

IMPLEMENTING THE WARSAW CONVENTION 1929 IN INDONESIA*

Ghema Ramadan**

Abstract

This article will discuss how the Warsaw Convention 1929 regulates the responsibility of international airlines to passengers and luggage under civil law. It will also discuss how Indonesia has been bound under this convention, and will further discuss how Indonesian courts have implemented this convention to adjudicate “international carriage” cases relevant to the convention. The unfortunate conclusion is that many Indonesian judges are still unfamiliar with private international law in general, and the Warsaw Convention 1929 specifically.

Intisari

Artikel ini membahas beberapa ide pokok. Pertama, penulis akan menjelaskan bagaimana Konvensi Warsawa 1929 mengatur tanggung jawab maskapai penerbangan internasional terhadap penumpang dan bagasi mereka. Kedua, artikel ini akan mencermati bagaimana konvensi ini mengikat Indonesia serta implementasi konvensi ini oleh pengadilan – pengadilan Indonesia. Kesimpulan yang dapat ditarik adalah bahwa hakim-hakim Indonesia di beberapa kasus yang diangkat, masih kurang terbiasa memberikan adjudikasi berdasarkan hukum perdata internasional, khususnya Konvensi Warsawa 1929.

Keywords: Warsaw Convention 1929, International Airline, Luggage Claims, Indonesia.

Kata Kunci: Konvensi Warsawa 1929, Penerbangan Internasional, Klaim Bagasi, Indonesia.

* Preferred Citation Format: Ramadan, G. (2014). Implementing the Warsaw Convention 1929 in Indonesia. *J.G.L.R.*, 2(1), 22-29.

** 2009, Transnational Law; Faculty of Law; Universitas Indonesia; Jakarta, Indonesia.

A. Introduction

In the past few decades, airplanes have become one of the most important modes of transportation due to its ability to rapidly carry passengers and goods. Airlines, being in charge of these fleets of airplanes, are regulated by comprehensive legal instruments enforcing their contractual legal relation with their passengers. These legal instruments differentiate between the obligations of airlines and passengers to one another.

In the 1920s, multilateral meetings to discuss this matter eventually led to the creation of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12 October 1929 (Warsaw Convention). Until today, this private international law convention has 154 contracting states around the world (ICAO, 2008). The Warsaw Convention –which consists of five chapters– determines the limitation of airline’s responsibility, but not the exact amount of compensation. The latter shall be proven by the passenger as the injured party. Article 1 Paragraph (1) Warsaw Convention states that this convention applies to all international carriage of persons, luggage, or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking. Furthermore, Article 1 Paragraph (2) of this convention also defines international carriage.¹

B. Airline’s Responsibility to Passengers

Article 3 Paragraph (1) of Warsaw Convention regulates that the carrier (airlines) must deliver a passenger ticket which shall contain the following particular information:

1. the place and date of issue;
2. the place of departure and of destination;
3. the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the carriage of its international character;
4. the name and address of the carrier or carriers; and
5. a statement that the carriage is subject to the rules relating to liability established by this Convention.

Beside the obligation to deliver a passenger ticket, the Warsaw Convention also renders carriers liable for its passenger based on a presumption of liability. Article 17 of Warsaw Convention regulates that the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. Hence, the carrier will always be presumed to be responsible for their passenger’s condition, such as death,

¹ Warsaw Convention, Article 1 Paragraph (2), “for the purposes of this Convention the expression “international carriage” means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention...”

wounds, or injury. The carrier is also liable for damage occasioned by delay in the carriage by air of passengers based on Article 19 of Warsaw Convention, also under a presumption of liability.

The Warsaw Convention determines that the nominal limitation of a carrier's liability to passengers is limited to the sum of 125.000 Francs. Nevertheless, the carrier and the passenger may agree to a higher limit of liability by a special contract made by themselves. The use of the Franc currency is somehow problematic because gold's price is fluctuative, for instance in 1933 forcing the USA to freeze gold's price at certain levels (Mankiewicz, 1972).

The above liability of carriers for passengers above can be exempted, under several reasons which have to be proven by the carrier itself or by the passengers. Facts to be proven by the carriers are that:

1. the carrier and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures (Warsaw Convention, Article 20(1)). Damages caused by a carrier's agents such as pilot or stewardess is considered as carrier's liability because they are acting as carrier's representative (Martono, 2002). This is in line with the concept of "vicarious liability" that was adopted by common law legal systems between an employer and his employee. In Indonesia, the concept of vicarious liability is regulated under Article 1367 of the Indonesian Civil Code.
2. The damage was caused or contributed by the negligence of the injured person. The Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability (Warsaw Convention, Article 21).

3. the claim is expired. The right to damages shall be extinguished if an action is not brought within two (2) years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped (Warsaw Convention, Article 29 Paragraph 1).
4. the accident which caused the damage so sustained did not take place on board the aircraft or in the course of any of the operations of embarking or disembarking. Thus, there is an element unfulfilled from Article 17;
5. the damages did not occur by delay in the carriage by air of passengers. Thus, there is an unfulfilled element from Article 19.

If the carrier can prove these conditions above, their liability to passengers can be wholly or partly exonerated. Meanwhile, the passenger who could prove:

1. that the carrier did not deliver passenger ticket (Warsaw Convention, Article 3 Paragraph 2); or
2. that the damage is caused by the carrier or its agent by their wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct (Warsaw Convention, Article 25).

Could claim for an excess of the nominal liability of 125.000 Gold Francs (can be exceeded—depends on the amount of loss) by the court.

C. Airline's Responsibility to Passenger's Luggage

Although the Warsaw Convention does not specifically define “luggage”, this convention obliges carriers to deliver a luggage ticket to passengers based on Article 4 Paragraph (1). That ticket shall contain the following particular information:

1. the place and date of issue;
2. the place of departure and of destination;
3. the name and address of the carrier or carriers;
4. the number of the passenger ticket;
5. a statement that delivery of the luggage will be made to the bearer of the luggage ticket;
6. the number and weight of the packages;
7. the amount of the value declared in accordance with Article 22 Paragraph (2);
8. a statement that the carriage is subject to the rules relating to liability established by this Convention.

Besides the obligation to deliver a luggage ticket, the Warsaw Convention also renders carriers liable to its passengers' luggage under presumption of liability. Article 18 Paragraph (2) of Warsaw Convention regulates that the carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air. The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever. In addition, the carrier is liable for damages occasioned by delay in the carriage by air of luggage. Thus, just like the carriage of passengers, the carriage of baggage is also based on

presumed liability principle where the carrier will always be presumed liable to the damages of passenger's luggage.

If a passenger's luggage is damaged, the passengers themselves must complain to the carrier immediately after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage. In the case of delay the complaint must be made at the latest within fourteen days from the date on which the luggage or goods have been placed at their disposal. The Warsaw Convention determines that the nominal limitation of carrier's liability to passenger's luggage is limited to the sum of 250 Gold Francs per kilogram based on Article 22 Paragraph (2).

Similar to the liability to passengers, the liability of carrier to passenger's luggage can be exempted by several reasons which have to be proven by the carrier itself or the passenger. If a carrier could prove that:

1. the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage (Warsaw Convention, Article 20 Paragraph 2).
2. the claim is expired. (Warsaw Convention, Article 29 Paragraph 1).
3. the damage did not happen during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever (Warsaw Convention, Article 18 Paragraph 2).
4. the damages did not occur by delay in the carriage by air of passengers.

So, there is an unfulfilled element from Article 19;

5. the passenger did not complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt. In the case of delay the complaint must be made at the latest within fourteen days from the date on which the luggage have been placed at his disposal (Warsaw Convention, Article 26 Paragraph 2).

their liability can be wholly or partly exonerated. Meanwhile, facts which may be proven by passenger is:

1. whether the carrier did not deliver luggage ticket, or the ticket did not contain of the number of passenger ticket, number and weight of packages, or a statement that the carriage is subject to the rules relating to liability established by this Convention (Warsaw Convention, Article 4 paragraph 4); or
2. that the damage is caused by the carrier or its agent by their wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct (Warsaw Convention, Article 25).

If a passenger can prove one of the above, the nominal liability of 250 Gold Francs per kilogram will not be applied (can be exceeded).

D. Airline's Responsibility to Hand Luggage

Besides liability for the passengers and their luggage, carrier is also liable to passenger's hand baggage -which is defined as objects which passengers takes charge themselves- under Article 22

Paragraph (3) Warsaw Convention. In this context, the limitation of carrier's liability is 5.000 Gold Francs per passenger. Different with the liability to passengers and their luggage, carrier is presumed not liable for passenger's hand baggage and therefore the damages shall be proven by the passengers in order to receive compensation. This idea was established because the hand baggage is carried by the passengers themselves (under their own surveillance).

Carrier's liability to passenger's hand baggage can be exempted by several reasons which has to be proven by the carrier itself or the passenger. Matters that should be proven by carrier is whether the passenger's claim is expired (Warsaw Convention, Article 26). Meanwhile, matters which could be proven by the passengers is whether the damage is caused by the carrier or its agent by their wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct (Warsaw Convention, Article 25).

E. Warsaw Convention's Implementation in Indonesia

Warsaw Convention is ratified by the Netherlands on July 1st 1933. According to the principle of concordance, this convention was also applied in the Dutch East Indies (Indonesia prior to independence) as their colonial territory under the *Staatsblad* No. 344 Year 1933. After independence, Indonesia bound itself to this convention by sending a written note to the International Civil Air Organization's (ICAO) secretariat. Further, Article 2 of the Transitional Provisions of the 1945 Constitution of the Republic of Indonesia also states that this convention is still relevant. It states that "all government bodies and rules which exist are still in force, as long as it has not been

replaced by this Constitution". The Warsaw Convention, which is still binding for Indonesia, needed to be updated through the Montreal Convention 1999 to better adapt to present circumstances (Martono & Pramono, 2013). The Warsaw Convention's currently holds the main functions for the unification of ticket regulation system, luggage, cargo, and loss claim by the passengers with certain limitations and its exception (Speciale, 2006).

F. Case Studies

1. Singapore Airlines v. Sigit Suciptyono (2000)

Sigit bought a ticket for a Jakarta-Singapore-Taiwan-Los Angeles (USA) flight with Singapore Airlines. When his plane was about to depart from Taiwan to Los Angeles, it crashed, which injured Sigit and caused permanent damage to him. Sigit then filed a lawsuit via the California State Court, but the Court declared the case inadmissible based on *forum non conveniens*. When he later filed a lawsuit via Singaporean Court, he could not fly from Jakarta to Singapore due to his trauma. Hence, Singapore Court did not accept his claim. Finally, he filed a lawsuit via Indonesian court, at the South Jakarta District Court.

In *Sigit v. Singapore Airlines*, the judges from the South Jakarta District Court clearly expressed in their verdict that they have jurisdiction to adjudicate the case under Article 28 of Warsaw Convention because Indonesia is the country where the claimant first bought the ticket (*Sigit Suciptyono v. Singapore Airlines*, 2000). This means that the judges have done the right thing according to the law. But even so, the judges did not discuss which law would apply, whereas this point is of critical importance. According to Indonesian jurisprudence, Indonesian court uses *lex loci delicti commissi* to mend foreign-element-

tort-cases. Moreover, Sudargo Gautama stated that whenever the claimant chooses a forum to file his lawsuit, it implies that he/she is also choosing the applicable law for their cases (Gautama, 2002). Therefore, Indonesian law should be the applicable law for this case. The judges were therefore supposed to analyze every element in Article 17 and 18 Paragraph (1) Warsaw Convention in order, an obligation which they did not undertake.

2. Emirates Airlines v. Dono Indarto (2008)

In *Emirates Airlines v. Dono Indarto*, the problem occurred when Dono ordered a ticket from Istanbul (Turkey) to Jakarta (Indonesia) with a transit route in Dubai (United Arab Emirates). At Istanbul Airport, the airport's security staff asked him to give his walking stick to them. At first, Dono rejected, but eventually the staff forced him to do so then gave him a luggage ticket. When Dono transited in Dubai, he asked Emirates' staff about his walking sticks' condition. The staff replied that his walking stick was fine and can be picked when they arrived in Jakarta later. Unfortunately, he did not find his walking stick when he arrived in Jakarta. He chose to bring legal action via Indonesian courts, at the South Jakarta District Court (*Dono Indarto v. Emirates Airline*, 2008). The judges did not give a clear explanation why they have competency over the case, a crucial omission.

In reality, Indonesian courts would have had competence over this case as Indonesia is the final destination of the claimant's flight, in accordance to Article 28 Paragraph (1) Warsaw Convention. The court also did not state which law shall be used although this case contains foreign elements (subjects of private international law). The proper law, similar with the above explanation, should be Indonesian law.

Furthermore, the court also repeated the same mistake as the Sigit case, by failing to elaborate and discuss whether all elements required for fault are satisfied.

3. **Eunike Mega v. Garuda Indonesia (1999)**

This case began when Eunike arrived in Singapore from the USA by using Northwest Airlines. After that, she bought a ticket from Singapore to Jakarta by using Garuda Indonesia Airlines. Before she had boarded the plane, she gave her luggage to Garuda Indonesia by herself. By the time she arrived in Jakarta, she could not find her luggage. She sued Garuda Indonesia through Indonesian court, via the Surabaya District Court (*Eunike Mega Apriliany v. PT (PERSERO) Perusahaan Penerbangan Garuda Indonesia, 1999*).

The judges at the Surabaya District Court stated that they have jurisdiction over this case under Article 18 *Algemene Bepaling van Wetgeving voor Indonesie* (AB), which provides for *lex loci regit actum*. This means legal action will be adjudicated by the court where such legal action is brought. Unfortunately, the judges were not thorough because there is a specific law instrument which should have regulated (*lex specialis*) this international carriage case, being the Warsaw Convention.

According to Article 28 paragraph (1) Warsaw Convention, a plaintiff may bring an action before the court having jurisdiction where the carrier is ordinarily residing (Indonesia), or has his principal place of business (Indonesia), or has an establishment by which the contract has been made (Singapore) or before the Court having jurisdiction at the place of destination (Indonesia). Hence, the judges should have also relied on the Warsaw Convention instead of referring merely to the AB. They also did not state which substantive law shall be used although this case also contains foreign elements (subject of private international law). The proper law, similar with the above explanation, should be Indonesian law. Furthermore, the court also repeated the same mistake as the Sigit and Dono cases, by failing to elaborate and discuss whether all elements required for fault are satisfied.

G. **Conclusion**

Indonesian judges should be more aware of private international law aspects when it comes to adjudicating foreign element civil cases. For example tort cases involving foreign airlines relating to international flights which is comprehensively regulated under Warsaw Convention.

BIBLIOGRAPHY

A. Books

Gautama, Sudargo. (2002). *Hukum Perdata Intenasional Indonesia*. Bandung: Alumni.

Martono, K. (2002). *Analisis dan Evaluasi Hukum tentang Status Hukum dan Tanggung Jawab Awak Pesawat Udara Sipil*. Jakarta: Badan Pembinaan Hukum Nasional Departemen Kehakiman dan HAM.

Martono, K & Pramono, A. (2013). *Hukum Udara Perdata Internasional dan Nasional*. Jakarta: Raja Grafindo.

Speciale, Raymond. C. (2006). *Fundamentals Aviation Law*. New York: McGraw-Hill Companies, Inc.

B. Journals

Mankiewicz, Rene H. (1972). The Judicial Diversification of Uniform Private Law Conventions, the Warsaw Convention's Days in Court. *The International Comparative Law Quarterly*. Vol. 21, No. 4, 718-157.

C. Convention and Legal Instruments

Algemene Bepaling van Wetgeving voor Indonesie, (1847).

Convention for the Unification of Certain Rules Relating to International Carriage by Air, (1929).

Staatsblad No. 344. (1933)

The 1945 Constitution of the Republic of Indonesia, (1945).

D. Case Law

Dono Indarto v. Emirates Airlines, Indonesian Supreme Court Decision No. 2094 K/Pdt/2010

Dono Indarto v. Emirates Airlines, South Jakarta District Court Decision No. 639/Pdt.G/2008/PN.Jkt.Sel

Dono Indarto v. Emirates Airlines, Jakarta High Court Decision No. 397/PDT/2009/PT.DKI

Eunike Mega Apriliany v. PT (PERSERO) Perusahaan Penerbangan Garuda Indonesia, Surabaya District Court Decision No. 631/Pdt.G/1999/PN.Sby

PT (PERSERO) Perusahaan Penerbangan Garuda Indonesia v. Eunike Mega Apriliany, Surabaya High Court Decision No. 535/PDT/2000/PT.Sby

PT (PERSERO) Perusahaan Penerbangan Garuda Indonesia v. Eunike Mega Apriliany, Indonesian Supreme Court Decision No. 970K/Pdt/2002

Sigit Suciptyono v. Singapore Airlines Limited, South Jakarta District Court Decision No. 908/Pdt.G/2007/PN.Jak.Sel

Sigit Suciptyono v. Singapore Airlines Limited, Jakarta High Court Decision No. 611/PDT/2008/PT.DKI

Singapore Airlines Limited v. Sigit Suciptyono, Indonesian Supreme Court Decision No. 1517 K/Pdt/2009

E. Others

International Civil Air Organization (ICAO). (2008). *Contracting Parties to the Convention for the Unification of Certain Rules Relating To International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention signed at the Hague on 28 September 1955*. Retrieved from http://www.icao.int/secretariat/legall/List%20of%20Parties/WC-HP_EN.pdf