



Renegotiation and Restructuring to Address Failure to Fulfill Lease Payment Obligations in an Aircraft Lease Agreements

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Abstract- In Indonesia, the aeronautical industry is one of the important revenue sectors, due to its high economic weight and is considered a strategic industry in international trade. Air transportation has become one of the most popular transportation options among other types of transportation. After going through a pandemic in 2019, with its limitations, airline companies are trying hard to come back from the downturn to maintain the quality of services provided by updating their fleet procurement. Aircraft procurement is also important so that airline companies can still meet the minimum number of aircraft units required to carry out their business operations. Airline companies in Indonesia are more inclined to choose finance leases in aircraft procurement, because in finance leases, airline companies can substantially utilize and risk the capital goods financed within a certain period of time without making prepayments. By carrying out efforts to renegotiate and restructure agreements can help airline companies to rise from the downturn of the effects of Covid-19. Regulations that apply and are implemented in Indonesia should be able to accommodate and pay attention to the development of practices carried out by aviation business actors in Indonesia. This is the focus of the discussion in this paper, the author focuses on efforts to fulfill contractual obligations and dispute resolution related to aircraft leasing. Contract renegotiation and restructuring is one of the efforts to fulfill contractual obligations and alternative dispute resolution that is considered effectively efficient compared to other dispute resolution procedures.

Keywords- Finance Lease, Aircraft, Dispute Resolution, Renegotiation, Contract Restructuring

I. INTRODUCTION

In Indonesia, the aeronautical industry is one of the important income sectors, because of its high economic weight so that this industry is considered a strategic industry in international trade [17]. For airline companies, the economic factors in the agreement are some of the important considerations before executing the agreement with other parties [20]. Lease agreement or leasing is one of the most chosen agreement options in carrying out aircraft procurement [21]. Based on data from the Ministry of Transportation in Indonesia, around 75 (seventy five) percent or as many as 483 (four hundred and eighty three) units out of a total of 631 (six hundred and thirty one) units of Air Operator Certificate aircraft using the aircraft lease scheme [21]. Meanwhile, the remaining amount uses an aircraft sale and purchase agreement.

Choosing leasing as a form for agreements in aircraft procurement is due to several advantages offered by leasing agreements. This is important so that airline companies can still fulfill the minimum number of aircraft units to carry out their business operations (Article 118 paragraph (1) letter b jo. Article 118 paragraph (2) letter a of the Aviation Law, 2009). However, after Covid-19 forced several airline companies in Indonesia to be able to make efforts to minimize losses on a large scale, including PT Garuda Indonesia Tbk. ("GIAA") and PT Lion Air Group ("Lion Air"). Several lessors have filed many lawsuits against the two companies because these airline companies are considered not to have fully carried out their performance obligations [23]. According to the Directors of GIAA and Lion Air, the cost of leasing aircraft to more than 30 lessors is considered quite burdensome because almost all aircraft units owned are leased [14]. Fulfilling the obligation to pay lease fees is considered burdensome, because during the Covid-19 pandemic many of the aircraft units were not operated [7]. This is what causes airline companies to try to fulfill efforts in certain ways in order to get relief from the cost burden of procuring aircraft [14].

The number of lawsuits filed against airline companies is not limited to Indonesia. Several major international airline companies have also felt the same way, including Avianca Holdings ("Avianca") in Latin America and Flybe in the UK. Even worse, one of these international airlines has been declared bankrupt because it is considered to have failed to recover its company's condition and has a lot of debt due to weak flight demand [2]. The hope of both national and international airline companies is to be able to renegotiate and restructure with the lessor of the contract between them, because this is important to do, with the aim of seeking to ease the financial burden borne by the airline.

The impact of Covid-19 is not only detrimental to airline companies, but also to finance companies, both banks and non-banks. The threat of airline bankruptcy is a form of threat that is real almost all over the world due to low users of aviation services [22]. To overcome this, recovery efforts such as renegotiating or reviewing agreements in the post-pandemic period like this have also been carried out several times between airline companies and finance companies. These recovery efforts sometimes end up finding a bright spot of agreement, but it does not rule out the possibility of failure [8]. One of the airline companies that has successfully restructured its financing agreement is GIAA. GIAA has successfully implemented the Peace Agreement effectively as of January 1, 2023 [28]. This is one of the open gates for airline companies and aircraft providers to rise from the downturn after the Covid-19 pandemic.

Not only GIAA, currently the Government through the Ministry of Transportation, along with the recovery period from the Covid-19 Pandemic, is making every effort to restore the condition of airport and flight activities as before the pandemic occurred. This step certainly cannot be achieved without the support and role of other stakeholders. Moreover, with the impact of Covid-19, the amount of aircraft is still quite limited to serve the people of Indonesia. During the Covid19, the number of airlines reduced their operating fleets and closed routes that were not congested to reduce their operating cost.

The Ministry of Transportation assesses that air flight traffic continues to increase and strengthen. The Ministry of Transportation also assesses that the aviation industry is starting to bounce back after being significantly affected by the Covid-19 pandemic. Based on global aviation industry data by the International Air Transport Association (IATA), the momentum of global aviation traffic recovery is starting to strengthen. In June 2022, domestic flights reached 81% and international flights reached 65%, this is stated to have increased by an average of 70% when compared to the Covid-19 pandemic [29].

In Indonesia itself, there are several regulations governing the financing or leasing of aircraft and the settlement of disputes over them, although they are not complete and comprehensive. This is the focus of the discussion points in this paper, because forced by uncertain conditions both in the short and long term, it is important for airline companies in Indonesia to still be able to make efforts to fulfill contractual obligations. Efforts to fulfill these contractual obligations are specifically related to the renegotiation and restructuring of aircraft leasing agreements as a form of protection, legal certainty, and efforts to minimize losses caused by the Covid-19 pandemic. However, because there has been no further and detailed discussion regarding the urgency of renegotiating and restructuring aircraft leasing agreements as a form of effort to fulfill contractual obligations, this paper will further discuss this matter.

II. LITERATURE REVIEW

A. Aircraft Lease Agreement

The definition of leasing is also regulated in the regulations of Article 1 point (5) of the Financial Services Authority Regulation Number 35 of 2018 concerning the Implementation of the Financing Company Business. However, in this article, the definition of leasing is not literally defined as leasing but is more specifically regulated as finance lease or finance lease, which is as follows: Finance Lease, hereinafter referred to as Finance Lease, is an activity in the form of providing goods by a Financing Company for the debtor's use for a period of time, which the financed goods benefit, right, and risks transfers substantially to the debtors.

In addition to the finance leases listed in Article 1 paragraph (5) of POJK 35/2018, in another article, namely in Article 2 paragraph (2) of POJK 35/2018, there is also a little mention of operating leases. The definition of operating lease is clarified in the explanation of Article 2 paragraph (2) POJK 35/2018, namely: What is meant by "operating lease" is a lease that does not substantially transfer the benefits and risks of the leased goods. Based on several definitions above, it can be seen that in leasing in Indonesia, several financing systems and methods are known. Commonly known financing systems include Finance-Lease, Operating-Lease, Direct-Lease, Sale and Leaseback, Syndicated-Lease, Vendor-Lease, and Leverage-Lease [6].

B. Failure of Fulfilling Contractual Obligations in Aircraft Lease Agreement

When viewed from several standard contract clauses, the aircraft leasing agreement has not specifically regulated the Covid-19 pandemic as a form of category that is classified as force majeure. The condition of Covid-19 as a force majeure is something that needs to be proven. So, if the debtor or lessee in the leasing agreement is the party affected by the Covid-19 pandemic, there is a necessity to prove that the force majeure conditions or force majeure conditions

are true, so that they can state that this pandemic is a force majeure condition that causes non-fulfillment. performance, namely the failure to pay.

III. METHOD

The type of writing used is Doctrinal Legal research. It provides a systematic exposé of the regulations governing certain categories of law [16], specifically regarding aircraft leasing in the perspective of international and national law, renegotiation and restructuring of agreements in aircraft leasing in the perspective of national law, analyzing the relationship between regulations, and discussing dispute resolution between the two. The approaches used in this writing are statutory approach, conceptual approach, and comparative approach. Primary sources used are legislation and applicable international conventions, and secondary legal sources used are scientific works and other legal materials.

IV. RESULT AND DISCUSSION

Prior to the Aviation Law in Indonesia, Indonesia had ratified several international conventions governing international agreements. One of the conventions ratified by Indonesia is the Cape Town Convention. Cape Town Convention regulates several agreements that can protect international interests, one of which is an aircraft leasing agreement [10]. According to the Convention, the types of international agreements that can give rise to international interests are Security Agreement, Title-Reservation Agreement, and Lease Agreement. These three types of agreements can give rise to international interests regarding to the Convention. These three agreements can be implied in aircraft transactions, with the aim of protecting internationally recognized international interests. Protected interests include both international interests and national (non-consensual) interests.

The Aviation Law has regulated several provisions regarding aircraft procurement requirements and operational licenses. The enactment of Regulation Number 11 of 2020 concerning Job Creation made several regulations in the aviation sector have been changed [5]. The requirements for ownership of the number of aircraft, flight rates, and service standards related to the aviation sector are things that are revised through the Ciptaker Law. When referring to Article 118 of the Aviation Law which stipulates that the minimum number of aircraft ownership requirements is five units and five units of aircraft control. Meanwhile, in the Transportation Chapter Article 58 point 51 of the Ciptaker Law revises this by not mentioning the minimum requirement for the number of aircraft ownership and is further regulated in Government Regulations (Rinaldi Mohammad Azka, 2020). So that when referring to Article 65 paragraph (1) letter b jo. Article 65 paragraph (2) letter a of Government Regulation Number 32 of 2021 concerning the Aviation Field, which stipulates that the minimum number of aircraft units for an airline company to obtain an operational license is revised to a minimum of 1 (one) unit and controls a minimum of 2 (two) aircraft.

A. *Indonesia Aircraft Leasing Agreement*

Airline companies in Indonesia are more inclined to choose finance lease than operating lease. This is because in a finance lease, airline companies benefit more from aircraft procurement, business expansion prospects in opening new routes in the future, and companies can substantially utilize and risk the capital goods financed within a certain period of time without paying off in advance.

In the lease agreement the parties bound in it are: [18]

- Lessor is a finance company that has been given permission from the Ministry of Finance to carry out financing to fulfill the object of the agreement.
- Lessee is an applicant who submits a leasing application to a certain finance company to fulfill his needs.
- Supplier is a party acting as the owner, producer, or ruler of the object of the agreement.
- Insurance/guarantor is the company or individual who will bear the consequences of the risk in the event of a loss to the goods that are the object of the agreement.

Then, the aircraft lease agreement mechanism is divided into four procedures, namely: [24]

1) The Process of Buying and Selling Agreement Objects (Purchase of Aircraft)

The leasing agreement begins with the prospective lessee conducting a negotiation process with the supplier regarding the need for capital goods. After notification of the suitability of the goods from the prospective

lessee and notification of the agreement, an order letter is made. The next process is the lessor who will order and purchase capital goods provided by the supplier.

2) Process of Lease Agreement Object (Lease Agreement)

After the capital goods are owned by the lessor, the next step is to make a lease agreement between the lessor and the lessee. In this leasing agreement, the parties, both the lessor and the lessee, will determine the amount of the rental fee, the interest rate for the installments, and determine the term of the agreement for the object of the agreement.

3) Return of the Object of the Special Finance Lease Agreement (Return of Aircraft)\

Between the lessor and the lessee, close to the end of the lease agreement, the residual value of the agreed capital goods must be determined. And the most distinguishing thing is in the provisions of the residual value, where based on the residual value that has been mutually agreed upon in the leasing agreement, (usually the minimum residual value is 10% of the price of the goods), the lessee is given the power / has the right to choose (option.) between buying the item, or returning it to the lessor.

4) Resale of the Object of the Operating Lease Special Agreement (Saleback of Aircraft)

Resale in aircraft leasing occurs only in the operating lease system. In the operating lease there is no option right, so the object of the agreement will automatically be traded to other parties by the lessor as the legal owner of the capital goods.

The main clause in the agreement, especially international agreements that need to be considered is the relation to the choice of forum / jurisdiction and choice of law that is applicable to contract [1].

B. Efforts to Fulfill Contractual Obligations in Aircraft Lease Agreement

Based on the force majeure category, the Covid-19 pandemic can be categorized as a form of relative force majeure. The obstruction of the debtor's obligation, namely the fulfillment of achievements, is not permanent to not be carried out, but only temporarily until an undetermined time, namely during the Covid-19 pandemic [13]. Thus, if during the pandemic, the lessor cannot unilaterally state that the pandemic is a reason for canceling the contract, so the contract does not need to be canceled. If the lessee can prove the existence of force majeure in the implementation of the leasing contract, the contract remains valid and binding on the parties.

In business or commercial contracts, the negotiation process is important because it is needed in order to realize a proportional exchange of interests between the parties [12]. Through the negotiation process, the parties can reconcile the interests between them and eventually reach an agreement. The definition of negotiation in dispute resolution is the process of direct discussion or deliberation between the parties to a dispute whose results are accepted by the parties [25]. This is certainly still related to the characteristics of the business world that requires a form of problem solving that is still mutually beneficial and still maintains the bona fides of the parties [4]. Negotiation, as one of the main alternatives in dispute resolution, is a means for the parties to discuss and seek resolution without the involvement of a third party mediator (through mediation or arbitration procedures and litigation).

In order for negotiations to run effectively in accordance with the expectations of the parties, the negotiations carried out should at least fulfill the following conditions: [11]

- a) The parties are willing to negotiate voluntarily and based on full awareness (willingness);
- b) The parties are ready to carry out the negotiation (preparedness);
- c) The parties have the authority to make decisions (authoritative);
- d) The parties have relatively balanced power so as to create interdependence (relatively equal bargaining power);
- e) The parties have the willingness to settle.

To protect the interests of the parties to a business contract, with a fast, effective and efficient process, contract negotiation and restructuring is one of the alternative dispute resolutions that is often carried out by business people. In the post-Covid-19 pandemic period, it is important to renegotiate and restructure the contracts made, but still on the condition that they are based on good faith and the principle of proportionality. This is done so that the parties can create a new form of agreement that considers and protects their respective interests [8]. However, requests for renegotiation and restructuring of agreements between lessors and airline companies as lessees sometimes fail. This is either because the request for renegotiation and restructuring of the agreement is not accepted, ignored, or even rejected by the lessor [11]. Therefore, in the implementation of renegotiation and restructuring, the parties are expected to be cooperative so that renegotiation and restructuring can be implemented. If the parties ultimately fail to

carry out renegotiation and restructuring of their agreement, then according to the agreement of the parties, another route can be taken, namely by resolving through litigation (court action) or other dispute resolution procedures.

V. CONCLUSION

In general, airline companies in Indonesia are more inclined to choose finance leases over operating leases in the procurement of aircraft. This is due to the fact that in a finance lease, the lessee can substantially take advantage of the risks and capital goods being financed within a certain period of time without paying off in advance. This is the characteristic of leasing, namely in terms of control over the object of the transaction. In a finance lease, there is an option right. The option right is the right for the lessee to determine at the end of the agreement whether to purchase the leased capital goods or to extend the term of the lease. The clauses in the leasing agreement that need to be considered are the clauses relating to the choice of forum and the choice of law.

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Based on the conclusion of this paper, there are several alternative suggestions that can be conveyed. First, it is expected that the Indonesian government has the authority to form implementing regulations in the form of Ministerial Regulations or other regulations related to aircraft leasing agreements and dispute resolution as a mandate from the Ciptaker Law and PP 32/2021 which are more complete and comprehensive as a form of incentive for the aviation sector in Indonesia. Second, it is hoped that business actors, both Indonesian and foreign, can take advantage of the incentives provided by the government in implementing aircraft leasing agreements. This is important to do, because the utilization of incentives from the government can drive business in the aviation sector in Indonesia to quickly recover and be strategic after the covid-19 pandemic and as a form of anticipation of many disputes in the future.

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