國際民間航空運航에 있어 政府機關의 責任

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머리말

이 論文은 筆者가 自由中國 타이페이에서 開催된 第1回 아시아 航空宇宙法大會에서 今年 5月 29日 發表한 內容을 다시 整理하고 補完한 것이다. 發表된 原文도 함께 揭載하였으며 筆者의 發表內容에 대하여 John Livermore教授(오스트레일리아) 및 藤田勝利教授(日本)의 質問과 筆者의 答辯은 本學會誌 特別報告欄中「아시아 航空 및 宇宙法大會參席報告」의 記事中에 紹介되었으므로 참고하기 바란다.

Ⅰ. 序 論

우리는 航空運送에 있어 航空社와 空港등을 民營形態와 國營形態의 法的 組織體(公共法人, 會社등)의 두가지 形態로 구별할 수가 있다. 개발途上國과 先進國에 있어 一部 航空社와 空港등이 國家 또는 公共機關에 의하여 運營·管理되어 왔고 한편 정부기관에 의하여 지휘·감독을 받

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아오고 있다. 아시아 및 유럽과 北美大陸間에 航空社와 空港등의 法的 所有形態를 비교하여 볼 때 美國은 대부분이 民間所有形態로 운영되어 왔고 아시아와 유럽에 있어서는 그 一部가 政府所有形態로 운영 되어오고 있다. 어떤 경우에 國有 또는 國營航空社의 機長, 操縱士, 乘務員과 航空交通管制官(Air Traffic Controller ; 이하 ATC라고 호칭함), 航空의 地上勤務職員등은 政府機關 또는 國營企業體에 소속되어 있고 그들의 法的 身分은 公務員 또는 國營企業體 職員으로 되어 있는 경우도 있다. 그들의 法的行爲 또는 過失에 基因된 人的 또는 物的損害에 대한 賠償責任은 國際協約, 條約과 國內法(例 : 國家賠償法등), 雇傭契約등을 기준으로 하여 처리하게 된다. 英美法國家에서 雇傭主로서의 政府機關은 被雇傭人(公務員등)이 雇傭契約범위내에서 한 행위가 第三者에게 損害를 加하였을 때에 政府機關은 代理責任(Vicarious Liability)의 原理에 입각하여 법적책임을 지게 된다.

英美法體系下에서 雇傭主인 政府機關이 그 權限範圍內에서 行爲를 하지 않고 이 機關들의 불법침해(tresspass), 불법방해(nuisance) 과실(negligence)등으로 기인된 第三者의 損害에 대하여 賠償責任을 부담하게 된다.

政府機關의 長과 被雇傭人(公務員등)은 違法行爲로 인하여 第三者에게 발생된 損害에 대하여 共同賠償責任이 있기 때문에 被害를 입은 原告는 政府機關의 長, 또는 履行補助者(被雇傭人)中 擇一하거나 併合하여 訴訟을 提起할 수 있으나 대부분의 경우는 政府機關의 長을 상대로 訴訟을 제기하는 경우가 많이 있다. 여하간 原告는 被告側의 過失을 法的으로 입증하지 않으면 안된다.

代理責任의 原理는 英美法의 體系下에서 過失, 不法妨害, 기타의 不法行爲의 경우에도 똑같이 적용되고 있다.

大陸法의 體系下에서는 특히 韓國과 日本에 있어 航空機의 乘客 또는 荷主가 公務員의 職務上 不法行爲로 인하여 입은 損害에 대하여 憲法과 國家賠償法의 규정에 따라 國家 또는 公共團體를 상대로 損害賠償請求權을 行使할 수가 있다. 그러나 公務員自信의 責任은 免除되지 아니한

다.

대부분의 國家에 있어 國家 또는 公共團體에 소속되어 있는 航空交通管制(Air Traffic Control)業務(機能)는 行政當局의 公務員에 의하여 監督 또는 統制되어 오고 있다. 따라서 航空交通管制官(履行補助者)이 公務員일 경우에 이들의 行爲가 國家 또는 公共機關의 行爲로 간주되기 때문에 이 航空交通管制官의 不法行爲로 기인된 損害에 대하여 國家 또는 公共機關이 賠償責任을 지게 된다.

우선 國際航空運送에 있어 政府機關의 責任과 관련된 航空交通管制官 및 航空運送人의 責任에 관하여 論하고자 한다.

Ⅱ. 航空交通管制機關과 관련된 政府機關의 責任

1. 航空交通管制官에 의한 航空交通管制業務와 注意義務

航空交通管制의 主된 目的은 航空管制圈內에서 航空機의 運航安全, 運航秩序維持, 迅速한 移動을 增進시키는데 그 目的이 있다. 따라서 航空交通管制官은 航空機의 運航秩序維持, 迅速한 移動, 運航安全을 확보하는데 담보책임을 부담하게 된다.

航空交通管制官의 責任은 일반적으로 보면 契約責任이 아니고 不法行爲責任(delictual liability)으로 구성되어 있다.

시카고條約 第二附屬書 航空規則(Rul of Law)에 의하면 機長은 空港의 管制塔內에 있는 航空交通管制官의 指示에 순응하여야만 된다고 규정하고 있다. 시카고條約 締結當事國들은 空中 또는 地上에서의 航空機의 衝突豫防과 飛行情報 및 警報提供, 航空機의 移動에 따르는 秩序維持를 확보하기 위하여 적절한 航空交通管制 써비스를 제공하여야만 된다.

특히 航空交通管制官의 業務는 航空機의 運航安全을 위하여 항상 注意義務를 다하여 業務를 처리하여야만 된다.

이와같은 注意義務는 航空交通管制業務에 관계된 規定 뿐만 아니라 航空交通管制官과 操縱士間의 關係에서 생겨나는 것이다. 이러한 注意義務의 違反은 過失(negligence)로 볼 수 있으므로 被害者가 訴訟을 제기할

수가 있다. 왜냐하면 特定 航空交通管制官이 航空交通管制業務를 처리하는 과정에서 過失이 있을 경우에 責任이 있기 때문에 雇傭主로서의 政府機關 또는 公共機關이 責任을 부담하게 된다.

航空機의 機長과 操縱士는 航空機의 運航安全에 대하여 第一次的責任을 지게 된다. 操縱士 또는 機長이 安全運航에 대한 誤判은 航空機事故의 직접적인 원인이 될뿐만 아니라 過失로서 提訴要件이 충족될 수가 있다. 여하간 操縱士의 運航安全에 대한 決定은 航空交通管制官에 의하여 제공된 비행정보를 비롯하여 그가 이용할 수 있는 情報에 기초를 두고 있다.

管制塔內에 있는 航空交通管制官은 尖端化된 電子裝備를 利用하고 있기 때문에 操縱士보다도 무거운 責任을 부담하는 경우도 있다. 한편 航空交通管制官들은 航空管制圈內에서 모든 航空機의 移動을 肉眼으로만은 식별할 수가 없다. 어떤 경우에는 항공기의 안전운항에 관한 비행정보를 제공하는 航空交通管制官이 操縱士보다도 더욱 무거운 責任을 지는 경우가 있다. 이와같은 航空交通管制業務는 管制機關이 被雇傭人으로서 그들의 職務遂行에 의하여 야기된 行爲에 대하여 國家 또는 公共機關이 代理人으로서 責任을 지게 되지만 管制機關의 資格으로서 한 行爲와 管制機關 個人으로서 한 行爲間에 區分이 어렵게 될 경우도 있다.

2. 航空交通管制機關의 責任制度를 統一시켜야만 되는 理由

國際航空運送에 飛行하는 航空機는 航空交通管制官의 유도에 따라 締約當事國의 領空을 비행할때도 있으나 地上에 있는 航空交通管制官과 連絡이 두절되어 第三國의 領空을 비행하는 경우 중대한 航空機事故가 발생되어 해결하여야만 될 심각한 법률문제가 제기될 때도 있다(例: 1983年 9月 1日 發生된 大韓航空의 007機 추락사건).

自國의 航空交通管制官의 유도 과실로 인하여 自國의 領空에서 他國의 航空機가 추락하는 경우도 있고 他國의 航空交通管制官의 과실로 인하여 他國의 領空에서 自國의 航空機가 추락하는 경우도 있다.

各國마다 賠償責任에 관한 法律制度가 英美法系와 大陸法系間에 다소

差異가 있기 때문에 國際航空交通管制事件에 관한 法的解決方案이 世界的으로 統一되지 않고 있으므로 國內法만으로 解決될 수 없는 難點이 있기 때문에 어느나라 法律을 適用시켜야만 되느냐 하는 法間에 충돌문제가 일어나게 된다.

航空交通管制官의 行爲로 기인된 航空機事故를 입은 損害에 대하여 被害者는 賠償請求訴訟을 제기할 수 있는 國際的으로 統一된 基準의 설정이 필요로 하다고 본다.

만약 航空交通管制機關의 責任에 관한 條約草案이 입안될 때에 過失이 있는 被告에 대하여 原告(被害者)가 損害賠償請求를 行使할 수 있는 權利가 분명히 이 條約草案에 규정되어야만 한다.

여하간 航空交通管制機關의 責任에 관한 國際條約草案의 立案은 많은 國家들간 相異한 法律制度를 조화시키고 통일시키는데 바람직한 일이라고 볼 수가 있다.

3. 國際民間航空機關(ICAO)과 國際法律協會(ILA)의 活動

國際的인 面에서 볼 때 航空交通管制機關의 責任에 관한 法律問題가 이미 1964年부터 1980年에 걸쳐 UN傘下 國際民間航空機關(ICAO)의 法律委員會와 1986年의 第62次 國際法律協會의 서울大會(韓國)의 非公式實務委員會, 1988年의 第63次 國際法律協會의 와르소大會(폴란드) 航空法分科委員會, 1990年의 第64次 國際法律協會의 골드 코우스트大會(오스트레일리아) 實務委員會에서 제기되어 여러 차례 討議된 바 있다.

특히 注目할 만한 일은 ICAO의 아르헨티나 代表가 航空交通管制機關의 責任에 관한 國際條約豫備草案을 ICAO 事務局에 제출된 바 있으나 ICAO 法律委員會에서 採擇되지는 않았다.

ICAO 第26次 會議가 1987年 4月 28日부터 5月 13日에 걸쳐 캐나다의 몬트리얼에서 開催되었다. 第26次 ICAO 法律委員會에서는 航空交通管制機關의 責任에 관한 國際機構 및 各國의 意見書, 發表者의 報告書가 첨부된 ICAO 事務局의 硏究報告書를 중심으로 장차의 討議進行節次에 대하여 심도 있게 論議된 바 있다.

1990年 몬트리얼에서 開催된 第27次 ICAO 法律委員會에서는 다음과 같은 두가지 事項에 대하여 ICAO 理事會의 承認에 따라 一般作業프로그램(General Work Programme)으로 定하여 討議키로 하였다.

1. 航空交通管制機關의 責任

2. 와르소制度에 관한 統合條約草案의 立案에 관한 硏究등

한편 1992年 4月에 이집트의 카이로에서 開催될 第65次 國際法律協會(ILA)의 航空法分科委員會에서 航空交通管制機關의 責任에 관한 國際條約豫備草案을 審議키로 定한바 있어 이 會議에서 본격적으로 同條約 豫備草案에 대한 討議가 있을 것으로 예상된다.

시카고條約에 따르면 이 條約에 加入한 國家들은 航空關係法規의 統一을 위하여 相互間에 共同努力을 하여야만 된다는 것이 기본 입장으로 되어 있다.

向後 航空交通管制機關의 責任에 관한 條約豫備草案을 正式으로 立案할 때에 그 基準으로 다음과 같은 項目이 삽입하여야만 된다고 본다.

① 航空交通管制機關의 定義 및 適用範圍

② 責任制度(過失責任主義 또는 無過失責任主義中 擇一함)

③ 責任制限(有限責任原則 또는 無限責任原則中 擇一함)

④ 裁判管轄權과 適用法規

⑤ 時効關係

⑥ 保證關係

⑦ 雜則

⑧ 外交條項

4. 航空交通管制機關의 責任

航空交通管制機關은 航空機事故로 인하여 입은 人的 또는 物的損害가 航空交通管制官, 被雇傭人, 代理人側의 過失이 原因으로 될때에 責任을 부담하게 된다.

한편 航空交通管制機關은 不可抗力的事由(force majeur)와 第三者의 行爲로 被害者側의 過失이 원인이 되어 발생된 損害에 대하여는 免責이

된다.

대부분의 國家들은 航空交通管制機關의 責任에 관하여 過失責任主義에 입각하고 있으며 따라서 原告則에 立證責任이 있게 된다. 한편 航空交通管制機關의 行爲를 원인으로 하여 발생된 損害에 대하여서도 國家 또는 公共機關이 責任을 부담하게 된다. 英美法上의 寄與過失, 不可抗力 또는 原告則의 過失등은 被告則의 責任을 免責 내지 경감시킬 수가 있게 된다.

5. 政府機關(ATCA)의 責任에 관한 立法例

航空交通管制機關에 관한 政府機關으로서의 責任에 대한 先進國의 立法例를 紹介하고저 한다.

프랑스에서는 國家가 公務員의 過失있는 行爲(重大한 過失)에 대하여 責任을 부담하는 것을 原則으로 하고 있다.

美國에서는 航空交通管制機關의 責任은 聯邦不法行爲請求法(Federal Torts Claims Act)에 의하여 처리되고 있다.

聯邦不法行爲請求法에 의하여 美國政府가 責任을 부담하게 됨은 航空交通管制官의 過失(negligence)이 立證되어야만 되고 그와같은 過失은 고통을 받고 있는 損害에 대한 主된 原因(近因 : Proximate Cause)이 있어야만 된다.

英國은 ATCA에 관한 最近의 規則으로 1981年의 航空 및 航空交通規則이 있다. 民間航空廳(CAA)은 航空機의 運航秩序維持와 迅速한 移動을 담당하고 있는 航空交通管制業務에 대하여 責任을 부담하게 된다. 航空交通管制局長은 交通部長官과 國防部長官이 協議하여 任命하게 된다. 航空交通管制局의 設立目的가운데 하나는 수시로 運航써비스를 點檢하는데 있다.

獨逸에서는 憲法 第34條(公法上의 損害賠償)와 民法 第839條(公務義務違反에 대한 責任)에 의거 航空交通管制機關의 責任問題에 관하여 法的處理가 可能하다고 보아 별도의 特別立法을 하지 않고 있다.

日本에서는 航空交通管制業務의 統括은 航空法 第137條에 의거 運輸

大臣이 防禦廳長官 또는 地方航空局長 航空交通管制部長에게 委任시킬 수 있게 되어 있다. 國家 또는 公共機關에 대한 損害賠償責任은 憲法 第17條 및 國家 賠償法 第一條에 의거 처리하도록 규정되고 있다.

韓國에서는 航空法 第75條(航空交通의 指示)에 의거 航空機는 管制區域 또는 管制圈內에서 交通部長官이 指示하는 離陸 또는 着陸의 順序時間 또는 飛行의 方法에 따라 비행하여야만 된다고 규정하고 있다.

한편 交通部長官은 航空機의 乘務員에 대하여 航空機의 運行上 필요로 하는 情報를 제공하여야만 된다(航空法 第78條)

航空交通管制機關에 관계된 政府機關(國家 또는 公共團體)의 損害賠償責任은 憲法 第29條와 國家賠償法 第2條에 따라 처리되도록 규정하고 있다. 世界 各國은 航空交通業務의 중요성을 인식하여 이 業務에 대하여 直·間接的으로 規制를 加하고 있다.

國際的으로 유럽國家들간에 航空機運航安全을 위한 協力에 관한 協定(Eurocontrol ; The Convention relating to the Cooperation for the Safety of Air Navigation)이 체결된바 있고 中美에서도 Cocesna(Corporation Centro-americana de Servicios de Navegacion Aérea)協約이 있고 아프리카에서도 ASECNA(the Agence pour la Sicurite de la Navigation Aérienne en Afriquue at a Madagascar)協約이 체결된 바 있으므로 航空管制에 관하여 地域的으로 브럭圈을 형성하여 국가간에 상호협력을 하고 있다.

航空機事故로 인한 희생자들은 過失이 있는 航空交通管制機關을 상대하여 損害賠償을 請求할 수 있지만 한편 被雇傭人인 航空交通管制官의 法的地位는 형평의 원칙에 입각하여 항상 보호받지 않으면 안된다고 본다.

ICAO 法律委員會와 ILA 航空法分科委員會는 各國의 國內立法에 기준이 되는 國際條約案을 立案하는데 國際的으로 權威가 있는 機構이다. ICAO 法律委員會는 모든 國家와 公共機關에 적용되는 航空交通管制에 관한 規則을 統一시키기 위하여 航空交通管制機關의 責任에 대한 國際條約豫備草案을 시급히 作成하는 것이 바람직하다고 사료된다.

Ⅲ. 航空運送人과 관련된 政府機關의 責任

1. 政府機關의 責任에 관한 條約의 適用範圍

國際航空運送에 있어 航空運送人에 관계된 國家 또는 公共機關에 관한 條約의 適用範圍에 대하여 와르소條約과 헤이그議定書, 과테말라議定書, 몬트리얼 第四追加議定書에 각각 규정하고 있다.

와르소조약 第2條 및 헤이그議定書 第2條에 의하면 이 條約과 議定書는 國家 또 公共機關에 의하여 수행된 航空運送에 適用되지만 郵便, 軍用航空運送에는 적용되지 않는다고 규정하고 있다. 그 밖의 國際條約 및 議定書에서는 稅關 및 警察用 航空機의 運航에는 適用되지 않은다고 규정되어 있다.

2. 政府機關에 관련된 航空運送人의 責任原則

國際條約과 議定書에 관련된 航空運送人의 責任原則에 따르면 1929年 와르소條約과 1955年의 헤이그議定書에서는 過失推定責任主義와 有限責任原則을 採擇하고 있고 1966年의 몬트리얼協約(航空社間), 1971年의 과테말라議定書, 1975年의 몬트리얼 第三, 第四 追加議定書에서는 航空運送人의 責任原則에 관하여 有限責任原則과 無過失責任主義(absolute liability)를 採擇하고 있다.

와르소條約은 國際航空運送中에 發生된 人的損害(死亡 또는 負傷)를 입은 被害者 보호를 위하여 損害賠償責任限度價額을 증가시키기 위하여 과거 60餘年間 여러차례 改正한 바 있다.

특히 현재의 와르소體制는 와르소條約을 중심으로 하여 하나의 補完條約인 과다라하라條約(1961年)과 6個의 議定書, ① 헤이그議定書 ② 과테말라議定書 ③ 몬트리얼 第一追加議定書 ④ 몬트리얼 第二追加議定書 ⑤ 몬트리얼 第三追加議定書 ⑥ 몬트리얼 第四議定書로 구성되는 복잡한 體制로 되어 있다. 이 복잡성을 탈피하기 위하여 유엔傘下 國際民間航空機關에서도 이것들을 統合시키기 위한 새로은 條約草案을 作成할

것을 決議한 바 있고 가까운 장래에 새로운 와르소體制 統合條約草案이 작성될 것으로 예상된다.

乘客의 死亡 또는 負傷에 관한 航空運送人의 人的 損害賠償責任限度額은 一人當 와르소條約에서 8,300달러이고, 헤이그議定書에서는 16,600달러이며, 몬트리얼協約(航空社間)에서는 75,000달러(訴訟費用포함)이고, 과테말라議定書에서는 100,000달러이며, 몬트리얼 第三追加議定書에서는 100,000 SDR로 규정되어 있다.

몬트리얼 第四 議定書는 航空貨物에 관한 과테말라議定書의 內容을 보완한 새로운 議定書이다.

과테말라議定書가 成立된 후 약 20年間, 四個의 몬트리얼追加議定書가 制定된 이후 約 16年間이라는 세월이 흘러갔지만 批准國數가 充足되지 않아 이들 議定書가 아직도 發效가 되지 못하고 있는 실정에 있다. 많은 國家들이 몬트리얼 第三追加議定書와 第四議定書에 대하여 美國의 批准을 기다리고 있으며 ICAO本部에서도 하루속히 批准하여줄 것을 여러차례 ICAO 加入國들에게 促求한 바 있다.

一部 國家들은 航空機事故로 인한 乘客의 死亡 또는 負傷에 대하여 人的損害賠償責任限度額을 80,000~100,000 SDR로 引上시키었으며 大韓航空, 日本航空, British Airway, Quantas Airlines, Sabena, Air France 등 航空社들은 이들의 航空社의 旅客運送約款에 이미 몬트리얼 第三追加議定書에 규정되어 있는 責任限度額과 또는 이와 유사한 賠償限度額으로 규정하고 있다.

3. 美國의 몬트리얼 第三追加議定書 및 몬트리얼 第四議定書에 대한 批准展望

現在 많은 國家들은 美國이 몬트리얼 第三追加議定書와 몬트리얼 第四議定書에 대한 批准이 1983年 美上院에서 否決된 후 과연 批准을 다시 할 것인지 하지 않을 것인지 그 可否에 대하여 지대한 관심을 갖고 지켜 보고 있다.

1988年 6月 24日에 美行政府(交通部)는 美國의 市民(乘客)을 보호하기

위하여 追求的 賠償案(Supplemental Compensation Plan)을 만들어 이것과 함께 다시 몬트리얼 第三追加議定書와 第事議定書를 批准하여 줄것을 美上院에 要請하였다.

美上院 外交分科委員會는 1989年 11月 15日 이 議定書들의 批准과 追加的 賠償案을 討議할 目的으로 청문회가 開催된 바 있다. 1990年 6月 21日 美上院 外交分科委員會는 이 追加的 賠償案에 대한 同意勸告와 議定書에 관한 批准을 本 會議에 上程시키기 위하여 表決에 붙인 結果 贊成 12票를 얻고 反對 2票로 通過된 바 있어 今年內에 美上院 本會議에서 批准與否가 決定될 것으로 예상된다.

美上院에 계류되어 있는 追加的 賠償案의 內容은 다음과 같이 네가지 事項으로 要約될 수가 있다.

첫째, 乘客의 死亡 또는 負傷에 관한 經濟的 損害賠償請求額은 每航空機마다, 每事故마다 5억달러이다(참고 : 現在 旅客機의 搭乘人員이 平均 500名으로 假定할 때 乘客 1人當 賠償限度額은 100萬 달러가 된다).

둘째, 와르소條約에 의거 커버되는 國際航空運送을 이용하는 美國市民과 美國市民이 안일지라도 비행기의 시발지가 美國內에서 출발 하였거나 또는 美國內에서 航空旅客搭乘票을 買入하였을 경우에는 經濟的 損害뿐만 아니라 非經濟的 損害까지 全額 損害賠償을 하여야만 된다.

셋째, 航空運送人則에게 無過失責任主義를 適用시키고 있기 때문에 原告則은 損害發生 事實만을 立證하면 된다.

넷째, 追加賠償全額에 관하여 商業的 保險市場을 통하여 航空社는 保險에 들어야만 되므로 乘客 1人當 추가요금으로 5달러를 支給하여야만 된다고 예상하고 있다.

이 追加的 賠償案은 乘客保護를 위하여 劃企的인 일로서 이와같은 높은 賠償額은 세계 어느나라에서도 그 類例를 찾아볼 수가 없다.

만약 이 몬트리얼 第三追加議定書와 第四議定書가 美國에 의하여 批准이 되고 追加賠償案(S.C.P)등이 美議會에서 통과된다면 다른 國家들에게 많은 영향을 줄 것이고 이에 따라 신속히 이 議定書들을 批准하는 國家들도 늘어날 것으로 예상된다.

아시아 國家들의 交通部와 航空社들은 自國의 航空政策樹立하는데 참고하기 위하여 이 議定書의 批准 및 追加賠償案에 대하여 美上院의 通過 與否關係를 주의깊게 지켜 보아야만 된다.

4. 美國에 있어 航空運送人의 不法行爲 責任에 관한 問題

國內 航空機事故로 인한 損害賠償請求事件에 있어 聯邦不法行爲請求法을 適用시키게 되는데 原告가 故意 또는 過失을 立證하는데 부당하게 時間이 너무 많이 소요되고 있을 뿐만 아니라 희생자와 유족들의 賠償이 適切한 時期에 이루워지고 있지 않으므로 被害者들에게 많은 타격을 주고 있다.

美國의 랜드 用役會社의 研究報告書에 의하면 損害賠償請求訴訟事件에 있어 和解에 도달하는데 平均 2年이 걸리고 裁判이 進行 될때에는 平均 4年 이상이 소요된다. 와르소體制下에 있는 有限責任限度額을「깨틀이기」위하여 航空社側의「認識있는 無謀한 過失」(Wilful misconduct)을 立證하기 위하여서는 平均 7年 以上이 걸린다고 보고하고 있다.

1983年 大韓航空 007機의 비극적인 擊墜事件에 있어서도 희생자 및 유족들은 배상을 받지 못하고 있으며 이들에 의하여 아직도 美國法院에서 訴訟事件을 進行시키고 있어 8年이라는 시일이 경과된 바 있다.

더욱이 上記 研究報告書에 의하면 와르소條約에 의한 美國人 原告들은 1970年부터 1982年에 걸쳐 發生된 航空機事故에 의한 損害賠償請求訴訟事件에서 平均 20萬 달러를 受領한 바 있으나 國內 不法行爲責任制度下에서는 平均 49萬 달러를 받은 바 있다.

美國은 國內航空運送人의 責任이 無限責任이기 때문에 最近 보도에 의하면 國內不法行爲責任訴訟下에서 原告는 평균 80萬달러까지 損害賠償을 받은 바 있다.

1982年 이후 國際航空運送에 적용되는 와르소條約 관련 訴訟事件中 한 件이 325,000달러(損害賠償請求責任限度額)까지 判決이 나온바 있다. 희생자(유족)들은 國際航空運送人側의 故意와 認識있는 無謀한 過失(wilful misconduct)을 訴訟事件에서 原告側이 입증함으로써 와르소條約上의

「有限責任限度額을 파기」 할려고 努力하고 있는 점을 訴訟遂行 과정에서 자주 볼 수가 있다.

5. 航空에 관련된 政府機關의 責任

全 世界를 통하여 政府機關(交通部, 航空廳등)은 航空社의 運航과 安全業務를 감독하는데 一次的 責任을 부담하고 있다. 美國에서 聯邦航空廳(FAA)과 國家輸送安全院(NTSB)이 關係法規를 통하여 航空社의 安全業務에 관한 監督 및 調査를 함으로써 航空業界에 상당한 영향을 미치고 있다.

美聯邦航空廳은 각종 航空安全規律을 制定하여 施行해 오고 있고 航空安全에 관한 責任을 부담하고 있다.

美國內航空運送人의 責任關係는 聯邦不法行爲請求法에 의하여 처리되고 있고 航空社와 航空機製造業者, 美國政府(航空交通管制業務關係)는 訴訟當事者가 될 수 있으며 法院의 裁判管轄權에 적용받게 된다. 美國 法院은 航空機의 運航安全에 責任을 맡고 있는 外國의 航空交通管制機關이나 政府當局에 대한 裁判管轄權이 없다는 점에서 문제점이 제기되고 있다.

만약 政府가 外國航空社를 所有하고 있을 경우 와르소條約에서는 이에 관한 규정이 없기 때문에 外國主權免責法의 규정에 따라 특정한 경우에 美國의 裁判管轄權을 피할 수 있게 된다.

6. 國際航空責任의 統合制度에 관한 필요성

와르소體制下에서 國際航空運送人의 損害賠償責任限度額問題는 金額面에서 航空社와 被害者, 航空法學者, 法曹人들간에 論爭이 많이 벌어지고 있다.

와르소條約은 國際航空運送에 있어 契約責任에서 발생되는 法的請求權(損害賠償)을 解決하는데 統一性을 期할 目的으로 마련된 일련의 國際的 基準이 內包된 條約이다.

한편 外國航空機에 의한 地上第三者의 損害에 대한 運航者의 責任과

賠償限度額을 규정한 1933年의 로마條約은 1952年, 1978年 두번에 걸쳐 改正된 바 있다. 이 條約에서도 運航者에게 無過失責任을 부과시키고 있을뿐만 아니라 賠償限度額의 通貨單位도 1978年의 改正된 로마條約부터 SDR(Special Drawing Right ; 特別引出權, 計算單位)로 변경 採擇하였고 賠償限度額도 상향·조정된 바 있다. 와르소條約體制는 契約責任理論에 밑바탕을 두고 있지만 로마條約體系는 不法行爲責任理論에 기초를 두고 있다.

이와같이 世界의 航空運送法體制內에서는 와르소條約과 로마條約이 主軸이 되어 定着되어 가고 있었으나 時代가 변함에 따라 급격한 航空尖端技術의 發達, 社會·經濟與件의 變化, 立證責任의 難點, 被害者保護 등을 감안하여 여러차례 改正된 바 있지만 지금까지 發效된 條約도 있고 아직도 未發效된 條約도 있다.

이 體制는 복잡한 구조로 구성되어 있기 때문에 이 體制를 改革하여 하나의 條約으로 統合시키고 단순하게 만들어야만 된다는 主張들이 世界의 航空法學者, 法曹人 航空關係專門家들간에 1970年代부터 나오기 시작하였다.

旅客의 입장에서 볼때에 현재의 와르소體制는 너무나 복잡한 구조로 되어 있기 때문에 同一한 事故에 의하여 旅客이 死傷을 입었으면서도 보상을 받는 權利者가 다르다는 것은 運賃이 똑같은 積算基礎下에서 計算되어 같은 航空機의 乘客이라는 점을 감안할 때에 不公正하게 되며 一般旅行者는 부당한 差別을 받게 된다.

航空機產業은 高度로 복잡하게 구성되어 있는 組立產業이기 때문에 그 運航을 위하여 航空機部品 메이커 또는 航空써비스供給業者, 空港從事員, 航空交通管制官, 航空關係 政府機關, 航空機에 사용되는 設備의 製造業者 또는 供給業者등 多數人이 참여하게 된다.

最近의 有限責任制度下에서 航空社와 損害賠償責任限度額에 대하여 被害者들은 滿足을 하지 않고 있으므로 航空社에 의하여 충분히 賠償받지 못한 部分에 대하여 航空機製造業者 또는 航空交通管制機關을 상대로 訴訟을 제기하게 되는 경향이 있다.

와르소條約은 航空運送人 이외의 當事者(航空機製造業者 및 ATC등)에 대하여 카버를 하지 못하고 있다. 이리하여 國際航空運送人은 와르소條約에 따라 有限責任의 惠澤을 받고 있지만 航空機製造業者나 航空交通管制官은 이 惠澤을 받지 못하고 있으므로 이와같은 사실은「형평과 配分的 正義의 原則」에 反하게 된다는 것이다.

上記와 같은 理由로 우리는 와르소體制의 內容을 再檢討하지 않으면 안된다.

國際民間航空機關(ICAO)의 法律委員會는 복잡성이 덜하고 단순화시키는 와르소條約 및 改正議定書들의 統合을 促求하는 새로운 條約草案의 作成·必要性을 인정하는 決議를 한 바 있다. 여하간 Bin Cheng教授(現 런던大學 명예교수)는 와르소條約의 극적인 改革없이는 現行航空法體制下에서 산적된 國際航空運送法問題를 효과적으로 해결할 수 없다고 주장하고 있다.

國際法律協會의 航空分科委員會 前議長이었던 Bin Cheng教授는 프랑스의 Jacqueline Dutheil de la Rochêr教授의 協力을 얻어 로마條約의 內容을 포함하여「國際航空責任의 統合制度에 관한 條約草案」을 作成하여 同委員會에서 發表한 바 있다. 이 새로운 提案은 1982年 8月 29日부터 9月 4日까지 캐나다의 몬트리얼에서 開催된 國際法律協會(ILA) 航空法分科委員會에 參席한 各國의 航空法學者, 教授, 辯護士, 專門家들간에 심도 있게 討議된 바 있다.

上記 航空法分科委員會에서 이 條約草案은 採擇되지는 않았지만 더욱 研究·檢討키로한 후 次期 會議時 다시 討議키로 決定된 바 있다. 이 提案은 國際航空運送人의 責任에 관한 하나의 條約草案內에 契約責任과 不法行爲責任을 統合시킨 것을 內容으로 하고 있다. 한편 이 草案은 根本的으로 와르소體制를 改革한 內容이었고 만약 이 條約이 成立된다면 國際航空私法을 統一시키는데 조그마한 보탬이 될 수 있다고 본다.

1987年 10月 11日 부터 16日까지 포루투갈의 아르보아에서 開催된「로이드의 런던 프레스」(Lloyd's of London Press)의 第四回 國際航空法 쎄미나에서 와르소體制를 改革하는「國際航空運送에 관한 알보아條約草

案」이 發表된 바 있다.

Bin Cheng教授는 이 條約草案을 알보아의 地名을 따서 「國際航空運送에 관한 아르보아條約草案(The Aboar Draft Convention Relating of International Carriage by Air)」이라고 이름을 붙이었다.

이 쎄미나는 27個國으로 부터 法學者, 教授, 辯護士, 政府의 法律顧問, 航空會社, 保險會社등의 關係人士 116名이 參加한 바 있다. 이 條約草案은 와르소條約, 헤이그議定書, 과테말라議定書, 몬트리얼追加第三議定書, 몬트리얼議定書의 主된 內容을 統合한 것이었고 航空運送人의 責任에 관하여 有限責任의 原則과 無過失責任主義를 採擇한바 있다.

한편 이 알보아條約草案은 와르소體制의 統合과 再統一을 이룩하는데 있어 많은 참고가 되리라고 본다.

美國과 日本에 있어 國內航空運送人의 責任은 無限責任의 原則을 採擇하고 있지만 韓國, 프랑스, 독일, 이탈리아등은 航空社의 旅客運送約款 또는 航空法에 의하여 有限責任의 原則을 採擇하고 있다.

이 條約草案은 航空旅客, 荷主, 航空運送人, 保險業者들간에 발생된 法律問題를 해결하는데 도움을 줄 것이고 복잡하게 구성되어 있는 와르소體制를 단순화 시키고 덜 복잡하게 만드는 하나의 條約으로 통합시킨다는 것은 대단히 劃期的인 일이 될 수가 있다.

Ⅳ. 結 論

와르소條約이 發效된 이후 많은 經濟的 社會的 與件의 變化가 일어났으며 또한 航空產業 分野에 있어 尖端科學技術도 發達되어왔고 各國의 國民所得도 增進된 바 있다.

더욱이 生命과 財產의 價値가 실질적으로 增加된 바 있으며 航空機事故로 인한 損害賠償價額도 社會與件의 變化와 國民所得이 增進됨에 따라 金額面에서 단계적으로 引上되어가고 있다.

現在의 航空責任制度下에서 航空社가 부담하고 있는 損害賠償責任制限價額에 대하여 희생자와 유족들은 충분히 만족을 하고 있지 않고 있

어 계속 분쟁의 要因이 되고 있다.

航空機事故로 인한 희생자 및 유족들과 航空運送人 및 運航者들간에 紛爭을 합리적으로 해결하기 위하여 航空運送人, 運航者, 航空交通管制機關의 責任에 관계된 새로운 統合條約案들을 만드는 것이 시급한 일이라고 볼 수가 있다.

政府機關의 責任을 포함하여 와르소條約의 體系를 근본적으로 改革하기 위하여서는 國際航空責任의 統合制度에 관한 條約豫備草案의 制定과 航空交通管制機關의 責任에 관한 國際條約豫備草案의 作成이 필요하다고 본다.

國家間에 國際航空運送과 航空交通管制에 관한 法規들을 統一시키기 위하여 가능한 빨리 ICAO 法律委員會와 ILA 航空法分科委員會에서 上記 航空運送人의 責任에 관한 條約豫備草案과 政府機關의 責任이 포함된 航空交通管制機關의 責任에 관한 두개의 條約豫備草案의 作成을 促求하는 바이다.

가까운 장래에 上記 두개의 豫備條約草案의 作成을 위하여 ICAO 法律委員會와 ILA 航空法分科委員會는 더욱 적극적으로 討議하여 줄 것을 提言하는 바이다.

Liability of Govermental Bodies in International Civil Aviation

Prof. Doo Hwan Kim*

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Ⅰ. Introduction

We can classify into two types of the legal entity for air transport and operation as the private bodies or Govermental Bodies of airlines and airports. Some airlines and airports between in the developing countries and developed countries has been controlled by the State or Public Corporations etc., and then the said airlines and airports are directed by the Govermental Bodies.[1)]

A comparison between airports in Asia, Europe and in the United States of America shows that thhe U.S. airports are mostly privately owned, where as in Aisa, Europe the govermental control has usually retained.

In some case of the pilot and crew of aircraft, an air traffic controller, airport ground personal of the national airlines belongs to the States or

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1) Gerard Pucci, "Aviation Law," (1977), pp. 3~1.

National Enterprise, so their legal status is a pubic official or employee of the said enterpries and so their liability on the compensation for personel and property damage caused their negligence or wrongful act governed by the international agreements or domestic law, employment contract.

The Govermental Bodie's employer may be liable for the acts of a servant acting within the scope of his employment as a vicarious liability.[2)]

According to the Anglo-American legal system, unless acting within the powers of the Govermental Bodies(Employer), they are liable for other person's damage caused by their tresspass, nuisance, negligence, and so forth. This is an important aspect of rule of the law.

Sometimes, plaintiff may sue to the Govermental Bodie's master(airport authority, national airlines) or servants(pilot, crew of aircraft, ATC.), or both, since master and servant are jointly liable, for the other person's damage, but in most cases, plaintiff will naturally choose to sue the master. However, plaintiff must be able to show some recognized legal wrong.

The principle of vicarious liability applies equally to negligence and nuisance, other torts.

In the Civil Law system, particularly, Korea and Japan, if passengers or owner of air cargo will be sustained the damage caused an unlawf acts of public officials in the course of their official duties, victims may claim the compensation for damage from the Govermental Bodies or State in accordance with the provisions of the Constitution and National Compensation Act ; however, the public officials shall not immune from the liability.

In most of nations, the air traffic control function belongs to the Govermental Bodies or States is directed by the officials of state administration.

The State or Govermental Bodies is liable for damage caused by the

2) Shawcross & Beaumont, "Air Law," fourth edition (1989), pp. V1/34~V1/37.

public official, ATC(servants or agent) since their activities are considered to be the act of the State or Govermental Bodies itself.

The chief problem arising for the activities of Air Traffic Control Agencies is that of determining the nature and conditions of their liability in the case of aircraft accidents or incidents associated with their activities, or due wholly or partly States or Govermental Bodies intervention.

From this time, I am going to explain the liability of Air Traffic Control Agencies and air carries with regarding to the liability of Govermenntal Bodies in international civil aviation.

Ⅱ. The Liability of Govermental Bodies relating to ATCA.

1. Air Traffic Contsol Service and Duty of Care by ACT

The principal object of air traffic control is to promote safe, orderly, and rapid movement of aircraft through airspace within control zone. Air Traffic Controllers are responsible for assuring a safe, orderly and expedious movement of air traffic.

The liability of Air Traffic Controllers is to my knowledge, universally accepted to constitute a delictual liability as opposed to contractual liabilty.[3]

We may conclude that the liability is universally based on fault(negligence) and besides is unlimited.[4] The Chicago Convention, in its Annex 2 entitled "Rule of Air" specifies that an aircraft commander must follow the instructions of ATC at the control tower.

Each State party to the Chicago Convention must, so far as practicable,

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3) Kim Doo Hwann, "Some Considerations on the Liability of Air Traffic Control agencies," Air Law, Vol. XⅢ, No 6. (1988), p. 268.

4) Edgar Ruhwedel, "Flugsicherheit, Luftverkehrs Kontrolle und Haftung," Zeitschrift für Luft und Weltraumrecht, (1973), pp. 265~266.

provide adequate air traffic services, namely, air traffic control services (radio, communication and meteorology services) in order to avoid collision of aircraft whether in the air or on the ground and to ensure the regular flow of aircraft movements, as well as a flight information service and alerting service.

Especially, air traffic control service, owe a duty of care to those making use of or relying upon their operations for safety of aircraft.

It is a duty created not only by the legal regulations govering the porvision of the service but by the relationship which exists between controller and pilot.

A breach of this duty of care will be actionable in negligence, the defendant being the Govermental Bodies in which the accident occured, or the appropriate goverment department or agency, by reason of it having assumed the responsiblility of operating the air traffic control service, and as the employer of the particular controller who was at fault.

A pilot or aircraft commander has primary responsbility for the safety of the aircraft. A wrong deceision by the pilot or aircraft commander may well be the immediate cause of an accident and may coustitute actionable negligence.

However, the pilot's deceisions for the navigation safety will be based upon the facts available to him, including a flight information supplied by Air Traffic Controllers.

Every control tower officers carry extremely a heavy burden of responsibility in their daily duties, depending in their operations almost entirely on advanced electronic equuipment, arguably even more so than a pilot : they cannot observe their entire control area nor the movement of all aircraft with their own eyes.

In some cases statements can be found suggesting that the Air Traffic Controller's duty is merely secondary ; the pilot is primarily responsible, an

Air Traffic Controller[5] being responsible "for adhering to procedures which minimise the difficulties for the crew", or for "assisting the person in command of the aircraft by providing such advice and assistance as may be useful for the safe and efficient conduct of the flight". But situations may arise in which an air traffic controller may be held responsible rather than pilot.

It seems better to regard the pilot and controlller as undr concurrent duties, in particular circumstances the pilot or the controller may have more complete information and questions of liability will turn on a close exmination of the position.

In our opinion, no distinction should be made between acts of the agency providing air traffic service and acts of individual controllers, since these services are provided by States or Govermental Bodies, and the controllers perform these functions as agents of the States which is responsible for acts carried out by its employees in the performance of their duties.

2. Reason why the system on the liability of ATCA should be unified

An aircraft engaged in an international flight, which is over the territory of another state and perhaps without controlling of an Air Traffic Control Agency in a third State(e. g. the Republic of Korea flight KAL 007 at 1 September, 1983) can give rise to a serious air crash, which makes a solution of this particular question necessary. A differenct case is that of aircraft in a State other than its own, but under the control of an ATC Agency in its own country, which has caused damage in other Contracting State.

Here again a conflict in law arises which can not be resolved by domestic law unless the legal solutions have been unified. My personal opinion is

5) Shawcross & Beaumont, supra. at V1/35~V1/36.

that international standards should establish a system of legal actions which a victims may initiate to obtain compensation for the damage sustained by the accident caused by the act of an air traffic controller.

If a Draft for such a Convention relating to the Liability of ATCA is prepared, the right of the victims to seek compensation for damages for the defendant at fault must be expressly prescribed. The victim is equally at liberty to sue the ATC and carrier or operator. It is useful to draft a model text that would be very beneficial to all the countries which need illustrative texts to organize their domestic legislation with regard to current air traffic control problems.

However, it is our feeling that the establishment of an international convention relating to the liability of ATCA would be desirable since it may foster the harmonization and unification for the different legal systems among the various nations.

3. Activities of ICAO and ILA

The legal problems on the liability of ATCA has been discussed already many times at the Legal Committee (1964~1990) of International Civil Aviation Organization, or at the Informal Working Group of the 62nd Seoul Confernece(Korea) of International Law Association of 1986, at the Air Law Committee of the 63rd Warsaw Conference(Poland) of ILA of 1988 and at the Working Session of the 64th Quinsland Conference (Australia) of ILA of 1990.

A Preliminary Draft for the Text of International Convention on the Lialibity of ATCA was presented by the Delegation of Argentina to the 25th Session of Legal Committee, ICAO in 1983 ; it should be noted that this Preliminary Draft for the Convention was not considered in its substance by ICAO, Legal Committee.[6]

6) ICAO, LC/26-WP, 16~1, 512/1987, para. 1, 3.

The 26th Session, ICAO was held at Montreal from 28 April to 13 May 1987. The 26th Session of the Legal Committee, ICAO was discuused to consider the future course of action on this subject on the basis of the Secretariat Study with the comments from States and international organization and of the Rapporteur's Report.[7]

The 27th Session of ICAO, Legal Committee at Monstreal in 1990 was reviewed its general work progromme and established, subject to approval by the ICAO Council, the following work programme ;

1. Liability of Air Traffic Control Agencies
2. Study of the Instrument of the "Warsaw System".[8]

After the 2nd World War, the aeronautic growth in the past 45 years could not have been possible without international co-ordination which is necessary for the devleopment of unified and efficient network of international airlines and airports.

On the Other hand, a new Preliminary Draft for the International Convention on the Liability of ATC Agencies will be discussed at the Air Law Committee of the 65th Conference of Intennational Law Association which will be held at Cairo, Egypt on April, 1992.

The Chicago Convention provides that States must corllaborate in securing the highest practical degree of uniformity in regulations.

I would like to suggest the guideline of the Preliminary Draft for the International Convention on the Liability of ATC Agencies dealt with the following subject,

① Concept of ATC Agencies and Application of the Convention ;

② System of Liability ;

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7) ICAO, Legal Committee－26th Session, Report on the work of the Legal Committee during its 26th Session, pp. 1～2.

8) Michael Milde, 27th Session of the ICAO Legal Committee", Air Law, Vol. X V, No. 3(1990), pp. 162～164.

③ Limitation of Liability ;

④ Jurisdiction and Applicable Law ;

⑤ Prescription ;

⑥ Gurantees

⑦ Miscellaneous Clauses

⑧ Diplomatic Clauses.[9]

4. The Liability of ATCA

The ATC agency shall be liable for fault on the parts of it officiers, employees and agents for the personal or property damage sustained by aircraft accidents. But ATCA shall not be liable if the damage occured fortuitously, as a result of force majeure, through action of a third party, through fault of victim or inaccurate information from another agency which ATCA only transmitted, and provided that ATCA proves that it was impossible to take corrective measures. In many countries, the liability of ATCA is based on fault and burden of proof rests on the claimant ; the State or Govermental Bodies is liable for damage caused by acts of ATCA.

Contributory negligence, force majeure and fault of their counterparts can be adduced as defences.

A breakdown of the equipment cannot constitute a defence leading to the exoneration of the provider of the service, in the absence of negligence on his part, since the ATCA will have, in case of damage resulting from faulty equipment, a recourse action against the manufacturer under general products liability rules.

9) Kim Doo Hwan, supra. p. 271.

5. Special Aspects of Liability of Govermental Agenicies(ATCA)

I will introduce the examples of the developed countrie's legislation relating to the liability of the Govermental Bodies with regard to ATC Agency as followings ;

In France, for instance, it seems to be an undeceided issue, whether state is responsible for all negligent acts of its servant(within the framework of their doing duty as such) or only for acts which are seriously negligent (faute lourde).[10]

In the United States of America, liability of ATC Agencies is governed by the Federal Torts Claims Act. To establish the liability of the United States Goverment under the FTCA it is essetial that the negligence of the Air Traffic Controller is proven and such negligence must have been the proximate cause of the damage suffered.[11]

The current regulations for ATCA of *the United Kindom* are the Rules of the Air and Air Traffic Regulations of 1981. The Civil Aviation Authority is responsible for air traffic control which, inter alia, is intended to expedite the orderly flow of aviation traffic. The Air Traffic Control Board is appointed jointly by the Secretary of State for Transport and the Secretary of State for Defence.[12]

One of its objects is to carry out from time to time reviews of the navigation services provides.

In *Germany*, Article 34 of the German Constitution juncto paragraph

10) Gibert Guillaume, La Responabilite des Service de la Circulation Airiem, Annals of Air an Space Law, (1978), p. 133.

11) Seti K. Hamalian, Liability of the United State Goverment in Case of Air Traffic Controller Negligence, Annals of Air and Space Law, Vol. XI (1986), at 59～63 ; Stuast M. Speiser and Charles F. Crause, Aviation Tort Law, (1979), New Yourk, pp. 350～436.

12) Nicholas M. L. Hughes, Air Traffic Control and Airport Authorities-The U.K. Viewpoint, Air Law vol. IX, No 4, (1984) pp. 211～212 ; B. G. Gerbis, Aviation Law, London, (1983), p. 618.

839 of the German Civil Code provide sufficient room for the legal treatment of liability problems of ATC Agencies so that specific legislation is not required.

The control of air traffic service in *Japan* is delegated to the Director of the Regional Civil Aviation Bureau or Director of the Air Traffic Control Center, Director General of the Defence Agency by the Minister for Transport in accordance with Article 137 of the Civil Aeronautics Act.

The liability for damage of the State or Public Agencies is regulated by Article 17 of the Constitutional Law or Article 1 of the National Compensation Act.

In the Republic of Korea, according to Article 75 (Instruction for Air Traffic) of the Aviation Act, aircraft shall navigate, while in control or control zone, in compliance with the instructions for order and time to take off, landing, or route of flight, etc., as directed by the Minister of Transportation.

The Minister of Transportation shall furnish the flight crew with all informations necessary for the navigation of an aircraft(Article 78 of the Aviation Act). The liability for damage of the Govermental Bodies(State or Public Agencies) relating to ATC agencies is regulated by Article 2 of the National Compensation Act or Article 29 of the Constitutional Law.

According to Article 2 of the National Compensation Act of Korea, the liability for damage of the State or Local Goverment is regulated as follows ;

When public officials inflict damage on person, intentionally or negligently, in the course of performming their official duties, in violence of the provisions of laws and regulations, the State or Local Goverment shall redress the damage ; if such damage has been caused by bad faith or gross negligence of the public official concerned, the State may demand reimbursement from the public official".

It is clear that States regulate and implement air traffic services, either directly or indirectly. There is a very small number of private corporations multinational agencies(Eurocontrol, Cocesna and Asecna) providing such service, and the possibliity also exists of ICAO itself doing so pursuant to Article 71 of the Chicago Convention. It is necessary to safeguard the legal position of air traffic controller as an employee, although the right of victims to seek damages for compensation from the party at fault must be expressly recognized.

It would be advisable for the Legal Committee of ICAO or the Air Law Committee of International Law Association as the principal advisory bodies in the air law field, to produce an international instrument that would serve as a model domestic legislation. It is a desirable for us that ICAO Legal Committee should make a formal Preliminary Draft for the Convention on the Liability fo Air Traffic Control Agencies as soon as possible, in order to unify the rules concerning the air traffic control systems of all States and Govermental Bodies.

Ⅲ. The Liability of Govermental Bodies relating to the Air Carrier

1. The Scope of Application of the Convention on the Liability of Govermental Bodies.

As for international air transport, the liability of State or by legally constituted Public Bodies(Govermental Bodies) relating to the air carrier has been regulated by the Warsaw Convention, Hague Protocol, Montreal Protocol No. 4 as the followings ;

Warsaw Convention, Article 2 ;

[1] This Convention applies to carriage performed by the State or by le-

gally constituted Public Bodies(Govermental Bodies) provided it falls within the conditions laid down in Article 1.

[2] This Convention does not apply to carriage performed under the terms of any international postal Convention.

Hague Protocol, Article 2.[2] ;

This convention shall not apply to carriage of mail and postal package.

Montreal Protocol No. 4 Article 2. [2], [3] ;

[2] In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administration.

[3] Except as provided in paragraphy 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

1) The Warsaw Convention(1929) ; according to the said Article 2(1), the Convention is applicable to carriage performed by a State or Govermental Bodies. Nevertheless, an Additonal Protocol(with reference to Article) provides that State may reserve to themselves the right to declare that "the first paragraphy of Article of this Convention shall not apply to internationl carriage by air performed directly by the State.

2) The Hague Protocol(1955) ; Article 26 stipulates that States may declare this Convention, as amended by the Hague Protocol, to be inapplicable to military transport.

3) The Guadalajara Convention(1961) ; follows, in so far as state aircraft are concerned, the provisions of the Warsaw Convention and the Hague Protocol.

4) The Guatemala Protocol(1971) ; stipulates in Article XXIII that a State may declare that "The Warsaw Convention of 1929 as amended at Hague, 1955, and at Guatemala City, 1971, shall not apply to the carriage of persons, baggage and cargo for its military authorities on aircraft, reg-

istered in that State, the whole capacity of which has been reserved by or on behalf of such authorities"

5) The Convention on Damage Caused to Third Parties on the Surface, Rome 1933, replaced by the Rome 1952 Convention, amended by 1978 Montreal Protocol provides in Article 26 that the said Convention and Protocol shall not apply to damage caused by military, customs or police aircraft.

6) The Tokyo Convention(1963), the Hague Convention(1970), and the Montreal Protocol(1988) shall not apply to damage caused by military, customs or police aircraft.

7) The Convention for the Unification of Certain Rules Relating to the Precautionary Attachement of Aircraft(1933) declares that aircraft used exclusively in the service of a State, including the postal service, but excluding commercial service, are not subject to precautionary arrest.

8) The Convention for the Unification of Certain Rules relating to Assistance and Salvage of Aircraft or by Aircraft at Sea(1938) provides in Article 16 that the Convention is applicable to goverment vessels and aircraft, but with the exception of Article 13 dealing with jurisdiction. The Convention(which, incidentally, never entered into force) is, however, inapplicable to "military, customs or police vessels or aircrfat".

9) The Convention on the International Recoginition of Rights in Aircraft (1948) provides in Article XIII that the Convention shall not apply to military, customs or police aircraft.

In this reason, the liability of Govermental Bodies or State relation to the air carrier in international air transport is regulated by the Warsaw Convention, Hague Protocol, Guatemala Protocol and Montreal Protocol No. 4 except the air carriage of the military.

2. The Principle of Air Carrier's Liability relating to the Govermental Bodies, According to the fundamental principle of air carrier's liability with regard to the international convention and protocols, the Warsaw Convention, the Hague Protocol has adopted the principle of the limited liability and presumed faulty system. thereafter the Montreal Inter-Carrier Agreement(1966) the Guatemala Protocol(1971), the Montreal Additional Protocol No. 3, and Montreal Protocol No. 4.(1975) has adopted also the limited liability, but the said Agreement and Protoclos has been changed to have adopted the absolute liability(strict liability) system from the presumed liability system.

The Warsaw convention has been amended many times during the past for sixty years in order to increase the maxi-mum amount of compensation for damage which an air carrier is liable for personal damage sustained in case of death or injury of a passenger because of an increasing desire to protect passengers damaged during an international flight.

The Warsaw system consits of the Warsaw Convention, the Guadalajara Convention Protocol, 2). Guatemala Protocol, 3) the Montreal Additional Protocol No. 1, No. 2, No. 3, and Montreal Protocol No. 4.[13] The Warsaw Convention imposes the burden of proof on the air carrier instead of the victim, thus presuming the air carrier's fault for personal or property damages caused during international carriage. The sum of the compensation for damage on a carrier's libility for the death or personal injury of each passenger was limited to the sum of 125,000 Poincar'e france's(approx, U. S. $8,300) under the Warsaw Convention, the sum of 250,000 franc's (approx, US. $16,600) under the Hague Protocol, the sum of US. $75,

13) Doo Hwan Kim, "Some Considerations of the Draft for the Convention on an Integrated System of International Aviation Liabibity", Journal of Air Law and Commerce, SMU, Law School, Texas, USA, Vol. 53, Issue 3, (1986), p. 765.

000(US. $58,000 exclusive of legal fees and costs) under the Montreal Inter-Carrier Agreement, the sum of US $100,000 under the Guatemala City Protocol and the sum of 100,000 SDR under the Montreal Additional Protocol No. 3.

Meanwhile, the States concerned by the prospect of not having an official price of gold as a result modification of the Articles of Association of the International Monetary Fund(IMF). Montreal Protocol No. 4 was to complement the Guatemala City Protocol by revision the cargo of the Warsaw-Hague Convention, whilst the Montreal Additional Protocol No. 1, No. 2 and No.3 changed the unit for computing the limits of the carrier's liability under respectively the Warsaw Convention, the Warwaw-Hague Convention and the Warsaw-Hague-Guatemala Convention into Special Drawing Right(SDR), the IMF artificial unit of account based on a baseket of leading currencies. By 1991, twenty years had elapsed since the conclusion of the Guatemala Protocol, and sixteen years since the four Montreal Additional Protocols. Yet relatively few States had ratified either Guatemala Protocol or Montreal Additional Protocols, certainly not in sufficent numbers to bring any of them into force.

The States mostly wait for a lead from the Goverment of the United States, by far the most important and lucrative market. However, many States had meanwhile become impatient and had unilaterally caused their airlines to raise the limit for passenger injury of death in carriage under either the Warsaw Convention or the Warsaw-Hague-Guatemale Convention to 80,000 or 100,000 SDR or more. Some airlines have done so of their own accord without prompting. Futhermore, the Korean Airline, Japan Airline, British airway, Quantas Airlines, Sabena, Air France etc. has regulated already the sum of 80,000~100,000 SDR of the compensation for damage of each passenger at the general conditions of passenger of their airlines relating to the Montreal Additional Protocol No. 3.

3. The Prospect on the Ratification of MAP. 3 and MP. 4 by the United States.

Nowadays many States have been much interested in the ratification of the Montreal Additional Protocol No. 3 and Montreol Protocol No. 4 (MAP. 3 and MP. 4) whether the United States will be ratified the said Protocols or not. The United States having failed in 1983 to its approval to MAP.3 and MP. 4, it was uncertain for many States whether they should go ahead and seek to bring these two Protocols into force without United States, or wait for another lead from the United States, or to abandon the Warsaw system altogether.[14]

The provision in MAP. 3 which permits a nation to adopt a Supplemental Compensation Plan that will provide a procedure for swift and efficient compensation of passengers killed or injured in international air transportation(Guatemala Protocol, Article 35 A).

The Adiministration(Ministry of Transportation) of the United States of America was proposed to ratify the Montreal Additional Protocol No. 3, and Montreal Protocol No. 4, with a Supplemental Compensation Plan to the Senate in order to protect of U.S. citizens on June 24, 1988.

On November 15, 1989, Committee on Foreign Relations, United States Senate held another hearing to discuss the protocols and the provisions of the new Supplemental Compensation Plan. At the hearing, representatives of the Departments of State, Justice, and Transportation ; airline industry leaders ; spokespersons for vairous associations of victims' families and prominent trial attorneys presented testimony to the Committee.

On June 21, 1990, the Committee voted 13 to report the Protocols favor-

14) George N. Tompkins, The defeat of the Montreal Protocols in the United States Senate··· "What next?" Lloyd's Aviation Law, Sept. 15, (1983), pp. 1—6.

ably to the Senate for advice and consent.[15] I guess that the Senate will be voted formally the ratification for the said protocols within this year. If the said protocols with S.C.P. will be ratified by the Senate, and then many countries and airlines in the world shall be much influenced by it. We must continuously take care of American air traffic policy in the near future.

As it now lies before the Untied States Senate, the proposed Supplemental Compensation Plan provides in broad terms of four points as following ;

[1] $500 million per accident per aircraft to pay for economic damages in claims based on personal injury or death ; (per passenger approximately one million dollar).

[2] Full compensation for economic as wells non-economic damages for U.S. citizens on any international flight covered by the Warsaw Convention, and for non-U.S. citizens if their flight originated in the United States or the ticket was purchased here ;

[3] Absolute liability on the part of the air carrier, thus requiring the claimant to prove only damages ;

[4] Underwriting the plan through the commercial insurance market and financing it by a ticket ; The per passenger surcharge is now expected to be $ 5.[16]

The purpose of this arrangement has been to provide a uniform international system of rules and practices for the protection of travellers and shippers and its goal is to bring airlines around the world up to a higher and more equitable level of compensation for injury or loss of life, insure quick and reliable recoveries(in most cases within 6 months), and promote

15) 101st United States Congress, 2nd Session, Senate, Exec. Rept. 101—21, Montreal Additional Protocols 3 and 4, June 28, 1990, pp. 2—6.

16) S. Hrg. 101～533, Montreal Addional Nos. 3 and 4, Ex. B. 95～1, Hearing before the Committee on Foreign Relations, United States Senate, one hundred first Congress, first Session, November, 15, 1989, p. 33.

greater efficiency in the handling of cargo and baggage.

I guess that the United Senate will be voted formally the ratification for the said Protocols No 3, No 4. and the Supplemental Compensation Plan within this year.

If the said Protocols No. 3 and No. 4 with Supplemental Compensation Plan will be ratified by the United Senate, so another countries will be influenced deeply by the said ratification and then will be followed promptly the ratification of the said Protocols No 3, No 4.

The Ministry of Transportation and Airlines of Asian countries must regasds continuously to the ratification of Protocols No. 3 and No. 4 with Supplemental Compersation Plan by United States Senate in order to make their new aviation policy .

4. The Problems of Air Carrier's Tort Liability in USA.

Relying on domestic tort law in USA for recovery for losses sustained in air disasters has proven to be unduly time consumming and insufficient in achieving the desired result of timely and just compensation of victims and their families. According to a study report by Rand Corp. in USA., the average claim takes 2 years to reach settlement. Compensation can take over 4 years if a trial is involved and up to 7 years of longer if the victim is attempting to prove wilful misconduct on the part of the airlines in order to break the liability cap of the Warsaw regime. For victims and families who need prompt compensation for their losses, delays of several years can be devastating.

Families of the victims of the Korean Air Lines tragedy(KAL. Flight 007) may now go to trial on the issue of damages. After 8 years they are in this respect where they could have been under the Protocols in approximately six months, and still have to face the prospect of time consuming appeals to be filed by KAL.

Futhermore, according to the said study report, while American claimants under Warsaw Convention received, on average, about $ 200,000 in compensation for aviation accidents that occured between 1970 and 1982, American claimants under the domestic system received on average about $ 490, 000.

The uncertainty of the results of litigation was an important factor encouraging acceptance of compensation that was less than value of the actual loss.

Now, We have done some updating on this information and, it suggests that the average award today in the domestic tort system is about $ 800, 000. The data series for Warsaw Convention for post 1982 accidents we just have one case came out at $ 325,000 victims may well seek to breach the Convention limits by alleging wilful misconduct or intentional act by the air carrier.

This will be difficult to prove in most cases and highly unlikely where airlines are so often the innocent vicitims of attacks aimed more generally at States. However in the case of KAL 007 which strayed over soviet airspace, an American Federal Jury found the crew guilty of wilful misconduct and the airline has been ordered to pay some % 50 million to relatives of 137 passengers($ 365,000 per passenger), having already settled 132 cases.

The airlines is undestood to be appealing this case to the Suprem Court which as just deceided in its favour in a related case-Chan v. Korean Airlines-arising from the same incident. Here the deceision was that the limits could not be breached simply because the notice contained on the ticket was in "8 point" type rather than the "10 point" prescribed in Montreal Agreement.

5. The Responsibility of Goverment Agencies relating to the International Civil Aviation

Throught the world, Goverment agencies have primary responsiblity for regulating and overseeing airline operations and safety practices. In the United States, the Federal Aviation Administration(FAA) and the National Transport Safety Board(NTSB) have considerable influence over an airline's safty practices through their regulations, oversight, and investigations. FAA has a variety ways to enforce its safety regulations. FAA can amend suspend, and revoke certificates ; levy civil and criminal penalties ; and seize aircraft. The combination of safety regulations, oversight, investigations, and sanctions provide a major incentive for an airline to operate safely. Moreover, Goverment Agencies that invesigate aviation accidents not only uncover most of the facts revealed during the civil litigation of fault but they also make them public.

According to the Presidential Commission on Aviation Security and Terrorism, which recently supported the ratification of Protocaol No. 3, the U. S. Goverment should strengthen current regulatory enforcement mechanisms to ensure airline accountability for safety violations, notwithstanding the powerful market forces that ought to deter unsafe or reckless conduct by the airlines. We believe that the Commission is right to emphasize that Goverment Agencies be responsible for ensuring aviation safety.

The compensation paid by airlines has been covered by liability insurance, the premiums for which represent an insignificiant portion of an airline's operating costs. According to an International Chamber of Commerce study of the Warsaw Convention, liability insurance costs were only about two-tenth of 1 percent of airlines operating revenues over a recent 10 years old. Change in premiums due to changes in liability limits would likely be too small to affect airline safety practices.

The compensation system available for the representatives of the victims of U.S. domestic airline accidents relies upon the negligence-based tort system established by state law. Frequently, the airline, the aircraft manufacturer and U.S. Goverment(as the result of its air traffic control activity) are named as parties and are subject to the court's jurisdiction. Typically U.S. courts lack jurisdiction over foreign air traffic controllers and Goverment Authorities which have responsibility for safety and security.

Indeed, in the absence of the Warsaw Convention, Goverment owned foreign air carriers might be able to avoide the jurisdiction of U.S. court in certain circumstances under the provisions of the Foreign Sovereign Immunities Act.

6. The Necessity for the Integrated System of International Aviation Liability

The amount of the limited liability of the compensation for damage caused aricraft accident in the Warsaw system is controversial and questionable. The Warsaw Convention contains a set of international principles designed to promote uniformity in resolving legal claims arising out contracts for international carriage.

The Rome Convention of 1933, amended in 1952 and again in 1978, provided for the limited liability for damages caused by Foreign Aircraft to Third Parties on the Surface during international carriage by air and so adopted the principle of absolute liability. Both the amendments of 1952 and of 1978 raised the ceiling on the damages, but the amendment of 1978 adopted the SDR as the currency unit.

The Warsaw system based on the theory of air carriage contract, but Rome Conrention based on the theory of torts.

Both the Warsaw systme and Rome Convention have played a major

role international community for air transportation. Many amendments have been proposed to each Convention due to the rapid high-technology developments in aviation, the change in social and economic situation, the difficulties in proof and discovery of facts and need for increasing protection of injured passengers and victims.

However, until now, not all of the proposed amendments have have been effectuated . As a result, international legal system for air transportation is presently so complicated and tangled.

Since the early 1970 year, many aviation law professors and lawyers, international aviation organization have tried to integrate and simplify the international legal system for air transportation. The Warsaw system is very complicated to the passengers receiving compensation for damages caused in the same aircraft accident have very different rights according to the jurisdiction in question even though the passenger paid the same freight. This discrimination among the passengers cannot be justified anymore.

Air carrier's liability should extend to loss of expectation of leisure activities, as well as to damage to property, and mental and physical injuries. The aircraft industry is a very complicted assembling industry, it utilizes many people in a variety of jobs, including parts manufacturers, air service suppliers, airport employees, air traffic controllers, govermental agencies, and manufacturers of suppliers of aircraft facilities.

When victims are not satisfied with the limited amount for which an airline corporation is liable under the current limited liability system, they tend to bring claims against the manufacturer of the aircraft or the air traffic controller for the balance of their damages which are not thoroughly compensated by the airline corporations.

The Warsaw Convention does not cover claims against parties other than the air carriers.

Thus, the air carrier may take advantage of the liability limitation, while the aircraft manufacturer or air traffic controller can not. This regards equity and distributive justice. In this reason, we must review the content of the Warsaw system.

The Legal Committee of the International Civil Aviation Organization has ever been made a resolution which recognized the need for making out a new Draft for the Convention to make the Warsaw system integrated and less complicated.

Professor Bin Cheng asserts, however, that the present air law system could not settle air law problems and disputes without dramatic and comprehensive reforms of the Warsaw Convention.

Professor Bin Cheng, former Chairman of the Air law Committee of the Intenational Law Assocition(ILA) and Professor Jacqueline Dutheil de la Rochêr have made out a Draft for the Convention on an Integrated System of International Aviation Liability covering for the contents of the Rome Convention.

This new proposal was profoundly discussed by many air law professors, specialist and lawyers in the Air Law Session of the 60th Conference of the ILA held at Montreal, Canada from Aug. 29 to Sept. 4, 1982.

That Draft for the Convention was not adopted but deceided that it should be under contineous analysis and review by the next Air Law Session of ILA. This Proposal means the synthesis and integration of contract liability and tort liability within one convention relating to the liability of the international air carries.

Furthermore, it could be reformed fundamentaly the Warsaw systme and could become the basis for the unification of international private air laws.

A detailed study of the present position and proposals for renovating the Warsaw system exits already in the form of the Alvor Draft for the Con-

vention relating to International Carriage by Air, adopted by the Fourth Lloyd's of London Press International Aviation Law Seminar held at Alvor, the Algarve, Portugal, from 11 to 16 October 1987.

The Seminar was attended by one hundred and sixteen executives and legal advisers of goverments and of the airline, aviation insurance and aerospace industries, as well as members of the legal profession involved or interested in aviation, comming from twenty-seven countries.[17]

This Alvor Draft Convention relating to International Carriage by Air has been integrated the principal content of Warsaw Convention, Hague Protocol, Guatemala Protocol, Montreal Additional Protocol No. 3 and Montreal Protocol No 4 and also has adopted the principle of the limited biability and absolute liability for air carrier's liability.

The said Alvor Draft Convention will be a great usefulness for us to make an integration and reunification for the Warsaw system.

The liability of the domestic air carrier in the United States and Japan has been adopted the principle of unlimited liability, but the Korea, Germany, France, Italy etc. and most of Nations of Latin America has been applied the principle of limited liability by the general conditions of carriage for passenges of airlines or aviation law.

This Alvor Draft Convention will be a great helpfulness for us to solve legal problems among the passengers, cargo owners, air carriers and underwriters and desirable to integrate the complicated Warsaw system into one simplified, less complicated Convention.

17) Bin Cheng, "Sixty Years of the Warsaw Convention : Airline Liability at the Crossroad(Part I), Zeitschrift für Luft-und Weltraumrecht, 38, Jahrgang, 1989, pp. 340~344.

Ⅳ. Conclusion

Many economic, social changes have occured since the Warsaw Convention was effectuated. The science and high-technology in the aeronautic industry has advanced and national incomes has been increased. In addition, the value of life and property have increased substancially, the amount of compensation for damage caused by aircraft accidents has been increased gradually in dollar amount as well as in volume.

The survivors and victims are not satisfied with the limited amount for which an airline corporation is liable under the current liability system.

In order to solve rationally disputes between air carriers, operators and victims, survivors caused by aircraft accident, it is desirable for us to make a new integrated convention relating to the liability of the air carrier, operator, air traffic controller.

It is necessary for us to revise the Warsaw system fundamentally including the liability of Govermental Bodies for the purpose of enacting a new Preliminary Draft for the Convention on an Integrated System of International Aviation Liability and to make a new Preliminary Draft for the International Convention of the Liability of Air Traffic Control Agency.

I would like to urge to the Legal Committee of ICAO and Air Law Committee of ILA to make the said a new Preliminary Draft for the Convention of the Liability of Air Carriers and on the Liability of ATC Agencies including the liability of Govermental Bodies as soon as possible, in order to reunify the regulations concerning the international air transport and air traffic control system among the nations.

I shall propose more to discuss positively at the Lgeal Committee of ICAO and Air Law Committee of ILA in order to make the said two pre-

liminary Draft for the Convention in the near future.

After professor Doo Hwan Kim speech at Taipei Conference on May 29, 1991, the question and answer is as followings ;

[Question I] Professor John Livermors (Dean, Faculty of Economics and Commerce, University of Tasmania, Tasmania, Australia) ;

In future, If the Air Law Committee, ILA and Legal Committee, ICAO would make the Preliminary Draft for the Convention on the Liability of an Air Traffic Control Agency or Draft for the Convention on an Integrated System of International Aviation Liabilty, what do you think which principle will be adopted more reasonable system between the principle of limited liability or unlimited liability and faulty or no-faulty liability system (absolute liability) within the said Draft for the Convention?

[Answer] Professor Doo Hwan Kim(The College of Law, Soong Sil University, Seoul, Korea) ; Now, Professor Livermose's question is a very inportant, delicate and controversial issues for the solution of the air crash case among the nations.

The developed countries have more protected the interest of victims and survivors caused by the aircraft accidents than air carrier, but the developing countries have much protected the interest of development of aircraft industry and airlines.

If we will make the said two Draft for the Convention, my personal opinion is that it is more reasonable and promising system for the principle of limited liability and no-fault system (absolute liability) than the unlimited liability and faulty system for the liability of ATCA or air carrier.

Because we must consider to protect and to mediate the interest of both side between victims or survivors caused by the air crashes and airlines, airport authority and aircraft manufacture industry and so forth.

[Question Ⅱ] Professor K. Fujita(Faculty of Law, Osaka City University, Osaka, Japan) ;

Professos Kim is my dearest friend for long time in aviation law field.

I have much interested in your report in this Conference. But I have heard that the Ministry of Justice, Korean Goverment will make a new Draft for the Contract Act of the Air Transport in the near future. Would you mind explain the progressing situation and the content of a new Draft for the Korean Air Transport Contract Act?

[Answer Ⅱ] Professor Doo Hwan Kim ;

Thank you very much for your kind question. The Ministry of Justice, Korean goverment have established a Committee of Enacting the Contract Act of the Air Transport which have been composed of eight members, seven law professors including a Director of Avivation Depastment, Ministry of Transportation, Korean Goverment last year.

This Committee has made a Preliminary Draft for the Korean Air Transport Act which contained to adopt the good points of the Warsaw Convention, Hague Protocol, Guatemala Protocol and Montreal Additional Protocol No. 3 and Montreal Protocol No 4, and examples of legislation of the developed countries on Arpril, 1991. Particularly, this Preliminary Draft for the Korean Air Transport Act has adopted the presumed fault liability and the limited liability system based on the Montreal Additional Protocol No. 3. Our Korean Goverment will be prepared the ratification of Montreal Additional Protocol No. 3, and Montreal Protocol No. 4 in the near future.