

Alternative Resolution of Legal Vacances Guarantee of Aircraft Particularly Aircraft and Helicopters for The Interests of Creditors In Indonesia

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ABSTRACT

Since the enactment of Law Number 1 of 2009 concerning Aviation, replacing Law Number 15 of 1992, there has been a legal gap regarding guarantees for airplanes and helicopters in Indonesia, leaving creditors unprotected. While foreign creditors benefit from charges for international interests on aircraft, such as Irrevocable Deregistration and Export Request Authorization (IDERA), domestic creditors are left facing unjust conditions. To address this issue and provide legal certainty for creditors in Indonesia, one alternative is to use the provisions of the material guarantee law, including the use of guaranteed institutions like Fiduciary, and to reconstruct existing laws to allow for the granting of material security rights in the form of mortgages.

Keywords: Aircraft Guarantee; Aircraft Mortgage, IDERA

INTRODUCTION

Since the enactment of Law Number 1 of 2009 concerning Aviation replacing Law Number 15 of 1992 in Indonesia, there has been a legal vacuum for guaranteeing aircraft, especially airplanes and helicopters registered and with Indonesian nationality, for the benefit of creditors in Indonesia, (Nainggolan, 2015) because the law as intended only regulates charges for international purposes on aircraft.

The inclusion of international interest provisions including the Irrevocable Deregistration and Export Request Authorization (IDERA) provisions in Law Number 1 of 2009 concerning Aviation cannot be separated from the follow-up ratification by the Indonesian State of the Convention On International Interest Mobile Equipment (Cape Town Convention) and the Protocol To The Convention On International Interest In Mobile Equipment On Matters To Aircraft Equipment with Presidential Regulation Number 8 of 2007. In the explanation of Presidential Regulation Number 8 of 2007, it is stated in the considerations that (Presidential Regulation No. 8 Tahun 2007) "The Convention and Protocol (Cape Town Convention) aims to form a set of laws that apply internationally in the context of aircraft procurement that can increase the development of international aviation."

The lack of regulation regarding the guarantee of aircraft, especially airplanes and helicopters for the benefit of creditors in Indonesia in Law Number 1 of 2009 concerning Aviation has worsened the condition of the practice of guaranteeing airplanes and helicopters which has been going on for a long time in Indonesia until the time the Aviation Law came into force. Number 15 of 1992 regulates the guarantee of aircraft, especially airplanes and helicopters with mortgages. (Badriyah, 2014)

The regulation of international interests and IDERA provisions in the Aviation Law, on the one hand, has brought a breath of fresh air, increasing the confidence of foreign investors in funding the procurement of airplanes and helicopters in Indonesia on a guarantee or hire purchase basis, but on the other hand, it has become increasingly difficult and expensive to find sources of funding in Indonesia.

There is a gap/or clash between the concept of *das sein*, the existence of a legal vacuum and legal uncertainty in the ongoing practice of underwriting aircraft and helicopters registered and with Indonesian nationality for the interests of creditors in Indonesia, and *das sollen* there

should be statutory regulations that provide legal certainty and prioritize justice and benefits for citizens as the philosophical foundation of the nation. If the condition is linked to the welfare state theory, the state has not been able to facilitate and provide a legal umbrella for its citizens in the absence of legal certainty as the main goal of law in positive law which applies to the Legal Certainty Theory proposed by Gustav Radbruch and Lon L. Fuller, Meanwhile, legal certainty can be achieved if the position and interests of the parties are treated equally before the law.

METHOD

This research adopts a qualitative descriptive approach to effectively portray the issues at hand. Through this methodological choice, the study aims to provide a nuanced understanding of the complexities surrounding the protection of creditors' interests in the domain of aircraft and helicopters in Indonesia. The findings of the research are meticulously presented in a comprehensive manner, delving into the intricacies of the subject matter. The narrative not only identifies existing legal gaps but also proposes various alternative solutions to address these shortcomings.

The articulation of the research findings goes beyond a mere cursory overview, offering a detailed exploration of potential avenues to enhance the legal framework pertaining to creditors' interests. By presenting a comprehensive analysis, this study contributes valuable insights that may inform future legislative developments and regulatory measures in Indonesia. The goal is to foster a more robust and secure environment for creditors involved in the aviation industry, ensuring a thorough examination of the pertinent legal landscape and paving the way for effective solutions to protect their interests in aircraft and helicopters.

RESULTS AND DISCUSSION

a. Aircraft Guarantee Practices, Especially Airplanes and Helicopters in Indonesia

The implementation of guarantees for aircraft itself was first regulated in the 1948 Geneva Convention which was signed in Geneva on 19 June 1948 concerning the Convention on the International Recognition of Rights in Aircrafts, where this Convention expressly recognized guarantees in the form of Mortgages or also known as Mortgages on an airplane (Rahadian, Ong, & Zakki, 2022). The Geneva Convention implicitly recognizes that the principle of *lex situs* or *lex rei sitae* which applies domestically in each country is no longer adequate to guarantee legal protection and certainty for aviation-related transactions.

Indonesia is a country that has the principle that law is the highest authority in a country. (Article 1 (13) 1945 Constitution) The practice of guaranteeing aircraft in Indonesia, especially airplanes and helicopters, can be divided into two major phases, namely during Law Number 15 of 1992 and Law Number 1 of 2009 concerning Aviation.

a) Phase of the Entry of Law Number 15 of 1992 concerning Aviation

During the enactment of Law Number 15 of 1992 concerning Aviation, it was strictly regulated regarding guarantees for aircraft, where in Article 12 paragraph (1) of the Law it was stated that "airplanes and helicopters that already have registration marks and Indonesian nationality can be mortgaged" (Article 12 (1) Law No. 15 of 1992). In reality, the implementation of aircraft mortgages cannot run as it should due to the failure to issue a government regulation regulating the procedures for registering mortgages as mandated by law, so that the guarantee implemented does not give rise to legal certainty, namely the emergence of priority rights and executorial rights as the purpose of the guarantee. implemented as intended in Article 1132 Civil Code.

In practice, mortgages on airplanes and helicopters are ultimately carried out by granting the creditor the power to place the mortgage, including granting conditional

power of sale. The granting of the power to install a mortgage is to fulfill the provisions of Article 1171 of the Civil Code which demands that the granting of a mortgage can only be done by making an authentic deed including the granting of the power to grant a mortgage. (Pasal 1171 Civil Code) Apart from that, guarantees are also carried out using a Fiduciary guarantee institution referring to Law Number 42 of 1999, by charging parts of the aircraft that are not intact so that they can become part of the object of the Fiduciary guarantee. Encumbrance, in this way, has risks and drawbacks, including that aircraft components are easy to shift and move, both within and outside the country, resulting in obstacles for creditors when confiscating collateral objects if the debtor does not carry out his obligations. (Andhanaricwari, Abubakar, & Handayani, 2020)

Procedures for encumbrances as collateral for airplanes and helicopters, whether using a Deed of Authorization to Install Mortgages or a Fiduciary Guarantee institution, in fact at this time can still be recorded at the Ministry of Transportation, Directorate General of Civil Aviation of the Republic of Indonesia on the aircraft registration card held, even though the registration referred to as not giving rise to a prior and executory right/or the emergence of a grosse Mortgage deed because the Mortgage Imposition has not been implemented by the provisions of the Civil Code and is only a certificate explaining that aircraft guarantee data has been collected in the aircraft Recordation Book. (Sa'adah, 2023)

b) Phase of the Entry of Law Number 1 of 2009 concerning Aviation

During the enactment of Law Number 1 of 2009 concerning Aviation, due to the legal vacuum regarding guaranteeing aircraft, especially for the interests of creditors in Indonesia, referring to the provisions of Article 71 and Article 74 of Law Number 1 of 2009 concerning Aviation, interest charges were used. International and Irrevocable Deregistration and Export Request Authorization (IDERA) which is based on the Deed of Agreement Granting Property Security Rights as the basis for the delivery of collateral, as well as the use of Mortgage and Fiduciary institutions during the enactment of Law Number 15 of 1992 concerning Aviation. (Wahyunie, Gozali, & Usman, 2022)

Regarding the recording of guarantees for airplanes and helicopters which previously could be carried out, at this time the recording of encumbrances as collateral for aircraft registered and with Indonesian nationality for the interests of creditors in Indonesia cannot be carried out except for recording for the interests of foreign creditors regarding international interests and the provisions of Irrevocable Deregistration and Export Request Authorization (IDERA).

b. Legal Certainty in the Application of International Interests and IDERA for Guaranteeing Aircraft for the Interests of Creditors in Indonesia

International interest provisions and Irrevocable Deregistration And Export Request Authorization (IDERA) for aircraft objects are regulated in Article 71 and Article 74 of Law Number 1 of 2009 concerning Aviation as a follow-up to Indonesia's ratification of the Cape Town Convention and its protocols. Article 71 regulated "Aircraft objects can be burdened with international interests arising from agreements granting security rights to objects, agreements binding conditional rights and/or leasing agreements" (Article 71 of Law Number 1 of 2009 concerning Aviation), Furthermore, Article 74 regulates "The debtor can issue a power of attorney to request deregistration to the creditor to request the deletion of registration and export of an airplane/or helicopter that has obtained registration marks and Indonesian nationality marks" (Article 74), it is called IDERA.

The purpose of ratifying the Cape Town Convention itself is intended to provide a sense of security to international creditors to invest, including in providing financing support related to aircraft procurement in Indonesia, where investment and/or provision of financing facilities

for aircraft procurement in Indonesia are difficult or very limited for the foreign side. The Cape Town Convention is a convention that was formed to universally standardize financing transactions related to movable objects, especially aircraft and aircraft engines. This is because, in financing and leasing transactions between countries, there are often problems with the execution (enforcement) of collateral. In this context and to facilitate financing methods that are based on assets and rent (asset-based financing and leasing), the provisions in the convention are regulated. (Convention on International Interests in Mobile Equipment, 2001)

According to Prof. Dr. Ida Bagus Rahmadi Supancana, S.H., M.H., The Cape Town Convention applies to transactions where the parties come from different countries. According to him, the implementation of certain transactions is determined based on basic provisions, namely the location of the debtor, the domicile of the company, the registered office, and the administrative center. (Supancana, 2012) According to Hikmahanto Juwana, to fulfill the requirements for the Cape Town Convention to come into force, at least two categories of countries must participate in financing transactions. First, the country that is the domicile of the company that produces aircraft and to facilitate the deal and leasing of aircraft has a bank that specifically provides credit which is referred to as a Bank or Export Import Agency (hereinafter referred to as "Producing Country"). Second is the country that is the domicile of the airline purchasing the aircraft (hereinafter referred to as the "Consumer Country").

In applying International Interests and IDERA in encumbrances as collateral for aircraft objects, what must be taken into account is the requirement that the international interests themselves receive priority, namely when the interests are registered at the international registration office which was established for conventions and protocols and is the only registration office for international interests in aircraft objects (Article 78 of Law Number 1 of 2009 concerning Aviation and its Implementing Regulations) and must be recognized and recorded by the Minister.

From the description above, it is clear that international interests and Irrevocable Deregistration and Export Request Authorization (IDERA), as intended by the makers of the Law, it is not intended to guarantee aircraft objects, especially airplanes and helicopters registered and with Indonesian nationality, for national interests/or creditors in Indonesia, so that the application of the provisions as intended for the benefit of creditors in Indonesia using the procedures as described will not give rise to legal certainty.

c. Alternative Settlement Fills the Vacancies in Aircraft Guarantee Laws Which Creates Legal Certainty for Creditors in Indonesia

By basing it on Satjipto Rahardjo's Progressive Legal Theory by interpreting the law progressively and reconstructing the material guarantee law that applies in positive law in Indonesia, then related to guaranteeing aircraft, especially airplanes and helicopters registered and with Indonesian nationality, for the benefit of creditors in Indonesia, it should be possible. The following alternative is taken:

a) The use of Fiduciary Guarantee Institutions is in accordance with the provisions of the Fiduciary Guarantee Law Number 42 of 1999

The use of Fiduciary guaranteed institutions in encumbrances on aircraft, especially airplanes and helicopters, can be implemented by making changes to the provisions of Article 3 letter "c" of Law Number 42 of 1999 concerning Fiduciary Guarantees which excludes airplane mortgages as objects of fiduciary guarantees. The exclusion of mortgages on airplanes as part of the object of Fiduciary collateral is no longer appropriate, where the exclusion in question is due to the formulation of Article 12 paragraph 1 of Law Number 15 of 1992 concerning Aviation which previously regulated the encumbrance of airplanes and helicopters as collateral with Mortgages. (Sukarmi, Sudirman, & Egawati, 2020)

Furthermore, with the repeal of Law Number 15 of 1992 concerning Aviation, it was replaced by Law Number 1 of 2009 which eliminates the formulation of guarantees for airplanes and helicopters in the national interest as regulated in the previous Aviation Law, except aircraft objects are the object of Fiduciary collateral is no longer appropriate.

Thus, it is very logical to make aircraft, especially airplanes, and helicopters, part of the Fiduciary guaranteed object without having to debate the material status of aircraft, especially airplanes and helicopters, considering that the object of Fiduciary guarantee as regulated in Law Number 42 of 1999 concerning Fiduciary Guarantee includes moving or immovable objects.

b) Use of International Importance Provisions and IDERA

"As is known, for international purposes, aircraft objects can be burdened with international interests arising from agreements granting security rights to objects, agreements binding conditional rights, and/or leasing agreements." (Article 71 Law No. 1 of 2009 regarding Aviation) In Aviation Law, international interests are defined as interests obtained by creditors arising from an agreement granting property security rights, a conditional rights binding agreement, and/or a leasing rights agreement which is subject to the convention on international interests in mobile equipment and protocols regarding special issues on air equipment (Protocol to The Convention on Interests in Mobile Equipment on Matters Specific to Aircraft Equipment). (Explanation of Article 71, Law number 1 of 2009)

Furthermore, in the provisions of Article 74 of Law Number 1 of 2009, it is regulated that "The debtor can issue a power of attorney to request deregistration to the creditor to request the deletion of registration and export of an airplane or helicopter that has obtained an Indonesian registration mark and an Indonesian nationality mark." (Article 74 Law No. 1 of 2009)

So from the two formulations of the articles above, it can be concluded that regarding guarantees for aircraft, especially airplanes and helicopters registered and with Indonesian nationality, guarantees can be made for international purposes based on an agreement granting property security rights, conditional rights binding agreement and/or a lease rights contract for business intentions and based on this, the Debtor can then issue an Irrevocable Deregistration And Export Request Authorization (IDERA).

With the priorities related to international interests and Irrevocable Deregistration and Export Request Authorization (IDERA) which are formulated in Law Number 1 of 2009 and made as a special provision (*lex specialis*) to create legal certainty, the provisions are very appropriate It could also be applied to the interests of creditors in Indonesia (nationally).

The imposition of international interests, in this case, can then be based on the collateral law that applies in positive law in Indonesia and in comparison with other countries participating in the Cape Town Convention, namely the use of mortgages, where the implementation order will be easier because the supporting devices include a notary as a public official is given the authority by Law to make an Aircraft Mortgage Deed as stated in the explanation of Article 15 paragraph 3 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary so that later there will be legal certainty regarding the guarantee carried out.

CONCLUSION

The outcomes of the analysis of the practice of guaranteeing aircraft, especially airplanes and helicopters for the benefit of creditors in Indonesia, which has been going on so far, can be concluded that both during the period of enactment of Law Number 15 of 1992 concerning Aviation and Law Number 1 of 2009, the practice of implementing charges

Guarantees with mortgages, fiduciaries or other forms of guarantee do not create legal certainty. This legal uncertainty is because the guarantee being implemented may not give rise to any priority rights among the creditors/or preferences over the collateral object owned by the creditor holding the collateral if there is a breach of contract/or non-performance regarding the execution of the collateral which is supposed to be implemented.

This, as an alternative to filling the legal gap in guaranteeing aircraft, especially airplanes, and helicopters, for the benefit of creditors in Indonesia, which can lead to legal certainty, namely the emergence of priority rights and executorial rights as the purpose of the guarantee which can be implemented by utilizing a Fiduciary Guarantee Institution by the provisions of the Fiduciary Guarantee Law Number 42 of 1999 by deleting the provisions of Article 3 letter "c" of the said Law regarding the invalidity of Fiduciary guarantees on aircraft mortgages by making the aircraft a registered movable property object which is part of the object of Fiduciary guarantee.

Apart from that, with the priority that it has as a special provision (*lex specialis*) in the positive legal order in Indonesia, the burden of international interests and Irrevocable Deregistration and Export Request Authorization (IDERA) as regulated in Article 71 and Article 74 of Law Number 1 of 2009 concerning Aviation can also be applied in guaranteeing airplanes and helicopters for the benefit of creditors in Indonesia by basing it on the granting of material security rights, namely in the form of Mortgage Guarantees as regulated in Book II of the Civil Code, because in the Law and the relevant regulations below it is not there is a single provision that prohibits the use of the provisions in question for the benefit of creditors in Indonesia/or nationally.

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