

# LEGAL ISSUES SURROUNDING AIRLINE ALLIANCES AND CODESHARE ARRANGEMENTS: INSIGHTS FOR THE INDONESIAN AND ASEAN AIRLINE INDUSTRIES

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## Abstract

*Following the liberalization of the aviation industry, airlines have been searching for a suitable business model that will support their expansion. Today, the business concept of the airline alliance is deemed as the correct answer, as many large airlines have joined to secure their business. Codeshare arrangements could be considered as the perfect implementation of an airline alliance. Alliances are more flexible than cross-border mergers and takeovers due to national restrictions, making such alliances legally viable and therefore preferable. However, codeshare arrangements have further legal implications that have led to classification of carriers and ended up as a liability issue. Several conventions and protocols, which are known as the Warsaw-Montreal regime, are applicable to dealing with liabilities to protect airline passengers. Anti-competition and consumer protection issues are the other main issues. This article aims to analyze the legal issues surrounding the tragic code-shared Flight MH17 incident, while also mentioning the rights of the Indonesian passengers' relatives. Compensation issues in the recent case are discussed. Finally, insights into the legal risks faced by codeshare arrangements for the rapidly growing Indonesian and Southeast Asian airline markets are also provided.*

**Keywords:** *airline alliance, codeshare arrangements, liability, compensation, consumer protection*

## Abstrak

*Seiring dengan liberalisasi industri penerbangan, berbagai maskapai penerbangan tengah mencari model bisnis terbaik guna berekspansi. Dewasa ini konsep aliansi antar maskapai penerbangan sebagaimana tengah dilakukan banyak maskapai besar dianggap sebagai suatu solusi. Pengaturan kode penerbangan bersama diyakini sebagai perwujudan sempurna akan implementasi konsep aliansi antar maskapai. Ia lebih fleksibel dari tindakan penggabungan (merger) maupun pengambilalihan (takeover) lintas batas negara yang umumnya terkendala berbagai batasan menurut hukum nasional masing-masing; lantas menjadikannya sebagai preferensi utama. Namun, konsep pengaturan kode penerbangan bersama juga memiliki implikasi hukum dimana berujung kepada klasifikasi maskapai penerbangan beserta pertanggungjawabannya yang kompleks. Saat ini terdapat beberapa konvensi dan protokol guna melindungi hak para penumpang maskapai penerbangan sebagaimana dikenal sebagai rezim Warsaw-Montreal. Persoalan seputar hukum anti-kompetisi maupun perlindungan konsumen terkait pengaturan kode penerbangan bersama juga akan dibahas. Artikel ini akan menganalisis isu hukum seputar insiden tragis Penerbangan MH17 beserta hak-hak keluarga penumpang berkewarganegaraan Indonesia; termasuk perihal pemberian ganti kerugian. Pada akhirnya akan disajikan suatu saran, baik kepada maskapai Indonesia maupun ASEAN, terkait potensi permasalahan hukum dibalik kode penerbangan bersama.*

**Kata kunci:** *aliansi maskapai penerbangan, pengaturan codeshare, tanggung jawab, kompensasi, perlindungan konsumen*

## I. INTRODUCTION

The airline industry has grown rapidly since the beginning of this century as a result of market liberalization in the United States (US) and Europe, followed by that in the Asia-Pacific region. This phenomenon is interesting in the context of the airlines' long history as a highly regulated and nationalized industry, where markets have been sealed off and competition has been limited and practically non-existent.<sup>1</sup> Further research and implementation toward efficiency in airline mass production and fuel consumption supported by world economic growth has led to the increase of aircraft demand from all over the world, particularly in the Asia-Pacific region. This situation has encouraged airlines to expand their business throughout the world.

When expansion has exceeded market equilibrium, the prospect is not as bright as it used to be, thereby endangering the airlines' profitability within the industry. Many European airlines are experiencing financial difficulties and a consolidation process is needed because an extremely large number of airlines may be playing an active role in European markets.<sup>2</sup> One way to solve this issue is by conducting mergers and acquisitions (M&A). However, in practice, mergers and takeovers have been limited to airlines of the same nationalities.<sup>3</sup> Governments that represent the interest of states in international air transport, either as majority or minority shareholders, naturally exert their best effort to protect their flag carriers.<sup>4</sup> The main reason for a government's decision to intervene in the aviation sector is to guarantee that the flag carrier maintains its effective control and market.

National laws with strict restrictions in nationality and foreign investment have been enacted and are continuously revised from time to time. The latter situation has limited M&A options. Airlines have responded to this legal constraint by forming alliances between themselves to deal with restrictive laws. The other main reason for airlines to form alliances are economic considerations where financing airlines needs a huge investment<sup>5</sup> while the industry profitability is low.

The nature of airline alliances could be expressed as a statement of common interest, coordination of frequent flyer programs; interlining to block space agreements<sup>6</sup>; or coordination of marketing, codeshare arrangements, franchising,

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<sup>1</sup> Karsten Fröhlich and Hans-Martin Niemeier, "Competition among European Airlines: On the Role of Product Differentiation" in *Liberalization in Aviation: Competition, Cooperation and Public Policy*, edited by Peter Forsyth (Farnham: Ashgate Publishing Limited, 2013), p. 59.

<sup>2</sup> Xavier Fageda, "Airline Competition in Liberalized Markets: Effects on Thin Routes" in *Liberalization in Aviation: Competition, Cooperation and Public Policy*, edited by Peter Forsyth (Farnham: Ashgate Publishing Limited, 2013), p. 91.

<sup>3</sup> Peter P.C. Haanappel, "Airline Challenges: Mergers, Take-Overs, Alliances and Franchises," *Annals of Air and Space Law* XX, Issue I (1995): 180.

<sup>4</sup> Having a state flag carrier is mainly an Asian and European concept. The US does not have a designated one even though PanAm was considered as the country's *de facto* flag carrier in the past.

<sup>5</sup> Many US airlines went bankrupt as a result of inability to find investment partners with both capital and capacity to meet the requirements. Chia-Jui Hsu and Yu-Chun Chang, "The Influences of Airline Ownership Rules on Aviation Policies and Carriers Strategies," *Proceedings of the Eastern Asia Society for Transportation Studies Vol. V* (2005): 558-560.

<sup>6</sup> Blocked space agreements allocate the marketing carrier a certain number or percentage of reserved seats on flights provided by the operating carrier. Under a "hard" blocked space code-sharing arrangement, the revenue risk is borne by both, as operating and marketing carriers are responsible for the sale of their allocated number of seats. The marketing carrier has to pay the operating carrier the agreed financial contribution for the reserved seats independent of whether or not it succeeds in selling the blocked seats.

joint freight flights, joint services, equity links or investments, and joint ventures.<sup>7</sup> Airline alliances can also vary in the extent of their coordination and geographical coverage in the form of route-specific or even more complex alliances to coordinate cost-sharing and marketing initiatives between countries or regions.<sup>8</sup>

Today, codeshare arrangements are among the most popular forms of implementing airline alliances. This type of arrangement has established the so-called contracting (or marketing) and actual (or operating) carriers. Accordingly, this paper aims to analyze further legal implications of airline alliances and code-shared arrangements starting from liability of the parties, competition law, and consumer protection. The tragic Flight MH17 incident will be taken as an example that represents this condition.

Ultimately, learning from the business practices and valuable experiences of the European Union (EU) and the US, this study proposes insights and recommendations for the airline industries of Indonesia and other member countries of the Association of Southeast Asian Nations (ASEAN). The Indonesian flag carrier and other national airlines are facing new legal challenges due to code-shared arrangement implications. Failure to adapt means potentially shrinking from becoming regional or global players to mere spectators in the aviation world.

## II. AIRLINE ALLIANCES IN THE 21<sup>ST</sup> CENTURY

### A. The Three Musketeers of Today's Airline Alliances

Global airline alliances have developed in response to the economic demands of global markets and the opportunities provided by deregulation and liberalization initiatives.<sup>9</sup> These situations have inspired the establishment of cooperation between two or more airlines in a wide range of areas following the increased competition within the airline business.

An airline alliance can be defined as an agreement between two or more airlines to cooperate on a substantial level, which provides a network of connectivity and convenience for international passengers.<sup>10</sup> Indeed, liberalization, followed by open skies agreements that have removed or reduced cabotage restrictions in some parts of the world, have become the catalysts for the establishment of such alliances. In general, the advantages for airlines joining an alliance are as follows:<sup>11</sup>

- i. the ability to provide increased capacity and enter new markets without

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However, in the context of a "soft" blocked space agreement, the marketing carrier can return seats to the operating carrier according to the term concluded on a bilateral basis. "Code-Sharing Agreements in Scheduled Passenger Air Transport," [http://www.bwb.gov.at/SiteCollectionDocuments/ECA%20Code%20sharing%20agreement\\_final.pdf](http://www.bwb.gov.at/SiteCollectionDocuments/ECA%20Code%20sharing%20agreement_final.pdf), accessed 18 January 2018.

<sup>7</sup> It may also include coordination of flight scheduling, baggage handling, catering, ground services, maintenance, frequent flyer programs, and airport lounges where the airlines create a joint product for their customers. Sivakant Tiwari and Warren B. Chik, "Legal Implications of Airline Cooperation: Some Legal Issues and Consequences Arising from the Rise of Airline Strategic Alliances and Integration in the International Dimensions," *Singapore Academy of Law Journal* 13, no. 2 (2001): 297.

<sup>8</sup> *Ibid.*

<sup>9</sup> Kostas Iatrou and Lida Mantzavinou, "The Impact of Liberalization on Cross-border Airline Mergers and Alliances" in *Liberalization in Aviation: Competition, Cooperation and Public Policy*, edited by Peter Forsyth et al. (Farnham: Ashgate Publishing Limited, 2013), p. 244.

<sup>10</sup> Stephen W. Wang, "Do Global Airline Alliances Influence the Passenger's Purchase Decision?," *Journal of Air Transport Management* 36 (2014): 54, doi: <http://dx.doi.org/10.1016/j.jairtraman.2014.02.003>.

<sup>11</sup> Paul Stephen Dempsey, *European Aviation Law* (The Hague: Kluwer Law International, 2004), pp. 154-155.

- having to provide large capital expenditures for aircraft purchases or airport infrastructure;
- ii. the opportunity to generate thousands of new online city pair combinations;
  - iii. the ability to extend the reach and scope of frequent flyer programs to enhance consumer loyalty;
  - iv. the ability to capture market share from non-aligned competitors;
  - v. the ability to fix price with competitors in dominant markets;
  - vi. the opportunity to reduce airport handling, airport operations, selling and ticket costs as a result of scale and the sharing of support services;
  - vii. the opportunity to reduce travel agent commission costs as an impact of the carrier's market power; and
  - viii. the ability to pool costs and revenues to share risks and rewards.

At present, three main airline alliances dominate the industry, namely, OneWorld, SkyTeam, and Star Alliance. These alliances mostly consist of flag carriers; thus, it is little wonder if some members still receive support from their governments in the form of capital injections, subsidy or state aid, and airport slot priority. These major alliances accounted for 77%<sup>12</sup> of the world airline capacity in 2014 and, with 62 member airlines, represent more than 50%<sup>13</sup> of global capacity in 2016.

Airline alliances are sometimes seen as the solution to circumvent restrictive bilateral agreements and national laws, which generally restrict cross-border mergers or acquisitions and also cabotage; therefore, they have been characterized as "virtual mergers."<sup>14</sup> All over the world, foreign direct investments (FDI) in establishing an airline, either as a new subsidiary or the acquisition of a national airline, remains strictly regulated and more or less highly politicized. Airline alliances represent the only business arrangement that would allow airlines from different countries to serve the global market together.<sup>15</sup>

The Italian flag carrier, Alitalia, was among the first airlines to pursue a strategy that would have led to a merger with KLM of the Netherlands between 1999 and 2001. However, the Dutch-Italian collaboration collapsed due to high political risks on the Italian side and many competing airlines complained about the proposed new hub, Milan's Malpensa airport, as an anticompetitive action, which was later confirmed by the EU.<sup>16</sup> In January 2009, Air France-KLM Group took over Alitalia, thereby securing the Italian flag carrier as their allies in SkyTeam.

The nature of airline alliances, which are flexible and not under a single management with power to limit its members' dealings, can establish intra-alliance rivalries. For example, although both Singapore Airlines and Lufthansa are members of Star Alliance, the early morning departure of Singapore Airlines from Frankfurt to New York does not codeshare the Lufthansa code and is therefore not sold by Lufthansa.

<sup>12</sup> Wang, "Do Global Airline Alliances Influx the Passengers?," 54.

<sup>13</sup> Vinay Bhaskara, "The Global Airline Alliances Are Outdated," <https://airwaysmag.com/industry/global-airline-alliances-outdated/>, accessed 18 January 2018.

<sup>14</sup> Michael Z.F. Li, "Distinct Features of Lasting and non-Lasting Airline Alliances," *Journal of Air Transport Management* 6 (2000): 66, doi: [http://dx.doi.org/10.1016/S0969-6997\(99\)00024-1](http://dx.doi.org/10.1016/S0969-6997(99)00024-1).

<sup>15</sup> Iatrou and Mantzavinou, "The Impact of Liberalization," p. 233.

<sup>16</sup> KLM had to pay €150 million plus interest due to breaking the contract in December 2002. Paolo Beira, Hans-Martin Niemeier, and Karsten Fröhlich, "How Liberalization Can Go Wrong: The Case of Alitalia" in *Liberalization in Aviation: Competition, Cooperation and Public Policy*, edited by Peter Forsyth et al. (Farnham: Ashgate Publishing Limited, 2013), pp. 120-121.

Moreover, between 2007 and 2008, Lufthansa scheduled its own all-business-class service to New York, five minutes ahead of Singapore Airlines' departure.<sup>17</sup> This situation shows that airlines within alliances have to do their utmost to sustain their business.<sup>18</sup>

## B. Further Steps in Airline Alliances: Cross-border Mergers and Takeovers

The question arises as to whether undertaking an airline alliance "only" through cooperation or joint operations is a sufficiently strong strategy. To secure and realize the maximum advantages of the alliance, some airlines have conducted cross-border mergers and takeovers.

Mohamed Elamiri of the International Civil Aviation Organization (ICAO) has defined cross-border mergers as acquisitions or operational integration of airlines of different countries under a single holding company.<sup>19</sup> Ownership and control become the main difference between airline alliances and mergers, where the latter leads to a single entity with an improved level of control, and the former does not affect legal ownership and is based on revenue-sharing and capacity coordination with loose links and each airline remaining independent.<sup>20</sup> Based on this situation, mergers and takeovers could be regarded as an alternative to the disadvantages of an airline alliance that has a "loose" nature.

However, in terms of a merger, dealing with two or more countries has raised further legal issues, such as ownership and effective control, which determines the nationality of the new airline (or airline group). Even though liberalization and privatization within the aviation business are the latest global trends, the airline's nationality remains an important factor. A country may loosen its foreign ownership restriction but could never waive its airline(s)' identity and allow them to operate stateless.

In 2003, Air France and KLM merged and became one group with two separate operating companies and three main business arms (passenger, cargo, and maintenance) through a swap of shares and the establishment of a common holding company that represents both airlines equally.<sup>21</sup> The latter step was needed to secure both Air France and KLM's nationalities as a French airline and a Dutch airline, respectively. This condition meant protecting the enacted bilateral agreements between the two countries and the world so that no air traffic rights were lost. Currently, the two airlines' successful integration is reflected in the numerous code-shared flights being operated.

The case of Air Berlin and Etihad is also interesting, in which the latter has become one of the former's main investors to secure the alliance between the two airlines.

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<sup>17</sup> Karsten Fröhlich, Wolfgang Grimme, Julia Hellmers, Martin Holtz, Adél Németh, and Hans-Martin Niemeier, "An Assessment of the Success of Cross-border Airline Mergers and Acquisitions in Europe" in *Liberalization in Aviation: Competition, Cooperation and Public Policy*, edited by Peter Forsyth et al. (Farnham: Ashgate Publishing Limited, 2013), p. 200.

<sup>18</sup> Ruwantissa Abeyratne, "ASEAN Single Aviation Market and Indonesia - Can It Keep Up with the Giants?," *Indonesia Law Review* 4, no. 2 (2014): 169. doi: <http://dx.doi.org/10.15742/ilrev.v4n2.87>.

<sup>19</sup> Iatrou and Mantzavinou, "The Impact of Liberalization," p. 239.

<sup>20</sup> *Ibid.*

<sup>21</sup> A special holding structure was needed until 2007, when the Dutch government held parts of the voting rights and a special option. After 2007, the holding structure was converted into a simplified structure. Fröhlich, Grimme, Hellmers, Holtz, Németh, and Niemeier, "An Assessment of the Success," p. 202.

The situation has raised questions as to whether Air Berlin is still an EU airline with capacity to make its own decisions rather than being “dictated” from Abu Dhabi.

### III. CODESHARE ARRANGEMENTS: A PROMISING BUSINESS MODEL

Codeshare arrangements can be found not only on intercontinental flights but also on regional or even domestic flights. Code sharing is principally the expression of inter-airline cooperation through alliances.<sup>22</sup> The US Department of Transportation defines it as a marketing arrangement in which airlines place their designator code on a flight operated by another airline and sells tickets for that flight so that they can strengthen or expand their market presence and competitive ability.<sup>23</sup>

Additionally, Prof. Wassenbergh has defined code-sharing arrangements as

*“...based on a contract between air carriers, enabling one of them to extend its scheduled international air services as published under its own code and line numbers operated by itself, to a point or points not served by it and situated beyond a point, most often the terminal point, which it serves with its own services, by including in the publication of its network, connecting services of another carrier or of air carriers as a service of its own, to such beyond points.”<sup>24</sup>*

Based on the definitions, both (or more) airlines engaged in codeshare arrangements receive benefits through reduced operating costs, thereby enabling them to allocate their savings to other purposes. On the part of passengers, they receive benefits from frequent flyer programs and by having a wider range of flight schedule options.

An important characteristic of codeshare arrangements is that they do not involve the introduction of new flights, and each carrier continues to operate the same flights as it has done prior to the arrangement.<sup>25</sup> During the early days, the codeshare arrangement was considered as a brilliant innovation not merely for business but also for legal purposes. Examples of codeshare flights in the past were by Alitalia and Continental Airlines (which ended its service in 2010) between Italy and the US, which resulted in flying with one airline’s color on one side and the other airline’s color on the other side.<sup>26</sup> Another example was Flight MH17 or KL4103, which crashed in 2014 in Ukrainian airspace during its flight from Amsterdam to Kuala Lumpur.

Regarding a third country in a codeshare arrangement, an approval from the third country might also be needed. One of the legal issues related to this situation was between Germany and the US with regard to the introduction of code-shared services by KLM and Northwest Airlines in February 1992.<sup>27</sup> The German government objected to the codeshare arrangement for the following reasons:<sup>28</sup>

<sup>22</sup> Peter P.C. Haanappel, “Airline Challenges,” 180.

<sup>23</sup> US Department of Transportation, “Code Sharing,” <https://www.transportation.gov/policy/aviation-policy/licensing/code-sharing>, accessed 16 January 2018.

<sup>24</sup> H. Wassenbergh, *Principles and Practices in Air Transport Regulation* (Paris: Les Presses IATA, 1993), p. 166.

<sup>25</sup> Emilia Chiavarelli, “Code-sharing: An Approach to the Open Skies Concept?,” *Annals of Air and Space Law* XX, issue I (1995): 198.

<sup>26</sup> *Ibid.*, 203.

<sup>27</sup> Klaus Günther, “Legal Implications of Code-Sharing Services: A German Perspective,” *Air & Space Law* XXII, no. 1 (1997): 9.

<sup>28</sup> *Ibid.*

- i. KLM did not have specific authorization to carry traffic on the code-shared arrangement between Germany and the Netherlands;
- ii. code-sharing authority was not inherent within both countries above bilateral air service agreements nor the applicable EU rules; and
- iii. the code-shared arrangements would exceed the frequency limitations of the Germany and US bilateral agreement.

Ultimately, the dispute was settled when the US government formally appointed Northwest to operate the code-shared services to Germany under both countries' interim agreement, which forced Northwest to limit its flights to only one German city.<sup>29</sup> This situation showed that codeshare arrangements had a close relationship with the fifth freedom of the air relevant to bilateral agreements regarding an airline's route. Airlines must pay attention to the existing bilateral agreements to conduct a codeshare arrangement, especially considering that full open skies have not been common until today.

Codeshare arrangements between low-fare and full-service airlines are already taking place in North America, where the low-fare Canadian Westjet Airlines has code-shared with Cathay Pacific, Delta, Emirates, KLM, and Singapore Airlines.<sup>30</sup> Brazilian GOL Airlines (Gol Linhas Aéreas Inteligentes SA), the largest low-fare airline company in South America, has also joined a codeshare arrangement with American Airlines.<sup>31</sup>

This situation shows that code-shared flights have become common within the aviation business and are forecasted to be a promising business model in the 21<sup>st</sup> century.

## IV. LEGAL ISSUES SURROUNDING CODESHARE ARRANGEMENTS

### A. What is in a Carrier's Name?

The Warsaw Convention of 1929<sup>32</sup> does not define the term "carrier" nor a classification of a carrier within its articles. When the convention was drafted, the aviation industry and international airline routes were not significant at the time. Hampering the development of the industry by defining the term was also considered undesirable.<sup>33</sup> The Hague Protocol of 1955<sup>34</sup> as its successor also does not define the term, even though an increase in the number of airlines was observed since many war transport aircraft were converted for commercial purposes after World War II.

Over time, with the need to clearly define the term "carrier," the Guadalajara Convention of 1961<sup>35</sup> defines the term in detail along with its classification as

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<sup>29</sup> *Ibid.*

<sup>30</sup> Keith Mason, William G. Morrison, and Ian Stockman, "Liberalization of Air Transport in Europe and the Evolution of 'Low-cost' Airlines" in *Liberalization in Aviation: Competition, Cooperation and Public Policy*, edited by Peter Forsyth *et al.*, (Farnham: Ashgate Publishing Limited, 2013), p. 153.

<sup>31</sup> *Ibid.*, pp. 153-154.

<sup>32</sup> *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw on 12 October 1929 and entered into force on 13 February 1933.

<sup>33</sup> I.H.Ph. Diederiks-Verschoor, *An Introduction to Air Law* (Deventer: Kluwer Law and Taxation Publishers, 1991), p. 87.

<sup>34</sup> *Protocol to Amend the Convention for the Unification to Certain Rules Relating to International Carriage by Air*, signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955.

<sup>35</sup> *Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier*, signed in Guadala-

“contracting carrier” and “actual carrier.” The preamble of the Convention mentions that the Warsaw Convention does not state specific rules relating to international carriage by air performed by a person who is not a party to the agreement for carriage.

Under the Guadalajara Convention of 1961, a contracting carrier is defined as “a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or a consignor or with a person acting on behalf of the passenger or consignor.”<sup>36</sup>

Meanwhile, the Guadalajara Convention of 1961 defines actual carrier as “a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph (b), but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof of the contrary.”<sup>37</sup>

Prof. Mendes de Leon elaborates on the definition of “actual carrier” also as the charter airline operating the aircraft carrying the passenger and the airline to whom the passenger was transferred in the case of overbooking, strike, or cancellation.<sup>38</sup> By having a clear definition of “carrier” under the convention, determining each carrier’s liability in a codeshare arrangement becomes easier whether they perform it in an airline alliance or not.

An air alliance represented in a code-shared flight does not qualify as a carrier. This condition is strengthened by a court decision on the Star Alliance<sup>39</sup> case. A bilateral air transport agreement does not use any term of “air alliance,” and instead uses only “airline.”<sup>40</sup> The reason is the nature that an air alliance could consist of more than two airlines and also more than one carrier during its flight. This situation can help the court to determine each carrier’s liability if something happens under a code-shared flight, whether within an airline alliance or not.

## B. Carriers’ Liability and the Applicable Conventions

### 1. Warsaw Convention of 1929 (“Warsaw Convention”)

The Warsaw Convention has become the foundation of carrier liability (in this section the term “carrier” instead of “airline” is used), which has received global acceptance with 152 parties to this day. This convention applies to all international transportation between the contracting states;<sup>41</sup> thus, for domestic transportation, which has no agreed stopping place outside the country of origin, states are not obliged to implement the convention. The place of departure and place of destination must be both located within the contracting parties.

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jara on 18 September 1961 and entered into force on 1 May 1964.

<sup>36</sup> The Guadalajara Convention of 1961, art. 1(b).

<sup>37</sup> *Ibid.*, art. 1(c).

<sup>38</sup> P.M.J. Mendes de Leon (ed), *Syllabus Private Air Law 2014-2015* (International Institute of Air and Space Law, Universiteit Leiden, 2014), p. 67.

<sup>39</sup> *Viktoriya Shirbokova v. CSA Czech Airlines, Inc.*, United States District Court District of Minnesota, Civil File No. 04-641, decision awarded on 24 August 2004.

<sup>40</sup> See Air Transport Agreement between the Government of Australia and the Government of the People’s Republic of China relating to Air Services, signed in Canberra on 23 March 2004 and Air Transport Agreement between the Government of Australia and the Government of the Government of the Republic of Indonesia relating to Air Services, signed in Canberra on 7 February 2013.

<sup>41</sup> The Warsaw Convention, art. 1.



A carrier is liable for any damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if it took place on board the aircraft or during embarkation or disembarkation.<sup>42</sup> The carrier is liable not only for a passenger's life but also in the event of destruction, loss, or damage to any registered luggage, and also any damage occasioned by delay of the passengers' luggage or goods.<sup>43</sup>

Protections toward the carrier are made when the carrier and its agents could prove having taken all necessary measures to avoid the damage or if it was impossible to do so.<sup>44</sup> The carrier could be exonerated if they could prove that the damage was caused by or contributed to by the negligence of the injured.<sup>45</sup> In *Chutter v. KLM*, the carrier was not held liable when a passenger who ignored the "fasten seatbelts" sign and did not pay attention when the stairs leading to the aircraft had already been removed fell out of the aircraft and injured her leg while saying farewell to her family.<sup>46</sup>

The carrier's liability is limited to a maximum of 125,000 Poincaré (French gold francs) or the equivalent capital value, which could be paid in the form of periodical payments; a special contract may also lead to a higher limit of liability.<sup>47</sup> Liability toward registered luggage and goods is limited to a maximum of 250 Poincaré unless a special declaration of value has been made; carry-on luggage is valued up to 5,000 Poincaré per passenger.<sup>48</sup> Any provisions to relieve the liability of the carrier or to lower the liability limit shall be null and void.<sup>49</sup> However, the limit is breakable if the carrier is proven to have exercised willful misconduct or equivalent to that by the court.<sup>50</sup>

A time limit to claim liability has been set up, which is i) three days in case of damaged luggage; ii) seven days in case of damaged goods; and iii) 14 days in case of any damage caused by delay from the date on which the luggage or goods have been placed at his disposal.<sup>51</sup> Ultimately, the right to damages is extinguished if an action is not brought within two years from the date of arrival or the date on which the aircraft ought to have arrived at the destination.<sup>52</sup>

The reversal burden of proof and strict fault liability were incorporated in the Warsaw Convention of 1929 in return for a limitation of liability toward passengers.<sup>53</sup> The concept of limiting liability essentially contravenes the fundamental principle of the law of liability that the victim is entitled to obtain restitution of the *status quo ante*.<sup>54</sup> However, at that time, it was deemed necessary to protect the vulnerable

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<sup>42</sup> *Ibid.*, art 17.

<sup>43</sup> *Ibid.*, arts. 18-19.

<sup>44</sup> *Ibid.*, art. 20.

<sup>45</sup> *Ibid.*, art. 21.

<sup>46</sup> *Chutter v. KLM Royal Dutch Airlines & Allied Aviation Services International Corporation*, US District Court, Southern District of New York on June 27, 1955.

<sup>47</sup> The Warsaw Convention, art. 22.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, art. 23.

<sup>50</sup> *Ibid.*, art. 25.

<sup>51</sup> *Ibid.*, art. 26.

<sup>52</sup> *Ibid.*, art. 29.

<sup>53</sup> Diederiks-Verschoor, *Introduction to Air Law*, p. 65.

<sup>54</sup> Michael Milde, "The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws and the New "non-Warsaw" Convention of 28 May 1999," *Annals of Air and Space Law XXIV* (1999): 161.

industry and balance the interests of airlines and passengers,<sup>55</sup> which has led to the growth of the aviation industry.

## 2. Hague Protocol to Warsaw Convention of 1955 ( "Hague Protocol" )

The Warsaw Convention was amended by the Hague Protocol in 1955, but the latter did not replace the entire Warsaw Convention. One of the most important points on protection of passengers is that the liability limit amount is doubled up to 250,000 Poincaré.<sup>56</sup> However, the other provisions remain the same; thus, registered luggage and cargo (goods) is limited up to 250 Poincaré, and carry-on luggage is valued up to 5,000 Poincaré per passenger.

The Hague Protocol introduced the new term "cargo" to replace "goods." Furthermore, it strengthened the condition that any provision to relieve the liability of the carrier or lower the liability limit becomes null and void. This convention also has simplified transport documents.<sup>57</sup>

Another important point is changing the term "willful misconduct" as stated in Article 25 of the Warsaw Convention to "damage resulted by an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."<sup>58</sup> A system of fault liability with a reversed burden of proof and with a low limit of liability exists, which can only be escaped from if the plaintiff proves willful misconduct (according to the Warsaw Convention) or intent or recklessness (according to the Hague Protocol) on the part of the carrier.<sup>59</sup>

## 3. Guadalajara Supplementary Convention to Warsaw Convention of 1961 ( "Guadalajara Convention" )

A distinction is made between the carrier that concludes the agreement (contracting or marketing carrier) and the carrier who actually carries it out entirely or partially (actual or operating carrier). The contracting carrier is liable for the whole carriage, while the actual carrier is only liable for the part of the carriage that the carrier performed.<sup>60</sup> In other words, the acts and omissions of each carrier are deemed to be the acts and omissions of the other; this condition is also known as the regime of reciprocal representation.<sup>61</sup>

Unlike the contracting carrier situation, the actual carrier cannot be held liable for an unlimited amount,<sup>62</sup> which means that the actual carrier is not liable to the same extent as the contracting carrier. Furthermore, the actual carrier and its employees' acts and omissions could end up to the contracting carrier and vice versa.

With regard to successive carriage, the Guadalajara Convention applies to both code-shared flights that either have a scheduled transit in which the passenger could catch the connecting flights operated by different airlines or have no connecting flight

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<sup>55</sup> *Ibid.*

<sup>56</sup> The Hague Protocol, art. 22.

<sup>57</sup> Hamid Kazemi, "Carrier's Liability in Air Transport with Particular Reference to Iran," (Dissertation at the International Institute of Air and Space Law, Universiteit Leiden, 2012, p. 172.

<sup>58</sup> Diederiks-Verschoor, *Introduction to Air Law*, pp. 82-84.

<sup>59</sup> M.L. Reerink, "Code-Sharing and Airlines' Liability," LL.M. thesis, Universiteit Leiden, 1996, p. 21.

<sup>60</sup> The Guadalajara Convention, art. 2.

<sup>61</sup> Tiwari and Chik, "Legal Implications of Airline Cooperation," 305.

<sup>62</sup> The Guadalajara Convention, art. 3.

at all. The contractual relationship between the actual carrier and the contracting carrier is of no importance because a contract is not a condition for applicability.<sup>63</sup>

The Guadalajara Convention is in favor of the passengers' rights, considering that they could choose whether to file a complaint to the actual or contracting carriers.<sup>64</sup> An important provision is related to consumers' rights considering airline business complexity, thereby eliminating any chance of wrongly addressing it. When an action of damage is brought against only one of the carriers, that carrier shall have the right to require the other carrier(s) to be joined in the proceedings with the procedure and effects being governed by the law of the court seized of the case.<sup>65</sup>

#### 4. Montreal Additional Protocols to Warsaw Convention of 1975<sup>66</sup>

A revolutionary concept introduced within the aviation sector in 1975 was the usage of Special Drawing Rights (SDR) as defined by the International Monetary Fund. This idea is due to the obsolete Poincaré currency and the urgency to implement an international standard.

Following this pivotal step, four Montreal Protocols were introduced. Protocol No. 1 translated the original Warsaw Convention limit (125,000 Poincaré) into 8,300 SDRs; Protocol No. 2 translated the Hague Protocol limit (250,000 Poincaré) into 16,600 SDRs; and Protocol No. 3 translated the Guatemala Protocol limit (1,500,000 Poincaré) into 100,000 SDRs, which until now has not come into force. Lastly, Protocol No. 4 changed the cargo liability system into a no-fault liability by amending Article 18(1), 20(2), and 22(2), also stating a liability limit for cargo (250 Poincaré) into 17 SDRs per kilogram unless a special declaration is made.<sup>67</sup> A traveler's hand luggage is valued at 332 SDRs.

#### 5. Montreal Convention of 1999 ("Montreal Convention")

In the 1990s, the international community from states, regional initiatives, International Air Transport Association (IATA), and even leading airlines, such as Japanese airlines, tried to improve the Warsaw Convention and all its amendments.<sup>68</sup> Their effort resulted in the Montreal Convention, which was finalized in 1999.

The Montreal Convention heralded a new era in the field of private international law and adjusted the regulatory framework to the realities of modern transportation by air.<sup>69</sup> This convention has the same purpose as the Warsaw Convention of 1929 with all its amendments, which are to keep the convention updated and balance the interests of airlines and passengers. Entering into force on November 4, 2013, 60 days after the 30<sup>th</sup> ratification, the Montreal Convention was long demanded but also long

<sup>63</sup> M.L. Reerink, "Code-sharing," p. 29.

<sup>64</sup> The Guadalajara Convention, art. 4.

<sup>65</sup> *Ibid.*, art. 7.

<sup>66</sup> *Additional Protocol Nos. 1, 2, 3, and 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw on October 12, 1929, as Amended by the Protocol done at The Hague on September 28, 1955 signed at Montreal on September 25, 1975.

<sup>67</sup> Paul B. Larsen *et al.*, *Aviation Law: Cases, Laws, and Related Sources* (Leiden: Martinus Nijhoff Publishers, 2012), p. 319.

<sup>68</sup> Michael Milde, "The Warsaw System of Liability," 163.

<sup>69</sup> *Ibid.*, 158.

delayed.<sup>70</sup>

No clear boundary exists between the jurisprudence of this convention and the Warsaw Convention, as evident in many provisions of the former using the same language, and when the language is different it cannot be understood without the judicial interpretations of earlier provisions on similar issues.<sup>71</sup> The Montreal Convention is a breakthrough because it incorporates all the amendments to the original Warsaw Convention to correct the confusion created by the failure of some governments to ratify the succeeding amendments.<sup>72</sup>

One of the most important issues is the increased liability limit, which will be reviewed every five years according to inflation to avoid the long process of drafting new conventions. According to Article 21 of the Montreal Convention, the liability limit is increased to 100,000 SDRs.<sup>73</sup> To reach the limit of the condition, which is death or bodily injury caused by accident, this convention must be fulfilled. *Air France v. Saks*<sup>74</sup> strengthened the latter condition. Advance payments are introduced to meet immediate economic needs in the case of aircraft accidents resulting in death or injury of the passengers.<sup>75</sup> The concept of strict liability is maintained within the Montreal Convention.

Damage caused by delay is limited to 4,150 SDRs,<sup>76</sup> while a sum of up to 1,000 SDRs has been set up for checked-in baggage of each passenger unless a special declaration has been made.<sup>77</sup> No revision is made toward the carriage of cargo, which is still valued at 17 SDRs per kilogram.<sup>78</sup> These values are subject to change following world inflation (see Table 1). The Montreal Convention also accommodates any airline that wishes to establish a higher or even no limit of liability.<sup>79</sup> Similar to the Warsaw Convention, any provision to fix a lower limit or relieve the carrier is null and void.<sup>80</sup>

| Components         | Original Limits (SDR, 1999) | Increase | Rounded Revised Limits (SDR, 2009) |
|--------------------|-----------------------------|----------|------------------------------------|
| Cargo              | 17                          | 13.1%    | 19                                 |
| Checked-in luggage | 1,000                       | 13.1%    | 1,131                              |
| Delay              | 4,150                       | 13.1%    | 4,694                              |
| Passenger's life   | 100,000                     | 13.1%    | 113,100                            |

Table I Montreal Convention Updated Limits in 2009<sup>81</sup>

<sup>70</sup> Larsen *et.al.*, *Aviation Law*, p. 320.

<sup>71</sup> *Ibid.*, p. 311.

<sup>72</sup> The Warsaw Convention of 1929 has been amended by The Hague Protocol of 1955, the Guatemala Protocol of 1961, and the Montreal Protocols of 1975. Certain agreements outside the Warsaw Convention from Guadalajara (1961), Montreal (1966), and IATA (1966) affect the Convention. *Ibid.*, p. 312.

<sup>73</sup> Montreal Convention, art. 21.

<sup>74</sup> United States Supreme Court, *Air France v. Saks*, 470 U.S. 392 on 4 March 1985.

<sup>75</sup> Montreal Convention, art. 28.

<sup>76</sup> *Ibid.*, art. 22(1).

<sup>77</sup> *Ibid.*, art. 22(2).

<sup>78</sup> *Ibid.*, art. 22(3).

<sup>79</sup> *Ibid.*, art. 25.

<sup>80</sup> *Ibid.*, art. 26.

<sup>81</sup> International Civil Aviation Organization, Document Ref. LE3/38.1-09/87 regarding revisions of limits of liability under the Montreal Convention of 1999, notification of effective date of revised limits dated

This convention changed the issuance of the passenger ticket, including electronic ticket, by eliminating the breakability of convention limitations where the ticket is not delivered to an individual.<sup>82</sup> The concept of contracting and actual carrier is acknowledged within Chapter V of the Montreal Convention, which used to be dealt within one exclusive convention, the Guadalajara Convention, during the Warsaw Convention era. Given the concept similarities between the Montreal Convention and its predecessors, the current regime is also known as the Warsaw–Montreal regime.

### C. Dominant Position and Anti-Competition Issues

The practice of airline alliances or codeshare arrangements could end up with certain airline(s) having a dominant position at some airports, thereby having the potential for anticompetitive practices. One of the most common direct results from cross-border mergers and takeovers is the obligation raised by the relevant competition authorities to give up airport slots to keep in line with the enacted anti-competition legal framework with the purpose of protecting airline passengers and other related business actors.

The merger between Air France and KLM as one of the mega alliances posed a threat to economic welfare,<sup>83</sup> considering what happened to the earlier integration of KLM and its alliance with Northwest Airlines into SkyTeam which gave the latter dominant position in the North Atlantic Market.<sup>84</sup> Ultimately, the merger was permitted by the European Competition authorities subject to the surrender of 94 slots owned by Air France and KLM at Amsterdam Schiphol and Paris Charles de Gaulle airports.<sup>85</sup>

When Lufthansa took over its loss-making alliance partner, Austrian Airlines, both airlines had to give up slots at Vienna airport due to dominant position and market power issues even though they had assured the European Competition authorities during the investigations that ticket prices would decline due to network effects.<sup>86</sup> During the merger of Lufthansa and SN Brussels Airlines, the merging airlines were forced to make slots available on four routes from Brussels, specifically to Munich, Hamburg, Frankfurt, and Zurich.<sup>87</sup>

Only the merger between British Airways and Iberia, which was a complementary network expansion, did not contain monopolistic tendencies according to the European Commission.<sup>88</sup> Consequently, the European Commission did not take any further action on the British Airways and Iberia merger in 2010 as monopolistic tendencies were not seen on the London and Madrid hubs; thus, no slot had to be abandoned, thanks to huge competition from the low-fare airlines on these routes.<sup>89</sup>

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November 4, 2009 and effective on December 31, 2009.

<sup>82</sup> Larsen *et al.*, *Aviation Law*, p. 320.

<sup>83</sup> Jan K. Brueckner and Eric Pels, "European Airline Mergers, Alliance Consolidation, and Consumer Welfare," *Journal of Air Transport Management*, 11 (2005): 38-39, doi: <http://dx.doi.org/10.1016/j.jairtra-man.2004.11.008>.

<sup>84</sup> Fröhlich, *et al.*, "An Assessment of the Success," p. 202.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*, p. 205.

<sup>87</sup> Lufthansa purchased 45% share in SN Brussels Airlines (formerly known as Sabena which went bankrupt in 2001). *Ibid.*, p. 205.

<sup>88</sup> *Ibid.*, p. 207.

<sup>89</sup> *Ibid.*, p. 207.

From the trans-Atlantic market, the US will grant antitrust immunity to the designated airlines in exchange for a country signing the open skies agreement, where the latter will enable joint decisions on pricing, scheduling, capacity provision, and service quality.<sup>90</sup> Without such immunity, the airline business will become very restricted and any code-shared arrangement will lose its economic value. Following the EU-US open skies agreement, the major airlines, such as Air France-KLM and Delta (SkyTeam), Lufthansa and United Airlines (Star Alliance), and British Airways and American Airlines (OneWorld), have received antitrust immunity. Furthermore, this agreement opens the way for trans-Atlantic investments but of less than 50%, as in the case of Lufthansa, which obtained 19% of JetBlue shares in February 2008.<sup>91</sup>

Practice in the US has shown that antitrust immunity can only be granted to agreements involving foreign, not domestic, airlines.<sup>92</sup> The US Department of Transportation has the ultimate authority to determine whether an application fulfills the condition. Anyone opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition; on the other hand, the party defending the agreement has the burden to prove the transportation urgency or public benefits.<sup>93</sup>

The presence of airline alliances has strengthened the premise that the airline business is an oligopoly or at least a monopoly. Taking advantage of the loopholes within FDI provisions, and also reducing the monopolization effect, airline alliances may establish virtual monopolies in markets between the hubs of alliance partners.<sup>94</sup>

#### D. Consumer Protection

In the 1990s, airlines and travel agents were often required to give passengers notice on which airlines operated in code-shared flights.<sup>95</sup> At the time, there was a chance of absence or lack of coordination in code-shared flights where the passenger was required to check the baggage twice and also needed to go through a second check-in to embark on the next journey.<sup>96</sup> This situation has improved due to management and technological developments, where passengers could access the information via airport information displays easily or even user-friendly smartphone applications.

Considering the current trend of two or more airlines participating in code-shared arrangement ticket sales, the passengers must know what airline they are flying with. Transparency of the total air fare on airline websites, including the name of the operating carrier, must be guaranteed to avoid misleading consumers. Showing the final price on media advertisements is considered as the best solution even though it depends on each national law.

In the EU, an indication of final price with at least the following details shall be specified: i) air fare or air rate; ii) taxes; iii) airport charges; and iv) other charges,

<sup>90</sup> Iatrou and Mantzavinou, "The Impact of Liberalization," p. 235.

<sup>91</sup> *Ibid.*, p. 236.

<sup>92</sup> Larsen *et.al.*, *Aviation Law*, p. 294.

<sup>93</sup> *Ibid.*, p. 295.

<sup>94</sup> Waleed Youssef and Mark Hansen, "Consequences of Strategic Alliances between International Airlines: The Case of Swissair and SAS," *Journal of Transportation Research Part A* 28 (1994): 416. doi: [http://dx.doi.org/10.1016/0965-8564\(94\)90024-8](http://dx.doi.org/10.1016/0965-8564(94)90024-8).

<sup>95</sup> Wassenbergh, *Principles and Practices*, p. 165.

<sup>96</sup> H.S. Harris and E. Kirban, "Antitrust Implications of International Code-sharing Alliances," *Air & Space Law* 23 (1998): 174.

surcharges or fees, such as those related to security or fuel.<sup>97</sup> Optional price supplements, such as extra insurance or lounge service, shall be communicated in a clear, transparent, and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an “opt-in” basis.<sup>98</sup>

Furthermore, no discrimination must be exercised based on nationality, including the passengers’ location when purchasing the ticket. Thus, using per capita income data or any similar data to determine the starting selling ticket price is illegal. To ensure legal enforcement, the EU Commission launched a “ticket sweep” in September 2007 to check the compliance of approximately 386 websites selling airline tickets; surprisingly, one-third of these websites had breached the law.<sup>99</sup>

What is happening in the EU is a challenge for non-EU airlines within an alliance or codeshare arrangements flying from or to the EU, where they have different practices based on their own laws. Harmonization of service standards awaits many airlines operating to leading countries or regional initiatives, such as the EU, the United Kingdom, and the US.

In relation to passengers’ checked-in and cabin luggage weight and dimensions, law infringement may occur when the marketing carrier’s policy does not match the operating carrier’s.<sup>100</sup> For example, many Gulf carriers’ checked-in luggage weight is limited to 30 kg, while many European carriers’ limit is 23 kg. When a European (operating) carrier, which codeshares with a Gulf (marketing) carrier, decides to impose a strict 23-kg limit to all passengers without distinguishing their tickets and proper notice during ticket sales, obviously some passengers will end up paying extra fees. Codeshare arrangements should deal with this issue as their priority, knowing the consumer protection body’s limited reach due to jurisdiction. Relying on IATA efforts is another realistic option.

## V. MH17/KL4103 TRAGEDY: COMPLEX LESSONS FOR CODESHARE ARRANGEMENTS

### A. Brief Overview

On July 18, 2014, the National Bureau of Air Accident Investigation of Ukraine sent a notification that a Boeing 777-200 with registration 9M-MRD of Malaysia Airlines disappeared in its territory.<sup>101</sup> The unfortunate Flight MH17<sup>102</sup> or KL4103 (“Flight

<sup>97</sup> European Union, *Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast)*, OJ L 293/3, art. 23.

<sup>98</sup> *Ibid.*

<sup>99</sup> Richard Klophaus, “À la Carte Pricing to Generate Ancillary Revenue: The Case of Ryanair” in *Liber- alization in Aviation: Competition, Cooperation and Public Policy*, edited by Peter Forsyth *et al.*, (Farnham: Ashgate Publishing Limited, 2013), p. 192.

<sup>100</sup> Ridha Aditya Nugraha, “Today’s Cabin Size Baggage: What’s in a Name,” *The Aviation and Space Journal* 15, no. 1 (2016): 18. <http://www.aviationspacejournal.com/wp-content/uploads/2015/06/The-Aviation-Space-Journal-Year-XV-n%C2%B01-January-March-2016.pdf>.

<sup>101</sup> Flight MH17 was carrying 283 passengers and 15 crew members, who were citizens of the following countries: Netherlands (193), Malaysia (43), Australia (27), Indonesia (12), United Kingdom (10), Germany (4), Belgium (4), Philippines (3), Canada (1), and New Zealand (1). Dutch Safety Board, *Preliminary Report Crash Involving Malaysia Airlines Boeing 777-200 Flight MH17 in September 2014*, pp. 7-8.

<sup>102</sup> After the tragic incident, flight number MH17 changed to MH19 and flight number KL4103 changed to KL4123 as new code-shared flights from July 25, 2014. KLM has partnered with Malaysia Airlines since

MH17”) crashed in eastern Ukraine during its flight from Amsterdam to Kuala Lumpur, killing all passengers on board. At the time of the incident, Flight MH17 was flying in unrestricted airspace above a restricted area,<sup>103</sup> and being under control of Air Traffic Controller (ATC) by following the route and flying at an altitude cleared by ATC.<sup>104</sup>

The route over Ukrainian airspace where the incident occurred is commonly used for Europe to Asia flights, where a different flight was on the same route at the time of the Flight MH17 incident, as were a number of other flights from other carriers in the days and weeks before.<sup>105</sup>

According to the information received from Malaysia Airlines, the crew was properly licensed and had valid medical certificates to conduct the flight.<sup>106</sup> Technical documents from Schiphol airport also mentioned that the aircraft was in airworthy condition at departure and had no known technical malfunctions.<sup>107</sup> When the cockpit voice recorder was found and processed after the incident, no alert of aircraft system malfunctions were found.<sup>108</sup> These facts described by the Dutch Safety Board had shown that Flight MH17 was well prepared and conducted according to standard procedures.

## B. Complex Legal Issues Surrounding Flight MH17

Flight MH17 was a code-shared flight between KLM and Malaysia Airlines even though both airlines were in different airline alliances; the former is a key player in SkyTeam while the latter is a member of OneWorld. KLM had acted as a marketing carrier only, while Malaysia Airlines had a greater role by acting as both marketing and operating carrier at the same time.

For those who bought their tickets via KLM, Malaysia Airlines was deemed as the operating carrier. No marketing data were shown to the public, but with 193 victims of Dutch nationals, one can assume that many of the passengers had bought their tickets via KLM, which means protecting Malaysia Airlines’ interest as acting as marketing carrier for the remaining passengers if the airline would be sentenced to bear unlimited liability.

A civil suit seeking remedies could be brought by the victims’ relatives before a court in several states based on the Montreal Convention, considering that both places (states) of departure and arrival ratified the Montreal Convention. Thus, neither the passengers’ tickets, either one-way or return, or the nationals, would make any difference in the applicability of the Montreal Convention. The applicability was unquestionable.

As an immediate reaction, Malaysia Airlines assigned their professional caregivers and offered financial assistance of USD 5,000 to the family of each passenger and crew member as advance payment,<sup>109</sup> and even up to USD 50,000 for Mr. Lauschet,

1998. “Statement about Malaysia Airlines MH17,” <http://news.klm.com/incident-with-malaysia-airlines-flight-mh017-e>, accessed January 18, 2018.

<sup>103</sup> Dutch Safety Board, *Preliminary Report*, p. 13.

<sup>104</sup> *Ibid.*, p. 15.

<sup>105</sup> “MH17 Ukraine Plane Crash: What We Know,” <http://www.bbc.com/news/world-europe-28357880>, accessed January 18, 2018.

<sup>106</sup> Dutch Safety Board, *Preliminary Report*, p. 16.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*, p. 19.

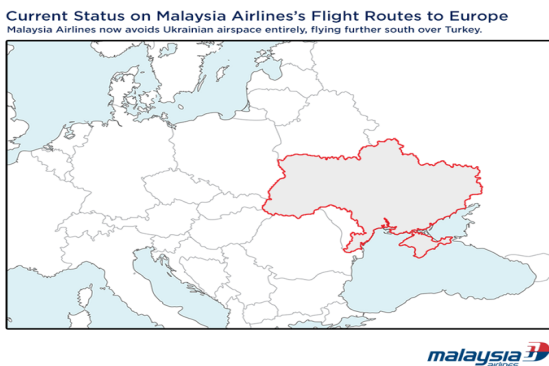
<sup>109</sup> Gregory Wallace, Michael Tarson and Charles Riley, “Malaysia Airlines’ \$5,000 Payment is Just the



an Australian whose wife died in the accident.<sup>110</sup> To ensure the families' immediate economic needs, Malaysia Airlines appointed Citibank for the logistical arrangements for fund transfers.<sup>111</sup> This initiative shall not be deemed as a final payment nor will affect the victims' families' right to claim compensation at a latter stage; however, they shall be calculated as part of the final compensation.

In questioning whether Malaysia Airlines had taken all necessary measures to protect its passengers, we can note that MH17's flight plan over Ukrainian airspace was approved by Eurocontrol. The latter, as the air navigation service provider for Europe, was solely responsible for determining civil (commercial) aircraft flight paths over European airspace. Indeed, Malaysia Airlines did not fly nor request to fly above an area around the Crimean Peninsula after ICAO identified the area as dangerous that year.<sup>112</sup> However, a strong argument could also be delivered as to why the airline did not take the initiative to avoid the entire Ukrainian and surrounding airspace to guarantee safety.

Unquestionably, flight efficiency was a factor influenced by high oil prices in 2014, and flying over Ukrainian airspace was "attractive," including for the unfortunate Flight MH17, which was accused of choosing the route based on cost-saving priority.<sup>113</sup> If commercial consideration overrides safety, then today's aviation business is in jeopardy.



Picture I European Area Avoided by Malaysia Airlines After the Flight MH17 Crash<sup>114</sup>

Beginning," <http://money.cnn.com/2014/03/25/news/malaysia-airlines-compensation/index.html>, accessed January 18, 2018.

<sup>110</sup> Sarah Carty, "Australian Family of MH17 Victim Says Malaysia Airlines is Demanding Tax Returns, Payslips, and Other Documents before It Will Pay Compensation," <http://www.dailymail.co.uk/news/article-3005907/Australian-family-MH17-victim-says-Malaysia-Airlines-demanding-tax-returns-payslips-documents-pay-compensation.html>, accessed January 18, 2018.

<sup>111</sup> "MH17: MAS Ready to Provide Financial Assistance to Families or Passengers," <http://www.thesun-daily.my/news/1119894>, accessed January 19, 2018.

<sup>112</sup> "Obama, MH17 Disaster 'An Outrage of Unspeakable Proportions' - As It Happened," <https://www.theguardian.com/world/2014/jul/18/malaysia-airlines-crash-flight-recorder-found-as-anger-at-russia-mounts-live-updates>, accessed January 19, 2018.

<sup>113</sup> Tim Barlass, "Malaysia Airlines MH17 Class Action Filed Ahead of Sunday's Anniversary Deadline," <http://www.smh.com.au/nsw/malaysia-airlines-mh17-class-action-filed-ahead-of-sundays-anniversary-deadline-20160712-gq466v.html>, accessed January 19, 2018.

<sup>114</sup> The map shows Malaysia Airlines avoids Ukrainian airspace entirely, thus flying south over Turkey. "Current Status on Malaysia Airlines' Flight Routes to Europe," <http://www.malaysiaairlines.com/content/>

In terms of whether the Montreal Convention limits were breached by Flight MH17, it depends on a court's view and decision whether the crash "was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents." In other words, the court must decide whether a negligent or wrongful act occurred within Malaysia Airlines's flight plan conducted with reliance on ICAO's policy over the Ukrainian airspace. At the time, the world knew that the entire Ukrainian airspace and its surroundings were a war zone, but the range of ballistic missiles and other technical details were not mentioned.

Airlines adopted different approaches; for example, British Airways and Qantas stopped flights over the region, while Air France-KLM, Lufthansa, Malaysia Airlines, and some others continued to fly this route "with caution."<sup>115</sup> The Ukrainian Government had reported on July 14 and 16, 2014 that its military aircraft had been shot down over eastern Ukraine using powerful surface-to-air missile systems capable of reaching the same altitudes of civil aircraft.<sup>116</sup> Thus, a strong argument of negligence or wrongful act appears knowing that Malaysia Airlines and KLM did not follow British Airways and Qantas precautions, which were proven to save their passengers' lives.

Obviously, the downing of Malaysia Airlines Flight MH17 has triggered a multimillion-dollar question. The fierce fight between the airlines and passengers' relatives is still ongoing, from choosing the right jurisdiction and forum for filing the case until questioning administrative issues such as the passengers' personal and financial documents to determine the appropriate compensation amount. Malaysia Airlines has been sued in Australia, before the New South Wales Supreme Court, following an unjust compensation amount that was less than half of the Montreal Convention limit.<sup>117</sup>

Two years after the incident, regarding the time limit given to file a lawsuit, a lawyer representing Dutch victims is understood to have struck an agreement for most of the victims; so far, no details have been revealed due to a confidentiality agreement.<sup>118</sup> The victims' relatives had faced difficult times in the early days when the airline's insurers were taking advantage of Dutch law to offer extremely limited compensation, which was only enough to cover "funeral costs."<sup>119</sup> Additionally, Prof. Mendes de Leon doubts if the Flight MH17 compensation agreement will set up a precedent by paying damages for psychological trauma,<sup>120</sup> as sought by some of the victims' relatives.

[dam/malaysia-airlines/mas/master/english/images/DarkSite/mh17\\_euflightstatus.png](http://dam/malaysia-airlines/mas/master/english/images/DarkSite/mh17_euflightstatus.png), accessed 19 January 2018.

<sup>115</sup> David Hodgkinson, "The Loss of Flight MH17: How Much Compensation - and Who Pays?," <http://theconversation.com/the-loss-of-flight-mh17-how-much-compensation-and-who-pays-29818>, accessed 19 January 2018.

<sup>116</sup> "Malaysia Airlines MH17 Class Action," <https://www.shine.com.au/service/class-actions/malaysia-airlines-mh17-class-action/>, accessed 19 January 2018.

<sup>117</sup> "MH17 Aussie Passenger's Son Sues MAS, Claims Compensation Didn't Follow Convention," <http://www.themalaymailonline.com/malaysia/article/mh17-aussie-passengers-son-sues-mas-claims-compensation-didnt-follow-conven>, accessed 19 January 2018.

<sup>118</sup> "Malaysia Airlines Strikes Compensation Deal with Families after Flight MH17 Shot Down," <http://www.express.co.uk/news/world/690460/Malaysia-Airlines-strikes-compensation-deal-with-families-after-flight-MH17-shot-down>, accessed January 19, 2018.

<sup>119</sup> Rachel Middleton, "MH17: Malaysia Airlines' Compensation Offers to Victims' Families 'Almost Offensive' Says Lawyer," <http://www.ibtimes.co.uk/mh17-malaysia-airlines-compensation-offers-victims-families-almost-offensive-says-lawyer-1555696>, accessed January 19, 2018.

<sup>120</sup> "MH17 Families Rearing to Take Legal Action to Get Compensation on Second Anniversary," <http://indianexpress.com/article/world/world-news/mh17-families-rearing-to-take-legal-action-to-get-com->

In May 2016, five Australian families filed before the European Court of Human Rights a USD 7.2 million<sup>121</sup> lawsuit against Russia for each relative killed in the plane crash; this lawsuit was probably inspired by some cases where states were paying an *ex gratia* compensation while formally denying legal liability and responsibility. El Al Flight 402 (1955), Aerolinee Itavia Flight 870 (Ustica Disaster, 1980), Iranian Civil Airline Flight 655 (1988), and Siberia Airlines Flight 1812 (2001) are several examples where states welcomed this form of compensation.<sup>122</sup> The case of PanAm Flight 103 (Lockerbie Bombing, 1988), where Libya admitted responsibility for the incident, opened the path to compensation for the victims' families. In the Flight MH17 case, Russia neglected its responsibility in May 2016 and stated the claims should be addressed to Ukraine.<sup>123</sup>

A fight also occurred between the code-shared partners and their insurers as to whether all losses and obligations would be covered under all-risk or war-risk insurance. Definitely, Malaysia Airlines' financial problems in 2015 would not relieve the airline of its liabilities by shifting them to KLM. As the (legal) codeshare partner, KLM is potentially jointly held liable for a certain amount of compensation borne by Malaysia Airlines.

Finally, the Flight MH17 case is highly complex because it involves states and belligerents. Again, the doctrine of state responsibility is contested. The case has shown a situation where Ukraine and the pro-independence militia were backed up by Russia's failure to implement Article 3bis of the Chicago Convention<sup>124</sup> to prevent either their armies or belligerents from using weapons against civil aircraft in flight. Russia and Ukraine are blaming each other to waive the responsibility and avoid paying the compensation, which reflects a disaster for the passengers' relatives to file claims before the two countries' courts.

### C. Rights of Indonesian Victims' Families

Twelve Indonesian nationals lost their lives in the Flight MH17 tragedy. No precise amount nor any progress on the settlement has been disclosed to the public due to high respect for privacy. At the time of the incident, Indonesia had not ratified the Montreal Convention and had ratified only the Warsaw Convention; assuming that some passengers had booked the ticket with Jakarta as the final destination in a single purchase will end up with determining the applicable convention. However, this fact will not have any impact on the passengers' relatives' rights to claim compensation.

The main questions are whether the Indonesian relatives shall receive the maximum compensation amount or even far beyond it, and whether they will be informed on how the compensation is calculated. Under the Montreal Convention, 113,100 SDRs or more are not given instantly; the relative must prove the position of the victim to determine the fair compensation amount. For instance, a breadwinner should be "valued" more than an infant based on family dependency.

[pensation-on-second-anniversary-2913347/](https://www.sputniknews.com/asia/20160521/1040023109/australia-lawsuit-russia-mh17.html), accessed January 19, 2018.

<sup>121</sup> "Five Australian Families of MH17 Victims File ECHR Lawsuit Against Russia," <http://sputniknews.com/asia/20160521/1040023109/australia-lawsuit-russia-mh17.html>, accessed January 19, 2018.

<sup>122</sup> Marieke de Hoon *et al* (eds.), *Legal Remedies for Downing Flight MH17*, Public International Law & Policy Group and VU Amsterdam White Paper, pp. 15-23.

<sup>123</sup> "No Legal Proof of Russia's Responsibility in MH17 Plane Crash," <http://sputniknews.com/politics/20160525/1040196602/mh17-crash-russian-responsibility.html>, accessed January 19, 2018.

<sup>124</sup> *Convention on International Civil Aviation* done at Chicago on December 7, 1944.

Filing the claim at the right forum is difficult for the Indonesian relatives. Considering the complexity and highly politicized Flight MH17 case, joining the existing Australian or Dutch class action in a foreign court could be the best option. When the result is not as expected, the relatives can still seek justice before an Indonesian court.

The relatives could learn from the AirAsia Flight QZ8501 compensation payment, where the airline decided to use the Indonesian Regulation No. 77 Year 2011<sup>125</sup> as reference instead of the Warsaw Convention in an accident on an international flight. The reason for this decision was the much smaller amount offered by the Warsaw Convention; at one point, this issue raise a question on Indonesian legal chauvinism imposed on international flights.

## VI. INSIGHTS FOR INDONESIAN AND ASEAN AIRLINES

### A. Legal Challenges faced by Indonesian Airlines

Currently, only the Indonesian flag carrier, Garuda Indonesia, has joined an airline alliance. SkyTeam is chosen due to strong commercial considerations for market connections and also a long history between Indonesia and the Netherlands. So, far, the Jakarta–Amsterdam route is one of the favorite destinations for Indonesian tourists traveling to Europe. Thus, Garuda Indonesia is planning to expand its world networks via Schiphol, the SkyTeam alliance’s main base airport, as its global hub in Europe.

To express the alliance, code-shared arrangements are being conducted by Garuda Indonesia with other SkyTeam member airlines and non-members. With this scheme, booking a ticket from Jakarta to Dublin or Athens is easy with a few clicks on the airline’s website. This results to more passengers and less operational costs, and consequently more income. Apparently, this could save a large amount of capital expenditure for market expansion, enabling the airline to strengthen domestic flights within the archipelago.

However, having seen what happened with Malaysia Airlines Flight MH17, Garuda Indonesia must also be aware of codeshare arrangements’ legal implications. As a marketing carrier, the airline could be trapped within its code-shared flights operated by the other airline(s) designating its code; for example, when the code is designated in a flight between two points where both countries have ratified the Montreal Convention. Before May 19, 2017, Indonesia had ratified the Warsaw Convention only. Prior to that time, the worst-case scenario would be when an accident occurred and a court decided that Garuda Indonesia, as marketing carrier, should pay a joint compensation according to the Montreal Convention limits. In other words, the Indonesian flag carrier was (virtually) flying within two liability regimes, namely, the original Warsaw Convention and the Montreal Convention, which is an unfavorable situation for the insurance industry.

The rise of Lion Group, consisting of Lion Air and Batik Air, is also interesting to discuss. With the group’s FDI in Malaysia and Thailand, specifically in Malindo Air and Thai Lion, both airlines’ operations will add more flight connectivity to Indonesia. Thailand ratified the Montreal Convention in October 2017. Prior to that time,

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<sup>125</sup> Indonesia, *Peraturan Menteri Perhubungan tentang Tanggung Jawab Pengangkut Angkutan Udara (Minister of Transportation Regulation regarding Airline Responsibility)*, Permenhub No. 77 Tahun 2011, BNRI No. 486 Tahun 2011 (Minister Regulation No. 77 Year 2011, SG No. 486 Year 2011).

Thailand had not ratified the Warsaw and Montreal Conventions,<sup>126</sup> while Malaysia had ratified the Montreal Convention. In relation to the Indonesian status, the Jakarta-based airline group used to deal with different liability legal regimes for any case that occurred on international flights, specifically intra-ASEAN flights.

Batik Air, operating as a full-service airline, has the potential to take the code-shared model for its long-haul expansion by flying to several points in the region. When it happens and code-shared arrangements are commercially favorable, Batik Air must choose its partner carefully by determining whether to be the operating or marketing carrier, considering the destination points' liability regimes, and paying close attention to safety records.

The burden now lies within Garuda Indonesia, which means calculating their global expansion plan through airline alliance and code-shared arrangements with legal risks. Learning from the Flight MH17 case, the Indonesian flag carrier must have the courage to withdraw from its code-shared arrangements with its partners who fail to maintain a high level of safety, such as flying above conflict zones and its surroundings for the sake of efficiency.

Consumer protection must also not be forgotten, such as harmonization of luggage policy and maintaining passengers' data protection and privacy. Indonesian passengers seem to not have much concern toward these issues, but European and American passengers do. Definitely, dispute on these matters at a foreign court must be prevented at all costs.

## B. ASEAN Level

Following the enactment of the open skies policy under the ASEAN Single Aviation Market<sup>127</sup> in 2015, the increase of intra-ASEAN flights is only a matter of time. A question arises whether this will be followed by harmonization of the liability regime within the member states; in this case, ratification of the Montreal Convention. Four or almost half of the ASEAN member states, namely, Brunei Darussalam, Laos, Myanmar, and Vietnam, have not ratified the Montreal Convention. Obviously, a standard is needed to encourage more code-shared arrangements among the member states in light of pan-ASEAN airline vision.

Establishing airline alliances and code-shared arrangements among the member states' airlines could boost regional development. However, some airlines whose governments have ratified the Montreal Convention could be reluctant to arrange code-share flights with others that are not at operating under the same rules. They may be afraid that their nationals are being less protected.

The existence of airline alliances and code-shared arrangements has underlined the urgency of establishing an independent ASEAN aviation body not only to deal with safety issues but also to protect the member states' airlines through guidelines

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<sup>126</sup> Ridha Aditya Nugraha and Lalin Kovudhikulrungsri, "Aviation Legal Issues in Indonesia and Thailand: Towards Better Passengers' Rights in ASEAN," *Indonesia Law Review* 7, no. 1 (2017): 40. doi: <http://dx.doi.org/10.15742/ilrev.v7n1.290>.

<sup>127</sup> The ASEAN Open Skies Policy came into effect on January 1, 2015. The policy, which is also known as the ASEAN Single Aviation Market, is intended to increase regional and domestic connectivity by allowing airlines from ASEAN member states to fly freely throughout the region via the liberalization of air services under a single and unified air transportation market. The 8<sup>th</sup> and 9<sup>th</sup> Freedom of the Air or cabotage are still prohibited in the ASEAN; at the moment, up to the 5<sup>th</sup> Freedom of the Air is allowed for the member states' airlines.

and recommendations for harmonizing national laws related to passengers' rights. Soft law is the best solution considering the regional initiative's nature as a political consensus.

The new established ASEAN aviation body could initiate anti-competition immunities, such as those in the US, for code-shared arrangements among its members' airlines as long it benefits the member states' development. Finally, this body could take the initiative to secure member states' bilateral and multilateral agreements when opening new code-shared flight(s); and also initiate the ratification of the Montreal Convention among all member states even though it is not an easy task.

## VII. CONCLUDING REMARKS AND THE WAY FORWARD

Airline alliances have become the current business trend in response to the liberalization and rapid growth of the airline industry. When open skies were enacted in more regions, some niche airlines found an opportunity to conduct deeper cooperation through cross-border mergers and takeovers. However, national ownership restrictions, which vary among states, have limited the possibilities of the latter. Airlines have been looking for the most promising business model and currently, code-shared arrangements seem to have been deemed the best recourse, which are also characterized as "virtual mergers" due to their ability to circumvent restrictive bilateral agreements and national laws.

Code-shared arrangements have broad legal implications. The current liability regime, both under the Montreal and the Warsaw Conventions, as amended by the Guadalajara Convention, facilitates this business model by defining the marketing (contracting) carrier and operating (actual) carrier. Each has its own limits of liability, which vary according to their role, including whether willful misconduct, negligence, or wrongful act has occurred, which could trigger unlimited liability. The other legal implications are the potential of infringing competition and consumer protection laws through code-shared arrangements given their dominant positions. Even current bilateral or multilateral agreements could be in jeopardy when a new code-shared flight exceeds one state's maximum traffic volume.

The tragic Flight MH17 case is a perfect example of code-shared arrangement legal implications. The Warsaw-Montreal regime must face the complexity of the doctrine of state responsibility, placing more burden on the victims' relatives for claiming compensation. Further explanation of "negligence or wrongful act" is also contested as to whether flying above conflict zones, although above certain recommended or designated altitudes, falls within that definition. Safety issues in today's airline business are at stake under the name of flight efficiency.

With the rapid growth of the aviation industry in Indonesia, joining an airline alliance or arranging code-shared flights, either with ASEAN member states' airlines or world niche airlines, could become an interesting option for Indonesian airlines to maximize their networks. However, this commercial strategy potentially poses more legal threats. Indonesian airlines must be cautious by choosing the right strategy either as a marketing or operating carrier. Legal consideration must be as important as commercial considerations. Firm action toward code-shared partners who set aside safety issues must be quickly taken, such as withdrawing from the partnership. Otherwise, Indonesian airlines' money and energy would be spent on paying compensation instead of expanding its business, as in the case of Malaysia Airlines.

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