



# Unravelling the Legal Position of Fiduciary Guarantees Against Aircraft in Indonesia

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**Abstract.** The aims of this study are to find out how is the technical publication of the recording of fiduciary guarantees on airplanes and to fill the legal vacuum for the implementation of aircraft guarantees that are used as credit guarantees in banks. With the idea, banks can remove registration marks and carry out executions by auction, and the auction can be carried out to the world of international aviation, because the registration mark in Indonesia has been removed, so if a foreign party wants to buy an auction item in the form of an aircraft guarantee, it can the registration mark is registered in the country of origin of the purchaser of the aircraft. And here is contained the theory of dignified justice because with the idea that if repayment cannot be made, the bank can easily execute the guarantee guaranteed by the bank and the value of the auction is sufficient to pay off the debt proposed by the airline company for financing credit facilities.

**Keywords:** Unravelling · Fiduciary · Aircraft

## 1 Introduction

In the corporate sector in Indonesia, of course, there are many internal interests that require large amounts of funding, the source of this funding can come from the investments of parties both domestically and foreignly, the capital market and other non-bank financing and bank credit financing. In this case, the corporate sector that requires financing through banks is a corporation engaged in air transportation which is managed by an aviation company, where Indonesia has several related companies engaged in aviation.

Law Number 10 of 1998 Concerning Amendments to Law Number 7 of 1992 Concerning Banking, which regulates the implementation of conventional banking credit, stipulates that one need for receiving credit is the presence of a guarantee.

In practice until now, aircraft mortgages cannot be implemented by a notary as a party who makes deeds regarding credit agreements, notarial banking deeds, because until now there are no implementing regulations under the Law. Considering that Indonesia as a country of law uses a statutory system as initiated by Hans Kelsen through the *stufenbau* theory, specifically for the installation of ship mortgage guarantees, there is a problem, namely legal vacuum. To ensure legal certainty to carry out the process of bank credit financing facilities which in practice are carried out between notaries and banks. The purpose of bank credit financing itself is to develop development based on economic

principles, namely with the smallest sacrifice, a large profit can be obtained, in general, the purpose of credit economically is to obtain profits. Credit is always purposeful, therefore it is impossible for the creditor to give credit to the debtor with just no purpose or to be used in any case by the debtor.

Banks in providing credit always ensure what the use of credit is for because if there is a deviation from the agreed credit objectives, it will threaten the interests of the bank itself.

In order to process the credit financing facility, legal certainty is needed for the parties so that the goals they want to carry out can be achieved, and here the notary participates in the implementation of the credit financing facility from the bank, the notary in this case provides a solution for the existence of a legal certainty so that there is no legal vacuum, so that the financing can be carried out by the Bank, debtors and notaries as legal subjects involved in the national credit process. Here the notary then records the fiduciary guarantee using IDERA (*Irrevocable Deregistration Export Authorization*) to ensure the legal certainty of the debtor who pledges the component parts of his aircraft. In relation to IDERA, in order for debtors to obtain protection of interests up to the international level, the aircraft must be registered first, theoretically in the registration of rights, known as two systems, namely through the registration of deeds and registration of rights which in modern society is a state task carried out by the government in order to provide guarantees of legal certainty.

Idera here provides convenience for the execution of aircraft by deleting the Indonesian registration so that the bank can in practice announce an auction of the guarantee to the international aviation world, so remove the nationality mark and the aircraft can be executed if the debtor defaults on the promise.

The issue of this study are what is the practice of implementing aircraft fiduciary guarantees currently in force in Indonesia? And what is the legal certainty of the recording of aircraft fiduciary guarantees in Indonesia? Therefore, the aims of this study are to find out how is the technical publication of the recording of fiduciary guarantees on airplanes and to fill the legal vacuum for the implementation of aircraft guarantees that are used as credit guarantees in banks.

## **2 Discussion**

### **2.1 Fiduciary Used as Collateral for Aircraft**

#### **2.1.1 Definition of Fiduciary**

In the sense that fiduciary guarantees are security interests over mobile property, including real estate that cannot be subject to a mortgage as defined by Law No. 4 of 1996, as well as intangible, tangible, and immovable property.

#### **2.1.2 Object of Fiduciary Guarantee**

There are several objects that are collateral in the fiduciary, objects that are object of the fiduciary guarantee include:

- 1) Objects that must be legally ownable and transferable.

- 2) Tangible objects.
- 3) Intangible objects, including in the form of receivables.
- 4) Moving objects.
- 5) Aircraft and helicopters that have already been registered.

### **2.1.3 Fiduciary Write-Off**

There is a certain thing that causes the fiduciary guarantee to be considered abolished by law. These events are:

- 1) Elimination of debts guaranteed by fiduciary guarantees;
- 2) Waiver of rights to fiduciary security by fiduciary recipients;
- 3) the destruction of the fiduciary collateral.

Because the fiduciary guarantee agreement is a follow-up agreement/assessor—specifically, an assessor of the principal agreement in the form of a debt agreement—the fiduciary's elimination as a result of the destruction of the debt it guaranteed is a natural outcome. Therefore, the fiduciary assurance and the assessor will likewise vanish if there is a debt agreement or if the receivables disappear for any reason.

### **2.1.4 Transfer of Fiduciary Rights**

The legal nature of the fiduciary transfer of property rights becomes problematic with its acknowledgment as a legal guarantee. With various opinions and jurisprudence, the nature of the law regarding fiduciary is concluded as follows:

- 1) Accessoir, which is because fiduciary has inherent nature with guarantee law such as pawn and mortgage, birth and end of fiduciary surrender of ownership rights depends on the principal debt.
- 2) Execution Parate as a consequence of the fiduciary transfer of property rights as collateral by jurisprudence is recognized as a new material security law in addition to pawning and mortgages, the fiduciary owner has the right to parate execution. From the foregoing statement, it can be inferred that, similar to the lien rule, the fiduciary owner should not enter into an agreement to buy a fiduciary object.
- 3) Preference Rights

The fiduciary guarantee owner in this scenario has a separatist position and is allowed to sell the fiduciary object in order to satisfy his debts. If the fiduciary owner grants a bankrupt fiduciary guarantee, the fiduciary object does not fall to the bankrupt boedel.

### **2.1.5 Fiduciary Guarantee Execution**

Fiduciary assurances may be executed in a number of ways, as per Law Number 42 of 1999, including:

- 1) by the method of execution, namely by court order (using the term "executor");

- 2) carried out by parate execution, namely by selling without the need for a court order, and carried out in public;
- 3) sold privately by the creditors themselves.

There are several kinds of executions carried out to execute fiduciary guarantee objects, namely:

- 1) Fiduciary Execution with Executorial Title, the power to be carried out by force with the help of state instruments, while those who can have executive power are Grosse Judge's Decisions, Grosse Deed of Mortgage and Grosse Deed of Debt Recognition made by a notary.
- 2) Execution of fiduciary duties by separate parties using the auction office, including execution of fiduciary recipients using institutions that hold public auctions. The auction's results are then used to settle the debt owed on the receivables. It is possible to carry out public auction-based parate executions without at all consulting the religious court.
- 3) Execution of fiduciary guarantees by parate execution through underhand sales, this is done by selling fiduciary objects under the hands, as long as the conditions for selling them are met.
- 4) Fiduciary execution via own auction without going through the auction office. This fiduciary guarantee is executed by the creditor by selling the auction themselves without the auction office's involvement.

## **2.2 Mortgage on Airplanes**

### **2.2.1 Definition of Mortgage**

According to the systematics, the provisions regarding mortgages are included in the legal part of objects regulated in book II BW in articles 1162 to 1232, starting the regulation of this type of guarantee institution. Immovable property, to take reimbursement thereof for the settlement of an engagement.

Mortgage is one example of long-term debt which uses collateral objects in the form of immovable objects and fixed assets. For example, houses, buildings, land certificates, buildings, office equipment, machinery and copyrights.

### **2.2.2 Mortgage Write-Off**

If certain things happen, the mortgage is considered by law to have been canceled. These events are:

- 1) termination of the principal engagement;
- 2) the release of the mortgage by the creditor;
- 3) due to a ranking determination by the judge.

A logical outcome of the nature of the mortgage agreement, which is a follow-up agreement or called an assessor, is that the mortgage collateral as a follow-up also

disappears when the receivables are lost for whatever reason or when the main agreement in the form of a debt agreement is terminated.

There are certain procedures that must be followed when a mortgage is canceled, that is, the registration must be crossed out at the office where the mortgage is registered, and for the next step, the office where the mortgage is registered issues a certificate stating that the mortgage certificate in question has been crossed out and declared no longer valid.

### **Prudential Principles on Banks**

Banks are required to apply the prudential principle or known as the prudential banking principle in order to minimize operational business risks at the bank by referring to central bank regulations and internal banking regulations. Especially in channeling funds through the provision of credit or financing to ensure that the debtor or customer has the intention and ability to pay in accordance with a predetermined agreement. The analysis in the provision of credit or financing, risk management and compliance with the provisions of the legislation is an implementation of the prudential principles that exist in the banking sector.

From the application of this principle, there are provisions that require banks to have and apply bank credit or financing policies in carrying out credit and financing as regulated in POJK number 42/POJK.03/2017 regarding obligations in the context of preparing and implementing credit or financing policies.

According to Article 2 of Law Number 10 of 1998 Concerning Banking, if the bank's defined credit principle is violated, it will have legal repercussions, and the party violating it may be subject to fines or other legal sanctions in the form of criminal penalties.

In connection with this credit facility guarantee, the company wants to guarantee part of its aircraft as a component of aircraft owned by airline companies because the demand for financing credit facilities is quite high in value and here it is stated that aircraft that can be categorized as objects of material guarantees in granting credit is an aircraft that already has a registration mark as described in Article 24 of Law Number 1 of 2009.

However, Article 25 of Law Number 1 Year 2009 states that, civil aircraft<sup>1</sup> that can be registered in Indonesia must have the following provisions:

- 1) Not authorized in another nation.
- 2) Belongs to an Indonesian national or a legally recognized Indonesian entity.
- 3) owned by a foreign national or foreign legal entity and run by an Indonesian national or Indonesian legal entity for at least 2 (two) years in a row, in accordance with a contract;
- 4) owned by a federal, state, local, or tribal government and not utilized for law enforcement purposes.
- 5) owned by a foreign national or a foreign legal entity whose aircraft is under the control of an Indonesian legal entity pursuant to a contract for the storage, leasing, or trading of aircraft that is subject to the law chosen by the parties.

In this instance, it is possible since the debtor still has possession of the aircraft that is the subject of the guarantee and is still able to use the aircraft to conduct its business.

International interests that result from the granting of real property security rights, conditional rights binding agreements, and/or lease agreements may be imposed on aircraft objects. Referring to the contents of Article 71 of Law Number 1 of 2009 above, it does not specifically mention what institutions are used for aircraft guarantees, so that the above problems raise pros and cons in general in the banking sector regarding guarantees for aircraft.

In Article 74 of Law Number 1 of 2009, the recipient of the aircraft object guarantee is given power by the debtor to exercise his power in deregistration or called deletion of registration at the Ministry of Civil Aviation, on the nationality of the aircraft if there is a breach of promise or breach of contract on the debtor.

The power of attorney for the aircraft guarantee process is regulated by IDERA (Irrevocable Deregistration and Export Request Authorization). Idera itself is a letter made by the debtor and addressed to the director general of air transportation which states that it gives irrevocable power to and from the creditor to carry out the deletion of registration and export of aircraft objects related to the existence of international interests in the aircraft object.

If the debtor defaults, the bank may request the deregistration of the registration or deregistration of the aircraft object to the director general of air transportation so that the debtor cannot transfer the ownership of the aircraft to another party, and other legal consequences are unable to operate the aircraft.

The legal basis for idera is regulated in the regulations mentioned below:

- 1) Article 74 of Law number 15 of 1995 concerning aviation;
- 2) Decree of the Minister of Transportation Number KM 49 of 2009 concerning civil aviation regulations;
- 3) Regulation SKEP/166/VII/2009 of the Director General of Air Aviation relating to the system for requesting the elimination of registration and irrevocable exports (IDERA), implementation instructions number 47-02;
- 4) In the order of the minister of transportation number KM 49 of 2009, Section 47 of the civil aviation safety regulations describes the rules for the issuing of idera and the elimination of aircraft registration in accordance with idera.

As for the cancellation of the idera, which is stated in a letter issued by the ministry of transportation, the directorate general of air transportation, which contains the registration number for the cancellation of the idea, the subject and contents of the letter, in the letter it is stated that appointing a request for cancellation of power of attorney to request the abolition of registration and exports that are not can be revoked/IDERA, hereby informs that the directorate general of air transportation cancels the registration of the power of attorney to request the irrevocable abolition of registration and export by stating the following matters:

- 1) Idera Number;
- 2) Idera's date of recording;
- 3) Manufacturer and type/model of aircraft;
- 4) Aircraft serial number;
- 5) Registration mark;

6) Registration number.

And delete from the power of attorney to request the deletion of registration, which is at the directorate general of air transportation.

In the technical instructions regarding idera or *irrevocable deregistration and export request authorization*, it is stated that there are several scopes that regulate the provisions regarding the recording of idera, including:

- 1) An aircraft object for which a power of attorney can be registered to request the abolition of registration and export that cannot be revoked/idera, which arises as a result of:
  - a) Agreement of granting material security rights;
  - b) Conditional rights binding agreement;
  - c) Lease Agreement.
- 2) The object of the aircraft as referred to in point a. include:
  - a) Aircraft; and
  - b) Helicopter.
  - c) The aircraft as referred to in letter b number 1 is an integral part of the aircraft frame and aircraft engine
  - d) Aircraft as referred to in letter b number 1 include:
    - (1) An airplane carrying at least 8 people including flight crew; or
    - (2) Aircraft carrying goods that are more than 2,750 kg.

Because there is a request from the bank for the debtor to register his guarantee with idera, there are several provisions and steps that must be carried out by the debtor at the time of idera registration, which are as follows:

1. Submit an application for the registration of an IDERA provided by the Directorate General for Air Transportation of the Ministry of Transportation, which includes details on the aircraft and the party that is permitted;
2. Fill Idera form
3. Fill in the summary of the idera agreement with several provisions, namely:
  - a. aircraft or helicopter object (insert type and serial number);
  - b. an agreement reference that explains the legal relationship between the debtor and the authorized party;
  - c. identity of the parties (listed by all parties in the agreement);
  - d. the structure of the parties to the agreement;
  - e. identity of the debtor and the authorized party;
  - f. reference agreement on the appointment of the authorized party;
  - g. rights and obligations of debtors and creditors in particular regarding the power to re-apply for the abolition of registration and export which cannot be revoked;

- h. provisions for breach of contract as regulated in each agreement;
4. submit a statement of Idera;
  5. fill in the list of ideas for registration, by submitting a power of attorney which must be legalized by a notary and the embassy, a copy of a valid registration certificate, an application for registration of an idera, an authorized application letter, a summary of the agreement and a statement signed by the debtor and the party given power.

### **Fiduciary Guarantee Registration**

According to Law Number 42 of 1999, there are a number of steps that must be taken in order to register a fiduciary guarantee with an authorized institution, specifically the following:

Fiduciary guarantee can occur through (2) two stages:

1. Stages of Imposing Fiduciary Security is an addendum to a primary agreement that imposes a duty on the parties to complete the requirements of an accomplishment. The imposition of objects with fiduciary guarantees is made with an authentic deed by an authorized notary and is stated in Indonesian which then contains the contents of the deed which is a fiduciary guarantee deed. Other things that must be stated in the fiduciary deed as the basis for the credit agreement.
2. Stages of Fiduciary Guarantee Registration Fiduciary guarantees on assets require that they be registered. The fiduciary guaranteed object is beyond the Republic of Indonesia's borders even though it is not in an Indonesian state. The fiduciary registration office is where fiduciary guarantee registration is done.

Fiduciary recipients, their proxies, or representatives must attach a fiduciary guarantee registration statement to their applications for registration of fiduciary guarantees. The following are the main components of the fiduciary registration statement:

1. The identity of the Fiduciary Giver and Recipient;
2. The date and number of the Fiduciary guarantee deed, the name and domicile of the notary authorized to make the Fiduciary Guarantee deed;
3. Basic agreement data guaranteed by fiduciary;
4. A description of the object that is used as the object of the Fiduciary Guarantee;
5. Guarantee value;
6. The value of the collateral object that is the object of the Fiduciary Guarantee.

If one party violates a commitment made during the implementation of financing between creditors and debtors, the creditor may execute the thing that has been guaranteed by a fiduciary guarantee.

If the applicant wishes to submit an application for the execution of a fiduciary guarantee, the following documents must be included:

1. a copy of the fiduciary guarantee deed issued by a notary;
2. a copy of the fiduciary guarantee certificate;



3. a warning letter to the debtor to fulfill his obligations, in this case, has been given to the debtor twice as evidenced by a receipt;
4. the identity of the executor of the execution;
5. letter of assignment for execution.

There are regulatory objectives regarding the execution of guarantees, namely:

1. The execution of fiduciary assurances in a secure, efficient, easy, and accountable manner;
2. Protection from activities that might result in property damage or the safety of lives of the fiduciary guarantee receiver, the fiduciary guarantee provider, and/or members of the public;

There are several reasons why the airplane is guaranteed with a fiduciary guarantee, because Law No. 15 of 1992 does not explain the regulation regarding the procedure for registering mortgages on aircraft.

These problems were analyzed using theories and concepts regarding agreements, credit, trust theory, legal protection theory, concepts of legal certainty, concepts of guarantees, concepts of mortgages, concepts of fiduciary guarantees, concepts of property rights, aircraft, the notary decided to be guaranteed with fiduciary because on the aircraft there are machines and other components attached to the fuselage, then that component is attached to the fiduciary and is recorded in the notary deed.

This is the basis of legal certainty and the reason why then the parties decide to be guaranteed with a fiduciary guarantee and fulfill all forms of procedures regarding the registration of the object so that it is guaranteed with a fiduciary guarantee. This alternative is one of the solutions to protect creditors, namely by using an irrevocable Idera or power of attorney to request the abolition of registration and export.

The concrete form of the making of the idera is a notarial deed in the form of imposition of guarantees on the aircraft for a unit or several units of the aircraft. Because Law Number 1 of 2009 does not clearly regulate the provisions regarding the mortgage, the form of imposition of collateral as stipulated in the deed does not specifically state that the aircraft or helicopter in question are burdened with mortgage guarantees.

### **3 Closing**

#### **3.1 Conclusion**

The authors can infer the following conclusions from the above-described study and discussion findings in light of the major issues that have been identified:

1. Mortgage is a material right on immovable property that is used as collateral in debt, while regarding mortgage imposition is a process that begins with making an agreement, debts made between debtors and creditors, this agreement does not require an authentic deed made at a notary. The process of charging a mortgage begins with an assignment to the creditor which in its implementation must be previously written into an authentic deed.

2. According to Law Number 4 of 1996, fiduciary guarantees are security interests over moveable, both physical and intangible, and immovable items, particularly buildings that cannot be subject to mortgage rights.
3. IDERA is a letter made by the debtor addressed to the Director General of Civil Aviation which states that it gives irrevocable power to and from creditors to carry out deletion of registration and export of aircraft objects related to the existence of international interests.

In this case, an airline company that will carry out the process of implementing a large credit facility will guarantee some of its assets, one of which is an airplane, but in Law Number 1 of 2009 concerning Aviation, it is not explicitly regulated regarding aircraft guarantees, as well as the procedures. Whether it can be done by fiduciary or mortgage, finally the notary as the authorized official for the implementation of the financing contract and as the party trusted by the bank and airline company to take care of the authentic deed for the benefit of the contract later, provides an alternative, namely by charging the fiduciary to the aircraft engines is part of the aircraft component, but due to the large amount of credit applied for and if there is a breach of contract for the repayment of debtor's debt, if only the aircraft component is executed, it is not sufficient to pay off the debt, and a legal vacuum occurs. Regarding the procedure for guaranteeing aircraft for which the arrangements are still not clearly regulated, the bank advises the debtor to register the guarantee at IDERA (irrevocable deregistration and export request authorization), in addition to filling legal voids, idera is also useful if there is a breach of contract and the bank wants to executing the guarantee, the bank is no longer in trouble because on the plane there is still a registration mark and the nationality of the plane because the plane is operating in Indonesia.

With the idea, banks can remove registration marks and carry out executions by auction, and the auction can be carried out to the world of international aviation, because the registration mark in Indonesia has been removed, so if a foreign party wants to buy an auction item in the form of an aircraft guarantee, it can the registration mark is registered in the country of origin of the purchaser of the aircraft. And here is contained the theory of dignified justice because with the idea that if repayment cannot be made, the bank can easily execute the guarantee guaranteed by the bank and the value of the auction is sufficient to pay off the debt proposed by the airline company for financing credit facilities.

### **3.2 Suggestion**

From what the author has learned here, the author can conclude that there is a legal vacuum regarding the regulation of aircraft guarantee registration procedures, whether it is guaranteed by registering a fiduciary or a mortgage because there are no provisions that regulate in detail about this, it is better for the authorities in this case. Can draft regulations on what if the aircraft is guaranteed using a fiduciary or mortgage in detail, about the provisions and also the things that must be fulfilled so that the recording can be carried out.

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