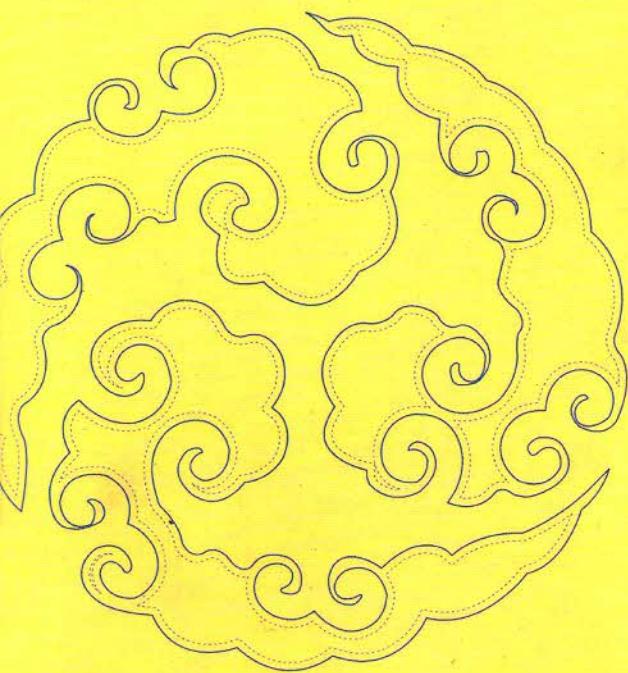


# 航空法评论

HANGKONGFA PINGLUN

主编／杨惠 郝秀辉



法律出版社  
LAW PRESS • CHINA

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(第5辑)

主编：杨惠 郝秀辉



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it will be played an important role in the protection of passenger's right as well as the development of the aviation industry.

Since it was enforced the Revised Commercial Code ( Air Transport Part 6 ) throughout South Korea, it would be desirable to establish an lecture course of " Air Transport Law " at the Law School in the South Korea as teaching a specialized subject in the near future.

The legislative problems on the domestic air transport will be eliminated to some extent the cause of dispute between the parties( plaintiff and defendant) so as to clarify the legal limit of the liability by civil law, the amount of the compensation for damages and the extinction time of the liability between the victims and air carrier. It will make predict to be the opportunity to enhance the confidence of International Civil Aviation Organization( member's states: 191 countries) to keep pace with international treaties and the legislative examples of the developed countries.

## Law and Regulations Related to Air ASIA QZ8501 Crash \*

Dr. Ariawan Gunadi\*\* and Dr. H. K. Martono\*\*\*

**Abstract** This article deals with introduction; legal regimes applicable in Indonesia; legal regimes related to Air Asia QZ8501; the Civil Aviation Act of 2009 includes provisions related to Air Asia QZ8501, single majority shareholders, the obligation of scheduled air services, schedule of Air Asia QZ8501's permit, air navigation service provider agency( ANSPA) and Air Asia QZ8501, airport operator and Air Asia QZ8501, insurance and passengers; Montreal Convention of 1999 includes,

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introduction, scope of application, content of Montreal Convention of 1999, compensation and jurisdiction; Warsaw Convention of 1929 includes introduction, scope of application, compensation, unlimited liability, jurisdiction; and finally conclusion.

### I. Introduction

Air Asia aircraft, of Airbus A320 – 200 flight number QZ8501 carrying 138 adult passengers, plus 16 children, one infant and five aircrews on a flight from Juanda Airport, Surabaya destined for Singapore was declared missing by air traffic controllers at 07.55 dated 28 December 2014 after air traffic controllers declared Incerfa, Alerfa and Distressfa conditions. On 9 January 2015 the National Search and Rescue (BASARNAS) supported by the armed forces (TNI) of Indonesia and a number of another states successes to lift the wing of Air Asia QZ8501. Now It's time to evaluate the legal aspects of Air Asia QZ8501. This article intends to evaluate legal regimes applicable in Indonesia and legal regimes related to Air Asia QZ8501. The Civil Aviation Act of 2009 includes provisions related to Air Asia QZ8501, single majority shareholders, the obligations of scheduled air services, Air Asia QZ8501's permit, the air navigation service provider agency (ANSPA) and Air Asia QZ8501, the airport operator and Air Asia QZ8501; the Montreal Convention of 1999 includes introduction, scope of application, compensation and jurisdiction; the Warsaw Convention of 1929 includes, introduction, scope of application, compensation, unlimited liability and jurisdiction.

### II. Legal Regimes Applicable in Indonesia

As in other member states of the International Civil Aviation Organization (ICAO), there are two legal regimes applicable in air transportation in Indonesia: national laws for domestic flights and international law for international flights. Domestic flight are subject to the Civil Aviation Act of 2009,<sup>①</sup> Act Number 33 Year

<sup>①</sup> *Act Concerning Civil Aviation*, Act No. 1 of 2009 [ Civil Aviation Act ], Ministry of Transportation of the Republic of Indonesia, online ; Directorate General of Civil Aviation <<http://hubud.dephub.go.id/?en/uu>>.

1964,<sup>②</sup> Ministerial Decree Number PM 77 Year 2011,<sup>③</sup> Private Penal Law Code (*Kitab Undang – Undang Hukum Pidana – KUHP*), Act of 2003,<sup>④</sup> Private Law (*Kitab Undang – Undang Hukum Perdata – KUH Perd.* ), Act Number 4 Year 1976,<sup>⑤</sup> whilst international flights are subject to the Warsaw Convention of 1929,<sup>⑥</sup> and its amendments<sup>⑦</sup> and its supplement,<sup>⑧</sup> The Geneva Convention of 1948,<sup>⑨</sup> Rome Convention of 1952,<sup>⑩</sup> The Montreal Protocol of 1978,<sup>⑪</sup> the Montreal Convention of 1999.<sup>⑫</sup> In addition, there is also public air law applicable to international air

<sup>①</sup> *Act Concerning Mandatory Insurance Premiums*, Act No. 33 of 1964 [ Mandatory Insurance act ].

<sup>②</sup> Ministerial Decree *Concerning Liability of Air Carriers*, Ministerial Decree No. 77 of 2011 [ Ministerial Decree, Liability ].

<sup>③</sup> *Act Concerning Terrorism*, Act No. 15 of 2003 [ Act on Terrorism ].

<sup>④</sup> Act Concerning the Amendment of Penal Law relating to Ratification of Tokyo Convention of 1963, The Hague Convention of 1970 and Montreal Convention of 1971.

<sup>⑤</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929.

<sup>⑥</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at the Hague on 28 September 1955; Protocol to Amend the Convention of the Unification of International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955. Signed at Guatemala City on 8 March 1971; Additional Protocol Number 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, signed at Montreal on 25 September 1975; Additional Protocol Number 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955, signed at Montreal on 25 September 1975; Additional Protocol Number 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 2 September 1955 and at Guatemala City on 25 September 1971; Additional Protocol Number 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975.

<sup>⑦</sup> Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 by Persons Other Than the Contracting Carrier, signed at Guadalajara, on 18 September 1961.

<sup>⑧</sup> Convention on the International Recognition of Rights in Aircraft, signed at Geneva on 19 June 1948.

<sup>⑨</sup> Convention for Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome, on 7 October 1952.

<sup>⑩</sup> Protocol to Amend the Convention for Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome, on 7 October 1952 [ Montreal Protocol ].

<sup>⑪</sup> Convention for the Unification of Certain Rules Relating for International Carriage by Air, signed at Montreal on 28 May 1999 [ Montreal Convention ].

transportation such as the Chicago Convention of 1944,<sup>①</sup> the Tokyo Convention of 1963,<sup>②</sup> The Hague Convention of 1970,<sup>③</sup> the Montreal Convention of 1971,<sup>④</sup> the Montreal Protocol of 1988,<sup>⑤</sup> and the Montreal Convention of 1991,<sup>⑥</sup> Act Number 2 of 1976.<sup>⑦</sup>

### III. Legal Regimes Related to Air Asia QZ8501

Though two legal regimes are applicable in Indonesia, they are not all directly related to the Air Asia QZ8501 crash. Those possibly related to the Air Asia QZ8501 crash are the Aviation Act of 2009,<sup>⑧</sup> Act Number 33 Year 1964,<sup>⑨</sup> Ministerial Decree Number PM 77 Year 2011,<sup>⑩</sup> for national law, whilst international law related to Air

Asia QZ850 crash are the Warsaw Convention of 1929,<sup>①</sup> and its amendment<sup>②</sup> and its supplement,<sup>③</sup> usually called the Warsaw System and Montreal Convention of 1999.<sup>④</sup>

#### IV. The Civil Aviation Act of 2009

The aims and objectives of the Indonesian Civil Aviation Act which came into force on 12 January 2009 are to promote the development of Indonesian air transportation.<sup>⑤</sup> It regulates a host of matters related to aviation, from sovereignty in airspace, aircraft production, operation and airworthiness of aircraft to aviation safety and security, aircraft procurement, aviation insurance, the independence of aircraft accident investigations, and licensing of aviation professionals. The Civil Aviation Act of 2009 also regulates scheduled and non - scheduled air transportation, airline capital, the ownership of aircraft, aircraft leasing, tariffs, the liability of air carriers, air navigation facilities, airport authorities and services, and law enforcement related to air transportation. The Civil Aviation Act Number 1 Year 2001 also has provisions aimed at supporting the development of national and international air transportation in Indonesia,

① Convention on International Civil Aviation, signed at Chicago on 7 December 1944.

② Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963.

③ Convention for the Suppression of Unlawful Seizure of the Aircraft, signed at the Hague on 16 December 1970.

④ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal 1971 on 23 September 1971

⑤ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation. Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal, on 23 September 1971, signed at Montreal on 24 February 1988 [Montreal Protocol 1988].

⑥ Convention on the Marking of Plastic Explosive for the Purpose of Detection, signed at Montreal on 1 March 1991 [Montreal Convention 1991].

⑦ Act Concerning the ratification of Tokyo Convention of 1963, the Hague Convention of 1970 and Montreal Convention of 1971

⑧ *Act Concerning Civil Aviation*, Act No. 1 of 2009 [ *Civil Aviation Act* ], Ministry of Transportation Republic of Indonesia online : Directorate General of Civil Aviation ([http://hubhub.denhup.go.id/2\\_en/ut](http://hubhub.denhup.go.id/2_en/ut))

<sup>⑧</sup> *Act Concerning Mandatory Insurance Premiums*, Act No. 33 of 1964 [Mandatory Insurance]

⑨ *Act Concerning Mandatory Insurance Premiums*, Act No. 35 of 1964 [ Mandatory Insurance ].  
⑩ Ministerial Decree *Concerning Liability of Air Carriers*, Ministerial Decree No. 77 of 2011 [ Ministerial Decree Liability ].

① Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929.

② Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at the Hague on 28 September 1955; Protocol to Amend the Convention of the Unification of International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955. Signed the Guatemala City on 8 March 1971; Additional Protocol Number 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, signed at Montreal on 25 September 1975; Addition Protocol Number 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955, signed at Montreal on 25 September 1975; Addition Protocol Number 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 2 September 1955 and at Guatemala City on 25 September 1971; Additional Protocol Number 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975.

③ Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 by Person Other Than the Contracting Carrier signed at Guadalajara, on 18 September 1961.

④ Convention for the Unification of Certain Rules Relating for International Carriage by Air, signed at Montreal on 28 May 1999 [Montreal Convention].

<sup>⑤</sup> *Civil Aviation Act* *supra* note 24, page 61.

including provisions regarding the creation of a public services institute to further those goals. Almost all of the provisions of the Chicago Convention of 1944 have been adopted by the Civil Aviation Act of 2009. Due to the comprehensive nature of the Civil Aviation Act of 2009, the present article is only able to discuss highly specific matters which have potential impact on law and regulations related to the Air Asia QZ8501 crash.

#### a. Provisions Related to QZ8501 Crash

The content of the Civil Aviation Act of 2009, most related to the QZ8501 crash are the provisions concerning ownership and single majority share holders. The establishment of a new airline requires a business permit issued by the MOC. To meet the requirements for obtaining a business permit, Air Asia must have held at least ten aircraft. Five aircraft must be owned and five aircraft of type(s) specified can be leased for supporting business sustainability in accordance with the routes served. Additionally, for non-scheduled air transportation, at least one aircraft must be owned and at least two aircraft of types suitable for supporting business sustainability must be possessed in accordance with the operational areas to be served. Additionally, for cargo transportation, at least one aircraft must be owned and at least two aircraft must be possessed in keeping with the routes and operational areas to be served.

The requirements of aircraft ownership for obtaining a scheduled air transportation permit as provided in the Civil Aviation Act of 2009 are relatively new when compared with the Civil Aviation Act of 1958 and the Civil Aviation Act of 1992. It was stipulated in Ministerial Decree Number KM 81 of 2004 provided that at least two aircraft should be owned, and this was amended by the Ministerial Decree Number KM 25 of 2008, which provided that an airline company must own at least three aircraft and possess at least two aircraft of the type(s) suitable for supporting business sustainability in accordance with the routes served.

In practice, there are some airlines which have not yet complied with the minimum aircraft possession requirements. In this matter, the MOC urges the non-compliant airline to establish joint enterprises, either between domestic and domestic airlines or between domestic airlines and foreign airlines so they can comply with the minimum

aircraft possession requirements.<sup>①</sup> However, it should be noted that in joint enterprises between domestic airlines and foreign airlines, an Indonesian citizen or an Indonesian legal entity must own the majority shares. The MOC will issue an administrative sanction to airlines that do not comply with the minimum aircraft possession requirements in the form of a warning, a revocation or a cancellation of the offending airline's business permit.

#### b. Single Majority Shareholders

Joint enterprises were first regulated by Ministerial Decree Number S.8/1/11 – Phb of 1967,<sup>②</sup> a regulation that was later amended by Ministerial Decree Number SK 13/S/1971.<sup>③</sup> These Ministerial Decrees lay down the foundations for joint enterprises between domestic and domestic airline or domestic airline and foreign airline with the intention of preventing a monopoly being held by GIA and MNA. Neither Ministerial Decree, however, requires that an Indonesian citizen or an Indonesian legal entity own a majority of the shares.<sup>④</sup> In practice, shares have been often highly divided and the majority of shares have been owned by foreign airlines.

For that reason, the Civil Aviation Act of 2009 requires that an Indonesian citizen or an Indonesian legal entity must own a majority of shares in an airline.<sup>⑤</sup> This, in turn, means the capital of the national air transportation business must be, entirely or in the majority, owned by an Indonesian legal entity or an Indonesian citizen. In the case that the capital of the national airlines owned by Indonesian legal entities or citizens is divided, one of the national shareholders must maintain a larger holding than any

<sup>①</sup> A prime example of the merger between two airlines to comply with the requirements of a minimum number of aircraft was the merger between Tiger Airways and Mandala Airlines, but they are now bankrupt as well.

<sup>②</sup> *Ministerial Decree Concerning Requirements and Provisions Regarding Commercial Air Transport Business Within Indonesian Territory Using Fixed Wing Aircraft*, Ministerial Decree No. S.8/1/11/Phb (21 September 1967).

<sup>③</sup> Aeroplane for Commercial Purposes *supra* note 8, page 65.

<sup>④</sup> In the framework of the implementation of Act Number 1 of 1967 Concerning Foreign Investment, PT Indonesia Air Transport was previously 80% foreign owned in 1968 and 20% Indonesian owned; in 1975 this changed to 50% foreign ownership and 50% Indonesian ownership. See *Concerning Business Permits to PT Indonesia Air Transport within the Framework of Implementation of Act Number 1*, Ministerial Decree No. 1 Indonesia, 196 Number KM 40/T.1b/Phb – 75.

<sup>⑤</sup> *Civil Aviation Act* *supra* note 24, page 65.

foreign airline shareholder (single majority) (emphasis added).

Even though there is a regulation providing that an Indonesian citizen or an Indonesian airline must own at least 51% of the total capital, ~~in the best practice, according to information made known to the author of this article, the capital is nevertheless frequently divided and majority ownership is not held by an Indonesian citizen or an Indonesian airline, but instead by a foreign airline engaging in the management of joint airline enterprises.~~ This practice can be seen in the example of a certain national airline which was established prior to the enactment of the Civil Aviation Act of 2009. After the Civil Aviation Act of 2009 came into effect, the national airline in question was required to comply with the new regulation and ensure that the majority shareholders were Indonesian citizen or airlines. It is a matter of law enforcement for MOC to ensure compliance with this new regulation. The MOC effectively controls the implementation of the Civil Aviation Act of 2009.

It is necessary to know whether Air Asia complied with the single majority shareholder considering that Air Asia is a joint enterprise between domestic airlines and foreign airlines. Article 108 Paragraph (3) provides that in the case of the capital of a national commercial air transportation business entity owned by Indonesian legal entity (ies) or citizen(s), one of the national share holders must have a larger shareholding than any foreign share holder (single majority). If Air Asia violated the single majority share holder, it could be evaluated and may be subject to administrative sanctions in the form of a warning, and/or revocation of business permit.

#### c. The Obligations of Scheduled Air Services

Obligations of domestic scheduled air transportation can be found in Article 118 of the Civil Aviation Act of 2009. This article provides that the holder of a scheduled air transportation business permit is obliged to perform air transportation activities in reality (*de facto*) no later than twelve months following the issuance of a permit. This is achieved by operating at least the minimum number of aircraft in possession of the company in accordance with its business or activity scope; owning and possessing the correct total number of aircraft; fulfilling the requirements for mandatory cargo transportation, civil passenger flights, and other provisions in accordance with rules of law and regulations. In addition, a scheduled air transport company must purchase transportation liability insurance with a liability value equal to the insurance coverage

for regular passenger air transportation proven by presentation of valid insurance policies. Air Asia that services paying passengers was also obliged to treat all passengers fairly without discrimination on ethnic, religious, racial, group, economic or social grounds.<sup>①</sup>

It is necessary to know whether Air Asia complied with the minimum number of aircraft requirements in its business permit. Article 118 paragraph (2) (a) of Civil Aviation Act of 2009 provides that a scheduled commercial air transport provider must own at least 5 (five) aircraft and possess at least 5 (five) aircraft of the type(s) suitable for supporting business sustainability in accord and with the routes served. If Air Asia did not comply, the MOC could have imposed administrative sanctions such as warning, and/or revocation of permit.

Furthermore, to continue operating, Air Asia had to submit to the MOC monthly activity reports, including information regarding delays and cancellations of flights, no later than on the tenth of the next month for each month.<sup>②</sup> Annual financial reports that contain at least a balance sheet, profit and loss statement, cash flow statement and a list of detail expenditures and that were duly audited by a registered public auditing firm had to be submitted to the MOC no later than the end of the next reporting year. Any changes in the management or ownership of the air transportation business entity, and any changes in the domicile or changes of aircraft ownership had to be duly reported to the MOC. Further provisions regarding the obligations of air transportation business permit holders, as well as the requirements, systems, and procedures of sanction imposition were issued by ministerial decree.

A discussion of flight networks and routes of air transportation businesses can be found in Article 122 of the Civil Aviation Act of 2009. This Article provides that domestic flight networks and routes for scheduled air transportation are determined by the MOC. The domestic flight networks and routes will be determined with consideration for demand for air transportation services, fulfillment of technical qualifications for flight operation and airport facilities, provision of airport facilities in compliance with aviation safety and security serving all regions, and will take into

<sup>①</sup> Civil Aviation Act *supra* note 24, page 72.

<sup>②</sup> Civil Aviation Act *supra* note 24, page 123.

consideration the flight operation centre of each scheduled air transportation business entity and the integration of domestic and international routes.

In addition, Air Asia was obliged to inform consumers regarding the conditions and specification of services being provided,<sup>①</sup> whether full services, medium service or no frill services. Full service means that during the flight, the passengers are given food and beverages, snacks, and the use of an executive lounge for business class and first class passengers. A medium level of service includes provision of light food (snacks) during the flight and other facilities such as executive lounges for passengers holding certain classes of tickets, whilst no - frill services have only one class of service, without any provision of food or beverages, snacks or an executive lounge. With a no - frill service, baggage can generally only be checked for a fee.

#### d. Air Asia QZ 8501's Permit

Under Article 6 of the Chicago Convention of 1944,<sup>②</sup> the Government of the Republic of Indonesia (ROI) issued the Civil Aviation Act of 2009. Under the Civil Aviation Act of 2009, the MOC is authorized to issue permits. Commercial air transport activities are performed by business entities in the field of national commercial air transportation. Business permits are issued by the MOC after the airlines fulfillment of administrative requirements, evidence of capital already deposited and business plan includes type(s) and total number of aircraft, core business, marketing aspects, human resources and economic and financial aspects. In addition, international commercial air transportation implemented other than by schedules, domestic non - scheduled, general aviation, technical landings, ferry flights to or from other country must obtain flight approval as well.<sup>③</sup> Except flight approvals issued by the MOC, international non - scheduled flights to Indonesia must obtain diplomatic clearance from the Ministry of Foreign Affairs and security clearance from the Ministry of Defense.

Each flight approval holder must report the implementation of flight approval to

<sup>①</sup> Art 97(5).

<sup>②</sup> Article 6 of the Chicago Convention of 1944 provides that no scheduled international air services may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

<sup>③</sup> *DGAC Decree Concerning Flight Approval*, [ DGAC Decree No. SKEP/251/XII/2008 dated 17 December 2008 ].

the Director General of Air Communications ( DGAC ), Chief of regional communications, and airport administrator. The report must contain the date of implementation, type of aircraft, nationality and registration mark, flight number for scheduled air transport, routes, number of flight approval, total passengers and cargo carriage and remarks.

In connection with the Air Asia QZ 8501 crash, the flight permit of Air Asia QZ8501 was found in the DGAC letter Number AU 008/30/6/DJU – DAU – 2014 dated 24 October 2014. In accordance with this letter, Air Asia QZ8501 used Airbus A – 320 – 200, scheduled for Monday, Tuesday, Thursday and Saturday departures at 0650 local time from Juanda Airport, Surabaya destined for Singapore, but in practice Air Asia QZ8501 from Surabaya left for Singapore on Sunday at 0536 local time. In accordance with the above – mentioned, Air Asia QZ8501 had to obtain flight approval taking into account that Air Asia QZ8501 was other than as scheduled. In this regard, on behalf of the MOC, the DGAC issued flight approval or flight permit Decree No. KP. 6 of 2012.<sup>①</sup> No flight permit is issued by the DGAC unless IDSC provides information regarding available slot times at the airport.

#### e. Air Navigation Service Provider Agency (ANSPA) and Air Asia QZ8501

The Government of the ROI is responsible for flight air navigation service operations for aircraft operated within the air service being served. In order to operate flight air navigation services, the Government of ROI has established an Air Navigation Services Provider Agency ( ANSPA ). This ANSPA has to prioritize aviation safety, be non – profit making, and be financially independent, and costs charged to users must be used for investment and cost recovery. The ANSPA was established by and reports to the MOC.<sup>②</sup> The legal status of the ANSPA is a state public services enterprise ( Perusahaan Umum – Perum ). Under this provision, the Government of the ROI issued Government Regulation Number 77 of 2012.<sup>③</sup>

Based on the Government Regulation Number 77 of 2012, ANSPA is obliged to

<sup>①</sup> *DGAC Decree Concerning Rules and Procedure of Indonesian Domestic Slot Coordination* [ Decree No. KP 6 of 2012 ].

<sup>②</sup> Article 271 of Civil Aviation Act of 2009/.

<sup>③</sup> *Regulation Concerning the Establishment of Indonesian Air Navigation Provider Agency* [ Reg. No. 77 of 2012, dated... ].

provide aircraft air navigation services from first communication contact until the ending of communication contact between the pilot in command and the flight air navigation facilities and personnel. The ANSPA for flight air navigation service operations must possess standard operating procedure, operate and maintain the reliability of air navigation facilities according to international standards, employ air navigation personnel who have competency licenses or certificates; and possess an oversight and control mechanism for service quality assurance.<sup>①</sup> The ANSPA for aviation service operations must divert flight routes of aircrafts, helicopters, or certain types of civil aircraft that do not meet flight air navigation requirements. Further provisions regarding diversion of flight routes by flight navigation operation will be issued by the MOC.

In relation to the Air Asia QZ8501, taking into account the legal status of ANSPA as a state public service, ANSPA is not liable for damage sustained in the event of the destruction of loss of, or of damage to, any registered luggage or any goods, belonging to the passengers, or consignors or consignees negligence by ANSPA personnel in the handling of aircraft or in air navigation services will be subject to administrative sanctions such as warnings.

#### f. Airport Operator and Air Asia QZ8501

Before the establishment of the Air Navigation Services Provider Agency (ANSPA), airtraffic services (ATS) was provided by the airport operator (PT Angkasa Pura I). The legal status of PT Angkasa Pura I was a profit - making State - Owned Enterprise limited company profit - making, for which reason PT Angkasa Pura I as the airport operator was liable for damage sustained in the event of the destruction of loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by Air Asia within the airport. However, after the establishment of ANSPA and air navigation services provided by ANSPA, PT Angkasa Pura I as the airport operator was no longer liable for damage sustained by the passengers or consignors. The liability of the airport operator (PT Angkasa Pura I) would have been based on the contractual relation between Air Asia and the airport operator (PT Angkasa Pura I).

<sup>①</sup> Article 272 of the Civil Aviation Act of 2009.

#### g. Insurance and Passengers

There are three kinds of insurance: voluntary insurance, and mandatory insurance under Act Number 33 Year 1964<sup>①</sup> and legal liability insurance. With regard to voluntary insurance, if a passenger buys the insurance premium, the insurer must automatically compensate the passenger concerned. Passengers will not get compensation based on Act Number 33 Year 1964, taking into account that passengers had no legal ground to buy mandatory insurance because Air Asia QZ8501 was on international flight. It is worthwhile to note here that tariff component calculated in Article 126 of the Civil Aviation Act of 2009<sup>②</sup> does not apply to international flights, but only to domestic flights.

With regard to legal liability, the Warsaw Convention of 1929 does no mention obligation of an air carrier to insure itself against liability, but most air carriers do insure against liability. If Air Asia insured itself liability, the insurer will compensate the passengers on behalf of Air Asia, but if the insurer proven that the damage is caused by Air Asia's willful misconduct or by such a default on its part as, according to the law of the court seized of the case, is considered to be equivalent to willful misconduct, the insurer may refuse to pay compensation to the passengers. In this event, a dispute will arise between the insurer and Air Asia.

Whatever the result of any such dispute between theinsurer and Air Asia, the passengers will still have the right to compensation and Air liable to the passengers, but the compensation will be limited to the sum of 125,000 francs, equivalent to US \$ 10,000 (equivalent to ten thousand US \$ ). According to information made known to the author of this article, Air Asia QZ8501 has agreed to voluntary compensate the passengers in the amount of IDR 1,250,000,000 (IDR 1.25 billion). The passengers will, however still have the opportunity to prove the negligence of Air Asia QZ8501.

<sup>①</sup> *Act Concerning Mandatory Insurance Premiums*, Act. No. 33 of 1964 [ Act. No. 33 of 1964 ].

<sup>②</sup> Article 126 of the Civil Aviation Act of 2009 provides "The passenger tariff for economy class for passengers and cargo shall be calculated based upon the component of distance tariff, tax, mandatory insurance premium (emphasis added) and surcharge."

## V. The Montreal Convention of 1999

### a. Introduction

The Diplomatic Conference which was held by the ICAO at Montreal on May 10 – 28, 1999 replaced six different legal System instruments,<sup>①</sup> with a single legal instrument. Victims of international aircraft accidents will be better protected and compensated following the historic air law agreement embodied in the Montreal Convention concluded on May 28, 1999 among the Contracting States of ICAO at Montreal, Canada. The new instrument adopted by the Diplomatic Conference on 28 May 1999 is a separate and distinct new Montreal Convention – not an amendment of the Warsaw System by means of a further Protocol.

The ICAO succeeded in adopting a new regime for air carrier liability, replacing the Warsaw Convention of 1929 and five other related legal instruments with a single convention that provided for unlimited liability in relation to passengers. The Montreal Convention of 1999 is the result of the efforts of the ICAO to reform the Warsaw Convention of 1929 through wholesale amendment rather than inter – carrier agreement.<sup>②</sup> The stated goals of the Montreal Convention of 1999 were the need to modernize and consolidate the Warsaw Convention of 1929 and related instruments and recognition that collective state action for further harmonization and codification of

<sup>①</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at Warsaw on 28 September 1955; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955, signed at Guatemala City, on 8 March 1971; Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, signed at Montreal on 25 September 1975; Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975; Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 2 September 1955, and at Guatemala City on 25 September 1971; Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975, see Paul Steven Dempsey, Ed. Annals of Air and Space Law, Vol. XXX – 2005 Part I. Toronto : The Carswell Company Ltd.

<sup>②</sup> Prof. Dr. Doo Hwan Kim.

certain rules governing international carriage by air through a new Convention was the most adequate means of achieving an equitable balance of interests.

The Montreal Convention of 1999 is basically the consolidation of the original Warsaw Convention of 1929 and the subsequent protocols, namely, the Hague Protocol of 1955, the Montreal Protocol Nos. 3 and 4 of 1975, the Guatemala City Protocol of 1971, and the Guadalajara Supplementary Convention of 1961. Victims of international air accidents will be better protected and compensated as a result of the historic air law agreement adopted by among the Contracting State's delegates of ICAO. From May 11 to 28, 1999 the ICAO headquarters at Montreal hosted a Diplomatic Conference convened to consider, with a view to adoption, a Draft Convention intended to modernize and replace the instruments of the Warsaw system. Some 525 participants from 121 Contracting States of ICAO attended,<sup>①</sup> one non – contracting state, 11 observer delegations from international organizations, a total of 544 registered participants took part in the historic three – week conference which began on May 10.

The Montreal Conference was a success since it adopted a new *Convention for the Unification of Certain Rules for International Carriage by Air*. The new Montreal Convention adopted by the diplomatic conference entered into force as soon as it had been ratified by 30 states. Fifty – two states including USA, China, EU etc. signed the new Montreal Convention at the conclusion of the historic diplomatic conference. This Montreal Convention entered into force on November 4, 2003. At present, 108 countries including the United States, the United Kingdom, Canada, France, Germany, Korea, Japan, Italy, China, Sweden, Brazil, Spain etc. are affiliated with the 1999 Montreal Convention.<sup>②</sup>

### b. Scope of Application

The Montreal Convention of 1999 applies to carriage of persons, baggage or cargo performed by aircraft for reward in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two State Parties, or within the territory of a single state party if there is an agreed stopping

<sup>①</sup> While this is a very impressive attendance, it represents only 65.4% – less than two – thirds – of the total ICAO membership which now stands at 185.

<sup>②</sup> [http://www.icao.int/secretariat/legal/List%20of%20Parties/Mt99\\_EN.pdf](http://www.icao.int/secretariat/legal/List%20of%20Parties/Mt99_EN.pdf).

place within the territory of another state, even if that state is not a state party. Carriage between two points within the territory of a single state party without an agreed stopping place within the territory of another state is not international carriage for the purposes of the Montreal Convention of 1999. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

Carriage to be performed by several successive carriers is deemed, for the purposes of Montreal Convention of 1999, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under form of a single contract or of a series of contracts, and it does not lose its international character entirely because one contract or a series of contracts is to be performed entirely within the territory of the same State. Montreal Convention of 1999 applies also to combine carriage subject to the terms contained therein.

#### c. Contents of Montreal Convention of 1999

Montreal Convention of 1999 consist of seven chapters with fifty seven articles such as chapter I – general Provisions; chapter II – Documentation and Duties of the parties Relating to the passengers, Baggage and Cargo; Chapter III – liability of the carrier and Extent of Compensation for damage; Chapter IV – combined Carriage; Chapter V – Carriage by Air Performed by a Person Other than contracting carrier; chapter VI – other Provisions; and chapter VII – final Clauses. With regard to compensation and jurisdiction provided in Article 21 of Montreal Convention of 1999 respectively.

#### d. Compensation

The carrier is liable for damage sustained in case of death or bodily injury of passengers upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. In case of death or injury of passengers, the compensation will not exceed 100,000 Special Drawing Rights (SDR) for each passenger, and the carrier can not exclude or limit its liability.

The carrier is not liable for damages in case of death or injury of passengers, to the extent that they exceed for each passenger 100,000 (SDR) if the carrier proves that (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; (b) such damage was solely due to the negligence or

other wrongful act or omission of a third party. With regard to the Air Asia QZ8501 crash, the compensation does not apply taking into account that Indonesia has not ratified the Montreal Convention of 1999.

#### e. Jurisdiction

With regard to jurisdiction, an action for damages must be brought, at the option of the plaintiff, in the territory of one of the State Parties, either.

(a) before the court of the domicile of the carrier; or

(b) before the court of its principal place of business; or

(c) before the court where it has a place of business through which the contract was made; or

(d) before the court at the place of destination.

In addition, in respect of damage resulting from the death or injury of a passenger, an action may be brought in the territory of a state party in which at the time of the accident the passenger had his or her principal and permanent residence and or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement. In this regard "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air, whilst "principal and permanent residence" means the one fixed and permanent abode of the passenger shall not be the determining factor in this regard. In relation to Air Asia QZ8501 the fifth jurisdiction does not apply because Indonesia has not yet ratified Montreal Convention of 1999.

### VI. Warsaw Convention of 1929

#### a. Introduction

The Warsaw Convention entitled: "A Convention for the Unification of Certain Rules Relating to International Carriage by Air", was signed at Warsaw on October 12th, 1929, entered into force on February 13th, 1933, and as of June 2005, the

convention has 151 parties and the Protocol has 136 parties.<sup>①</sup>

#### b. Scope of Application

The Warsaw Convention of 1929 applies to any carriage of persons, luggage or goods performed by aircraft for reward in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of Warsaw Convention of 1929. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

Carriage to be performed by several successive air carriers is deemed, for the purposes of this convention, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party shall not be deemed to be international for the purposes of Warsaw Convention of 1929. It is worthwhile to note here that the Warsaw Convention of 1929 does not apply to international carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation, nor does it apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business. In this case, Air Asia QZ8501 was subject to the

<sup>①</sup> In this regard, by a note dated 2 February 1952, Indonesia declares that it considered itself bound by the Convention; before Indonesia became independent, acceptance of the convention was effected by the Netherlands on 1 July 1933. See Dempsey P. S. Ed, *Annals of Air and Space Law, Volume XXX – Part I – 2005*. Toronto : The Carswell Company Ltd., page 368.

Warsaw Convention of 1929, taking into account that Air Asia QZ8501 was international carriage between the two High Contracting Parties such as Indonesia and Singapore, both of which are sovereign States.

#### c. Content of Warsaw Convention of 1929

The Warsaw Convention of 1929 consists of five chapters and 41 articles: Chapter I Scope – Definition; Chapter II Document of Carriage includes passenger ticket, luggage ticket, air consignment note; Chapter III Liability of the Carrier; Chapter IV Provisions Relating to Combined Carriage; and Chapter V General and Final Provisions.

#### d. Compensation

The carrier is liable for damage sustained in the event of the destruction of, loss of, or damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air. Carriage by air comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

The liability of the carrier for each passenger is limited to the sum of 125,000 francs, more or less equivalent to US \$ 10,000 (ten thousand US dollars). Where, in accordance with the law of the court seized of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the payment shall not exceed 125,000 francs, more or less equivalent to US \$ 10,000 (ten thousand US dollars). Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.<sup>①</sup> In accordance with information known by the author, Air Asia has agreed to compensate passengers the amount of IDR 1.25 billion for each passenger.

For registered luggage and goods Air Asia liability is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that sum is greater than the actual

<sup>①</sup> Article 22 paragraph(1) of the Warsaw Convention of 1929.

value to the consignor at delivery.<sup>①</sup> As regards objects of which the passenger took charge himself the liability of the carrier is limited to 5,000 francs per passenger.<sup>②</sup>

#### e. Unlimited Liability

The carrier will not be entitled to avail himself of the provisions of Warsaw Convention of 1929 which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court seized of the case, is considered to be equivalent to willful misconduct, such as the air carriers does not provide enough oxygen during flights. Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.<sup>③</sup> In the case the passengers can prove that the damage was caused by the carrier's willful misconduct or by such default on his part, in accordance with the law of the court seized of the case, the liability of the air carrier is unlimited compensation, as was the case of the Singapore Airlines aircraft accident in Taipei in 2000. The passengers were awarded some US \$ 15,000,000.00 (fifteen million US dollars).

#### f. Jurisdiction

With regard to jurisdiction, an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination, whilst procedure of an action shall be governed by the law of the court seized of the case. In relation to the Air Asia QZ8501, an action for damage could be brought to the court of Surabaya (place of departure), court of Jakarta (principal place of business), court of Singapore (place of destination) or any other place where the carrier is ordinary resident.<sup>④</sup> The Warsaw

Convention of 1929 is applicable to Air Asia QZ 8501 taking into account that Indonesia<sup>①</sup> and Singapore<sup>②</sup> have ratified the convention concerned.

### VII. Conclusion

Based on the above mentioned evaluation, as far as the Air Asia QZ8501 crash is concerned, like any other member state of ICAO, the operation of Air Asia QZ8501 was subject to domestic and international law. The domestic law applicable was public law (administrative law) such as aircraft ownership, single majority share holders, business permits, flight networks and routes of air transportation, monthly activity reports, flight permit of Air Asia, information to the consumers regarding the conditions and specification of services being provided by Air Asia, air navigation service, slot time coordination, whilst the international law applicable was private law such as liability of Air Asia, compensation, jurisdiction, insurance etc.

① Article 22 paragraph(2) of the Warsaw Convention of 1929.

② Article 22 paragraph(3) of the Warsaw Convention of 1929.

③ Article 25 of the Warsaw Convention of 1929.

④ Article 28 of the Warsaw Convention of 1929.

① By a note dated 2 February 1952, Indonesia declared that it considered itself bound by the Convention (before Indonesia became independent, acceptance of the Convention was effected by the Netherlands on 1 July 1933. See Milde M. ,Ed. ,*Annals of Air and Space Law, Volume XVIII – 1993 Part II*. Toronto : The Carswell Company, Ltd. ,page 383.

② Singapore adhered to the Hague Protocol 1955 on 6 November 1967, see Milde M. ,Ed. ,*Annals of Air and Space Law, Volume XVIII – 1993 Part II*. Toronto : The Carswell Company, Ltd. ,page 377.