

AIRCRAFT FINANCING INDUSTRY: JURIDICAL ANALYSIS OF GUARANTEE AGREEMENT IN THE AIRCRAFT FINANCING INDUSTRY

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Abstract

All humans require various supports to progress in life, particularly in Indonesia. People's mobility is required at a rapid pace due to the shape of Indonesia as an archipelago. The aviation industry is one of the supporting factors. Indonesians require the use of both domestic and international aircraft. As a result, massive procurement of aircraft fleets takes place. The airline requires financing to support the aviation sector as a capital-intensive and high-technology industry in its procurement. Every business activity must require collateral to prevent the parties from defaulting. As a result, the contents of this journal will explain the entire discussion of financing and collateral in accordance with applicable laws.

Keywords: Aircraft Financing; Leasing; Guarantee Agreement

Abstrak

Semua manusia memerlukan berbagai dukungan untuk kemajuan kehidupannya, khususnya di Indonesia. Mobilitas masyarakat diperlukan dengan pesat mengingat bentuk Indonesia sebagai negara kepulauan. Industri penerbangan menjadi salah satu faktor pendukungnya. Masyarakat Indonesia memerlukan penggunaan pesawat domestik dan internasional. Dampaknya, terjadi pengadaan armada pesawat secara besar-besaran. Maskapai ini membutuhkan pembiayaan untuk mendukung sektor penerbangan sebagai industri padat modal dan berteknologi tinggi dalam pengadaannya. Setiap kegiatan usaha pasti memerlukan agunan untuk mencegah para pihak melakukan wanprestasi. Oleh karena itu, isi jurnal ini akan menjelaskan keseluruhan pembahasan mengenai pembiayaan dan agunan sesuai dengan peraturan perundang-undangan yang berlaku.

Kata Kunci: Pembiayaan Pesawat; Leasing; Perjanjian Penjaminan

A. Introduction

Indonesia is the largest island empire in Southeast Asia and the world with an area of 1.905 million square kilometers and over 17,000 islands, including small islands. As a result, Indonesian territory also passes through the Malacca Strait, which serves as the primary route for the world's most active global shipping traffic. This statement starts with the observation that water connects the Indonesian islands, i.e., Indonesian territory. The Indonesian population has become a highly mobile society as a result of their ability to move from one island to another. Appropriate modes of transportation are required to support this mobility. These modes of transportation must include land, sea, and air travel.

The presence of these three modes of transportation necessitates the creation of suitable infrastructure. For example, if the community uses surface transportation, it can connect to the destination via the toll road; if the community uses water transportation, it can connect via the port; and if the community uses air transportation, it can connect via the airport. One of the three modes of transportation mentioned above, air transportation or aircraft, has seen rapid development. From the fuselage of the aircraft to the infrastructure that supports it, aircraft are one of Indonesia's fastest growing modes of transportation. This development is being driven by people's desire for quick, convenient, and safe transportation.

The Indonesian government also contributes to the development by allowing airlines to set their own fares. This encourages airlines to bring more aircraft to the market in order to support Indonesia's economic activities. In this case, PT. Dirgantara Indonesia (Persero) is Indonesia's sole airframe manufacturer ("PT DI"). PT DI, on the other hand, is unable to manufacture airframes for all Indonesian airlines, forcing them to engage in cross-border airframe transactions.¹ Airlines in Indonesia have two options for procuring aircraft: buying and selling from aircraft manufacturers or leasing from foreign leasing companies. Airlines have chosen to lease aircraft to foreign leasing companies when procuring aircraft because aircraft are very expensive and PT DI has not been able to produce many aircraft.²

Airlines use leasing as a form of financing. Direct financing, finance lease, operating lease, and sale and lease back are the four types of aircraft financing. Leasing is a type of airline financing. Direct financing, finance lease, operating lease, and sale and lease back are the four types of aircraft financing. Because of the cost of the aircraft and the type of financing provided by the airline, the aircraft business is classified as a high-tech business; financing is also provided in the form of syndicated loans, in which creditors include more than one bank.³ The aircraft lease is also handled in accordance with the credit agreement between the parties. This credit agreement gives rise to additional guarantees agreements in the form of fiduciary guarantees. The objects guaranteed in trust are divided into several aircraft parts, such as the wings and aircraft engines with economic value.⁴

In Indonesia, leasing is governed by positive law, specifically Article 1 Paragraph 5 of Law No. 9 of 2009 concerning Financing Institutions, which states that financing activities include

¹ Nike K. Rumokoy, "Strategi Pembangunan Hukum Ekonomi Indonesia", *Jurnal Hukum Universitas Sam Ratulangi*, Vol. 18, No. 5, 2010, 14-28, Page 21.

² Siti Malikhatun Badriyah, "Problematika Pesawat Udara Sebagai Jaminan Pada Perjanjian Kredit Dalam Pengembangan Industri Penerbangan", *Jurnal Masalah – Masalah Hukum* 43, No. 4 (2014): 546-552, Page 548.

³ Martin Ari Gunanta Sembiring, "Status Hukum Jaminan Pesawat Dalam Perkembangan Objek Jaminan di Indonesia", *SASI* 25, No. 2 (December 27, 2019): 155 – 159, Page 157.

⁴ Jatmiko Winarno, "Perlindungan Hukum Bagi Kreditur Pada Perjanjian Jaminan Fidusia", *Jurnal Independent Fakultas Hukum*, Vol. 1 No. 1 (2013), Page 45.

providing capital goods on a lease basis with option rights (finance lease) or leasing. Transaction with no option to purchase (operating lease), in which the lessee pays monthly installments for a set period of time. The four types of aircraft financing have different practices. The first type of financing is direct financing, which is carried out by three parties: manufacturers, banks, and airlines. The airline and the manufacturer enter into a purchase agreement with the bank in this case. The fuselage of the manufacturer is then leased to the airline by borrowing money from a bank, and the fuselage can then be transferred directly to the airline.⁵ Second, the manufacturer enters into a purchase agreement with the leasing company in the case of finance lease financing. Following the signing of the purchase agreement between the leasing company and the manufacturer, the airframe is handed over to the airline, who signs the lease agreement for the airframe. In contrast to direct financing, which does not provide the airline with a purchase option at the end of the lease term, it is proposed that the airline be provided with a purchase option at the end of the lease term. The operating lease, which is similar to the finance lease but differs in the end of the aircraft lease, is the third type of financing. Under the operating lease, the airline does not have the option to purchase the leased aircraft, so it must be returned to the leasing company. Finally, sale-and-leaseback financing is commonly used in Indonesia, where airlines enter into direct purchase agreements with manufacturers. The airline has the right to purchase the aircraft under this type of financing, but must first find a leasing company that will later acquire the right to purchase from the airline. After locating a suitable leasing company, the airline must enter into a purchase agreement that includes the requirement that the leasing company lease the aircraft to the airline following the transfer. The airlines have the option to purchase or not purchase the aircraft at the end of the lease under this type of financing.⁶

The airlines that received the airframe are not permitted to market the aircraft immediately following the lease. The Civil Aviation Directorate requires airlines to register an aircraft type certificate. This type of aircraft certificate is issued by the Ministry of Transport. The aircraft type certificate tariff was established in accordance with Government Regulation No. 11 of 2015 on types and tariffs for non-tax government revenues (PNBP). This tariff is Rp. 35,000,000.00 per certificate for aircraft with a maximum take-off weight ("MTOW") of up to 12,500 lbs, Rp. 65,000,000.00 per certificate for aircraft with an MTOW of 12,000 lbs or more, and Rp. 5,000,000.00 per certificate for the engine type or aircraft propeller.⁷

⁵ Hendra Ong, Seminar Presentation, *Aircraft Financing Industry*, (Jakarta, 29 September 2020)

⁶ Anitana Widya Puspita, *Bisnis.com*, "Mengenal Empat Skema Transaksi Pesawat dan Dampaknya Saat Pandemi", <https://ekonomi.bisnis.com/read/20200929/98/1298341/mengenal-empat-skema-transaksi-pesawat-dan-dampaknya-saat-pandemi>, accessed on 22nd February 2023 14.30.

⁷ Biro Komunikasi dan Informasi Publik, "Tarif Penerbitan Sertifikat Tipe Pesawat Udara", <http://dephub.go.id/post/read/tarif-penerbitan-sertifikat-tipe-pesawat-udara>, accessed on 22nd February 2023 14.35.

As previously stated, aircraft financing systems are extremely complex and are unknown to the majority of people, particularly Indonesians who are researching or studying from a legal standpoint. As a result, this study will examine the systems used in aircraft financing in a language that people of all backgrounds can understand. Furthermore, by evaluating the Aviation Law to regulate financing with systems established in accordance with the Cape Town Convention, this study can serve as a reference to promote Indonesia's progress, particularly in the field of aviation.

B. Method

This study employs a normative legal research method, as well as a conceptual and statutory approach. Data was gathered through library research, using primary legal materials such as laws and regulations, as well as secondary legal materials such as books and literature on aviation law and aircraft finance practice. This research typology is a prescriptive typology, which means it provides a description and analysis of the problem in order to find solutions to the corresponding problems. The main issue in this investigation is the air financing system, which includes a guarantee agreement resulting from the main agreement. Qualitative data analysis methods are used in this study. The qualitative analysis method describes the research with sentences describing the results. In this case, the author reviews and processes the legal materials obtained in order to analyze the issues concerning the parties' positions in the practice of aircraft financing and the legal efforts in Indonesia to provide legal certainty to the parties involved. The results of this research take the form of prescriptive analysis, which is a type of research that uses existing legal problems to propose a solution based on the findings of an analysis of the applicable legislation and legal theory.

C. Result and Discussion

1. The Various Types of Aircraft Financing available in Indonesia, as well as The Mechanisms Based on Aviation Law No. 1 of 2009 and The Guarantee Agreement that follows The Main Agreement

An aircraft, according to Article 1 Paragraph 3 of Law No. 1 of 2009 concerning Aviation, is a machine or device that can fly in the atmosphere due to the buoyant force of air reaction, but not due to the reaction of air to air. Flying takes place on the earth's surface. Airplanes and helicopters are the two types of aircraft. The fuselage is classified into three types: Boeing, Airbus, and Cessna. These three types of aircraft are different in size and even financing.⁸ According to

⁸ Siti Malikhatun Badriyah, *Op.cit*, Page 548.

Prof. Dr. Mieke Kantaatmadja, the nature of air law over an aircraft differs from those over moving objects. Despite the fact that an aircraft is a moving object, it must be registered in order to carry a national registration number. This is required because when an aircraft is in operation and crosses a country's borders, it has a distinct identity, and air traffic control can grant the aircraft permission to land on that country's runway. This opinion serves as the foundation for other legal experts to assign an aircraft's special characteristics as movable object and *sui generis*.⁹

The most important aspect of the aviation industry is aircraft financing. The presence of this financing is the first form for the airline to begin commercialization and pay the aircraft lease cost until the lease period ends. The financing of this aircraft is time consuming, costly, and the contract terms are quite complicated. This provision necessitates large sums of money in order to finance the aircraft. A clause in the contract states that in the event of force majeure, such as a natural disaster or human error, no compensation will be paid for the aircraft financing.¹⁰ As a result, choosing a qualified and competent financial institution is critical in financing this aircraft. Lessors, lessees, banks, and manufacturers are all involved in aircraft financing. The role of all parties involved in this aircraft financing is critical. If there is a default in this financing, not all four parties are liable because not all parties agreed to the financing agreement clause.¹¹

According to Article 1313 of the Commercial Code, a contract is a legal act that binds one or more persons to one or more other persons. That is, when a contract is signed, legal acts arise in relation to the parties' rights and obligations to achieve the agreed-upon goals. R. Subekti explained that the agreement creates an obligation between the parties who enter into it, so the relationship between the obligation and the agreement is that the agreement creates the obligation, whereas the obligation is created by the agreement.¹² Leasing is also governed by Article 1 No. 5 of Presidential Decree No. 9 of 2009 on Financial Institutions, hereinafter as Perpres 9/2009, which states that leasing is a financing activity consisting of the provision of capital goods on a lease basis with option rights (finance lease) or lease without option rights (operating lease), which are used by the lessee for a set period of time through installment payments.

Leasing is classified into two types, according to the definition in Perpres 9/2009: finance leasing and operating leasing. Leasing contracts are classified into two types: finance leasing and

⁹ Septy Milda Wahyunie, Djoni S Gozali, and Rachmadi Usman, "Pesawat Udara Sebagai Jaminan Kredit Dalam Hukum Jaminan di Indonesia", *Notary Law Journal* Vol. 1 Issue 4 October 2022, Page 360.

¹⁰ Ridha Aditya Nugraha, and Anggia Rukmasari, "Menetapkan Standar Baru Force Majeure Dalam Perjanjian Sewa Pesawat", *Hukum Online*, <https://www.hukumonline.com/berita/a/force-majeure-dalam-perjanjian-sewa-pesawat-lt61b7e758097ee/?page=2>, accessed on 23rd February 10.00.

¹¹ Achmad Anwari, *Leasing di Indonesia*, (Jakarta: Ghalia Indonesia, 1987), Page 10.

¹² R. Subekti, *Hukum Perjanjian*, (Jakarta: PT Intermedia, 2005), Page 1.

operating leasing.¹³ A finance lease is a type of financing in which the lessor finances the capital goods to the lessee, who receives the capital goods. The lessee, as the owner of the capital, is responsible for ordering, inspecting, and selecting the goods that are the subject of the lease on behalf of the lessor under this finance lease, and the lessee pays the residual value of the leased goods during the lease term. The lessor acquires the capital goods required by the lessee and then leases them back to the lessee under an operating lease. However, the lessee's payment for the leased goods includes all costs other than maintenance and interest. Authors will then discuss the system of aircraft financing in Indonesia using various methods such as direct lease, operating lease, finance lease, and sale and lease back based on the legal principles of leasing explained above. The four systems and their benefits will be thoroughly explained.

a. Direct Leasing

When financing an aircraft through direct leasing, three parties are involved: the lessor, the lessee, and the supplier. Each party has its own set of rights and responsibilities. The lessee is the leasing company that purchased the entire aircraft from the manufacturer (supplier) and then leased it to the airline. Because there is no right to purchase in a direct lease, the lessee must return the aircraft to the lessor at the end of the lease along with all lease payments.¹⁴

b. Operating Leasing

The leasing company, as lessor, uses the goods leased to the lessee by operating them under the operating lease financing method. Because the lease agreement only covers a portion of the asset's economic value and there is no purchase option right in this financing method, the lessor is not required to bear the entire economic cost of the asset. Furthermore, all forms of maintenance of the goods are not imposed on the lessee, so the lessor bears all maintenance costs and retains the residual value of the goods. If the secondary market price of the asset remains promising, the lessor may also lease the leased asset back to another lessee or sell it back to the manufacturer under this method of financing.¹⁵

c. Finance Leasing

Financing is provided solely by the leasing company as lessor to finance the assets required by the lessee under a finance lease. The lease provisions are then added to the total

¹³ Agnes Sawir, *Kebijakan Pendanaan dan Restrukturisasi Perusahaan*, (Jakarta: Gramedia Utama, 2004), Page 169.

¹⁴ Hendra Ong, *Seminar Presentation, Op.cit.*, (Jakarta, 29 September 2020).

¹⁵ Andre Rahadian, Hendra Ong, and Devandra Maula Zakki, *Pembiayaan Pesawat Udara Di Indonesia Teori dan Praktek*, (Jakarta: UI Publishing, 2022), Page 81.

economic value of the assets involved. Since the lessee has the option to purchase the asset at the end of the lease period, the entire cost is charged to the lessee, and the lessor is no longer associated with the assets it leases. When the lessee pays the entire cost, the lessor is no longer liable for any losses or residual value. Regarding the treatment of all costs, the period required for the lessee to repay the entire lease is longer because the lessor cannot terminate the lease unilaterally because the final determination of the asset belongs to the lessee.¹⁶

d. Sale and Lease Back

The lessee initially owns the required asset and then sells it to the leasing company as lessor, resulting in a purchase agreement in this sale-and-leaseback procedure. After the asset is transferred to the lessor, the lease agreement between the lessor and the lessee is reestablished. As a result, all asset maintenance is charged to the lessor, and the lessee recovers the company's money by leasing the asset. Sale-and-leaseback transactions are common in Indonesia.¹⁷

Based on the explanations provided above for aircraft financing, the guarantee contract will be followed the main contract as security for the aircraft fuselage. Under the Aviation Law, the security charge governs not only the lessee, but also the legal form of security that banks may use as creditors for aircraft financing when accepting aircraft assets as international interests and based on security agreements, contingent rights contracts, and/or leases in the form of public deeds when subject to the Republic of Indonesian laws.¹⁸ Kartini Muljadi also believes that all contracts involving large assets, multiple parties, and cross-border transactions, such as aircraft financing, should be drafted in the form of a public deed.¹⁹ International interests govern the interests of creditors arising from security agreements governed by the Cape Town Convention and Protocol, both of which Indonesia has ratified.²⁰

In fact, all aircraft financing is subject to a fiduciary guarantee because each party's rights are given preferential or priority treatment over ordinary debtors, and the pledged assets are under the debtor's control, so that the proceeds from the assets' operation are a form of timely payment of the financing. There are some exceptions to the surety's preferential rights, such as the rights of the air carrier's employees for unpaid salaries as a result of a promise from the aircraft financing, the rights of Indonesian authorities regarding taxes or other bills, and other rights of the party repairing the aircraft asset under its control as long as the repair adds value to the aircraft

¹⁶ *Ibid*, Page 83.

¹⁷ *Ibid*, Page 84.

¹⁸ *Ibid*, Page 176.

¹⁹ Eddy P. Soekadi, *Mekanisme Leasing*, (Jakarta: Ghalia Indonesia, 1990), Page 153.

²⁰ Andre Rahadian, Hendra Ong, and Devandra Maula Zakki, *Op.Cit*, Page 176.

asset.²¹ There are also obligations that the lessee must meet when guaranteeing aircraft financing, which are listed in the credit agreement for the assets used as collateral as special features that set it apart from standard credit agreements.²² The aircraft collateral is also registered in the international register due to the cross-border nature of the financing agreement. If it is only registered in the Indonesian trust register, it cannot cover all of the parties involved in the aircraft financing. The bank is also granted a right of first refusal on the aircraft object guarantee in this case.²³

When either the lessee breaches or defaults on its pledge, the Bank, as guarantor, may take the following actions: By completing and attaching a copy of the IDERA document issued by the lessee, a copy of the valid certificate of registration of the guarantee, a copy of the agreement granting ownership rights, and a summary of the reasons for the Bank to deregister and export the aircraft, the Bank may apply to the Directorate General of Civil Aviation for deregistration of the aircraft pledged as a loan to the Bank. If the Bank nullifies the registration, the General Directorate of Civil Aviation will cancel it within five working days. The bank must then apply to the district court designated in the agreement for the granting of security rights in rem to enforce the bank's creditor rights, which it may do because it is in accordance with the security agreement's content.²⁴

D. Conclusion

The authors' legal facts presented in this journal are based on normative research findings combined with the author's analysis as a form of in-depth understanding of aircraft financing. According to the amount of capital required and the various maintenance cycles, aircraft financing is a capital-intensive and highly technical business practice. Direct financing, operating lease, finance lease, and sale and lease back are all aircraft financing models. The Law on Financing Institutions No. 9 of 2009 governs the aforementioned schemes. Each of these systems has benefits and drawbacks, and potential borrowers will select their own aircraft financing. The presence or absence of a purchase option at the end of the lease, which is assigned to finance leases and operating leases, has become the industry standard for airlines.

Fiduciary guarantees are used as collateral in aircraft financing. The fiduciary guarantee is provided by the creditor giving the debtor full control over the trust object in order to fulfill the agreed obligations, according to Law No. 42/1999 on Fiduciary Guarantees. For example, in the case of an aircraft, parts with economic value, such as the fuselage, which includes components

²¹ *Loc.cit.*

²² *Ibid*, Page 179.

²³ Serly Amanda Putri, *Problem Hukum Hak Jaminan Kebendaan Atas Pesawat Udara Dalam Hukum Indonesia*, Skripsi (UII:Yogyakarta, 2018), Page 106.

²⁴ Andre Rahadian, Hendra Ong, and Devandra Maula Zakki, *Op.Cit*, Page 187 – 188.

such as the tail, wings, nose, and cabin of the aircraft, as well as the engine of the aircraft, are subject to fiduciary guarantee. These components each have a monetary value that can be insured in order to impose a fiduciary guarantee. All agreements arising from aircraft financing are international security interests as well as a security agreement for banks providing financing, according to the Cape Town Convention and Protocol; thus, the guarantee agreement must be concluded with a public deed so that the rights and obligations of each party involved are clearly defined.

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