

Collateral Agency for Aircraft

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ABSTRACT

One way of raising funds is to visit a collateral agency. Law no. 42 of 1999 concerning fiduciary matters does not apply to aircrafts. However, in Law no. 1 of 2009 regarding aviation which refers to the Cape Town convention suggests that aircrafts could be burdened by getting into fiduciary matters because of contradiction between the two laws. One solution for this problem is to collateralize all parts of planes.

Keywords: Aviation; Fiduciary; Mortgages

1. INTRODUCTION

Indonesia is an archipelago located strategically between two continents and two oceans. Further, it has the fourth largest population in the world. All this makes it a country with a strategic location, a very large and lucrative market.

The location and market advantages have enabled Indonesia to grow quite rapidly in recent years. Its development has been thorough and even. In an archipelagic country like Indonesia where given that most of the area is in the form of sea, it is not possible to use road transportation if you want to reach all areas across the country. Sea transport can be the choice for transportation between islands. But sea transportation takes quite a long time. The final choice then has to be to transport by air, which is quite fast and can reach out to remote corners that are difficult or impossible to reach over land.

In Law No. 15 of 1992 regarding air flights, it is argued that transport has an important role and is of strategic importance in establishing embodiment archipelago insight, strengthen national security, and strengthen the relationships between nations in an effort to achieve national goals based on Pancasila (five sila) and the Constitution of 1945. It is also stressed that one mode of transportation cannot be separated from other modes of transport and that the national transportation system should be dynamic so as to be able to adapt to progress in the future. The system should be able to achieve its objectives in a short time, be high-tech and ensure a high level of safety, play an enhanced role in link regions both at the national and international levels, and help drive national development in order to improve people's welfare.

Another feature concerns national economy: the transportation developed should increase national income by helping develop national industry and creating

and maintaining the level of employment. It should also meet defense and national security requirements.¹

Air transport is now mature enough in the Republic of Indonesia. The demand for air transport is growing significantly from year to year. Today, one can see an impressive number of airline companies operating in Indonesia in response to the growing demand for transportation by air. Examples include Garuda Indonesia, Lion Air, Citilink, Airasia, Express Air and Susi Air. The growth has meant a lot of airplanes.

Naturally, the growing need for aircraft entails very large capital investments—the aircraft industry is one of the industries requiring large capital. To develop the aircraft industry, one needs substantial funds. The planes to be bought are expensive because of the requirement for intensive research². In short, it is a capital intensive industry for the aircraft industry is capital intensive. For example, the price of the Airbus A-380 series, which was launched in 2005, is between US\$263 and US\$ 283 million, while a Boeing 777 series aircraft is priced in the vicinity of US\$ 250 million. There are many ways of securing such substantial funds.³ One way is to go to a collateral agency.

Securing control or ownership of an aircraft requires an agreement among the providers of funds. Invariably, some would be foreign companies. When the aircraft is leased, one needs an agreement between the airline and lessor in which the party financing the lease can face the burden with interest rates at international levels through a collateral agreement delineating the right material, and the rightly conditioned binding agreement and/or lease agreement. Such arrangements usually refer to the international convention on mobile equipment (covering international interests on mobile equipment) which is better known as the Cape Town Convention. The convention covers protocols regarding specific issues on equipment aircraft, e.g., a protocol stipulating the convention on interest rates associated with mobile equipment specific to aircrafts.⁴ The Presidential Decree on Ratification of the Convention on International Interests in Mobile Equipment was promulgated on February 20, 2007. Along with this, the Protocol on Convention on International Interests in Mobile Equipment Issues Concerning Special On Aircraft Equipment was extended. This was done by enacting Law No. 1 in 2009 to include adjustments to the Cape Town Convention according to which nations can use it as a security object as follows:⁵

- a. Aircraft and all equipment and spare tribes.
- b. Parts separately from the aircraft.
- c. Aircraft still under construction (*in aan bouw* / in construction).
- d. The entire fleet of aircraft owned by a company (fleet mortgage)

¹ Abbas Salim, Transportation management, Jakarta: Raja Grafindo. 2006. p. 2-6

² <http://www.kemenperin.go.id/artikel/6966/Industri-Pesawat-Terbang-Terganjil-Modal> access 20 April 2016

³ Martinus Udin Silalahi, “Airbus versus Boeing, Competition of Two giants”, <<http://www.sinarharapan.co.id/ekonomi/industri/2005/0223/ind2.html>>, access 5 Januari 2015

⁴ <http://www.dephub.go.id/berita/baca/capetown-treaty-perlu-disosialisasikan-kepada-ahli-hukum-indonesia-9863/?cat=QmVyaXRhfHNlY3Rpb24tNg==> access 15 April 2016

⁵ Mariam Darus Badruzaman, Serial Civil Law Book II: Compilation Security Law, cet.1, (Bandung: CV Mandar Maju, 2004), p. 166.

- e. All of the company's assets including aircraft flight and other equipment (floating charge).

Collateral aircrafts are regulated under the laws of the Republic of Indonesia. The arrangement provided in Article 3 letter c of Law No. 42 of year 1999 on fiduciary matters states: "Law Fiduciary shall not apply to Mortgages on aircraft". This meant that a bail aircraft is not bound by the fiduciary constraint even though the aircraft is a moving object. However, it is mortgaged, so that when the debtor defaults or is unable to meet his obligations, namely pay off his debt to a Bank according to the agreement set forth in the loan agreement, the bank may be able to execute its rights against the debtor.

The provisions of Article 71 of Law No. 1 of 2009 regarding flights says that aircraft may be saddled with international interest arising from collateral agreement granting the right material, the rights associated with a conditional binding agreement, and/or a lease agreement. However, it does not explain what security institutions can be put on board the aircraft. Further, because moving objects have not yet been recognized as fiduciary institutions in Indonesia, problems could arise because no regulations have been issued for implementation on airplanes moving objects and for using collateral mortgages for the pupose of implementation,

2. ANALYSIS

In the provision of credit, banks must pay attention to the principles of healthy credit while taking into account the risks associated with loan repayments. To obtain a conviction before providing credit, the bank should conduct a careful assessment of the character, capacity, capital, collateral and business prospects of the borrower. Collateral is one element of a credit guarantee that enables the bank to obtain additional confidence in the ability of the borrower to return the debt.

In a broad sense, a guarantee can be of material as well as immaterial nature. Material guarantees relate, for example, to buildings, land, vehicles, jewelry, securities while an immaterial guarantee, for example, is one given to one or more individuals (*borgtocht*). As for the nature and manifestations of objects according to the law, we can distinguish by moving (*roerende goederen*) and immovable objects (*onroerende goederen*).

One can also classify moving objects into tangible and intangible ones. Tangible means that the items can be classified into groups and moved from one place to another, e.g., office equipment and motor vehicles. Examples of intangible are checks, money orders, shares, bonds and bills.

The following two rights are guaranteed to assure creditors:

- a. The warranty rights are of a general nature, namely the guarantee given by the debtor to the creditor, without giving rights concurrently—between the creditor and the other creditors.

- b. The warranty rights are of a specific nature in that the guarantee given by the debtor to the creditor accords precedence to the rights of the creditors over those given to others, i.e. the creditor enjoys a lender privilege (preferent)

Kansil and Christine classify object as follows:⁶

- a. FIXED OR NOT MOVING OBJECTS

A fixed or immovable object or item is that which cannot move or can not be moved physically, i.e. land and buildings, grounds (land) including whatever that has been established above, trees and field crops, machinery attached to the ground where it is located, ships and airplanes.

- b. MOVING OBJECTS

Moving objects or goods that can, by nature, move or be moved, e.g., motor vehicles, deposits, goods-stock (inventory), office equipment, machinery, livestock, bills and rights to collect on collateral claims. Such objects can be used as security for the repayment of the debt by the debtor and binding guarantees on the objects mentioned.

In addition to material guarantees, other collateral accepted as loan collateral are non-material guarantees such as the assumption of responsibility. Pursuant to Article 1820 of the Civil Code, one needs third party approvals for the benefit of creditors undertaking to pay the debt to the Debtor if the Debtor does not fulfill its obligations. Underwriting a guarantee takes one of the following forms:

- a. Individual Assurance
- b. Assurance Company
- c. Bank Guarantee
- d. Standby Letter Of Credit ("SBLC")

Classification of objects as security objects according to the applicable Civil Law system of Indonesia is on movable and immovable, based on the following criteria:⁷

- a. An immovable guarantee can pertain to entities such as:
 - 1) The land, with or without buildings or without plant thereon;
 - 2) Machinery and equipment that is attached to the land or building as one unit;
 - 3) Ships of size 20 cubic meters high and have been registered; and

⁶ C.S.T. Kansil dan Christine S.T. Kansil, *Module Civil Law (including Principles of Civil Law)*, third edition, PT Pradnya Paramita, Jakarta.

⁷ *Ibid.* p. 35

- 4) Flats built below the ground under the building erected (in the case of freehold land) are subject to building rights or land use rights by the State, as well as other objects which constitute an integral part of the land.
- b. A guarantee pertaining to moving objects can pertain to objects such as the following:
 - 1) Warranty bodied objects, guaranteeing physically visible objects such as motor vehicles, machinery and office equipment, jewelry and so on; and
 - 2) Disembodied securities, e.g., collateral in the form of securities, such as the bill of exchange, promissory notes, time deposits, certificates of deposit, accounts receivable, share certificates, bonds and other securities.

Moving objects binding to guarantee can be fiduciary or in the form of a pledge. Moving objects to be mortgaged should be controlled by the creditor whereas fiduciary physical binding of moving objects continue to be under the control of the debtor—only the ownership rights are submitted to the lender.

One form of collateral is mortgage, which consists of material rights over immovable objects obtained by the replacement of the collector to sue him for repayment of an engagement and is regarded as collateral for a debt loaned to the owner of the object. Mortgage collectors have the right to receive the payment of money; the right takes precedence over any redemption or payment of the debt to others.

The term ‘mortgages’ originated from the word *hypothek* of Roman Law; *hypotheca* is a debt security with respect to which no dependent goods are transferred to the hands of people who lend but the goods can always be requested or required even though the goods are already in the hands of another person because the person owing does not meet his/her obligations.⁸

In the Indonesian translation from the Dutch language, *onderzetting* is loading. But *hypotheca* is not exactly the same since mortgages pertain only to items that do not move alone while *hypotheca* includes both guaranteed moving objects and objects that do not move. Regardless, the resemblance in the legal

⁸ Subekti, Principles of Civil Law, (Jakarta; Intermasa, 1984), p. 78

language in Indonesia and in the Netherlands, the term *hypotheek* has now been adopted to show one form of security of land rights.⁹

Following the guarantees intended, the debt of a debtor provides primary right to a particular creditor, namely, the holder of the security interest. Therefore, he takes precedence over other creditors in case the debtor defaults. Encumbrance only replaces mortgages as long as the land is left alone. *hypotheek* aboard a ship and aircraft remains applicable. Mortgages on ships and aircraft remain in effect. Alongside, the rights guaranteed in the form of mortgages on ships and aircrafts, fiduciary lien and security interest are also applicable.

As for mortgages, the mortgage provisions set forth in paragraph 4 in Article 314 and Article 315 a, b, c of the Book of Commercial Law contain a *lex specialist* on the draft Civil Code. When the draft Trade Law does not set forth requirements specifically, all provisions concerning existing mortgages in the Book of the Law of Civil Law remain valid.

According to Article 1162 of the Civil Law, "mortgages is a right material on the objects do not move, to take the reimbursement of him for repayment of an engagement." From these formulations, it can be said that mortgages is a right on immovable material arising from agreements, which is a form of collateral that must be agreed upon in advance. Mortgages as the right material is confined to the right to take the reimbursement of the immovable concerned for the settlement of an engagement only.

Imposition of mortgages should be done via an authentic deed. Since entitlement mortgages must be agreed upon beforehand, a mortgage can be seen as a security interest that is *accessoir*, i.e., as a debt agreement made between the creditor and the debtor. According to Gautama Sudargo¹¹, principal agreements that raise the legal relationships pertaining to debts, can be done by the deed under hand or in an authentic deed.

To perform a mortgage on an object, the requirements to be met by the debtor and creditor are;

- a. Upper fixed objects;
- b. Notary deeds; and
- c. The registered office behind the Name (*Kodester*).

The main characteristics of mortgages are:¹⁰

⁹ <http://srirahmayanizaricazalacca.blogspot.co.id/2014/11/hukum-jaminan-hipotek.html> access 20 April 2016

- a. Mortgage is a right over materials and having absolute rights means that they can be maintained against any person while binding the object and giving not only complete authority to the owner of the object but also a period of unlimited rights.
- b. An *Accessoir* agreement.
- c. *Droit de Preference* or rights take precedence over other receivables.
- d. Are easily executed.
- e. The objects are fixed objects, either tangible or intangible.
- f. They contain only rights to pay off the debts in question based on the values of the collateral objects but they do not give the rights to master the objects.
- g. They are charged on objects belonging to other persons and not on ones own possessions.
- h. It is a right that cannot be of for-for nature.
- i. It is *openbaar* or open-ended.
- j. It contains descriptions or speciality.

As set forth in Articles 1162 and of 1163 Book of Civil Law, a mortgage is a right to material that is attached to an object that is not moving. It is an object that is a collateral mortgage that can be availed by anyone with the objective to pick a replacement for repayment of an engagement. The right for the material cannot be divided and weighed for the the overall assurance of the given objects. It can be concluded that the rights to the material, referred to as mortgages absolute, provide assurance that they can be maintained by anyone in the form of mortgages. Article 315 e Book of Commercial Law, also affirms that "Ships are registered and will be auctioned when seized outside Indonesia, are not exempt from mortgages."

The legal consequences of loading mortgages on objects that do not move continue to have value as objects of collateral for debt repayment by the debtor to the creditor and does not question who is the master of the object (*droit de suite*). The only way to get the right for material attached to the object mortgages is to get the registration requirements fulfilled. Once the mortgages have been registered, they must be attached the right materials in the form of collateral mortgages—as object mortgages. In case the mortgage has not been registered, the lender would

¹⁰ Mariam Darus Badruzaman, Chapters About *hypotheek*, fourth edition, PT Citra Aditya Bakti, Jakarta, 1991. P. 40

not have the right to the material as guaranteed in the mortgage. This is because paragraph 2 of Article 1179 in the Book of Civil Law, asserts that "mortgages not yet registered do not have any power and are against the creditors who do not have ties with mortgages."

Registration gives birth to the binding force of the agreement and the date of registration of mortgages accord executorial power on the *grosse* deed mortgage agreement. Another consequence of the registration is to determine the order of "ranking" to the holder of the mortgage of an object. Holders who first registered mortgages have accrued to the precedence in the fulfillment of the billing receivable from the holders of mortgages that register next (*droit de preference*).

It is stipulated in Article 315 of the Code of Trade Law that the level of mortgages is determined on the day of bookkeeping. Mortgages recorded on the same day, have the same rate. Article 1181 of the Book of Civil Law also confirmed that the level of collateral of the mortgage holder is determined according to the date of its books. They must be posted on the same day, have a mortgage dated identically (no matter at what hours the bookkeeping was done, although the hour was recorded by an employee of mortgages).

An important consequence of the registration of mortgages is the fulfillment of the principle of publicity, i.e., mortgages can be known by the public and the principle of specialty, the principle that requires that mortgages can only be imposed on the designated objects specifically, the objects do not move, and the objects are tied up as collateral.

3. CONCLUSION

Although it has a finite life, an airplane can be seen as a permanent thing for practical purposes. According to the Indonesian legislation, an aircraft is an object that needs a security agency for financing mortgages recognized by fiduciary legislation which states that the aircraft cannot be secured by a fiduciary institution. However, the aircraft can be incorporated into other security institutions such as leasing or in a fiduciary manner the components in the aircraft itself, so it is not a unified whole-shaped aircraft.

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