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Some Considerations for the Modernization of the Rome Convention, in case of Unlawful Interference

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Contents

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I. Historical Background of the Rome Conventions

An international effort to unify law concerning damage to the above-ground third party by aircrafts began with research of CITEJA (Comité international technique d'xperts juridique aérien)[1] established by the first International Conference on Air Law held in Paris under the initiatives of the French Government in November 1925, when the World War I was over and the peace came back. Later, the former 1933 Rome Convention, and then to amend the Convention in relation to clauses securing liabilities the 1938 Brussels Additional Protocol were adopted. But these Convention and Protocol were ratified by few States. Thus, the effort to unify the law was not successful. After the World War II, the issue was taken over by the ICAO Legal Committee, and then, the 1952 Rome Convention and the 1978 Montreal Protocol were adopted.

1. The 1933 Rome Convention

In May 1933, at the third International Conference on Air Law (this Conference was later called as 1933 Rome Conference.), Convention pour l'unification de certaines régles relatives aux dommages causes par les aéronefs aux tiers à la surface[2] was adopted. While the 1929 Warsaw Convention regulates contractual liabilities of carriers, the Rome Convention stipulates tort liabilities of carriers. This Convention has Absolute Liability and Limited Liability as a general rule. Aircraft operators will owe liabilities if victims simply show the existence of damage and a cause of the damage attributed to

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1) For CITEJA, see, Ikeda Humio, *Outline of International Aviation Law [Kokusai Kôkû Gairon]*, (1956) at 15 et seq; Sekiguchi Masao, "History of International Aviation Law [Kokusai Kôkû Hô no Enkaku]", Komazawa University Faculty of Law, Volume 25 Hôgaku Ronshû (1982), at 74 et seq.

2) Experts delegating twenty eight States and seven international organizations and observers from three States participated in this Rome Conference. For reference on the 1933 Rome Convention, Komachiya Sôzô, *Aircraft Accidents and liabilities for damages [Kôkûki jiko to Baishô sekinin]* (1948).

the aircrafts (Art.2).

Operators are defined as those who have aircrafts including freedom of disposition, and make use of it on their own accounts (Art.4). This Convention will be applied to every damages case arising from foreign aircrafts in the territory of a member State (Art.20, para.1). Liabilities for damages will be limited to 250 Franc by each kilogram of aircraft weights. But this limitation must be from more than 600,000 Franc to less than 2 millions Franc (Art.8, para.3). If damage arises from intention or gross negligence of operators or their employees, the operator will owe unlimited liabilities.

Liabilities will be exempted if the operators show that damage arouse from negligence concerning aircrafts' operation, handling or navigation, or that the operator took all reasonable steps to prevent the damage (Art.14 Item a).

Although initially CITEJA did not take further considerations, a proposal that provisions ensuring payments for damages to secure relief to member States' own victims should be added to the body was raised. As a result, provisions for compulsory insurance were introduced. Therefore, foreign aircrafts must subscribe insurance corresponding to the liability limitation if they have a flight over territories of other member States (Art. 12, para.1). If they do not subscribe, they will be imposed on unlimited liabilities (Art.14, item b). Instead of insurance, deposits of cash into State financial institutions or banks which are permitted for handling will be allowed (Art.12, para.2). Foreign aircrafts must keep on the plains insurance policies or warranty certificates (Art.13). Victims are allowed to file an action to courts in a State of the operators' address, or courts in a State where the damage occurred (Art.16). An action must be filed within a year from the day of the damage (Art.17).

This Convention became effective in February 1942, and only five States have ratified it until today[3]. Main reasons for such result are raised by UK or USA saying that the liability limitation was set too low, or other States saying that the Absolute Liability was hardly accepted.

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3) The five States are Belgium, Brazil, Guatemala, Rumania, and Spain.

The insurance clause under the 1933 Rome Convention was a little amended by the 1938 Brussels Additional Protocol (Protocole additional de Bruxelles)[4].

2. The 1952 Rome Convention

In 1947 after the World War II, the ICAO Legal Committee set up a Legal Sub-Committee to investigate causes of States' hesitation of ratifying the 1933 Rome Convention and to prepare for amendment to the Convention.

In June 1948, the Legal Sub-Committee submitted a report concerning four issues which reciprocally related to one another. The Legal Sub-Committee submitted a report concerning inherent issues in the 1933 Rome Convention and the 1938 Brussels Additional Protocol, that is, (1) liabilities and (2) insurances. In addition to these two issues, the report newly raised issues of worldwide limitation, that is (3) in-flight collisions, and (4) liabilities of operators.

The ICAO Legal Committee reviewed each of those above four issues, and determined whether one Convention would be able to include all of them. Further, On instructions of Professor S. Iuul, who was selected as a rapporteur by ICAO, a draft of a new Convention substituting for the 1933 Rome Convention was prepared. From September to October in 1952, the International Conference on Air Law was held. At that Conference, a new Convention was adopted, and it became effective in February 1958[5].

The 1952 Rome Convention took Absolute Liability and Limited Liability as a general rule as in the case of the 1933 Rome Convention. But the 1952 Rome Convention adopted its own regulations, which were not included in the

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4) Protocole additionale de Bruxelles pour la garantie des pretentions en dommages-intérêts, (1938). So far, only two States of Brazil and France have ratified.

5) For a literature studying the 1933 Rome Convention, the 1952 Rome Convention, and domestic law of States such as France and Germany, see, Yamazaki Yûki, "A Study on Liabilities for Damages of Losses Caused Third Parties by Aircrafts-Volume 1, as to conditions giving rise to liabilities [Kôkûki ga Chijô Daisansha ni kuwaeta Songai no Baishôsekinin ni kansuru Kenkyû - sono 1, Sekinin wo hassei saseru yôken ni tsuite]", 12 Kûhô (1968) at 55, and "Volume 2" 13 Kûhô (1970) at 64.

1933 Rome Convention such as measuures in line with about 20 year aviation development in terms of the extent of liability, and security for payment of liability, and also steps relating to jurisdiction of courts, and approval and execution of foreign decision (Art. 20).

As to the relationship between the 1933 Convention and the 1952 Convention, for States which ratified the 1933 Convention the 1952 Convention substituted the 1933 Convention automatically when the 1952 Convention came into force (Art. 29).

Although the 1952 Rome Convention renewed substances as seen above, only 49 States out of the 189 ICAO Member States have joined it, as of December 2007, and that number did not even include major aviation powers like US, UK, Germany, and Canada. Most States ratifying the Convention are developing States in aviation[6]. Reasons for delay in ratifying and joining the Convention are said, for example, (1) that limited amounts of damages stipulated in the Convention are too low, (2) that it is considered unnecessary to introduce international rules because domestic law already provide for sufficient limited amounts of damages in terms of rights of third parties on the surface, (3) that the Convention does not provide for such matters as noise, sonic boom, and nuclear disasters, and (4) that there is an objection against the single jurisdiction.

3. The 1978 Montreal Protocol

As seen above, the state of ratifying the 1952 Rome Convention, which amended the 1933 Rome Convention and clauses for insurance in the 1938 Brussels Protocol, was not favorable.

In the circumstances, in June 1964 the ICAO Council gave its Legal Committee a proposal to review the 1952 Rome Convention[7].

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6) For a list of Contracting States, see, http://www.icao.int/cgi/gotom.pl?/icao/en/leb/treaty.htm.

7) M.Milde, "Legal Work of ICAO in 1978", III Annals of Air and Space Law (1978) at 578 et seq.

After over about 14 year workout to amend the 1952 Convention beginning in June 1964, a settlement was achieved at the tenth Conférence internationale de droit aérien[8] held in Montreal, September 1978. Participants in this Conference were delegations of 58 States, and as observers, PLO and delegations of three international organizations of PLO, IATA and IFALPA.

Important Amendments by the 1978 Montreal Protocol are as follows,

(1) Rise of Limitation of Liabilities

Limitation of liabilities amounts of each aircraft and each accident was written down in four classifications on the grounds of maximum takeoff weights of aircrafts from 2,000 kilograms or less than to more than 30,000 kilograms. Under the 1952 Convention there were five classifications on the basis of each weight of 1,000 kilograms, 6,000 kilograms, 20,000 kilograms, and 50,000 kilograms. On the other hand, the 1978 Montreal Protocol took the four classifications, and under the Protocol limitation of liability amounts were raised six times higher where aircraft weights were 6,000 kilograms, and five times higher where aircraft weights were 30,000 kilograms. In the case of Boeing 747 whose maximum takeoff weight are 352 tons, according to calculations at that time, limitation of liability amounts became 23,430,000 SDR (about 29,290,000 US dollars) from 40,700,000 Franc (about 3,390,000 US dollars), so that it increased 8.64 times higher.

Advanced States in Aviation requested large increase, while developing States did not desire the increase. In the circumstances a compromise was reached. There was also a controversial discussion as to amending Article 2 Paragraph 2 providing limitation of liabilities concerning death and physical disabilities[9]. The 1952 Convention took 500,000 Franc (4165 US dollars) for limitation of liabilities per a person. This amount of liabilities at the time when

8) For a detailed study on the tenth Conférence internationale de droit aérien, G.F. FitzGerald, "The Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome 1952)", IV Annals of Air and Space Law (1979), at 29 et seq.

9) For amendments to Article 11 Paragraph 2, see, G.F. FitzGerald, supra note 8, at 41 et seq.

the 1952 Convention was adopted was four times of 125,000 Franc which was the limitation amount of liabilities per a passenger under the 1929 Warsaw Convention. At the Conférence internationale de droit aérien, several proposals were submitted. But in the end, the limitation amount of liabilities decided with a compromise was 125,000 SDR (156,250 US dollars). This amount is 3.75 times of limitation amount of liabilities for passengers under the 1952 Convention, 15 times of limitation amount under the 1929 Warsaw Convention, 7.5 times under the 1955 Hague Protocol, and 25 percents under the Guatemala Protocol.

Since the currency units were changed from Franc to SDR, for States who did not join IMF, Article 11 Paragraph 4 was amended in line of Article 22 Paragraph 1 of the Warsaw Convention which was amended by the 1975 Montreal Additional Protocol No.1.

In Chapter II, Article 14 concerning cases where total amounts of claims became over limitation amount of liabilities was amended. In that case, when both of human damage and material damage occur, the human damage will be preferentially given damages.

(2) Leases, Charters and Interchanges of Aircrafts

The second important point is an amendment achieved with taking into considerations issues as to leases, charters and interchanges of aircrafts[10], while the 1952 Convention is applied to only damage caused by foreign aircrafts registered in other contracting States (Art.23,para.1).

(3) Guarantee for Payments of Aircrafts Operators

Provisions under the 1952 Convention were largely complicated, therefore, substantial simplification was attained. At the same time, the term "Guarantee" is adopted instead of the term "Security" used in the 1952 Convention

(4) Damage by Nuclear Power

The fourth point is an introduction of Article 27 stating that this Convention

10) M.Milde, supra note 7, at 581; G.F. FitzGerald, supra note 8,at 55.

will not be applied to disasters of nuclear power. Its aim is to chiefly impose liabilities concerning nuclear power damage on management of nuclear power facilities.

(5) Treatment of Noise or Sonic Boom

In relation to amending Chapter V, there was a proposal that a clause stating that the Convention would be applied to damage by aircrafts' noise or sonic boom should be inserted into Article 23 or Article 1. However, this proposal did not come true[11].

4. Relationship between the 1952 Rome Convention and the 1978 Montreal Protocol

The 1952 Convention and the 1978 Montreal Protocol are deemed as a single instrument in contracting States of the 1978 Montreal Protocol. These Convention and Protocol are called as "the 1952 Rome Convention amended in Montreal, 1978" (Art.19, the Protocol). Therefore, if all contracting States of the 1952 Rome Convention becomes contracting States of this Protocol, an integration of the Rome Convention amended by the 1978 Montreal Protocol will be attained. Otherwise, the 1952 Convention and the 1978 Protocol will coexist.

In the circumstances seen above, the 1978 Montreal Protocol amending the 1952 Rome Convention was adopted at the tenth International Conference on Air Law held in Montreal, September 1978[12]. The 1978 Montreal Protocol became effective by deposit of the fifth ratification instrument. But there are only 11 States who have ratified or joined it as of December 2007[13].

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11) G.F. FitzGerald, supra note 8, at 61 et seq.

12) M. Milde, supra note 7, at 579.

13) Contracting States are Azerbaijan, Benin, Brazil, Burkina Faso, Guatemala, Kenya, Morocco, Suriname.

II. Problems in the Rome Convention in Force from the View of Domestic Law

As expected by a person of the ICAO Legal Section in charge of workout amending the 1952 Rome Convention[14], there are no American and European advanced States ratifying the 1978 Protocol, but only a few developing States becoming contracting States to the Protocol. Therefore, the 1978 amendment to the Rome Convention is posed with more failure than the 1952 Convention. A strong reason for this is that while many States have no limitation of liabilities concerning liabilities to third parties on the surface, the limitation under the 1978 amendment was fixed substantially low in terms of amounts of liabilities for advanced States with a view to development of international civil aviation and internationally unified rules concerning liabilities of operators to third parties.

As in the case of the Warsaw Convention, rationality for a certain limitation of liabilities could be found in relation to passengers who directly receive benefits of aviation. But it is hard to find reasons for allowing limitation in liabilities of operators for damage of third parties on the surface who are only brought disasters. Therefore, many States have not adopted limitation in liabilities of aircrafts as to damage of third parties on the surface[15].

For example, Japan has joined none of the 1933 Rome Convention, the 1952 Rome Convention, and the 1978 Protocol, and have no special acts, so that where third parties are caused damage by aircrafts, or persons or objects falling from aircrafts, resolutions are found under general Tort Law. Therefore, liabilities of aircraft operators concerning third parties suffering damage are dealt with under Article 709 of the Civil Code in the case of civil aircrafts, Article 715 of the Civil Code in the case of employees of airline corporations, and Article 1 of the State Redress Law in the case of State-owned aircrafts

14) M.Milde, "Tenth International Conference on Air Law", 6 (1) Air Law (1979) at 44.

15) In Yamazaki, supra note 5 "Volume 1", at 67, there is a list of twenty nine States adopting unlimited liabilities.

such as these of the Air Self-Defense Force.

In these cases, there is no limitation in liabilities of operators. But victims have to prove intention or negligence on the operators' side. Therefore, relief for victims will not always be easy, if a case of an aircraft's accident is unclear, if fallen objects from aircrafts cannot be identified. It is considerable to find aircrafts as "constructed objects to lands" under Article 717 of the Civil Code, or as "built objects" under Article 2 of the State Redress Law, and Absolute Liability could be imposed on airline corporations or States through application or analogical application of those Articles. But as to liabilities of constructed objects or built objects, victims will have to prove defects in aircrafts which are the objects. Therefore, victims will be possibly confronted with similar difficulties[16].

However, provisions of the Civil Code and the State Redress Law are hard to consider that they originally had a supposition on liabilities involving aviation accidents which would demand high safety. Essentially, resolutions should be achieved by enacting a special act concerning aviation carriage, taking into consideration peculiarities of air operators as in the case of UK, France, and Germany. As long as such an act is not introduced, where the general Tort Law is applied, judicial decision should be given with considering peculiarity of air operators from an international viewpoint. Especially as to liabilities of aircraft operators to third parties on the surface, the 1933 Convention, the 1952 Convention and the 1978 Protocol adopt the Absolute Liability, and also since the 1966 Montreal Agreement was concluded, Absolute Liability meaning that carriers will give up defense of no negligence to a certain extent in relation to passengers has been adopted[17], and it has become common under the 1999 Montreal Convention.

Air carriers owe even passengers receiving benefits of aviation the Absolute Liability to a certain extent. Therefore, consequential liabilities rendered by a

16) Yamazaki, supra note 5 "Volume 1", at 62 et seq.

17) For details of adopting Absolute Liability of air carriers, see, Fujita Katsutoshi, *Legal Theory on Aviation Liabilities for Damages [Kôkû Baishô Sekinin Hôron]*, (1985) at 53 et seq.

proper legal interpretation should not be irrational in terms of aircraft operators' liabilities towards third parties on the surface who have no contractual relationship with the operators. But where third parties on the surface suffer damage through aircraft accidents by terrorists, aircraft operators will be also victims. Therefore, as long as no imputed cause in aviation security systems is found, some relief should be taken by States[18].

III. The Modernization of the Rome Convention

1. Activities of ICAO

The 1978 Protocol was adopted to modernize the 1952 Rome Convention, and on ratification of five States, the 1978 Protocol became effective in July 2002. During this period, the 1999 Montreal Convention was established, and thereby, a two tier liability system under which Absolute Liability up to 100,000 SDR and Presumed Negligence Liability in relation to sums over 100,000 SDR are applied.

The 1999 Montreal Convention became effective by ratification of thirty States on November 4 2003. Its States Parties have smoothly increased. On the other hand, on September 11 2001 the coordinated simultaneous terror attacks used by aircrafts occurred in the US, and unprecedented damage was brought. Therefore, insurers cancelled a special clause concerning wars (AVN52 C), and then on a new clause, demanded for reduction in extent of security, cutting down of limitation in payment amounts, and additional insurance premiums.

18) After the terrorist attack on September 11 2001, in Japan on a decision of a Cabinet meeting, the Government decided to take a measure, that is, in relation to liabilities to third parties of aviation enterprises caused by aircraft accidents by terrors arising in a certain period, on a condition of a resolution of the Parliament, payment of damages up to 2 billion US dollars would be available. Nakamura Katsumi, "The Current State of Liabilities for Damages to Third Parties Caused by Terrorists [Teroni kiinsuru Daisansha Baishô Sekinin no Genjô to Kôsatsu]", 44 Kûhô (2003) at 29.

Thus, a burden of aviation flight enterprises became larger[19]. In the circumstances, the ICAO in the first place, made attempts such as presenting a proposal of scheme relating to war risks[20]. In a long term, the ICAO studied amendments to the Rome Convention.

The ICAO Council let a Secretariat prepare a draft of the new Rome Convention adding new special clauses including clauses for cases where large scale ground damage arouse from such acts as terrors. As a result, a Secretariat's draft of the new Rome Convention introducing a Chapter "Special Provisions on Liabilities Relating to Acts of Unlawful Interference, including Terrorist Acts" was prepared[21]. To study this draft, the ICAO Legal Committee was convened at Montreal in March 2004.

Delegations of fifty one States participated in this Committee. An article by article study on that draft was carried out. In the end, a draft of the ICAO Legal Committee was adopted. At the Legal Committee, a unified agreement was not reached as to general rules in liabilities of operators. A reason for this was that there was difference of domestic legal systems of each State. Therefore, in January 2005 the ICAO Council convened a meeting of the ICAO Special Group composed of twenty States and five organizations in Montreal, and it let the Special Group have a discussion. Further, in July 2005 the second meeting of the Special Group was convened, at which a workout was mainly carried out for a draft Convention concerning a fund for damage caused by acts of unlawful interference, including terrorist acts. The ICAO Secretariat had an expectation that a diplomatic meeting to adopt a new

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19) See, Kozuka Sôichirô, "Damages and Compensation for Losses of Third Parties by Aircrafts (1) [Kôkûki ni yoru Daisansha Songai no Baishô to Hoshô (1)]", 48 (3 · 4) Jôchi Hôgaku Ronshû (2005) at 25. It is said that victims of death by the September 11 terror attack reached about 3,000 people, and that total payment sum of insurance was about 40 billion US dollars, and in that sum, payment of insurance covering liabilities for damages of aircrafts was 3.5billion US dollars and payment of aircraft body insurance was 500 million US dollars. See, Nakamura, supra note 18, at 26 et seq.

20) Nakamura, supra note 18, at 30.

21) The ICAO Seretariat's draft of the new Rome Convention is found in C-WP/12077 Appendix A.

Convention will be held in 2006[22]. However, a rosy prospect on holding such meeting could not be drawn.

The draft Convention adopted at the ICAO Legal Committee(cited as the 2004 draft Convention) was composed of 26 Articles, and divided into 5 Chapters. The Articles are; in Chapter I-Principles, Definitions (Art.1) and Scope (Art.2); in Chapter II-General Provisions on Liability, Liability of the Operators (Art.3); in Chapter III-Special Provisions Concerning Liability Relating to Acts of Unlawful Interference, including Terrorist Acts, Limit of Liability (Art.4), Suspension of Liability Rules (Art.5); in Chapter IV-Extent of Liability, Exoneration(Art.6), Reduced Compensation (Art.7), Right of Recourse (Art. 8); in Chapter V-Exercise of Remedies and Related Provisions, Exclusive Remedy (Art.10), Conversion of Monetary Units (Art.11), Review of Limits (Art.12), Insurance (Art.13), Time Limit (Art.14), Forum(Art.15), Arbitration (Art.16), Primacy of Proceedings in State of Occurrence (Art. 17), Execution when Limits of amounts of Liability Apply(Art.18), Recognition and Enforcement of Judgements (Art.19), Execution (Art.20), Period of Llimitation (Art.21), Death of Person Liable (Art.22), Advance Payments (Art.23), Contract or Workmens' Compensation Applicable (Art.24), State Aircrafts (Art.25), and Nuclear Damage (Art.26)[23]. Compared with the 1978 Convention, remarkable points of the 2004 draft Convention are presented below.

First, a comprehensive review was accomplished in relation to general rules in liabilities of operators and limitation of amounts of liabilities. Namely, as to principles of liability, general rules of operators and special rules for damage caused by acts of unlawful interference, including terrorist acts are separated. Under the general rules, where operators cause third parties damage, the operators will owe unlimited liability on grounds of Presumed Negligence, and

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22) L.J. Weber, "Recent Developments in International Air Law", 24 Air and Space Law (2004) at 299 note 4.

23) An article by article commentary is found in Kozuka Sôichirô, "Damages and Compensation for Losses of Third Parties by Aircrafts (2) [Kôkûki ni yoru Daisansha Songani no Baishô to Hoshô (2)]", 49 (1) Jôchi Hôgaku Ronshû (2005) at 4 et seq.

they will owe strict liability, namely they will owe liability for damage up to 100,000 SDR (about 16,000,000 yen even if they prove force majeure (Art.3)). On the other hand, under the special rules for damage caused by acts of unlawful interference, including terrorist acts, on the assumption that operators owe liability for damages in accordance with the general rules of Article 3, they will owe liability for damages to the extent of limitation in amounts of liability corresponding to maximum takeoff weights of aircrafts causing the damage. But the limitation in amounts of liability will not be applied if the operators cause the damage with intention (Art.4). Under the 2004 draft Convention, as in the case of the 1999 Montreal Convention, human damage and material damage were differentiated, and only for human damage, a two tier system taking Absolute Liability and Presumed Negligence Liability was provided. However, since there is no reason for taking different liability rules for the human damage and the material damage, the ICAO Legal Committee's draft gives the same treatment to these types of damage. Thereby, the overall liability system under the present Rome Convention was abolished except damage by "acts of unlawful interference", and aircraft operators will owe unlimited liability.

As to damage caused by "acts of unlawful interference", the general rules of liability of Article 3 will be applied, and then, the overall liability limitation can be available as long as the damage was not caused with intention by the operator or its servants or agents. Namely, for each aircraft and each accident, limitation in amounts of liability will be fixed on maximum takeoff weights of aircrafts under six classifications. Thus, the overall liability system remains only in the case of "acts of unlawful interference". Criticism is directed to the overall liability system[24], but it had to be accepted as an amendment with a consideration of urgent measures taken by some aviation advanced States including US after the September 11 terrorist attack.

Second, for guaranteeing the above mentioned liability of aircraft operators, following the 1999 Montreal Convention, State Parties are forced to make arrangements for insurance or guarantee to their own national operators

24) Kozuka, supra note 23, at 12, 13.

(Art.13). Under the present Rome Convention, where aircrafts fly across State Parties, the State Parties only can demand the operators for proof that they maintain insurance or other security to guarantee the operators' liability (Art.15). However, the 2004 draft Convention only states "such appropriate insurance or guarantee", but does not show any standards. Therefore, there will be a difference between governing States whose operators are forced to maintain insurance, and "States accepting fly-across" who demand proof of subscription of insurance in terms of amounts of insurance to be arranged. Such difference will be an unresolved problem.

Third, the ICAO Council can give State Parties recommendation on suspension of the general rules of liability, if acts of unlawful interference bring detriments to availability of subscription of aviation insurance or there is a possibility of such detriments (Art. 5). This relates to cancelling special clauses of wars in aviation insurance after the September 11 terrorist attack, but it is faced with objection from many States. A scheme was submitted, that is, a fund for an additional compensation to victims should be founded in case that operators become unable to purchase aviation insurance in aviation insurance markets because of large scale terrors. As to marine pollution with oil, the international compensation fund for marine pollution with oil is established. Although there will be a problem if a fund is designed in parallel to such fund for marine pollution with oil[25], such fund can be of value in reference. If the foundation of the fund is accomplished, compensation for damage caused by "acts of unlawful interference" will be possibly treated in a three tier structure where the first tier will be insurance covering liabilities of aircraft operators for damages to third parties, the second tier will be a fund under the fund Convention, and the third tier will be measures by States. But such fund is still only a hypothesis.

Fourth, as to environmental damage such as noise, it is difficult to define a specific extent of damage, and an object to receive compensation is not clear. Therefore, as in the case of the present Rome Convention, the new draft Convention is not applied to environmental damage.

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25) Kozuka, supra note 23, at 19.

As seen above, it seems that the 2004 draft Convention made a progress, compared with the present Rome Convention. However, difference is found in domestic legislation of various States in terms of liabilities of third parties on the surface, and therefore, the new Convention does not have much difference as to the general rules of liabilities from the 1999 Montreal Convention presupposing contractual liabilities of carriers. Especially since the 2004 draft Convention contains many problems in relation to regulations on liabilities of acts of unlawful interference including terrorists acts, the 2004 draft Convention was scare in becoming fruitful.

2. The Draft of the ICAO Special Group

The ICAO Council considered that the 2004 draft Convention would need more work to gain support from each State, and therefore, it convened a Special Group composed of twenty States. The Special Group studied the 2004 draft Convention six times from January 2005. The meetings of the Special Group had recognition of the high necessity to establish a system of how the society as a whole could or should take a burden of compensation to victims for damage in terms of damage caused to third parties as in case of the Terror Attack of the September Eleventh in the US. Thus, the meetings placed a priority in the study on damage caused by terror attacks over general damage, and adopted a Special Group Meeting Draft on the New Rome Convention (hereinafter, referred to as "Meeting Draft"). The Meeting Draft was, on the decision of the 187th Session of the ICAO Council held at the end of 2007, submitted to the 33rd Session of the Legal Committee held at Montreal from 21 April to 2 May 2008[26].

The Special Group developed two kind of the draft Conventions. The first Draft is commonly referred to as "the Unlawful Interference Compensation Convention". This Convention is "Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference" and is comprised of 37 Articles in 8 Chapters. Chapter I stipulates definitions of

26) ICAO C-WP/13031, 13/11/07, at 1. LC/33-WP/3-25.1/5/08.

terms under the Convention (Art.1), and the scope of application (Art.2); Chapter II (Art.3 to 7) stipulates liability of the operator, limit of operator's liability, events involving two or more operators or other persons, advance payments for compensation, and insurance; Chapter III (Art.8to18) contains the Supplementary Compensation Mechanism (SCM) and its related provisions; Chapter IV provides compensation from the Supplementary Compensation Mechanism (Art.19) and advance payments and other measures(Art.20); Chapter V (Art.21 to 25) contains acts or omissions of victims and right of recourse; Chapter VI provides assistance in case of events in States non-party (Art. 26); Chapter VII (Art.27 to 35) exclusive remedy, forum, recognition and enforcement of judgments and period of limitation; Chapter VIII stipulates state aircraft (Art. 36) and nuclear damage (Art. 37)[27].

The second Draft is commonly called as "the General Risks Convention". The Convention is "Convention on Compensation for Damage Caused by Aircraft to Third Parties", and has 19 Articles in 5 Chapters. Chapter I has definitions of terms under the Convention (Art. 1) and scope of application (Art. 2); Chapter II (Art. 3 to 7) provides liability of the operator (Art. 3), events involving two or more operators or other persons, court costs and other expenses, advance payments for compensation, and insurance; Chapter III has acts or omissions of victims, and right of recourse; Chapter IV (Art. 10 to 17) has provisions for exercise of remedies and related matters such as exclusive remedy, conversion of Special Drawing Right(SDR), review of limits, forum, recognition and enforcement of judgments, and period of limitation; Chapter V stipulates non-application of the Convention to state aircrafts (Art.18) and nuclear damage (Art. 19)[28].

These two Conventions will have no link between each other. States can become a party to one or the other, or to both[29]. The majority of delegations agreed that these two draft Conventions were mature enough to go to the

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27) ICAO C-WP/13031, 13/11/07,Appendix B.

28) ICAO C-WP/13031,13/11/07,Appendix C

29) LC/33-WP/3-1, 7/01/08, at 2.

Legal Committee. But in the decisions of 182nd Session of the Council, a request was presented, namely that the Legal Committee should take into account the concerns raised by Germany, and in particular pay attention to possible ways of protecting the interests of victims most efficiently and to ensuring the ratifiability of the revised Convention and the operability of the funding mechanism[30].

The Draft of the General Risks Convention applies to damage occurring in the territory of a State Party caused by an aircraft in flight other than as a result of unlawful interference regardless of whether a State of the operator of the aircraft is not a State Party (Art.2), but State Parties can choose whether this Convention will apply to general risks damage occurring in their own territory caused by a domestic operator as in the Unlawful Interference Compensation Convention. The most remarkable point in the Draft of the General Risks Convention is that the Convention has the two-tier system as in the 1999 Montreal Convention. Namely, an operator of an aircraft, regardless of whether the operator's State is a State Party, will be imposed on the strict liability for damage per a third party amounting to between 250,000 and 500,000 SDR, only because the damage was caused by the aircraft in flight; and unless the operator proves that damage was not due to its negligence or other wrongful act or omission or that of its servants or agents, or that the damage was solely due to the negligence or other wrongful act or omission of another person, the operator will be liable for all of the damages (Art. 3).

It seems that the Draft of the General Risks Convention basically succeeds to the 2004 Draft Convention of the Legal Committee. The Draft of the General Risks Convention is strongly opposed by the IATA[31]. It seems that the Draft of the General Risks Convention was not given sufficient consideration because of the agenda of placing the priority in the study on the Unlawful Interference Compensation Convention over the General Risks Convention. Therefore, this article presents no more comments on the Draft of

30) LC/33-WP/3-1, 7/01/08, at 3.

31) LC/33-WP/3-10,8/4/08.

the General Risks Convention.

3. Some Comments on the Unlawful Interference Compensation Convention

This article focuses on remarkable points of the Convention below, rather than gives comments on every provision.

(1) The Liability of the Operator (Art.3)

The liability of the operator only covers damage caused by "an aircraft in flight". Although words "in flight" are defined as at any time from the moment when all external doors of an aircraft are closed following embarkation or loading until the moment when any such door is opened for disembarkation or unloading (Art.1,para.c). In summary, "in flight" means the moment during which a captain of the aircraft has a power over the aircraft. There is no provision concerning damage caused by "a fallen subject". Such damage should be considered to be within the ambit of damage arising from an aircraft in flight.

Environmental damage will also be compensable as long as compensation is provided for under the law of the State Party in the territory of which the damage occurred (Art.3). There is a possibility that destruction of ecosystems will come within the extent of compensation. Under the Conventions on nuclear damage or damage with oil, coverage of damage is provided in a restrictive way. The Unlawful Interference Compensation Convention should have limitation to prevent discrepancy from arising in States in terms of the coverage of damage. An issue whether noise damage or sonic boom would be included in the environmental damage could be raised, but noise damage or sonic boom would hardly come within the application of the Unlawful Interference Compensation Convention.

Damages due to death, bodily injury and damage to property shall be compensable, but damages due to mental injury shall be compensable only if caused by a recognizable psychiatric illness resulting either from bodily injury

or from a reasonable fear of exposure to death or bodily injury (para.5). Some influential views are that pure nervous shock, as an interpretation of the Japanese Law or Article 17 Paragraph 1 of the Montreal Convention, will not be covered. It seems that the same view is taken under the Unlawful Interference Compensation Convention. In the 1971 Guatemala City Protocol, a term of personal injury, which has larger notion than bodily injury, is used. It is pointed out that to compensate for damage for mental trauma or other pure nervous shock, a term of personal injury, instead of bodily injury, should be used[32].

(2) Limit of Operator's Liability (Art. 4)

Operator's liability is fixed in accordance with each maximum mass of an aircraft. There are 10 classifications from 750,000 SDRs for aircraft of 500 kilogrammes or less to 700 million SDRs for aircraft of more than 500,000 kilogrammes.

There is a possibility that appropriateness of limit will differ by interpreting the purpose of the provision as stipulating liability or compensation. If this Article was applied to the case of B 747-400, the limit would be about 80 billion yen. On the other hand, it is said that there were 3000 deaths in the Terror Attack of the September 11 in the US, and therefore, taking a supposition of the same scale of an event, compensation per a death will become below 30 million yen. Therefore, this will mean that substantially narrow limit will be placed, when compared with a situation where an act of tort is established in Japan, and Article 709 of the Japanese Civil Code is applied. On the contrary, coverage of relief will be more extended than under the general Civil Law, if it is considered that the Convention has a meaning that although limit of liability is fixed, since the operator is imposed on strict liability, victims can receive compensation more than under Article 709 of the Japanese Civil Code. If a meaning of the Convention is considered as to be writing down liability of operators, then, limit of liability will be based on a

32) Doo Hwan Kim, A Study for the ICAO Draft Convention on Compensation for Damages Caused by Aircraft to Third Parties, at 18.

policy decision that operators will not be bankrupt. If damage is not satisfied with the coverage of limit of operator's liability and the fund is employed, then it can be pointed out that fair apportionment of damage will not be achieved where the fund is allotted to damage due to a terror attack to a business jet, although a capital for the fund is collected from users of regular air transports, while it is not collected from users of business jets[33].

(3) Collision in Air (Art. 5)

Regardless of collision in air, two or more aircrafts caused damage to which the Convention applies, the operators of the aircrafts will be jointly and severally liable. But in case of collision in air, passengers of the other aircraft will be treated as third parties. Therefore, these passengers will be able to file a claim against both of the operator of the other aircraft and the operators of the aircraft on which they were boarding under the Convention. In this case, the operator of the aircraft on which the passengers were boarding will owe both of liability to the passengers under the Montreal Convention (contractual liability) and liability to the operator of the other aircraft under the Convention (tort liability). In the circumstances, supposing that the passengers file a claim for damages against the operator of the other aircraft under the Convention, and recovery is demanded from the operator of the other aircraft to the operator of the aircraft on which the passengers were boarding (the air carrier of the passengers), then a theoretical issue will be arising, namely, a part of the presumed negligence of damage for personal injury (a part exceeding 100,000 SDR) stipulated in the Montreal Convention will become strict liability[34].

(4) Insurance (Art. 7)

State Parties have to require their operators to maintain adequate insurance

33) The Air Law Committee Working Group [Kôkû Unsô Iinkai Sagyôbukai], "A Study Report on the New Rome Draft Convention of the Special Group [Shin Rôma Jôyaku Tokubetsu Gurûpu Kaigôan Kentô Hôkokusho] "22/2/2008, at 9.

34) A Study Report, supra note 33, at 10.

or guarantee, and can require operators which operates into the territory of the State Parties to furnish evidence that the operators maintain the adequate insurance or guarantee. "The adequate insurance" in this case means that premium of insurance will not become below limit of liability[35]. To ensure effectiveness, it can be considered that in Japan a penalty provision can be introduced by amending the Air Law[36]. In case of the Convention on pollution with oil, entry into ports of State Parties or terminal facilities will not be allowed unless evidence that effective insurance is maintained is furnished.

(5) The Supplementary Compensation Mechanism (Art.8 to 18)

Under Article 8, an independent organization named the Supplementary Compensation Mechanism (SCM) is planned to be established. The SCM has purposes to provide compensation for damage to victims who are suffered in the territory of State Parties, and to supply financial support in cases where operators of State Parties cause damage in States which are not State Parties.

The SCM, as an independent organization, is not given only legal personality, but also tax exemption and other privileges (Art.8,para.4 and 5). Funds to the SCM will be collected by operators. The contribution is collected per a passenger and a ton of cargo (Art.12). It is not clear whether the contribution will be collected uniformly per a passenger. But Article 14, which provides basis for fixing contributions, can be read as allowing different contributions in accordance with operators.

(6) Compensation (Art. 19)

The coverage of compensation supplied by the SCM is a part of total damage exceeding limit written down in Article 4. Namely, if an operator owes liability, the operator will pay compensation up to limit of liability, and

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35) A Study Report, supra note 33, at 12.

36) According to Article 112 (order for improvement of business) Item 6 of the Japanese Air Law, the Minister for the Land, Infrastructure, Transport and Tourism can give Japanese air business persons an order to conclude an insurance contract for damages to pay resulting from air accidents.

an additional compensation over the limit will be provided by the SCM (Art.19). If operators virtually can not arrange air insurance ensuring payment for liability covered by the Convention, as in case where insurance premium becomes so high that the continued operation will become difficult, then, the drop-down[37], as stated by the Special Group, can be pursued, that is, the SCM, on a decision of meetings of State Parties, can provide financial support ensuring payment for liability of operators written down in Articles 3 and 4 (Art.19, para.3).

Without this way of financial support, there are no provisions stating that the SCM will compensate for liability of operators in case where the operators are insolvent. The reason for this seems to prevent free ride of operators, but if the Convention has a purpose for relieving victims of State Parties, considerations, from a view of relief of victims, should be given to cases where operators cannot provide compensation.

Moreover, where limit in compensation is fixed, there is a possibility that later claimants will not receive sufficient payment if the payment is carried out in order of claims. Thus, there are unfinished tasks such as studying the way of payment, and how appropriate amounts of claim should be ensured. In this point, the delegation of the Japanese government submitted a working paper of amending Articles 4 and 23, basing on the framework of the 1992 International Convention on Civil Liability for Oil Pollution Damages (the CLC)[38]. This paper will be available for reference.

(7) Additional Compensation (Art.24) and Exclusive Remedy (Art. 27)

Additional compensation, which virtually has the same effect of excluding limit of liability of the operator can be requested. But such compensation is limited to intentional acts or omissions of, or gross negligence of senior management, if the operator is a legal person. From a view of protecting victims, the additional compensation should be covered for intentional acts or

37) LC/33-WP/3-1,7/01/08, Appendix A, at A-2.

38)LC/33-WP3-16,17/4/08

omissions of, or gross negligence of servants or agents. Furthermore, as one of cases where operators owe liability for additional compensation, Article 24 Paragraph 2 uses notions of "disregard of a known, probable and imminent risk", but general words of "recklessly and with knowledge", which have been widely used in air transport and sea transport, should be employed[39].

As to exclusive application of the Convention, complete concentration of liability on the shoulders of operators is attained. A reason for this seems that makers of aircrafts, air traffic controllers and etc. will possibly owe liability over limit of liability covered by the Convention. But since there is a question as to necessity of Article 27, it should be deleted.

39)LC/33-WP/3-21,24/4/08

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As to ICAO Working Papers:

LC33-WP/3-1 which includes the texts of the two draft Conventions.

For additional documentation,http:www.icoa.int/icao/en/leb/mtgs/2008/lc33/index.html

Abstract

Most compensation issues are regulated under domestic law where third parties are suffered damage from crushes of aircrafts or their falling objects. This issue was internationally recognized. A Convention to unify the rules of the law concerning damage caused by aircraft to the third parties on the surface was signed in May,1933(the 1933 Rome Convention) and it became effective in 1942. Later, modernization was carried out through the 1952 Rome Convention and the 1978 Montreal Protocol amending the 1933 Rome Convention. Ratifying States either to the Convention or to the Protocol is not as many as those States to the Warsaw Convention concerning air-transport.

In 1999, which was a turning point of changes of centuries from the twentieth century to the twenty first century, the Montreal Convention was passed to modernize the Warsaw Convention, and was quickly widespread. On September 11 2001, the coordinated simultaneous terror attacks occurred. In the circumstances, the issue modernizing the Rome Convention came up. Thus, workout under the initiatives of the Legal Committee of the ICAO is under operation to adopt new Rome Convention. In Japan, a study on the ICAO Draft Convention was operated by which a working study group composed of experts from academy, industry and government was set up. This article, being based on that study, clarifies issues and gives future perspectives. This article presents author's individual views.