

The 2001 Cape Town Convention on International Interests in Mobile Equipment/the Aviation Protocol and Relevant issues in Indonesian Aviation Law

Mieke Komar Kantaatmadja¹

The 2001 Cape Town Convention provides a mechanism for recognizing and recording international security interest² in high- value moveable equipment. However, Law No.83 of 1958 did not mention the recording of secured private rights or security interests in aircrafts. Furthermore, Law No.15 of 1992 on Airport Transportation succeeded Law No.83 of 1958 which contained some rules on secured rights in aircraft. Chapter X of the new law no 1 of 2009 on Aviation could be regarded as the implementation of the Ratified Cape Town Convention and its Protocol. Does it mean that a national interest should be registered in the International registry, even though the aircraft object is legally owned by an Indonesian seller/lessor/creditor, but beneficially owned and operated by an Indonesian airliner/lessee based on a contract governed by Indonesian Law?

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I. Introduction

The 2001 Cape Town Convention provides a mechanism for recognizing and recording international security interest³ in high- value move-

¹ Professor of Law, Padjadjaran University, Bandung and Justice of the Indonesian Supreme Court.

² In my dissertation on "Lembaga jaminan kebendaan Pesawat Udara Indonesia ditinjau dari Hukum Udara"/Security Interests in Indonesian Aircrafts, from the perspective of Air Law" 1988, I translated the term "security interest" with "jaminan bersifat kebendaan". However, the earlier term is now used in a much wider sense than the last one. In my view, the translation of "International Interest" in the Cape Town Convention 2001 with "Kepentingan Internasional" as used in Aviation Law no 1, 2009, is misleading. The essence of International Interests in the Cape town Convention 2001, refers to security interest / financial interests or secured property rights with a nature of "in rem" / zakelijk recht, which follow or are linked to the aircraft wherever it goes. In private law recognized as "droit de suite" which is obtained by registration /recording of these property rights in an Aircraft Register. The owners of these rights or interests are the creditors : the Lenders . the conditional sale Sellers,, Lessors, Holders of Charges on the Aircraft based on security agreements.

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able equipment. This Convention intends to encourage more sophisticated cross-border and domestic financing of moveable assets, where banks, lessors and other financiers funding assets would not risk losing their security position as the moveable assets move across jurisdictional borders.

This Convention aims to provide more security to the relevant private sector, in this case the aviation industry, to reduce cost of borrowing and facilitating such borrowing which are usually not possible in the absence of strong Government guarantees. It provides a basic framework applicable to the aviation industry and this Convention has also adopted an Aviation Protocol, which was signed at Cape Town in 2001 and came into force on March 1, 2006.

The Convention and the Aircraft Protocol are private legal instruments supported by the International Institution for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organization (ICAO). Indonesia has adhered to the ICAO since the 1950th and to the UNIDROIT in 2008. And Indonesia has ratified the Cape Town Convention 2001/the Aircraft Protocol with President Rule no 8 of 2007.

The progressive development aspects in Air Law involves the establishment of a modern electronic International Registry for interests in aircraft or an Aircraft Registry. Lenders, conditional sellers, lessors, and other "security" rights holders may register/record their security interests electronically. The Registry, as the first of its kind in aviation history⁴ signifies its progressive development in air law.

This International Registry defines the priority of (security) interests on airframes, aircraft engines, and helicopters. It permits individuals and organizations to register security interest in assets using the MSN (manufacturer's serial number). International (security) interests in aircraft objects are being recorded, thereby establishing priority of interests. Priority will be determined on a "first-to-file" basis.

Approved Administrator and Company Users and the general public may request a search of the International Registry concerning interests or prospective interests in assets. Such searches are usually done by inter-

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⁴ Ronald C.C.Cuming, *The International Registry for Interests in Aircraft, an Overview of its Structure.* No date..

ested parties prior to a purchase, sale or re-financing of an asset. A Priority Search Certificate is issued which lists all registered interests in the asset.

The Convention is not equipment –specific, it applies in principle equally to any of the three categories of mobile equipment, namely aircraft objects (airframes, aircraft engines and helicopters), also railway rolling stock and space assets provided a protocol has been made relating to those equipments.

The Aircraft Protocol, to which Indonesia is also a party, provides the creditor with additional remedies:

- a. de-registration from the State's civil aircraft register;
- b. the export of the aircraft concerned to another state;
- c. a special insolvency regime to strengthen a creditor's position in the event of insolvency.

The Aircraft places an obligation on Contracting States to assist a creditor in exercising the de-registration remedy by removing aircraft from their national aircraft register (civil aircraft register) at the creditor's request.

This global system will improve predictability and the enforceability of security interests arising from cross border transactions applying to aircraft objects. Creditors involved in aircraft financing will have more confidence in transactions with aircraft operators in the Contracting States to the Convention and the Aircraft Protocol. Hence, the reduction in risks permits discounted finance costs.

II. The recognition of “security interest in aircrafts”, according to the Aviation laws of Indonesia, Law no 1 of 2009 and the former Law no 15, 1992

The first Aviation Law in Indonesia, *Law no 83 of 1958* did not mention the recording of secured private rights or security interests in aircrafts. In early 1970, the Minister of Transport issued several Decrees on the prerequisites regarding the use of commercial aircrafts in Indonesia (SK 13/S /1971 and its implementing rules SK 14 /S/1971 and Surat Edaran /Internal memo no 01 /ED/1971 of the Director General, the Minister of Transport). The Director General also issued announcements regarding Mortgages in aircrafts.

In essence, it orders the establishment of a Registration/recordation of *foreign* security rights in aircraft, this Register was to be executed at

the Directorate General's office. Also recorded were deeds of acquiring (such as hire purchase, loans coupled with mortgages) and other transfer of aircraft, renunciation of private property rights and payments of debts in aircraft. Most important it established that *foreign* recorded Mortgages /security right should be recognized in Indonesia. Hence, acquiring a priority of interest. Registration also includes the recordation of aircraft appliances and spare parts.⁵ Moreover, it includes the task of the Directorate General in case of the default of the Buyer/debtor, provided it has been agreed in the secured agreement by the parties, to:

- a. upon a claim of repossession of the creditor/mortgagee, assist this party to repossess the mortgaged aircraft objects, to assist the immediate transfer from Indonesia to be sold, or else by the creditor;
- b. in case the debtor disputes his default, he should prove that he is not in default and prove that repossession has not been agreed upon in the secured agreement. In this case the parties may proceed to court. The Directorate General will respect the choice of a foreign court to settle the case, and in the case the mortgagee wins the case, assist in transferring the objects out of Indonesia.⁶

The above decrees, rules, announcements practically binding in the aviation industry, purposely did not mention the security of a hypothek in aircraft, known in Indonesia as a strong secured right which can be vested on immovable goods (include real property, land), in foreign aircraft such as the French and the Netherlands (See :Wet van 6 Maart 1957 on Teboekstelling van Luchtvaartuigen.⁷). Such security right should be established based on a Law, and not on decrees or other Rules as such to gain the nature of in rem (zakelijk recht).⁸

Hence, in the case of hypothek, a lease, a lessor's and lessee's security right, the right of a conditional seller/buyer, the essence of Registering/Recordation these rights in a private register is to establish the nature of in rem/zakelijk recht (cf FA Bakelen, *Leasing van Luchtvaartuigen*,

⁵ See dissertation 1988, page 232 etc.

⁶ Op cit pages 338-341

⁷ Op.cit page 355-374.

⁸ The articles on Hipotheque in the BW on real property has been amended by Law no 4 of 1996 named Hak Tanggungan atas Tanah., also Fiduciary Rights in Law no 42 of 1999,formally fidusia was also used as security interest in Indonesian aircraft. This Law firmly opposed the use of Fiducia for aircraft.



1985⁹). Establishing a recordation system not based on a public law, but on Minister decrees, would not fulfill the above legal requirement.

III. Law no 15 Of 1992 on Airport Transportation

This Law succeeded Law no 83 year 1958 contained some rules on secured rights in aircraft. Article 12 stated that (1) aircraft and helicopters carrying registration marks and the Indonesian nationality may be secured with hypothek. (2) Hypothek secured on aircraft and helicopters shall be recorded, (3) Recordation shall be governed by a Governmental regulation¹⁰. The elucidation of art 12 states that the rules applicable to Hypothek according to the Civil Code of Indonesia will apply to hypothek on aircraft and helicopters.

This rule does not exclude aircraft and helicopters to be secured with other security rights based on other Indonesia Law and regulations. However said Governmental regulation has never been promulgated, until this Law was amended and replaced by Law no 1 year 2009. One of the main critic voiced in several seminars was that Recordation of secured rights in aircraft should not be established by a Government Regulation but by a Law /Undang undang.

Indonesia has a Law on Maritime Liens, including Hypothek on Indonesians Ships since colonial times. Later Indonesia in 2005 ratified the International Convention on Maritime Liens and Mortgages on Vessels, 1993. This Convention covers the recognition and enforcement of mortgages, hypotheks and *other charges*, the change of ownership, and the registration of property rights in vessels, maritime liens, forced sales etc.

Why this practice has not been taken as an example in the case of securing the security interest in aircraft is not clear. Indonesia has not ratified the Geneva Convention on International Recognition of Rights in Aircraft of June 19, 1948. This Convention, very important for the aircraft Industry has not been accepted world wide, hence the efforts to establish a new Convention in Cape town in 2001.

⁹ opcit, page 283.

¹⁰ Mieke Komar Kantaatmadja, Law no 15, 1992 on Air Transportation Revisited, spec. on the secured rights in Indonesian Aircraft, in LIBER AMICORUM, in Honour of Prod. Dr. LH.Ph. Diederiks-Verschoor, Leiden, 2005

IV. Chapter X of the new law no 1 of 2009 on Aviation

This Chapter could be regarded as the implementation of the Ratified Cape Town Convention and its Protocol. In line with the Declarations Indonesia made when ratifying the Convention:

- a. Declaration to art. 39 (1) (a) and (b), regarding non-consensual rights or interests which according to Indonesian Law have priority, such as the wages of workers, taxation claims and claims of services in respect of an aircraft object; and Declaration to art 40, regarding Registrable non-consensual rights and interests;
- b. Declaration to art 53 regarding determination of courts for the purpose of article 1 and Chapter XII on Jurisdiction and re art 13 (1)(a), (b) (c) and art 13 (4) on Relief pending Final Determination to obtain from a court a speedy relief by the creditor for the preservation of the object and its value, possession, control or custody of the object, immobilization of the object and the income thereof, and lease or management of the object, which should be read in line with article 8 on Remedies of Chargee;
- c. Declaration to art 54 (2), regarding Remedies, whereby a Contracting State shall declare whether or not any remedy is available to the creditor under any provision of this Convention which is not there expressed to require application to the Court may be exercised only with leave of the Court;
- d. Art XXX (1) re art VIII, re art XII, re art XIII; regarding the application of art VIII on Choice of Law, art XII on Insolvency assistance and art XIII on deregistration/export request authorization;
- e. art XXX (2) re art X regarding the application of art X(2) on the speedy relief means;
- f. art XXX (3) re art XI making effective alternative A for Indonesia.

V. Conclusion

This Chapter embodies the above rules, in article 71 to art 81, with their elucidations. In art 71-73, it recognizes the establishment of international (security) rights in aircraft and in the case of the agreement is governed by Indonesian Law as chosen by the parties, said agreement should



be executed by an authentic deed. It does not require specifically a notarial deed.

Whether the international interest is able to override local title interests or claims is not clearly stated in this Chapter. Indonesia has not made a declaration to art 50 of the Convention, which states that a Contracting State may declare that this Convention shall *not* apply to a transaction which is an internal transaction in relation to that State. Although, the Convention states any provisions of this Convention shall apply to an internal transaction.

Does it mean that a national interest should be registered in the International registry, even though the aircraft object is legally owned by an Indonesian seller /lessor/creditor, but beneficially owned and operated by an Indonesian airliner/ lessee based on a contract governed by Indonesian Law?

In the case of the Indonesian seller or the Indonesian aircraft manufacturer sells an aircraft/aircraft object to be used in Indonesia with the support of Indonesian asset financing should this sale and the security interests be recorded in the International Registry in Ireland?

The long time issue so far has always been the recognition of foreign security interests vested in an aircraft bought or leased by an Indonesian airliner and the importance that the rights of the foreign holders of these interests should be recognized, supported and assisted in case of default by the Indonesian buyer or lessee and supported in the de-registration process by preferably the Ministry of Transport.

Also with regard to the role of the Courts in Indonesia in executing this Convention, legal steps should be taken to further elaborate the rules, such as the rules regarding default cases and the need for preliminary injunctions by the Court, also issues related to bankruptcy which are mandatory public law rules and not easily deviated from in legal practice.

One other issue often voiced is the cost related to the International Registration of Rights such as related to the registration of patent right according to the Patent Cooperation Treaty and the European Patent Convention.

A simple statement in art 82 regarding to the principle of *lex specialis derogate lex generalis*, implying that all relevant rules in Indonesian Private Law as well as Insolvency law should be set aside by the present ratification of the above the Convention and Protocol is easier said than done.