, Kluwer Law International (1971), at 147.

the responsible party, and only very limited defenses are available. Article 1 of the 1952 Rome Convention provides that "any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling there from, be entitled to compensation".

Liability attaches to the operator of the aircraft in general, the person making use of the aircraft at the time the damage is caused. The registered owner is presumed to be the operator unless he can prove that some other person is the operator. I think that the Rome Convention of 1952 and Montreal Protocol of 1978 had adopted the principle of limited liability in order to afford some protection to the operators of aircraft and aviation enterprises. As for the limits themselves, they are clearly expressed in the 1952 Rome Convention in terms of weight of aircraft, while gold francs are the units of account.

A scale of five weight categories has been adopted for this purpose, a number which has later been reduced to four categories in the Montreal Protocol. In addition to the limit per aircraft, Article 11(2) in the 1952 Rome Convention states that liability in respect of loss of life or personal injury shall not exceed 500,000 gold francs per person killed or injured. As regards limits of compensation for loss of life or personal injury in the 1978 Montreal Protocol, these were raised 375 percent over those set forth in the Rome Convention, namely to a maximum of 125,000SDR (or 1,875,000 Monetary Units).

In 1978, a Protocol was adopted at Montreal aiming at amending the Rome Convention of 1952. According to the 1978 Montreal Protocol, the limits of liability were upwardly amended, with the Special Drawing Rights (SDR) replacing the gold franc as the unit of currency. In comparison to the Convention of 1952 the limits have indeed been raised substantially, but the United States still consider these sums to be far too low, especially in relation to large transport by aircraft.

Moreover, the United States objected to the special limits with regard to liability for death and injury and so they did not sign the Rome Convention.

In 1976, Canada denounced the Convention; Aust-

ralia did so in 2000. A number of large aviation nations have not ratified these instruments. It is clear that the instruments are not acceptable to any notable extent to the international community, and that they do not reflect the needs of that community.

III. Reasons Why the 1952 Rome Convention should be amended

Many economic and social changes have occurred since the 1952 Rome Convention and the 1978 Montreal Protocol was effectuated.

First, All air operator's liability caused by the foreign aircraft should extend to loss of expectation of leisure activities, as well as to damage to property, and mental and physical injuries.

Secondly, the limits for compensation abovementioned in the Convention were considered too low. When victims, survivors and the injured persons are not satisfied with the limited amount for which an airline corporation and aircraft's operator is liable under the current limited system, they tend to bring claims against the manufacturer of the aircraft or the air traffic controller for the balance of the damages which are not thoroughly compensated by the airlines and aircraft operators. The Rome Convention does not cover claims against parties other than the aircraft's operators.

Thirdly, the liability limitation in the Rome System was very controversial and questionable. In the light of the development in the high technology and safety of air transportation, this reason for the liability limitation does not exist any more.⁹⁾

Fourthly, because the Rome Convention is very complicated, victims, survivors and the injured party receiving compensation for damages caused in the same aircraft accident have very different rights according to the jurisdiction in question, even when they have paid the same freight. This discriminates among the victims and can no longer be justified.

Fifthly, the Rome Convention did not deal with

9) Doo Hwan Kim, "Some Considerations of the Draft for the Convention on Integrated System of International Aviation Liability," *Journal of Air Law and Commerce*(Vol.53, No.3, 1988) SMU, USA, at 774-776.

problems such as noise, super sonic boom of aircraft and nuclear damage.¹⁰⁾

Sixthly, insurance poses a problem.

Nowadays almost all the damages resulting from air transportation are covered by liability insurance. Most of the insurance company dislikes taking the aviation liability insurance for covering the huge and immense damage such as catastrophe of September 11, 2001 in the United States of America. Influenced by the principle of absolute liability, however, the present air law system could not settle fundamentally air law problems and disputes without a dramatic and comprehensive reform for the 1952 Rome Convention and the 1978 Montreal Protocol.

IV. Activities of ICAO on the Modernization of the 1952 Rome Convention

The 31st Session of the Legal Committee of ICAO of 2000¹¹⁾ considered a proposal by Sweden to include in the General Work Programme of the Committee an item on the modernization of the Rome Convention.

The delegate explained that the Convention should be modernized to reflect recent developments, including liability limits and environmental damage on the ground caused by aircraft.

The item was included with priority No. 4 in the Work Programme. The 32nd Session of the Legal Committee of ICAO was held in Montreal from 15 to 21 March 2004 under the chairmanship of Mr. G. Lauzon (Canada). It had as Agenda Item 3 the subject: Consideration of the Modernization of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on 7 October 1952.

This item was considered on the basis of the text of a Draft Convention on Damage Caused by Foreign Aircraft to Third Parties prepared by the Secretariat with the assistance of a Secretariat Study Group established by the Council on 5 June 2002.¹²⁾

10) I. H. Ph. Diederiks-Vershoor, *op.cit.*, at 148.

11) The 31st Session of the Legal Committee of ICAO was held at Montreal, Canada from 28 August to 8 September 2000.

12) C-DE166/8 refers.

The Group held four meetings in 2002 and 2003.

The 32nd Session of the Legal Committee of ICAO (Montreal, 15~21 March 2004) had as its main item for consideration "Consideration of the Modernization of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on 7 October 1952"; the Committee made no change to its Work Programme as amended by the Council on 25 November 2002. At the fourth meeting of its 174th Session on 21 February 2005, the Council considered a report on the work of the First Meeting of the Special Group on the Modernization of the Rome Convention of 1952.¹³⁾

This Special Group reported, *inter alia*, on the changes made to the Draft Convention on Damage Caused by Foreign Aircraft to Third Parties; the 12 General Points of Agreement reached by the Group; and the list of "Grey Points" which required additional work.

The Council expressed appreciation for the work of the Group which, in its view, was moving in the right direction, and agreed to convene a second meeting of the Group from 4 to 8 July 2005.

Third meeting of the Group at Headquarters of ICAO was held at Montreal from 13 to 17 February 2006. On 6 December 2006, the ICAO Council amended the title of this item to read: "Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks".

Secretarial support was provided to the Council Special Group on the Modernization of the Rome Convention of 1952, which continued its work and held its sixth meeting of Special Group at ICAO headquarters from 26 to 29 June 2007.¹⁴⁾

The sixth meeting of the Group was held at ICAO Headquarters from 26 to 29 June 2007 and was attended by 46 delegates from 20 Member States, one *ex-officio* member, and fifteen observers from two Contracting States and seven international organizations.

Mr. Henrik Kjellin (Sweden) and Ms. Siew Huay Tan (Singapore) continued as Chairman and Vice-

13) C-WP/12391.

14) ICAO Working Paper, A36-WP/8, LE/2, 20/06/2007, at 3.

Chairman respectively. At the conclusion of its sixth meeting (26-29 June 2007), there was broad agreement in the Special Group of ICAO that it had completed its work, and it decided to recommend to the Council to convene a Session of the Legal Committee to further develop the texts of the Draft Conventions.

The Legal Commission of the 36th Session Assembly of ICAO held at Montreal from 18 to 28 September 2007 in order to discuss the progress report on compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks as an agenda item 45. The 33rd Session of the Legal Committee of ICAO was held at Montreal from 21 April to 2 May 2008 in order to discuss the report on the Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks.”

This item has been studied by the Council Special Group on the Modernization of the Rome Convention of 1952 during six meetings, resulting in the following two draft conventions:

- 1) Convention on Compensation for Damage Caused by Aircraft to Third Parties, in Case of Unlawful Interference Involving Aircraft (Unlawful Interference Convention); and
- 2) Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risk Convention).

Two new air law conventions setting out international compensation and liability rules for damage caused by aircraft to third parties were adopted by a Diplomatic Conference hosted by the ICAO, from 20 April to 2 May 2009.

Some 400 participants from 94 States and 16 international organizations attended the Diplomatic Conference held at Montreal in Canada which was presided over by Ms. Kate Staples from the United Kingdom.

V. Main Contents and Comments for the 2009 Unlawful Interference Convention and General Risk Convention

5.1 Table of Contents in the 2009 Unlawful Interference Convention¹⁵⁾

This Convention is divided into eight chapters (thirty seven articles). The first chapter (arts. 1 and 2) defines the scope of the Convention and term used. The second chapter (arts. 3-7) is concerned with liability of the operator, limit of operator's liability and related issues. The third chapter (arts. 8-17) contains provisions relating to establish the international civil aviation compensation fund, the conference parties, the meeting of conference parties, secretariat and director, contributions to the international fund, basis for fixing the contributions, period, rate and collection of the contributions, duties of state parties.

The fourth chapter (arts. 18-19) deal with the compensation from the compensation fund and advance payments and other measures. The fifth chapter (arts. 21-27) regulates the special provisions on compensation and recourse. The sixth chapter (arts. 28) comprises the assistance in case of events in States non-party.

The seventh chapter (arts. 29-37) prescribe includes the exercise of remedies and related provisions. The chapter eighth (arts. 38-47) regulates the final clauses.

The abovementioned Convention has the objective of providing compensation for damage to third parties as a result of acts of unlawful interference involving aircraft.

5.2 Table of Contents in the General Risks Convention¹⁶⁾

This Convention is divided into five chapters (nineteen articles). The first chapter (arts. 1 and 2) defines the scope of the Convention and term used.

The second chapter (arts. 3-9) is concerned with liability of the operator, limit of operator's liability, priority of compensation, advance payment, insurance and related issues.

The third chapter (arts. 10-11) contains provisions

15) http://www.icao.int/DCCD2009/docs/DCCD_doc_43_en.pdf

16) http://www.icao.int/DCCD2009/docs/DCCD_doc_42_en.pdf

relating to the exoneration and recourse.

The fourth chapter (arts. 12-20) deal with the exercise of remedies and related provisions.¹⁷⁾

The chapter fifth (arts. 21-28) regulates the final clauses. This instrument, the Convention on Compensation for Damage Caused by Aircraft to Third Parties, modernizes the current legal framework provided for under the 1952 Rome Convention and related Protocol of 1978. It covers cases of damage caused by aircraft as a result of safety related matters and not involving an act of unlawful interference and provides for full compensation of victims.

5.3 Main Contents of the Convention on Compensation for Damage Caused by Aircraft to Third Parties, in Case of Unlawful Interference Involving Aircraft¹⁸⁾

5.3.1 Scope of the Draft Convention

Under Article 2, paragraph I, the Convention would apply to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight as a result of an act of unlawful interference when the operator has its principal place of business or, if it has no such place, its permanent residence, in another State whether or not a Party. This Article ensures that damage in any State Party would be Compensated; whether or not the operator is from a State Party.

This Convention shall not apply to damage caused by State aircraft. Aircraft used in military, customs and police services shall be deemed to be State aircraft.

5.3.2 liability of the Operator

The liability of operator is strict. Article 3, paragraph 1, states simply that the operator shall be liable for damage sustained by third parties upon condition only that the damage was caused by an

aircraft in flight.

Damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable only if caused by a recognizable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.

Damage to property shall be compensable. Environmental damage shall be compensable, in so far as such compensation is provided for under the law of the State in the territory of which the damage occurred.

There is no need for the claimant to prove fault. However, punitive, exemplary or other non-compensatory damages shall not be recoverable.

Damages due to death, bodily injury and damage to property shall be compensable.

5.3.3 Limit of Operator's Liability

Under Article 4, the operator's liability is limited or capped, based on the weight of the aircraft, ranging from 750,000 Special Drawing Rights (SDR)¹⁹⁾ for the smallest aircraft to 700,000,000 (seven hundred million) SDRs for the largest aircraft. This liability cap may be broken in exceptional circumstances only.

For several meetings, the Special Group of ICAO considered whether to make only the operator liable and to exempt from liability of her actors in the air transport industry, such as owners, lessors or financiers, manufacturers, air navigation service providers, airports, security providers and ground handling service providers. This issue was resolved only at the very last meeting when the Group adopted an exclusive remedy provision, similar to that found in the 1999 Montreal Convention.

An article has been included to provide an international mechanism for third parties suffering damage on board an aircraft involved in mid air collision to claim compensation from the other carrier.

Where two or more aircraft have been involved in an event causing damage to which this Convention

17) ICAO C-WP/13031, 13/11/2007, Appendix A and B.

18) http://www.icao.int/DCCD2009/docs/DCCD_doc_43_en.pdf

19) <http://www.imf.org/external/index.htm>; The rate of Exchange for 1 SDR is US Dollar 1.57 and the Korean Won 1844 on December 29, 2009.

applies, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party (Article 5, 1).

5.3.4 Advance Payment and Insurance

If required by the law of State where the damage occurred, the operator shall make advance payment without delay to natural persons who may be entitled to claim compensation under this Convention in order to meet their economic need. Such advance payments shall not constitute a recognition of liability and may be offset against any amount subsequently payable as damages by the operator (Article 6).

Having regard to the limit of the operator's liability, States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention. If such insurance or guarantee is not available to an operator on a per event basis, the operator may satisfy this obligation by insuring on an aggregate basis (Article 7, 1).

5.3.5 The International Civil Aviation Compensation Fund

An organization named the International Civil Aviation Compensation Fund, hereinafter referred to as "the International Fund", is established by this Convention. The International Fund shall be made up of a Conference of Parties, consisting of the States Parties, and a Secretariat headed by a Director. The International Fund shall have its seat at the same place as the International Civil Aviation Organization. The International Fund shall have international legal personality (Article 8). At the heart of this new instrument is the creation of an International Fund which may potentially provide victims of an event compensation in addition to that paid by the aircraft operator, up to an amount of 3 billion Special Drawing Rights (approximately USD 4.5 billion).

The compensation will be paid from a newly proposed International Fund, which is to be created through funds collected from each international passenger

and each tonne of cargo carried by the international airline. I think that the compensation fund would be managed by an ICAO secretariat and funded by a levy of \$1 per airline passenger and a levy on each ton of cargo at an amount yet to be determined.

The convention on 'Compensation for damage to third parties, resulting from acts of unlawful interference involving aircraft' seeks to create an International Fund that may potentially provide victims of an event compensation of approximately \$4.5 billion.

5.3.6 The Conference of Parties

The International Fund would comprise a Conference of Parties (COP) which would be the principal policy-making organ, made up of all State Parties, and a Secretariat headed by a Director. The COP would, inter alia, establish regulations of the International Fund, Guidelines for Compensation, Guidelines on Investment, fix the contributions to be made to the International fund and decide the cases where financial support should be given to the operator in cases of events in States non-Party. A full list of the powers and duties of the COP is provided in Article 9. The COP shall meet once a year unless it decides otherwise (Article 9~10).

5.3.7 The Secretariat and the Director

The International Fund shall have a secretariat led by a Director. The director shall hire personnel, supervise the secretariat and direct the day-to-day activities of the International Fund (Article 11). Each State party undertakes to fully respect the international character of the responsibilities of the personnel and not seek to influence any of its nationals in the discharge of their responsibilities.

5.3.8 The Contributions to the International Fund

By virtue of Article 12, the contributions to the International Fund shall be the mandatory amounts collected in respect of each passenger and each

tonne of cargo departing on an commercial flight from airport in a State Party.

Where a State Party has made a domestic opt-in declaration under Article 2, Paragraph 2, such amounts shall also be collected in respect of each passenger and each tonne of cargo departing on a commercial flight between two airports in that State Party.

The operator shall collect the mandatory amounts and remit them to the International Fund.

5.3.9 Collection of the contributions

The Conference of Parties shall establish in the Regulations of the International Fund a transparent, accountable and cost-effective mechanism supporting the collection, remittal and recovery of contributions. When establishing the mechanism, the Conference of Parties shall endeavour not to impose undue burdens on operators and contributors to the funds of the International Fund. Contributions which are in arrears shall bear interest as provided for in the Regulations (Article 15).

5.3.10 Duties of States Parties

Each State Party shall take appropriate measures, including imposing such sanctions as it may deem necessary, to ensure that an operator fulfills its obligations to collect and remit contributions to the International Fund. Each State Party shall ensure that the following information is provided to the International Fund:

- (a) the number of passengers and quantity of cargo departing on international commercial flights from that State Party;
- (b) such information on general aviation flights as the Conference of Parties may decide; and
- (c) the identity of the operators performing such flights (article 16, 1~2).

5.3.11 The Funds of the International Fund

The International fund may only be used for the purpose set out in Article 8, paragraph 2. The

International Fund shall exercise the highest degree of prudence in the management and preservation of its funds.

The funds shall be preserved in accordance with the Guidelines on Investment determined by the Conference of Parties. Investments may only be made in States Parties.

Accounts shall be maintained for the funds of the International Fund. The auditors of the International Fund shall review the accounts and report on them to the Conference of Parties.

5.3.12 Compensation from the International Fund

The International Fund shall, under the same conditions as are applicable to the liability of the operator, provide compensation to persons suffering damage in the territory of a State Party.

Where the damage is caused by an aircraft in flight on a flight other than an international flight, compensation shall only be provided if that State Party has made a declaration according to Article 2, paragraph 2. Compensation shall only be paid to the extent that the total amount of damages exceeds the limits according to Article 4.

The maximum amount of compensation available from the International Fund shall be 3,000,000,000 Special Drawing Rights for each event.²⁰⁾

5.3.13 Exoneration

If the operator or the International Fund proves that the damage was caused, or contributed to, by an act or omission of a claimant, or the person from whom he or she derives his or her rights, done with intent or recklessly and with knowledge that damage would probably result, the operator or the International Fund shall be wholly or partly exonerated from its liability to that claimant to the extent that such act or omission caused or contributed to the damage (article 20).

²⁰⁾ http://www.icao.int/DCCD2009/docs/DCCD_doc_43_en.pdf

5.3.14 Right of recourse of the operator and the International Fund

The operator shall have a right of recourse against:

- (a) any person who has committed, organized or financed the act of unlawful interference;
- (b) the operator subject to the conditions set out in Article 23; and
- (c) any other person (Article 25).

5.3.15 Period of Limitation

The right of compensation according to Article 3 shall be extinguished if an action is not brought within two years from the date of the event which caused the damage.

The method of calculating such two-year period shall be determined in accordance with the law of the court seized of the case (Article 36).

5.3.16 Entry into force of the Convention

This Convention shall enter into force on the one hundred and eightieth day after the deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession on condition, however, that the total number of passengers departing in the previous year from airports in the States that have ratified, accepted, approved or acceded is at least 750,000,000 as appears from the declarations made by ratifying, accepting, approving or acceding States.

If, at the time of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession this condition has not been fulfilled, the Convention shall not come into force until the one hundred and eightieth day after this condition shall have been satisfied. An instrument deposited by a Regional Economic Integration Organization shall not be counted for the purpose of this paragraph. This Convention shall come into force for each State ratifying, accepting, approving or acceding after the deposit of the last instrument of ratification, acceptance, approval or accession necessary for entry into force of this Convention on the ninetieth day after the deposit of its instrument of ratification,

acceptance, approval or accession (Article 40).

5.4 Main Contents of the Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risk)²¹⁾

5.4.1 Scope of the Convention

This Convention applies to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight on an international flight, other than as a result of an act of unlawful interference.

If a State Party so declares to the Depositary, this Convention shall also apply where an aircraft in flight other than on an international flight causes damage in the territory of that State, other than as a result of an act of unlawful interference.

This Convention shall not apply to damage caused by State aircraft. Aircraft used in military, customs and police services shall be deemed to be State aircraft (Article 2).

5.4.2 liability of the operator

The operator shall be liable for damage sustained by third parties upon condition only that the damage was caused by an aircraft in flight.

There shall be no right to compensation under this Convention if the damage is not a direct consequence of the event giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations.

Damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable only if caused by a recognizable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.

Damage to property shall be compensable. Environmental damage shall be compensable, in so far as such compensation is provided for under the law

²¹⁾http://www.icao.int/DCCD2009/docs/DCCD_doc_42_en.pdf

of the State Party in the territory of which the damage occurred. No liability shall arise under this Convention for damage caused by a nuclear incident (Article 3, 1~6).

Beyond that, the operator is liable for all damages unless it proves that such damages were not due to its negligence or that the damages were solely due to the negligence of another person.

In other words, there is no cap on the liability of the operator. This two-tier system is similar to that found in the Montreal Convention of 1999.

5.4.3 Limit of Operator's Liability

Under Article 4, the operator's liability is limited or capped, based on the weight of the aircraft, ranging from 750,000 Special Drawing Rights (SDR) for the smallest aircraft to 700,000,000 (seven hundred million) SDRs for the largest aircraft.

This liability cap may be broken in exceptional circumstances only. If an event involves two or more aircraft operated by the same operator, the limit of liability in respect of the aircraft with the highest maximum mass shall apply.

5.4.4 Events involving two or more operators

Where two or more aircraft have been involved in an event causing damage to which this Convention applies, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party. If two or more operators are so liable, the recourse between them shall depend on their respective limits of liability and their contribution to the damage (Article 6, 1~2).

5.4.5 Advance payments

If required by the law of the State where the damage occurred, the operator shall make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute a recognition of liability and may be offset against any amount subsequently payable as damages by

the operator (Article 8).

5.4.6 Insurance

Having regard to Article 4, States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention.

An operator may be required by the State Party in or into which it operates to furnish evidence that it maintains adequate insurance or guarantee. In doing so, the State Party shall apply the same criteria to operators of other States Parties as it applies to its own operators (Article 9).

5.4.7 Exclusive Remedy

Any action for compensation for damage to third parties caused by an aircraft in flight brought against the operator, or its servants or agents, however founded, whether under this Convention or in tort or otherwise, can only be brought subject to the conditions set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights (Article 12, 1).

5.4.8 Forum

The actions for compensation under the provisions of this Convention may be brought only before the courts of the State Party in whose territory the damage occurred.

Where damage occurs in more than one State Party, actions under the provisions of this Convention may be brought only before the courts of the State Party the territory of which the aircraft was in or about to leave when the event occurred (Article 16, 1~2).

5.4.9 Period of Limitation

The right of compensation according to article 3 shall be extinguished if an action is not brought within two years from the date of the event which

caused the damage.

The method of calculating such 1 year period shall be determined by the law of the court seized of the case (Article 19).

5.5 Author's Comments for the said two Conventions

After I would like to introduce only Article 3, 5 of "the Convention on the Compensation for Damage Caused by Aircraft to Third Parties, Resulting from Acts of Unlawful Interference" and "the Convention on the Compensation for Damage Caused by Aircraft to Third Parties", I going to present my comment and personal opinion for it in this paper as the followings;

※ The Problems on the Noise and Sonic Boom of Aircraft

Article 3 Liability of the Operator

1~4 section is omitted.

5. Environmental damage shall be compensable, insofar as such compensation is provided for under the law of the State Party in the territory of which the damage occurred.

<Author's Comment and opinion>

The incidence of noise, sonic boom or super sonic boom cause by aircraft is specially harmful and detrimental for the people on the surface.

Although in some countries legislative measures against excessive noise, sonic boom of aircraft have already been introduced, common standards and arrangements sanctioned by international agreements are still sadly lacking.

The definition of the environmental damage regulated by Article 3, paragraph 5 of the said Convention is the very broad definition. As it is very difficult thing for us to decide in the concretely the scope of environmental damage and object of the compensation amount for the environmental damage, so the compensation as such is provided for under the law of the State in the territory of which, or under the jurisdiction of which, the damage occurred. It is necessary for us to clear the definition of the environmental damage.

The environmental damage also include the damage

caused by the noise or sonic boom of aircraft.

I think that it is reasonably to add the noise or sonic boom of aircraft after environmental damage of the Article 3, paragraph 5 as the following;

Article 3 Liability of the Operator

5. Environmental damage including the noise or sonic boom of aircraft shall be compensable, insofar as such compensation is provided for under the law of the State Party in the territory of which the damage occurred.

VI. Conclusion

The changes in the aviation since 9/11 disasters have left us questions to answer how to effectively respond to the occurrences of terror attacks and what proactive measures to take to prevent them from happening.

Without ensuring aviation security, we can not affirm you of the prosperity of aviation industry and world economy. In the coming years, against the continued happening of terror in various and crafty forms such as the potentially devastating attacks involving bacteriological, chemical weapon or missile attack etc, we should advance security related technology and every state in the globe should make even more strides to seek for thoroughly preventive measures.

And more importantly, we should tighten up our international cooperation's ties to better respond to terrorist acts in the Asia Pacific countries.

Almost eight years have gone by since the effort to construct a liability and compensation framework to meet the challenge of compensating victims of an act of unlawful interference of the 11/9, 2001 scale began.

The security threats against aviation remain undiminished and strict and unlimited liability for air carriers in many jurisdictions have not changed while "war risks" insurance remains very limited. The framework of the abovementioned two Conventions as developed by ICAO are indeed sufficiently mature for taking to the level in the ICAO air law-making process.

I would like to urge the ratification expeditiously the said two Conventions by the Republic of Korea

so as to protect more third party victims and to solve quickly and efficiently the air unlawful Interference and general risk cases occurred among the different legal system and different countries. It is a great desirable and necessary for us to import the contents of the aforementioned Unlawful Interference Convention and General Risk Convention into the domestic air transport law in order to provide the legal basis for protection of victims caused by aircraft accidents.

참고문헌

- [1] 김두환, 「최신국제항공법학론」, 한국학술정보 [주] 발행, (2005), pp. 376~408.
- [2] 김두환, 「항공기사고로 인한 지상 제 3자의 배상책임에 관한ICAO 조약 초안에 대한 논평과 국내입법의 방향」, 항공우주법학회지(제19권 제2호, 2006년), pp 9~53.
- [3] 板本昭雄, 「新しい國際航空法」, 有信堂, (1999), pp. 199~215.
- [4] 藤田勝利編, 「新航空法講義」, 信山社, (2007), pp. 207~229
- [5] (財) 日本航空振興財團, 平成16年度 航空私法研究會內 航空運送法委員會報告書, (2003), pp. 3~38.
- [6] (財) 日本航空振興財團, 平成16年度 航空私法研究會內 航空運送法委員會報告書, (2005), pp. 3~20.
- [7] (財) 日本航空振興財團, 平成19年度 航空私法研究會內 航空運送法委員會報告書, (2008), pp. 13~68.
- [8] H. Ph. Diederiks-Vershoor, *An Introduction to Air Law*, Kluwer Law International, (1971), pp.147~186.
- [9] Doo Hwan Kim, *Essays for the Study of the International Air and Space Law*, Korea Studies Information Co. Ltd., (2008) pp. 249~286.
- [10] Doo Hwan Kim, "The Liability of International Air Carriers In Changing Era", *The Use of Airspace and Outer Space for all Mankind in the 21st Century*, Kluwel Law International, (1995), at 102.
- [11] Chia-Jui Cheng and Doo Hwan Kim, *The Utilization of the World's Air Space and Free Outer Space in the 21st Century*, Kluwer Law International, (2000), at 68-70.
- [12] Carole Blackshaw, *Aviation Law & Regulation*, Pitman Publishing (1992), p. 179.
- [13] G. Miller, *Liability in International Air Transport*, (1977), p. 126.