

Implementation of Deregistration and Export Back Aircraft Based on Cape Town Convention in Indonesia

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Abstract

The Cape Town Convention is a regulation that creates international standards for security interests (liens), leases, and various legal remedies for default in financing agreements, including repossession. Nevertheless, several incidents resulted in losses to the lessor because the Cape Town Convention was not implemented properly in Indonesia. This research aimed to analyze Indonesians' compliance with implementing the deregistration and re-export of aircraft based on the Cape Town Convention. Apart from that, this research also examined the obstacles faced by the Indonesians when implementing the Cape Town Convention, especially in implementing Deregistration and Export (IDERA) in Indonesia, and whether they have solutions to overcome these obstacles. This research used a Normative-Empirical research methodology that analyzes the implementation of written legal provisions and whether the provisions of the statutory regulations have been implemented properly. This research employed qualitative methods to analyze the data collected. The conclusion is first, the Indonesian Government is implementing the deregistration and export of aircraft adequately based on the results of analysis by comparing the regulations and interviews with practitioners; second, the Indonesian Government in the process of implementing the Deregistration and Export Back of aircraft faces several obstacles, including the lack of legal certainty regarding the implementation mechanism and limited authority; and third, the Indonesian Government has a solution to overcome obstacles, including revising related regulations and becoming a mediator if there are problems as a form of legal filling. Therefore, it can provide certainty and peace of mind for lessors when receiving collateral in the form of aircraft in Indonesia. The results of this research are expected to increase understanding regarding deregistration and export back of aircraft based on the Cape Town Convention in Indonesia so that many parties understand and comprehend this matter.

Keywords: Cape Town convention, deregistration of aircraft, export back aircraft.

Abstrak

Implementasi Deregistrasi dan Ekspor Kembali Pesawat Berdasarkan Konvensi Cape Town di Indonesia. Konvensi Cape Town adalah suatu peraturan berstandar internasional untuk kepentingan keamanan (hak gadai), sewa guna usaha, dan berbagai upaya hukum untuk menangani wanprestasi dalam perjanjian pembiayaan, termasuk reposesi. Meskipun demikian, beberapa insiden menyebabkan kerugian bagi pemberi sewa karena Konvensi Cape Town tidak diterapkan dengan baik di Indonesia. Penelitian ini bertujuan untuk menganalisis kepatuhan Indonesia dalam menerapkan deregistrasi dan ekspor kembali pesawat udara berdasarkan Konvensi Cape Town. Selain itu, penelitian ini juga mengkaji hambatan yang dihadapi oleh Indonesia dalam menerapkan Konvensi Cape Town, khususnya dalam penerapan Deregistrasi dan Ekspor (IDERA) di Indonesia, serta apakah terdapat solusi untuk mengatasi hambatan tersebut. Penelitian ini menggunakan metodologi penelitian normatif-empiris yang menganalisis pelaksanaan ketentuan hukum tertulis dan apakah ketentuan peraturan perundang-undangan telah diterapkan dengan baik. Penelitian ini menggunakan metode kualitatif untuk menganalisis data yang dikumpulkan. Kesimpulan yang dihasilkan adalah, pertama, pemerintah Indonesia telah menerapkan Deregistrasi dan ekspor pesawat udara secara memadai berdasarkan hasil analisis dengan membandingkan regulasi dan wawancara dengan praktisi; kedua, pemerintah Indonesia dalam proses penerapan deregistrasi dan ekspor kembali pesawat menghadapi beberapa kendala, termasuk kurangnya kepastian hukum mengenai mekanisme pelaksanaan dan keterbatasan kewenangan; dan ketiga, pemerintah Indonesia memiliki solusi untuk mengatasi hambatan tersebut, yang meliputi merevisi regulasi terkait dan menjadi mediator jika terjadi permasalahan sebagai bentuk pemenuhan hukum. Dengan demikian, diharapkan hal ini dapat memberikan kepastian dan ketenangan bagi pemberi sewa dalam menerima jaminan berupa pesawat udara di Indonesia. Hasil penelitian ini diharapkan dapat meningkatkan pemahaman mengenai deregistrasi dan ekspor kembali pesawat udara berdasarkan Konvensi Cape Town di Indonesia sehingga banyak pihak memahami dan mengerti tentang hal ini.

Kata Kunci: deregistrasi pesawat udara, ekspor kembali pesawat udara, konvensi Cape Town.

1. Introduction

International Civil Aviation Organization (ICAO) Convention Art 29 contains an obligation for every aircraft to be registered in a state in which owners of the aircraft intended to operate the aircraft. However, there are discrepancies in the mechanism to register it [1]. Consequently, the international community

agreed on the mechanism to register in which the aircraft must be registered by its owner [2]. In several years, the trends on requirements of aircraft registration have changed due to the development of the economy in the international community, in which airlines tend to lease rather than purchase the aircraft. Hence, the parties that lease or other titles permitting the use of aircraft could register their aircraft [3]. The reason they choose to lease is because leasing provides more efficiency for the airlines rather than purchasing the aircraft in the sense of reducing the maintenance fee and using the designated purchase fee for other aspects [4], [5]. The recent data showed that Boeing Company leases 50% of their aircraft to the airlines.

When airlines prefer to lease the aircraft rather than purchase it to save costs, they need to make a leasing agreement with the lessor [6], [7]. Regarding the dispute settlement section on the lease agreement, each party can choose the options of law on how to solve the dispute [8]. Agreeing concerning the choice of law is easy if the lessor and lessee have the same nationality or residence since the parties do not have differences. The problem starts to arise when the lessor and lessee have a different nationality or different residence of states [9]. It is hard to determine which law must be implemented to settle the dispute since the law comes from various nations. Meanwhile, the nation should be neutral towards each party in the lease agreement. For example, when Cessna demands to take possession of their aircraft back from Airline A in Indonesia, Airline A refuses to give it back. Then, the judge in court supports these ideas because national law tends to protect their citizens. It is difficult for the lessor to attain their property back because the lessee's states protect the lessee. It is because the lessee is their citizen, and the decision by the lessor state's law cannot be enforced in foreign states based on the principle of non-intervention [10]. This indicates that the lessor always gets a disadvantage if the dispute occurs.

Due to these events, the international community agreed to make the convention called the Cape Town Convention. Cape Town Convention is the Convention on International Interests in Mobile Equipment that concluded in Cape Town on 16th November 2001, along with the Protocol on Matters Specific to Aircraft Equipment [11]. The convention aimed to create international recognition of international interests and resolve the problem of obtaining certain and opposable rights to high-value aviation assets. This problem arises from each state having a different legal system on securities, rent, and lease agreements that create uncertainty for the lending institution on their rights [12], [13]. Through the Cape Town Convention, they can assure that the asset is going back to them if the lessee conducts a violation regardless of the national law of the lessee. Based on several events that happened when there was no unified law that was neutral to protect the lessor, the Cape Town Convention is applied. It is important to use the Cape Town Convention as the appropriate option for their choice of law in leasing aircraft agreements between lessor and lessee that have different nationals and places of residence to ensure that the rights of the lessor are protected.

Indonesia ratified the Cape Town Convention on 20th February 2007 through President Regulation Number 8 of 2007 and promulgated in Law Number 1 of 2009 on Aviation [14]. The essential article on the Cape Town Convention is Article IX, para 1 (a) and para 1 (b). Article IX para 1 (a) mentions the obligation of states to "*Procure the de-registration of the aircraft*". Meanwhile, article IX para 1 (b) mentions the obligation of states to "*Procure the export and physical transfer of the aircraft object from territory in which it is situated*". These articles give advantages for Indonesia to persuade foreign investors to conduct leasing and rent in Indonesia as their activities are protected under the convention. However, losses may occur if the application of these articles is not in line with the aims and objectives of the Cape Town Convention. The losses experienced by Indonesia were related to reputation damage due to the international community's distrust of Indonesia's ability to protect foreign lessors. This happens because, in Indonesia's aviation climate, 50% of aircraft have rental status with foreign investors. Up to the present, there has been no assessment regarding Indonesia's compliance in implementing the Cape Town Convention properly, even though it is essential to know whether the convention is being implemented properly.

Based on the explanation before, this paper aimed to answer and provide a better understanding of 1) How Indonesia implements Article IX Para 1 (a) and (b) of the Cape Town Convention regarding the deregistration system; 2) Whether there is an obstacle to implementing Article IX Para 1 (a) and (b) of

the Cape Town Convention regarding the deregistration system and export back aircraft in Indonesia; and 3) Whether the Indonesian government has solutions to overcome the obstacle in implementing Article IX Para 1 (a) and (b) of the Cape Town Convention regarding the deregistration system and export back aircraft in Indonesia.

This paper is the first to analyze Indonesia's implementation of Article IX Para 1 (a) and (b) of the Cape Town Convention, addressing the deregistration and export of aircraft in the Indonesian aviation context. Two studies previously have discussed relevant articles in Cape Town Convention, titled “*Analysis on the Implementation of Financial Lease Related to Aircraft Procurement of PT Garuda Indonesia (persero) Tbk. Based on UNIDROIT Model Law on Leasing and Cape Town Convention*” written by Naomi Margaretha Hasianna, a student from the Undergraduate Law Program, Universitas Gadjah Mada and “*Kepastian dan Perlindungan Hukum Bagi Kreditur dalam Negeri Terkait dengan Pesawat Udara Sebagai Jaminan Hutang Ditinjau dari Undang-Undang Nomor 1 tahun 2009*”, written by Melissa Caroline S, a student from the Postgraduate Law Program, Universitas Gadjah Mada. However, Melissa Caroline’s article differs from this paper as it aims to explain legal certainty on the security interest of the aircraft as collateral based on Law Number 1 of 2009 on Aviation. Meanwhile, Naomi Margaretha Hasianna’s article differs from this paper as it aims to explain the leasing conducted by PT Garuda Indonesia Tbk. and focuses on procurement conducted by PT Garuda Indonesia Tbk. These two papers did not analyze Article IX Para 1 (a) and (b) of the Cape Town Convention regarding the deregistration system

2. Methods

The research methods used to conduct legal research are a combination of normative legal research (normative study) and empirical legal research (juridical sociological approach). Normative-empirical is a type of research method regarding the enforcement of normative legal provisions in action within every legal event that occurs in society. This study conducts qualitative analysis using primary data originating from interviews with authorized parties and secondary data originating from statutory regulations.

2.1. Type of Legal Research

The research method used in this paper was normative-empirical, which is a type of research method regarding the enforcement of normative legal provisions in action within every legal event that occurs in society [15]. Besides, normative-empirical is defined as research that combines a normative legal approach with the addition of various empirical elements [16]. This research method carries out research related to the implementation of normative legal provisions (laws) in action at each specific legal event that occurs in society [17]. The normative study in this research is used to examine written law from aspects of comparison, structure and composition, scope and material, and general explanation of each article, which is related to the formation and implementation of law in society [18]. The purpose of choosing a normative study when conducting the paper is to identify and analyze whether Indonesia implements Art IX 1(a) on deregistration and IX 1(b) on export back aircraft adequately. The empirical approaches used include interviews and field research regarding the obstacles faced by authorities and solutions to overcome obstacles related to the deregistration and export back aircraft in Indonesia.

2.2. Type of Data

Primary data is data obtained directly from the research object by conducting interviews with several interviewees that the authors contacted to complete this research. The interviewees included Mr. Nandi Wardhana, Head of the Section of Aeronautical Products of Directorate Airworthiness and Aircraft Operation and Mr. Robi Bagus Riyono, Staff of Directorate Airworthiness and Aircraft Operation.

Secondary data was obtained from literature studies such as books, journals, papers, and legal dictionaries, as well as document studies such as legal documents and regulations related to problems or research material.

2.3. Data Analysis

Data analysis was carried out with qualitative analysis, which does not use numbers but provides a verbal description of the findings and prioritizes the quality of the data, not the quantity of the data. Thus, data analysis has descriptive, evaluative, and prescriptive characteristics. This legal research employed deductive analysis, namely concluding a general problem regarding the concrete problem being faced. The deductive analysis begins by exploring the legal rules and principles of the Cape Town Convention and The Revision of Ministry Regulation Number 52 of 2018. After gaining a better understanding of these 2 (two) regulations, the next step is discussing the problem that happened and analyzing it by comparing the regulations, interviews, and the facts that happen in society.

3. Results and Discussions

Cape Town Convention is the Convention on International Interests in Mobile Equipment that concluded in Cape Town on 16th November 2001, along with the Protocol on Matters Specific to Aircraft Equipment. The convention aims to resolve the problem of obtaining certain and opposable rights to high-value aviation assets. This problem arises from each state having a different legal system on securities, rent, and lease agreements that create uncertainty regarding the rights of the lending institution. The solutions provided by the Cape Town Convention are the deregistration of the aircraft and procuring the export and physical transfer of the aircraft object from the territory in which it is situated. Indonesia ratified the Cape Town Convention on 20th February 2007 through President Regulation Number 8 of 2007 and promulgated in Law Number 1 of 2009 on Aviation. Through the ratification, the Cape Town Convention is implemented by the authority, which is the Directorate General Civil Aviation, supervised by the Ministry of Transportation.

3.1. Compliance assessment.

Indonesia has implemented deregistration and export back aircraft based on the Cape Town Convention adequately. Compliance assessment aims to show whether the Indonesian government is fully committed as the party of the Cape Town Convention, specifically by implementing Art IX 1(a) on the deregistration and IX 1(b) on exporting back aircraft adequately. The results of this analysis are obtained by a normative study and deductive method, which is through an analysis of the steps that have been taken by the Government of Indonesia by comparing the regulations, interviews, and the facts that happen in society.

- First, the Indonesian government has transformed the Cape Town Convention to the Presidential Decree Number 8 of 2007. Indonesia is a state that implemented the dualism theory as Indonesia does not recognize international convention in its national legal system based on Article 7 para. 1 of Act number 12 of 2011, in which the international convention does not include the national legal systems [19]. Therefore, based on Act 24 of 2000 on the International Agreement, the international convention needs to be ratified before enforcing at the national level. The Cape Town Convention was ratified in Presidential decree form, not in the acts, due to the content of the convention itself in the field of economy and technical, as well as the urgency to ratify it as presidential decree no need approval from the house of representatives. Therefore, Indonesia has fulfilled one point in the Compliance assessment where the Indonesian government is fully committed as the party of the Cape Town Convention.
- Second, the Indonesian government has conducted promotion by regularly conducting seminars supervised by the Department of Research and Development of the Ministry of Transportation. One of the seminars conducted by said department relates to the importance of Indonesian legal experts to acknowledge the Cape Town Convention in Indonesia. The seminar invited several parties including INACA (Indonesia National Air Carriers Association), Indonesia AirAsia, Lion Air, and NTSC (National Transportation Safety Committee). Therefore, Indonesia has fulfilled another point in the compliance assessment regarding its commitment as the party of the Cape Town Convention.
- Third, the Indonesian government has enforced the convention in Indonesia in line with the Cape Town Convention based on The Revision of Ministry Regulation Number 52 of 2018 is in line with

the convention through the comparison in Table 1. Therefore, Indonesia has fulfilled another point in compliance assessment regarding the Indonesian government’s full commitment as the party of the Cape Town Convention.

Table 1. Comparison of the Cape Town Convention dan the revision of Ministry Regulation Number 52 of 2018		
Materials	The Cape Town Convention	The Revision of Ministry Regulation Number 52 of 2018
Object that covered under the Cape Town Convention	Annex B, Article I: Para 2(a): “Aircraft means Airframes or helicopters;”	Sub Section E, 47.93 Scope (a): “Aircraft objects, including: Airplanes and helicopters”
Agreement covered under the Cape Town Convention	Annex A, Article 1(a): “‘Agreement’ means a security agreement, a title reservation agreement or a leasing agreement”	Sub Section E, 47.93 Scope (g): “The object of the aircraft as referred to in letter a, may be recorded in the event that the object of the aircraft arises from the control right of: Security Agreement, Title Reservation Agreement and/or Leasing agreement”
Request for Deregistration	Annex B, Article XIII Para 2: “Where the debtor has issued an irrevocable de-registration and export request authorization substantially in the form annexed to this Protocol and has submitted such authorization for recordation to the registry authority, that authorization shall be so recorded.” Para 3: “The person in whose favour the authorization has been issued (the “authorized party”) or its certified designee shall be the sole person entitled to exercise the remedies specified in Article IX(1)…”	47.97 Scope (a) “Application for registration and cancellation of IDERA registration must be submitted by the party authorized (authorized party) to director General” 47.97 Scope (c) “The Director General shall record and cancels IDERA records if the requirements in the technical guidelines operational has been fulfilled”

- Fourth, the Indonesian government has applied the Cape Town Convention in dispute adequately by proceeding with the deregistration and export back aircraft certificate in line with the Convention. The dispute arose in 2018 when PT A (Lessee) had not paid the leasing fee for these two aircraft. Hence, PT C (Lessor), through its representative in Indonesia, sent the three demand letters to PT A (Lessee). However, PT A (Lessee) neglected the demand letters sent by PT C (Lessor). Based on the action of PT A (Lessee), PT C (Lessor) requested the deregistration of the aircraft and asked for the export back based on IDERA towards the Ministry of Transportations. Because the party that requested for deregistration and export back request based on IDERA is a lessor as an authorized party, the Ministry of Transportations, through the Directorate of Airworthiness and Aircraft Operations (DAAO), proceeded with the request. Therefore, Indonesia has fulfilled another point in the compliance assessment regarding Tits commitment as the party of the Cape Town Convention.
- Fifth, the damages that happen to Indonesia if the government fails to implement the convention adequately is that Indonesia gets a low index from the Aviation Working Group. Aviation Working Group is a not-for-profit legal entity consisting of major aviation manufacturers, leasing companies, and financial institutions that contribute to the development of policies, laws, and regulations that facilitate advanced international aviation financing and leasing. The aviation working group had a duty to evaluate the Indonesian government in applying the Cape Town Convention. The result could determine whether Indonesia Airlines, being a lessee, could get export credit discounts (Discount of Interest Rate or Insurance). The result is in the form of the rate that started from low to high. Low means that the lessee could get less export discount and vice versa. Therefore, Indonesia has fulfilled another point in the compliance assessment regarding the commitment as the party to the Cape Town Convention.

3.2. Obstacle Assessment

The Indonesian government has been faced with several obstacles when applying the deregistration and export back aircraft, which hamper the effectiveness and efficiency of the Directorate of

Airworthiness and Aircraft Operations (“DAAO”). Obstacle assessment aims to show the results of analysis using an empirical approach, including interviews and field research regarding the obstacles faced by authorities and solutions to overcome obstacles related to the deregistration and export of aircraft in Indonesia.

The obstacles faced by DAAO are:

- First, the regulations do not provide legal certainty regarding the implementation of aircraft deregistration and export back. According to Mr. Nandi Wardhana, the Aviation Law and CASR 47 barely stated that when aircraft become collateral. The mechanism that will be used is international interest with the exercise of deregistration and export back aircraft. International interests are interpreted implicitly by the Ministry of Transportation of the Republic of Indonesia as activities or collateral agreements regarding international transactions (in this case, international transactions mean that one of the lessors or lessees is a foreign entity). When referring to the Cape Town Convention, there is no express or implied statement that internal transactions do not include international interests. As long as the interest meets the stated requirements, the interest is an international interest. In the author’s opinion, international interests are recognized and protected at the international level. Therefore, the first obstacle faced by Indonesia is that there is no legal certainty in the implementation of the Cape Town Convention.
- Second, DAAO does not have enforcement power. If there is a dispute arising from deregistration and export back aircraft based on the Cape Town Convention in Indonesia, DAAO does not have the authority to settle the dispute based on the regulations stating that DAAO authority is limited to the administrative matter of registration of aircraft. These obstacles make lessor faced with uncertainty if the dispute happens, as stated by Mr. Nandi Wardhana. Therefore, the second obstacle faced by Indonesia is that there is no legal certainty in the implementation of the Cape Town Convention.
- Third, there is no further mechanism to implement export back aircraft in Indonesia. Based on the regulations, it does not set the requirement on export back aircraft. The CASR 2018 only provides the mechanism of deregistration that makes lessor faced with confusion and difficulty in regards to their assets after conducting deregistration once the aircraft is already deregistered. The aircraft cannot fly anywhere, according to Mr. Robi Bagus Riyono. Therefore, the third obstacle faced by Indonesia is that there is no legal certainty in the implementation of the Cape Town Convention.

3.3. Solution Initiative Assessment

DAAO provides effective and efficient solutions that are accepted by stakeholders and can overcome obstacles. This subchapter aims to show the solutions that have been taken by DAAO to overcome obstacles when implementing the deregistration and export of aircraft based on analysis using an empirical approach and primary data.

The solutions are:

- First, DAAO proposes to the Ministry of Transportation to revise the current regulations. DAAO needs to propose to the Ministry of Transportation to revise the current regulations (Aviation Law and CASR 47) by specifically providing a clear definition of International Interests and stating that aircraft deregistration and re-export apply to national transactions/interests. By revising the current regulations, DAAO can maximize its potential through regulations to issue and assist stakeholders in the deregistration and re-export of aircraft based on the Cape Town Convention effectively and efficiently. Unfortunately, until now, this revision has not been made and signed by DAAO. According to Mr. Nandi Wardhana, this incident occurred because DAAO did not prioritize revising existing regulations regarding the deregistration and re-export of aircraft. The first solution to overcome the obstacle in implementation is to provide legal certainty in the implementation of the Cape Town Convention and give more authority to DAAO to do enforcement power regarding the mechanism of the Cape Town Convention. This is due to the revision of regulations which provides a clear explanation regarding the definition of international interests, the scope of the subject that can

use IDERA, the authority of DAAO to enforce IDERA, and a detailed mechanism to implement export back aircraft in Indonesia.

- Second, DAAO becomes a mediator if there is a dispute between the lessor and lessee in regards to deregistration and export back aircraft based on the Cape Town Convention in Indonesia. There are several cases when DAAO asked to become a mediator when the lessor or lessee seeks advice for better resolutions to settle the dispute and if the lessee feels they are less protected. When getting the requests to become a mediator, DAAO can initiate a meeting for both of the parties to explain their interest as the position between lessor and lessee is equal. It is the right choice for DAAO to become a mediator or facilitator based on DAAO the government agencies which makes DAAO neutral because they do not have an interest in the disputed issues. Also, according to Mr. Nandi Wardhana, they have the expertise and understanding of the situation faced by both of the parties, which leads to them proposing a solution or mediating them. The second solution to overcome the obstacle in implementation is to provide legal certainty in the implementation of the Cape Town Convention and give more authority for DAAO to do enforcement power regarding the mechanism of the Cape Town Convention when waiting for certainty regarding regulatory revisions and when a solution is needed quickly.
- Third, DAAO could advise on the problems that are not yet regulated by Indonesian regulation, for example, regarding the protection of national transactions and lessee that unwillingly use deregistration and export back aircraft. Up until now, according to Mr. Robi Bagus Riyono, all of the solutions provided by DAAO have been positively accepted by the lessor and lessee because DAAO also assists in the implementation of solutions. The third solution to overcome the obstacle in implementation is by providing legal certainty in the implementation of the Cape Town Convention, giving more authority for DAAO to do enforcement power regarding the mechanism of the Cape Town Convention when waiting for certainty regarding regulatory revisions and when a solution is needed quickly.

4. Conclusion

Based on the results of research and analysis on regulations and facts that happen in society, it can be concluded that Indonesia has implemented deregistration and export back aircraft based on the Cape Town Convention adequately since the government fulfills the step that needs to be taken by states after being the party of an international convention. Indonesia has transformed the Cape Town Convention to the Presidential Decree Number 8 of 2007; Indonesia has promoted the Cape Town Convention regularly; Indonesia has enforced the convention in Indonesia in line with the Cape Town Convention based on The Revision of Ministry Regulation Number 52 of 2018, and Indonesia has applied the Cape Town Convention in dispute resolutions. Despite this, The Government of Indonesia has been faced with several obstacles when applying for deregistration and export back aircraft. It can hamper the effectiveness and efficiency of DAAO where there is no legal certainty on the implementation of the Cape Town Convention. DAAO does not have enforcement power, and there is no further mechanism to implement export back. However, DAAO provides effective and efficient solutions that are accepted by stakeholders, which can overcome obstacles and are already implemented in the practice by DAAO. It revises the regulations and DAAO becomes a mediator and gives advice. Therefore, it can be concluded that even though there are several obstacles in implementing the Cape Town Convention, Indonesia can overcome them and implement them well. Also, this could be a starting point for research related to the implementation of the Cape Town Convention in Indonesia.

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