

# AirAsia Flight 8501 Disaster: Applying International Conventions

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On Dec. 28, 2014, AirAsia Flight 8501, an Airbus A320 carrying seven crew members and 155 passengers, departed Juanda International Airport in Surabaya, Indonesia, bound for Singapore's Changi Airport. After climbing to cruise altitude, the crew requested permission to deviate from the airplane's flight path and to climb due to poor weather conditions.<sup>1</sup> Air traffic control gave permission for the turn, but was not able to grant the request for the climb because of conflicting air traffic in the area. That was the last anyone heard from the flight. After this communication the jet disappeared from radar and crashed into the Java Sea.

It will be some months before we learn what caused Flight 8501 to crash. It is not too soon, however, to examine the different laws that may govern the rights of the victims' families against AirAsia.



The AirAsia disaster highlights a continuing problem in international aviation law caused by a relic: the 1929 Warsaw Convention, which provided a uniform liability standard and a very low liability limit of 125,000 French francs, about \$8,300 in 1929. The modern treaty governing international aviation, known as the Montreal Convention, which most relevantly increased the Warsaw Convention's liability limit and required the airline to establish that it was not negligent in order for the new limit to be enforceable, was opened for signature in 1999 and came into force in 2003.

But because Indonesia never signed the Montreal Convention the potential recovery for passengers with round-trip tickets to and from Indonesia, or even one-way tickets from Indonesia to Singapore, are subject to the Warsaw Convention. Indeed, because Indonesia did not sign protocols that raised the Warsaw Convention's liability limit nor did AirAsia join any of the voluntary airline initiatives to increase the limit, the wrongful death actions for many AirAsia passengers may be subject to the unreasonably low limit of about U.S. \$8,300 dating back to 1929 before commercial travel became established. To exceed that arbitrary limit, the surviving families of many passengers may need to prove that the airline committed willful misconduct in causing the tragedy.<sup>2</sup>

Not all of AirAsia Flight 8501's passenger families, however, will face the Warsaw Convention's 1929 liability limit. For instance, those passengers travelling on round-trip tickets to and from Singapore will have their rights against the airline adjudicated under the Montreal Convention to which Singapore is a party. Under the Montreal Convention, the airline is absolutely liable for provable compensatory damages of up to 113,100 Special Drawing Rights (SDRs), approximately U.S. \$162,000, and is liable for damages without limit unless it can prove that it was not negligent.

Thus, under international law, no matter what their nationality, some families will have far better rights of recovery than other families based solely on the itinerary listed on their passenger's ticket the "contract of carriage."

## The Warsaw Convention

The Warsaw Convention was enacted in 1929 at a time when international commercial aviation was in its infancy and flying internationally was far less safe than it is today.<sup>3</sup> The hazards and potential liability of airlines to passengers put the entire future of the industry in doubt. To address the issues, international conferences on air law were held in Paris in 1925 and in Warsaw in 1929. The 1929 Conference gave us the Warsaw Convention, which governed international aviation liability law for the rest of the 20th century.

The Warsaw Convention was intended to protect the fledgling international aviation industry by providing a uniform law and, most importantly, by limiting an airline's liability to a passenger or his or her family. The Warsaw Convention applies to international flights between two nations that have joined the Convention. It can also apply to round-trip flights from and to a nation that adheres to the Convention even if the other nation or nations on the flight itinerary do not.<sup>4</sup>

Under the Warsaw Convention an airline is liable for provable damages caused by the death or injury of a passenger when an accident takes place on board the flight or in the process of embarking or disembarking.<sup>5</sup> The liability of the airline, however, is limited to 125,000 French francs, worth about \$8,300 in 1929 dollars. Since the 125,000 francs limit was established in 1929, France devalued its currency in 1960 (100 old French francs to 1 new French franc) and embraced the Euro in 2002, making it a difficult task to determine what the limit is today in any current currency. (The problem of the limit being expressed in old French francs was solved in 1975 by the introduction of the Montreal Additional Protocol no. 2, which changed the limit to

16,600 Special Drawing Rights (SDR), a form of currency established by the International Monetary Fund, but Indonesia never signed or otherwise adhered to the protocol.)

## The Hague Protocol

The Warsaw Convention limit was revisited in 1955 in a protocol that was adopted after the Hague Conference of that year. In relevant part, the Hague Protocol doubled the Warsaw Convention limit from FF125,000 to FF250,000. The Hague Protocol came into effect in 1960 after 30 nations ratified it, but since Indonesia did not agree to the Protocol, the "old Warsaw" limit continued in force for many flights to and from Indonesia.

## The Montreal Agreement

In 1965, the United States announced its renunciation of the Warsaw Convention because the U.S. was dissatisfied over the Convention's low limit even after it was increased by the Hague Protocol. Two weeks before the renunciation was to take effect, a meeting took place in Montreal between the U.S. State Department, the U.S. Civil Aeronautics Board and representatives of major international airlines that resulted in an agreement by which the airlines would voluntarily raise the Warsaw Convention's Article 22 liability in passenger injury and death cases to \$75,000.<sup>6</sup>

The Montreal Agreement is not a modification of the Warsaw Convention, but rather a "special contract" authorized by Article 22(1) of the Warsaw Convention by which the airline and passengers may agree to higher liability limits in the contract of carriage. Most major international airlines signed the agreement, and any international airline flying to the United States was required to sign it in order to obtain a Foreign Air Carrier Permit to operate in the United States. AirAsia, which does not operate flights to the U.S. and did not even exist when the Montreal Agreement was put in place, is not a signatory.

## IATA Agreement

After the Montreal Agreement, which was intended as an interim fix to the problem of the Warsaw Convention's unconscionably low liability limit, there was continuing pressure to reform the Warsaw Convention, particularly with respect to its liability limit. This led to the International Air Transport Association (IATA), the trade association for international airlines, to draft agreements that would waive the Warsaw Convention's liability limit for compensatory damages in personal injury and death cases while preserving an airline's right to raise the Warsaw Convention's Article 20 defense that all necessary measures were taken to avoid an accident.

The IATA agreement followed the historic initiative of Japanese airlines to waive the Warsaw Convention's liability limit. The Japanese Initiative grew out of Japan's dissatisfaction with the low Warsaw Convention limit and compensation disparities between claims limited by the Warsaw Convention and those that were not.<sup>7</sup>

Under the Japanese Initiative and the IATA Agreement the airlines were liable for full provable compensatory damages without limit unless an airline was able to prove that it took all necessary measures to avoid the accident which limited its exposure to 100,000 SDRs.<sup>8</sup>

The drafters of the Montreal Convention followed the lead of the Japanese airlines and IATA, but made it somewhat easier, at least in theory, for an airline to limit its liability by only requiring that the airline prove that it was not negligent or that the loss was caused by the negligence of a third party, rather than requiring the airline to prove that it took "all necessary measures" to avoid an accident.<sup>9</sup> The drafters believed that a negligence standard was well-known and easier for courts to consider, while the "all necessary measures" defense was not.<sup>10</sup>

While most major international airlines signed IATA, AirAsia did not.

## The Liability of AirAsia

AirAsia will be liable to some passenger families under the Warsaw Convention and to other passengers under the Montreal Convention. Which convention applies will depend on the passenger's ticket.

***Passengers With Round-Trip Tickets to Singapore.*** The families of passengers with round-trip tickets to Singapore and/or other nations that adhere to the Montreal Convention do not have to prove the airline's negligence nor even the cause of the crash because under the Montreal Convention an airline becomes liable when an "accident" causes death or bodily injury.<sup>11</sup> The term "accident" is not defined in the Montreal Convention. The Supreme Court determined that "accident," as used in the identical provision in the Warsaw Convention, means "an unexpected or unusual event or happening that is external to the passenger."<sup>12</sup> This definition encompasses a plane crash, whether due to malfunction, pilot error or a terrorist attack.<sup>13</sup>

Under the Montreal Convention, the airline's liability is strict for provable compensatory damages up to the 113,100 SDRs limit and the carrier is liable for provable compensatory damages above that amount unless "the carrier proves" that the damage was not "due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or was solely due to the negligence or other wrongful act or omission of a third party."<sup>14</sup>

To date, no airline has successfully limited its liability under the Montreal Convention by proving that it was not negligent or was otherwise free from fault in a major aviation accident.

***Passengers With Round-Trip Tickets to Indonesia or One-Way Tickets to Singapore.*** The Warsaw Convention will govern the airline's liability to families of passengers with tickets to and from Indonesia or one-way tickets from Indonesia to Singapore. The families of these passengers will face the Warsaw Convention's liability limit and, if the airline and its insurers decide to take advantage of the limit, will have to establish that the airline committed willful misconduct in order to recover above the limit.

Airlines have successfully defended against claims of willful misconduct, but they have also lost major cases. Most notably, Pan Am was found guilty of willful misconduct in not preventing terrorists from getting a bomb on Pan Am Flight 103 and that finding permitted the Pan Am Flight 103 families to recover their provable compensatory damages from the airline.<sup>15</sup>

It is highly questionable whether it is in an airline's interest to invite willful misconduct litigation by attempting to limit a passenger family's recovery to the Warsaw Convention's liability limit. The defense costs and the media attention may cause the airline to compensate the families rather than attempt to limit their recoveries to the limit put in place in 1929.

In fact, according to the Wall Street Journal, AirAsia CEO Tony Fernandes has promised that the airline will provide financial assistance and will not "hide behind any convention."<sup>16</sup> What that means, however, is not entirely clear. For instance, will AirAsia's insurer voluntarily agree to waive a viable legal defense? If not, the families will be at a distinct disadvantage and will be under undue pressure to accept any settlement offer above the Warsaw Convention limit because their only other option would be to sue and seek to hold the airline accountable for willful misconduct.

## **Domestic Laws**

The international laws are not the only ones that will affect the rights of families of AirAsia Flight 8501 passengers. Neither the Warsaw Convention nor the Montreal Convention contains a damages law and the courts having jurisdiction over the claims will have to decide what damages law governs each plaintiff's claim. Given that different jurisdictions may have very different damages laws and standards of recovery, the recovery levels would likely differ widely and maybe based not on the damages facts or the value of the decedent's life, but rather on the compensable losses in particular jurisdictions.

Where a passenger happened to call his or her home or, in some cases, the place of the crash can have a large effect on the recoverable damages. Therefore, the AirAsia families' rights are affected by differences in both international and domestic laws. Under the different laws recoveries can conceivably range from under \$10,000 to many millions of dollars.

On Dec. 8, 2015, the Wall Street Journal reported that AirAsia would compensate the passenger families almost \$100,000, an amount that is consistent with Indonesia law and what the Indonesian government had asked the airline to provide.<sup>17</sup> This low damages that the law of Indonesia allows will mean that the Indonesian families subject to law will be devastated financially as well as emotionally by the tragedy.

## **Conclusion**

The AirAsia disaster demonstrates the patchwork of international and domestic laws that apply to the rights of victims of international aviation accidents.

Hopefully, given AirAsia's comments to the Wall Street Journal, the differences in the international laws outlined in this article will prove to be academic and the 1929 Warsaw Convention liability limit will not be enforced. News reports suggest that the airline will pay \$124,000 to each passenger's family based on Indonesia law.<sup>18</sup> Even if this occurs, however, there will remain the anomaly raised by nations who have not joined the Montreal Convention and airlines that have not agreed to waive the Warsaw Convention limits.

There are 152 parties to the 1929 Warsaw Convention,<sup>19</sup> but only 109 parties to the Montreal Convention.<sup>20</sup> Only 108 international airlines have signed IATA.<sup>21</sup> This means 43 "Warsaw Convention" nations remain and that AirAsia is not alone in not agreeing to waive the Warsaw Convention limits. Travelers to and from these nations or on these airlines should consider buying aviation insurance or better yet booking alternative arrangements. The International Civil Aviation Organization and its member states, including the United States, should put pressure on the nations so that the Montreal Convention is adopted worldwide and that passengers and their families are not left to rely on an airline's goodwill after a disaster.

### **Endnotes:**

1. [www.facebook.com/notes/AirAsia/updated-statement-8z8501/10/5152667884908742](http://www.facebook.com/notes/AirAsia/updated-statement-8z8501/10/5152667884908742).

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, Poland, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C.A. app. at 430 (Warsaw Convention.)

Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature on May 28, 1999, reprinted in S. Treaty. Doc. No. 106-45, 2242 U.N.T.S. 350.

Warsaw Convention Article 25.

3. Kreindler, Aviation Accident Law, 10.02 (Matthew Bender 2005).

4. Warsaw Convention Article 1(1)-(2).

5. Warsaw Convention Article 17.

6. Kreindler, Aviation Accident Law 10.02[2][b].

7. Julian Herminda, The New Montreal Convention: The International Passenger's Perspective, Air & Space Law 26 (2001) p. 150.

8. Kreindler, Aviation Accident Law, 10.02[d] (Matthew Bender); Naneen K. Baden, Comments: The Japanese Initiative on the Warsaw Convention 61 J.Air.L. Com. 437 (1995)

9. *Cortes v. American Airlines*, 177 F.3d 1272, 1288 (11th Cir. 1999)).

10. Id.

11. Montreal Convention Article 17.

12. *Air France v. Saks*, 470 U.S. 392, 405-406 (1985).

13. Id.

14. Montreal Convention Article 21.

15. *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F2d 1267 (2d Cir. 1991).

16. See [www.wsj.com/articles/AirAsia-families-offered-compensation-14020475052](http://www.wsj.com/articles/AirAsia-families-offered-compensation-14020475052). According to the article, AirAsia has offered AirAsia victim families \$24,000 each as initial payment.

17. [www.waj.com/articles/Indonesia-finds-tail-of-airasia-flight-8501-1420608845](http://www.waj.com/articles/Indonesia-finds-tail-of-airasia-flight-8501-1420608845).

18. [www.com/2500/01/07/asia/airasia-disaster](http://www.com/2500/01/07/asia/airasia-disaster).

19. See [www.icao.int/secretariat/legal/List of Parties/WC-HP](http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP).

20. See [www.icao.int/secretariat/legal/List of Parties/Mtl99](http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99).

21. See [www.iata.org/whatwedo/workgroups/Documents/legal/mia-signatory-list.pdf](http://www.iata.org/whatwedo/workgroups/Documents/legal/mia-signatory-list.pdf).

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