

CAN NOTARY IMPLEMENT ITS AUTHORITY IN MAKING AN AIRCRAFT MORTGAGE DEED?

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Abstract-- *This research aims to analyze the regulation of aircraft classification in terms of material law relating to collateral law in Indonesia. In addition, it examines the implementation of the power of the Notary as a public office holder in preparing an Aircraft Mortgage deed which is mandated in the law, but is constrained due to the absence of regulation on aircraft mortgage. Meanwhile in the business world, the aviation industry currently requires capital to develop its business by making credit agreements with banks. The results showed that aircrafts are categorized as registered objects and can be used as collateral. However, the stipulation of registered objects is not regulated in Civil Code which only regulates the classification of immovable objects. Classification of registered objects towards aircraft can be matched with immovable objects as stipulated in Civil Code by using a mortgage guarantee agency. Like the registered objects carried by the Ship (Shipping Law) it uses a mortgage guarantee. This provision can also be applied on aircraft by using analogy mechanisms. To overcome this, the alternative adopted by a notary is to make a fiduciary deed because what guaranteed by aircraft is engines, not a plane as a whole, and it is categorized as a movable object. Alternatively, the notary makes a "Transfer of Guarantee and Power of Attorney Deed" containing a statement of the existence of debt guaranteed by aircraft. In the scenario of default of the borrower, the creditor is given the right and full authority to make the sale and in the deed the name of the guarantee agency is not stated. Thus, an aircraft mortgage regulation becomes urgent to be prepared by the government so that there is no legal vacuum.*

Keywords: *Notary, Authority, Mortgage Deed, Aircraft*

I Introduction

The authority of making certificates is the authority given by the government to notary to make, witness and validate various correspondences regarding the law, for example; agreement, cooperation, testament and so on.

There are 3 categories of power of a Notary in preparing an authentic deed, namely general authority; special authority; and other authorities. Meanwhile, other Notary authorities regulated in Article 15 Paragraph (3) are elaborated in the Elucidation of Article 15 Paragraph (3), among others: the authority to certify transactions conducted electronically (cyber notary), make a certificate of endowment pledge, and aircraft mortgages. There

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are still many other laws and regulations which state that other lawful measures should be effected in a notarial deed, for example in the law on Intellectual Property Rights.

The problem to be examined is how the classification of aircraft as registered object is reviewed in material laws and how the implementation of notary power to prepare an aircraft hypothecation deed is related to the lack of regulations that govern it. Meanwhile in recent aviation business world requires capital by making a loan application with a credit agreement with the bank. In the loan agreement the aircraft could become a collateral. The credit agreement and the guarantee agreement between the creditor and the debtor, whereby the wishes of the parties as an interested party are poured into a deed made before a notary with a sense of responsibility. In a credit agreement which is the principal agreement in general, it is always followed by a guarantee agreement as an additional agreement to avoid bank risk if the debtor defaults. A credit agreement coupled with a collateral agreement whether for movable or immovable objects made before a notary public is a form of the implementation of the precautionary principle of the bank.

Indonesia does not have a national material law. At least it must be addressed first material law, which can create a sense of justice, expediency and legal certainty, which will later facilitate the handling of collateral provisions. At the moment, the opposite is happening, several legislative products turn out to have a lot to do with guarantee issues which are still lagging behind as found in Law # 2 (2014) regarding Notary Position, Law # 42 of 1999 regarding Fiduciary Guarantees and Law # 15 (1992) regarding Aviation which mentions mortgages for aircraft as collateral object.

II Literature Review

2.1 Character of object as transaction object

The divisions of movable and immovable as well as tangible and intangible objects, its regulations still refer to Book II Civil Code (Law on Objects) which is almost 180 years old. Book II Civil Code (CC) with the character of *dwingend recht* (compelling law) cannot be distorted or ruled out with agreement though. This is one of the reasons why CC Book II has a closed nature. At first glance, it is no longer possible for the birth of new material guarantees created by the parties. It is different from Book III CC which has open nature.

Objects labeled with ownership rights that possess economic value in terms of law are one of the most superior types of personal rights when compared to others. The owner of the object can be free to do legal actions against the object such as to sell, donate and even guarantee the object to obtain a loan amount. Creditors as the recipient of the guarantee will have a safer position, "practically everything of financial value can be reserved as assurance, ... "

However, despite having received guarantees, it still needs to be vigilant and concerned by all parties regarding one's authority over an object, especially those engaged in the business of loan funds disbursement. Anyone who has received loan funds plays a creditor position, who receives collateral from the owner of the object (debtor) must be very clever to build a fortress of self-guarantee. Because the guaranteed objects are still controlled by the debtor, while the creditor party has only the material guarantee rights, not the collateral owner.

2.2. Movable - Immovable Objects

In material laws in Indonesia which are regulated in Book II CC it is known the classification of movable and immovable objects. The background of differentiating these objects in pairs brings different effects when the objects as property are used as collateral objects because they have economic values. Whatever the name is, every object classified as a pair, according to the system adopted to bring different consequences with the business transaction matters related to collateral.

So that guarantees do not clash with each other, the CC formers stipulate the existence of two different institutions. For movable objects, there is a pawn guarantee institution, whilst for fixed entities it is regulated through a debt guarantee institution. Keep in mind that the mortgage guarantees regulated in CC are intended for registered land and not for aircraft, but the legal principles of guarantee in CC can still be used.

Along with the advance of guarantee regulation in Indonesia, currently the material guarantee institution is not only limited to security and mortgages as controlled in Book II CC. With the enactment of the Agrarian Law, the guarantee rights for the land rights of the guarantee institution are used (the Law # 4 (1996) concerning Mortgage Rights), and followed by Law # 42 (1999) regarding Fiduciary. Thus, Indonesia has currently 4 types of material guarantee institutions namely Pawn and Mortgage which rules are listed in CC, plus Mortgage Rights and Fiduciary. These four material guarantees can be utilized in business, especially in banking world, by making a material guarantee agreement between creditors and debtors by involving a notary.

As previously stated, the establishment of a material guarantee agreement (additional agreement) is related to the credit agreement (principal agreement) made in advance between the bank as the lender and the borrowing client as the mortgagor. In the loan and loan pact between the creditor and the debtor, the debtor actually has to pay the loan as stipulated in Article 1131 CC which is a general guarantee. However, according to the guarantee creditor regulated in Article 1131 CC felt that it did not provide a sense of guarantee. Therefore, parties based on an agreement are welcome to make a material guarantee agreement (special agreement) intended for the payment of creditors' debts in accordance with the agreement. This means that the parties have deviated from Article 1131 CC (Book II on material which is closed in nature) by making a material guarantee agreement.

Making a material guarantee agreement in the form of a pawn agreement, mortgage guarantee agreement, mortgage rights agreement, or fiduciary agreement are classified as additional agreements (*accessoir*), only if they are preceded by a basic contract as a credit arrangement. The fate of the additional agreement depends on the principal agreement, where if the principal agreement ends, then the additional agreement also ends. It is not vice versa, if the *accessoir* agreement ends, it does not result in the end of the agreement. The existence of the main agreement then followed by an additional agreement is a general pattern that applies in the banking world when disbursing loan funds, as a manifestation to reflect the principle of prudence.

III Methodology / Material

This research is an empirical study with a normative approach that uses primary and secondary data which is obtained in the field through structured and in-depth interview techniques. Normative research is supported by empirical legal research to explain how to investigate the roles of legislation, regulations, legal policies, and other legal arrangements that apply in society. Purposive sampling technique is a notary as a practitioner with

criteria that once made a deed of guarantee with an aircraft object. In addition, the respondents interviewed were experts in the field of Material Law and Guarantee Law.

Furthermore, secondary data is obtained by tracing primary official information (as laws and regulations), secondary official information contains doctrines, legitimate theories, research results or journals, supported by tertiary legal materials. They are legal material consisting of related laws, regulations, views and developing doctrines. Data analysis was performed descriptively qualitative to obtain answers to problems and conclusions can be drawn.

IV Result and findings

4.1 Aircraft as Registered Objects

The existence of the main agreement and then followed by an additional agreement, is a general pattern that applies in the banking world when channeling loan funds, as a form to reflect the principle of prudence. In a credit agreement, the creditor usually asks for a guarantee to get legal certainty in payment if the debtor breaks his promise.

In order to guarantee that the two types of objects (not moving) do not clash, the legislators stipulate two different institutions, namely, for movable objects, a collateral institution is provided as a security while for fixed entities, it is regulated through a loan guarantee agency.

"Aircrafts" are included neither in the category of movable nor in immovable objects. Being a legal issue, which class of objects and which guarantee institution for an aircraft will be used. This needs legal certainty because the guarantee agreement is made with an authentic deed made by a notary.

Aircrafts according to Law No. 1 of 2009 concerning Aviation can be categorized as a registered object. This provision can be analyzed through Article 24 which states "every aircraft operated in Indonesia must have a registration mark". The registration can be in the form of an Indonesian registration or a foreign registration issued by the authorized flight authority for each country. In Indonesia the authority is owned by the Director General of Civil Aviation, controlled in the Minister of Transportation's KM Regulation 49 (2009) regarding Civil Aviation Safety Regulations Part 47 regarding Aircraft Registration.

Related to material laws, the term registered object appears. The existence of registered objects that complement the life of modern society today involves the existence of registered objects such as motorized vehicles, ships and aircraft. The existence of Civil Law regulates the use of "analogy" institutions to overcome them. Based on the mechanism of applying the analogy, the provisions regarding immovable objects in general can be applied to overcome the legal position of registered objects using the guarantee institution regulated in CC to apply to immovable objects. The establishment uses the analogy mechanism, even it has been explicitly affirmed by Law # 17 (2008) regarding Shipping determines that vessels that have been listed if they want to be guaranteed use a loan guarantee institution that is in CC.

In fact, the registered objects in a general register, most of them are types of objects that attract many citizens because of their very important position in social life. For this reason, the registered nature of these objects at the behest of the authorities is seen as having insignificant influence on the needs of the multitude. When it is conceived, a separate class room should be made, such as registered objects as well as other categories of objects that have their respective rooms with certainty. If this has been realized, in turn, the provisions regarding the guarantee will immediately adjust coherently as the system.

If the national law has been dealt with by stating the classification of registered and unregistered objects, then the existence of aircraft and ships becomes clear. When these objects are mortgaged, the regulatory arrangements can be logically tracked according to the existing and applying system.

According to Moch. Isnaeni, by registering the aircraft it can then be used as a transaction object, for example it can be leased, transferred, operated as a mean of flight transportation, and can also be used as collateral. Based on this, potentially aircraft can be used as an applicable legal system in Indonesia.

Indonesia's National Material Law should be addressed immediately. Not only does it need to maintain the classification of movable - immovable objects, but it is also time to acknowledge the division of registered - unregistered objects. In fact, many people assume that the distribution of this last type of object is felt to be more important today when compared to the differentiation of movable - immovable objects.

In the development of transportation in Indonesia nowadays, it is time for aircrafts and ships to be excluded from quarantine qualifications of movable objects that are *sui generis*, and then herded into new space, namely registered objects as a type of division of objects which are very necessary to be determined in order to improve Indonesian Private Law. According to Moch. Isnaeni, this attitude should be realized immediately, considering that other countries including the Netherlands have stipulated the distribution of registered objects in their positive law, while still maintaining the classification of immovable objects. If the existence of classifying registered - unregistered objects is intended to be matched with the division of objects known by CC, there is exactly a little relation.

Mortgage object requirements are only restricted to land that have been listed and this is actually the embryo of the emergence of the division of types of objects registered-unregistered objects in the next development period. While in CC, mortgages are focused on immovable objects, according to their developments and without exception, the law in Indonesia.

Endorsement that aircraft as collateral in the form of a mortgage is stated by Annalisa Y: "an aircraft is more appropriate to use a form of mortgage guarantee agency, where the phrase label is found in the Notary Position Law, the Fiduciary Law and the Aviation Law of 1992.

In contrast to the Netherlands, France and Italy, aircraft is categorized as movable object, but its collateral is in a form of mortgage. According to the Geneva Conventions of 1948, member states are obliged to recognize personal privileges in airplanes which is classified as portable object, but can be encumbered with debt. The Netherlands, France and Italy have issued national laws governing aircraft as movable object, but in national law they treat specificity (*sui generis*). The agreement between the creditor and the debtor regarding the formation of the mortgage is formalized by special document as prepared in the State of Ukraine.

In practice, aircraft is guaranteed in fiduciary form. Fiduciary guarantee status applies the reason that the guarantee is not the aircraft as a whole, but some components or parts of the aircraft such as wings in which there are engines that have economic value and can be traded.

The division of types of registered - unregistered objects, in an effort to improve the national law of objects while maintaining the classification of movable - immovable objects, need to be addressed immediately.

4.2 Authentic Deed: Notary Authority to Make Aircraft Mortgage Deed

Notary is public official with the mandate to make authentic deeds that are recognized by judges as strong and perfect evidence. According to the provisions of Article 1868 CC, an authentic deed is a deed made in a form defined by law; made by or in front of the public official authorized for it; and at the place where the deed was made. In a proof, authentic deed has perfect power over what is contained therein. Therefore, in order for a deed to be declared authentic, it must fulfill the following criteria in its making:

1. Made in the form specified by law;
2. Made by an authorized official; and
3. Made in the area where the official is authorized to make the deed.

If an authentic deed is not made with formalities determined by law, the deed loses its proof of function as a perfect proof and only acts as a deed under the hand of the parties if the parties sign it. Thus, the deed drawn up by a notary because of its authority to make an aircraft mortgage deed (Explanation of Article 15 Paragraph (3) of the Notary Position Law), can be used in the future as strong and perfect evidence. Provisions for Elucidation of Article 15 paragraph (3) of the Notary Position Law are in line with the provisions of Article 1171 CC which states "Mortgages can only be granted with an authentic deed ..."

The problem faced by a notary is the absence of specific regulations regarding aircraft mortgage guarantee institutions. As a result, this authority cannot be exercised by a notary. So what is the solution, if there are debtors who need capital with an aircraft as guarantee? Aircraft is a business industry of high technology category that requires substantial financing. Quite a lot of airlines require funding for business continuity, especially in the case of aircraft rejuvenation. The credit needs of airline companies in Indonesia are quite high. Airlines often join with banks as financial institution. The type of credit issued by banks is consortium credit, which means that credit financing is provided by more than one bank due to the large amount of loans.

The absence of special regulations on aircraft mortgages causes the use of fiduciary deeds. In addition, there are also notaries who make power of attorney to post aircraft finance. The emergence of power of attorney to post aircraft debts and fiduciary deeds is due to a legal vacuum, so it was forced to use fiduciary deeds and power of attorney to post debt or deed of indemnity and power of attorney. Whereas the Fiduciary Law itself states "there is no mortgage on aircraft" (Article 3 of Law # 42 (1996) regarding Fiduciary Guarantee). This means that guarantees for aircraft are in the form of mortgages rather than fiduciary.

Law # 1 (2009) regarding Aviation only states that aircraft owners must register the aircraft they operate in, as stated in Article 24: "Every aircraft operated in Indonesia must have a registration mark". This means that the law only regulates aircraft ownership registration in accordance with specified requirements and is given a registration certificate that is valid for 3 years.

Registered aircraft can be guaranteed as stated in Article 71 (Aviation Law). But the Aviation Law does not regulate the name of the guarantee agency and also does not regulate the registration of the guarantee. If the guarantee deed is not registered (which is an element of publication and specialism), the result will not give preferential rights to creditors to exercise their rights when the debtor defaults.

To overcome the problem of registration in the imposition of collateral for the aircraft, in practice two alternatives are carried out, namely :

1. Guaranteed by giving fiduciary to aircraft engines, turbines, propellers and other parts of the aircraft that are the core of the aircraft (Interview with Notary in Jakarta, July 18, 2019) where the weight of the engine is still included in the category of guarantee on a fiduciary basis. Aircrafts are included in motorized vehicles that move. Aircrafts are movable objects so fiduciary collateral is used. But in total weight, aircraft have a weight of more than 20 m³ including the category of immovable objects, so including objects that are excluded in the imposition of fiduciary collateral. Thus, there is a shift where fiduciary initially refers to collateral in the form of movable object, but over time it has also been used as immovable object.

2. Making the Transfer and Guarantee of Power of Attorney Deed.

In certain circumstances, the debtor cannot submit a guarantee that can be bound using the media of mortgage rights, mortgage, pawn or fiduciary due to the absence of rules, even though the debtor has a pretty good business prospect and has the ability to return the financing he received, then the alternative that can be taken by a notary is to provide guarantees in the form of a " Transfer and Guarantee of Power of Attorney Deed" (Interview with Notary in Palembang, 12 February 2020). However, the deed did not mention the name of the guarantee agency.

Giving guarantees in the form of Transfer and Guarantee of Power of Attorney Deed, is not a guarantee of giving which is known in the guarantee institution as described in the law. The deed is a statement of the ability of the collateral owner to submit the guarantee designated in the deed to the bank. In the case of certain processes that can hamper the binding of guarantees that are recognized by law cannot be carried out due to the absence of specific regulations for that (mortgages). If the debtor defaults the collateral owner has handed over the aircraft as collateral so that the bank can execute it as the debtor's debt repayment. The nature of the Transfer and Guarantee of Power of Attorney Deed has the weakest legal force compared to other forms of collateral , and can only be used as a bridge in the absence of special arrangements regarding aircraft guarantees.

The power of attorney means the power to sell collateral that gives the preferential right to the bank to make an offer to a third party if the debtor defaults. The deed of selling power used by the Bank (creditors) is not a genuine deed of selling power, nor is it a deed of selling power which is absolute. In common practice, a power of attorney is made to sell the collateral from the owner of the goods to his trusted person to carry out the sale and purchase transaction of the collateral, representing the owner of the collateral.

To protect creditors, an irrevocable power of attorney to appeal the elimination of listing and Export (Irrevocable Deregistration and Export Request Authorization-IDERA) is in use. IDERA is regulated in the International Convention on International Interest in Mobile Equipment and the Protocol on special issues in

airplane equipment recognized as the "Cape Town Convention", which has been endorsed by Indonesia via Presidential Regulation # 8 (2007). With this endorsement, it is possible for aircraft / helicopters listed and used in Indonesia can be burdened with guarantees based on collateral laws in foreign countries. The notarized IDERA grants power of attorney to the notary to register guarantees in other countries with mortgage guarantees for the aircraft.

The concrete form of making IDERA deed is a notarial deed in the form of Collateral Imposition of Aircraft for one unit or several units of the aircraft, because Law # 1 (2009) regarding Aviation does not regulate the provision of mortgages, then the form of imposition of guarantees regulated in the deed referred to is not specifically stated that the aircraft or helicopter referred to are burdened with Mortgage Collateral. The Deed of Imposition referred to, contains a statement of the existence of debt guaranteed by the aircraft / helicopter. If the borrower defaults, then the lender is given the right and full authority to make sales in public and also the power to deregister the aircraft registration in question from Indonesia to be executed in other countries.

Based on the deed, the creditor or his/her proxy can report to the Director of Airworthiness and Operation of the Aircraft-Transportation Agency where the aircraft is registered, to be noted that the aircraft has been burdened with collateral. However, the Transportation Agency did not register as did the registration of the mortgage, but ONLY noted that there had been a credit agreement between the bank and the customer / debtor. Thus, the Transportation Department knows that aircraft with the following specifications belonging to the debtor are known and recorded as collateral for certain banks. As evidence has been recorded, they will issue a document which has recorded the imposition of said guarantee. For the recording process, the creditor or his/her proxy carries documents such as:

1. Aircraft / helicopter specifications;
2. Aircraft / helicopter invoices;
3. Declaration of ownership of aircraft / helicopter;
4. An application for recording an aircraft / helicopter guarantee made by a bank (creditor) to the Director of Airworthiness and Aircraft Operation. Letters are made on bank letterhead paper and have textiles and stamps.
5. The original power of attorney to record the collateral given by the bank (creditor) to its proxy which will represent the bank in registering the collateral.
6. A copy (photocopy) in accordance with the original credit agreement (both notary and underhand) for the facilities that have been received by the customer (debtor) with the guarantee of the aircraft.

As explained before, that the mandate of a notary to make an authenticated deed is an attribution mandate, that is the authority granted by the law as mentioned in the Elucidation of Article 15 paragraph (3) is a difficult authority to implement.

The absence of special regulations for aircraft mortgage is a challenge for the notary to exercise his authority in serving the community and is the duty and responsibility of the Notary to provide legal advice to the public who come to question him/her about the making of the deed.

In making an aircraft guarantee deed, the Notary must be able to explain the documents needed and the process of making the deed as well as important matters in the deed . So in this case the Notary is required to comprehend the law comprehensively. As a profession, a notary must work by upholding the law, the Notary

Position Law and the Notary Ethics Code. Prajitno said, the notary expected by the state and the community was to have personal characteristics that had to be given special attention to shape the character of his/her official in carrying out his profession, namely being honest with oneself and the community; discipline related to accuracy and order; and objective in goodness and truth. In addition, the Notary in carrying out his/her profession professionally is required to continue to develop his/her knowledge and skills so that he/she can provide maximum service to the community.

V Conclusion

Aircrafts are categorized as registered objects and can be used as collateral. But the regulation of registered objects is not regulated in CC, for which there is a classification of movable-immovable objects. So there is no guarantee form that regulates the aircraft. If the existence of the classification of registered objects is to be matched with the division of objects known by CC, then it is not much different from immovable objects. Thus, the most suitable form of aircraft guarantee is mortgage institution. Another reason for using the analogy mechanism as applied to registered vessels, the guarantee is a mortgage. Based on the mechanism of applying the analogy, the provisions on immovable property in general can be applied to overcome the legal position of registered objects using the guarantee institution regulated in CC, and can also apply to immovable objects with the name of the mortgage guarantee.

The absence of special regulations regarding aircraft mortgage is an obstacle for the notary to exercise the mandate to prepare the aircraft debt deed, because it does not have a strong legal basis. To overcome these obstacles, the alternative made by a notary is to make a fiduciary deed and the "Transfer and Guarantee of Power of Attorney Deed" which contains a statement of debt guaranteed by an aircraft. If the borrower defaults, then the lender is given the authority and full authority to make the sale, but the deed does not mention the name of the collateral agency.

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