

Notarial Challenges for Aircraft Deeds: Unlocking the Potential of Aircraft as Collateral

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Abstract: A notary is a public official entrusted with the authority to draft legal deeds pertaining to agreements within the scope of private law. However, their ability to fulfill this role is limited when they are unable to draft aircraft mortgage deeds. This study aims to critically evaluate the scope of a notary's authority in preparing aircraft-related deeds and to examine the various forms of legal deeds that have emerged in practice when aircraft are used as collateral in credit agreements. Using a normative legal approach, the research employs statutory analysis, conceptual exploration, and interpretative methods to assess legal materials. The findings reveal that notaries face considerable obstacles in exercising their authority due to the lack of specific regulations on aircraft mortgages, even as the aviation industry continues to grow rapidly. This regulatory void has resulted in the emergence of diverse deed types, such as Deeds of Agreement for the Transfer of Guarantee and Grant of Power of Attorney, Fiduciary Deeds, and Deeds for the Transfer and Guarantee of Power of Attorney. Furthermore, as aircraft, categorized as registered objects, can be classified as immovable property and potentially treated as mortgageable collateral, the establishment of specific regulations governing aircraft mortgages is essential to avoid legal uncertainty and ensure clear regulatory guidance.

Keywords: Aircraft Deeds; Fiduciary Deeds; Legal Issues; Notary; Property Law; Registered Objects

1. Introduction

Agreements between carriers and passengers, as well as the broader regulatory framework governing transportation companies, including those operating aircraft, are crucial. The aviation industry, which requires substantial capital investment for business development, typically relies on financing from lending institutions.¹ Creditors, in turn, demand collateral to secure their loans, following the principle of prudence. In this process, the services of notaries, as public officials, are essential.²

The primary function of a notary is the creation of authentic deeds, which serve as legally recognized written evidence. The authority of a notary to draft such deeds in private agreements is essential for ensuring legal certainty and providing legal protection to the

¹ Carmichael, Jeffrey, and Michael Pomerleano. *The development and regulation of non-bank financial institutions*. World Bank Publications, 2002.

² A.A. Andi Prajitno, *Apa Dan Siapa Notaris Di Indonesia* (Surabaya: CV. Perwira Media Nusantara, 2015).

involved parties.³ An additional area of notarial authority that warrants further exploration is the "other authorities" referenced in the Explanation of Article 15, paragraph (3) of Law No. 2 of 2014 concerning the Position of Notary. "Other authorities regulated in the legislation" include, among others, the authority to certify electronic transactions (cyber notary), draft Deeds of Waqf pledges, and create aircraft mortgages. This provision suggests that notaries possess the authority to draft aircraft mortgage deeds. However, this authority has not yet been exercised due to the absence of specific regulatory frameworks, presenting both legal and practical challenges for notaries in implementing this aspect of their authority.

The lack of legal norms regulating the use of aircraft as collateral stands in stark contrast to the rapid growth of Indonesia's commercial aviation industry over the past decade.⁴ This presents a significant issue, as financial institutions and banks, which provide essential financing, rely on legal instruments that ensure legal certainty, particularly to safeguard their interests in loan distribution and collateral management. Consequently, the principle of prudence is critical in financial sector operations. Therefore, the establishment of legal frameworks that protect the rights of guarantee holders is urgently needed in the financial industry. The absence of clear regulations not only hinders airlines from securing capital but also deters national and international investors from lending to airlines due to the lack of legal certainty and assurance that their investments will be protected.⁵

The notary's authority to create authentic deeds is intended to ensure legal certainty and provide legal protection for the community in various transactions and agreements, including the authority to draft aircraft mortgage deeds. Historically, aircraft could be encumbered with mortgages under Law No. 15 of 1992 on Aviation, which stipulated in Article 9 that "aircraft operated in Indonesia must have a registration mark," and in Article 12 that "aircraft with registration marks and Indonesian nationality can be mortgaged." However, this provision was repealed by Law No. 1 of 2009 on Aviation, which no longer includes the possibility of mortgaging registered aircraft. Nonetheless, this earlier legislation established a precedent for treating registered objects as mortgageable assets. Drawing a parallel, the *Burgerlijke Wetboek* (BW) Articles 1162-1232 allowed for mortgages on registered land, classified as non-permanent objects, while customary land was subject to *creditverband*. Additionally, the legal framework for land collateral has

³ Oting Supartini and Anis Mashdurohatun, "Akibat Hukum Akta Perjanjian Kredit Yang Dibuat Notaris Dengan Jaminan Hak Tanggungan Adanya Kepastian Hukum Dan Keadilan Para Pihak," *Jurnal Pembaharuan Hukum* 3, no. 2 (2016): 200, <https://doi.org/10.26532/jph.v3i2.1443>.

⁴ Feri Wirsamulia, "The Legal Problem of Aircraft Mortgage in Indonesia," *Indonesia Law Review* 12, no. 1 (2022): 17–31, <https://doi.org/10.15742/ilrev.v12n1.2>.

⁵ CR, "Ketiadaan Aturan Yang Jelas, Implementasi Hipotek Pesawat Terhambat," *hukumonline*, 2004, <https://www.hukumonline.com/berita/a/ketiadaan-aturan-yang-jelas-implementasi-hipotek-pesawat-terhambat-hol11634/?page=1>.

been further clarified in Law No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land.

The restriction of mortgage objects to registered land has historically served as the foundation for the later distinction between registered and unregistered objects.⁶ In contemporary and future contexts, the classification of registered objects holds significant importance in society, as it now encompasses not only physical property but also other assets like aircraft. When considered alongside Notary Law, it becomes evident that aircraft can be regarded as mortgageable collateral within the notary's authority to draft the corresponding deeds. However, the lack of specific regulations governing aircraft mortgages presents a significant challenge for notaries in executing these deeds. Given this context, the study aims to explore the potential for aircraft, as registered objects, to be used as mortgage collateral in the future. It also seeks to investigate the challenges faced by notaries in drafting aircraft mortgage deeds and the forms of deeds that have emerged in practice when credit agreements are accompanied by collateral agreements involving aircraft.

2. Method

This study employs a qualitative research methodology, incorporating legislative, conceptual, comparative, and interpretative approaches.⁷ It investigates the potential of aircraft, as registered objects, to be utilized as mortgage collateral. Additionally, the research analyzes the notary's authority in drafting aircraft mortgage deeds within the context of societal developments and examines how these deeds relate to supplementary agreements associated with primary credit agreements.

3. Potential of Aircraft as Registered Mortgage Collateral: Comparative Insights into Aircraft Mortgage Regulations

In Indonesian property law, objects are classified into two categories: movable and immovable.⁸ The concept of "registered objects" has emerged as a distinct category, referring to entities or items that have been officially recorded or entered into a registry or list. Aircraft, as an example, fall into this category of registered objects.⁹ This registration process grants legal validity and provides specific protections or rights to the

⁶ Moch. Isnaeni, *Hipotek Pesawat Udara (Seberkas Pelangi 4.0 Di Langit Euphoria Indonesia)* (Surabaya: CV Revka Prima Media, 2018).

⁷ Irwansyah, *Penelitian Hukum Pilihan Metode & Praktik Penulisan Artikel*, ed. 4 (Yogyakarta: Mirra Buana Media, 2021).

⁸ Moch Isnaeni, *Pengantar Hukum Jaminan Kebendaan* (Surabaya: PT. Revka Pertra Media, 2016).

⁹ Annalisa, Y., Murzal Zaidan, Mada Apriandi, and Nurhidayatuloh Febrian. "Aircraft Mortgage in Indonesia: Alternative Object of Material Guarantee as a Debt Settlement." *Int J Recent Technol Eng* 8, no. 2S9 (2019): 601-7.

owner or registered entity. Typically, the registration involves an administrative procedure where relevant details about the object are documented in a government-regulated system or database. The rationale for registration varies depending on the type of object and its context.

In the *Burgerlijk Wetboek* (BW), only immovable objects, specifically registered land, can be mortgaged. This establishes the principle that mortgages are inherently applicable to registered objects.¹⁰ Consequently, for the purpose of aligning with both national and international legal standards, extending the concept of mortgages to aircraft is a logical choice. The term "registered objects" is also referenced in Law Number 15 of 1992 on Aviation, which stated in Article 12, paragraph (1) that "aircraft and helicopters with Indonesian registration marks and nationality may be mortgaged." This provision implies that registration is a prerequisite for an aircraft to be mortgaged. However, Law Number 15 of 1992 was repealed by Law Number 1 of 2009 on Aviation, which also requires in Article 24 that "every aircraft operated in Indonesia must have a registration mark," thus reaffirming that operational aircraft must be registered.

The term "registered property" is broadly defined and can encompass various items depending on the context. When an object is entered into an official registry, its legal status often parallels that of immovable property under the BW. Issues related to ownership transfer, collateral, and other related matters generally follow similar procedures to those established for immovable objects. In the Netherlands, the New BW (NBW) has expanded the traditional categories of movable and immovable objects to include registered and unregistered objects.¹¹ As such, the role of registered objects in Indonesia is becoming increasingly significant, necessitating their regulation and integration into the national property law framework while preserving the distinction between movable and immovable property.

An aircraft is classified as a "registered object" when it is officially recorded in the aircraft registration system, as outlined by the Regulation of the Minister of Transportation. According to this regulation, aircraft registration can proceed after an inspection by the Director General of Civil Aviation, confirming compliance with Part 47.39 requirements, which include: a) proof of original ownership or a notarized copy; b) proof of removal of previous registration marks or confirmation of non-registration in other countries; c) a copy of the aircraft insurance; d) approval of aircraft procurement; and e) adherence to age limit requirements set by the Minister of Transportation. Hence, it is permissible for an individual or entity to register an aircraft without being the owner, provided that they submit a copy of the proof of ownership. Once these requirements are fulfilled, the

¹⁰ Isnaeni, *Hipotek Pesawat Udara (Seberkas Pelangi 4.0 Di Langit Euforia Indonesia)*. p.379

¹¹ Mariam Darus Badruzaman, *Mencari Sistem Hukum Benda Nasional* (Alumni: Bandung, 1983).

Minister will issue a registration certificate. However, this certificate does not serve as evidence of ownership.

In the Netherlands,¹² the 1948 Geneva Convention on the International Recognition of Rights in Aircraft establishes a public registry for recording aircraft mortgages and other rights, managed by the Land Registry. The Dutch Civil Code, along with the Rules on Registered Aircraft 1996 and the Regulations on Registered Aircraft 2005, outline the procedures for aircraft registration in this public registry. To be eligible for registration, an aircraft must have a maximum take-off mass of at least 450 kg, be registered with the Netherlands nationality register, not be registered with the nationality register of any other state, and have its registration request approved by the court.

Civil aircraft registration records provide a unique identifier for each aircraft, as outlined in Section 47.31 of Regulation Number PM 26 of 2021 by the Minister of Transportation. The Director General of Civil Aviation maintains a record of civil aircraft registrations in Indonesia, which includes: a. the registration number; b. the registration and nationality marks; c. the aircraft model as per the manufacturer; d. the aircraft serial number; e. the year of manufacture; f. the name and address of the aircraft owner; g. the name and address of the aircraft operator; h. the name and address of the lessor (if applicable); and i. the date of issuance of the registration certificate. This information is also included in the guarantee deed associated with the aircraft. The registration number serves to uniquely identify the aircraft among others and is typically displayed on the aircraft's exterior, such as the tail or fuselage, in a contrasting color for visibility. The registration number usually comprises a combination of letters and numbers with the prefix PK, for example, PK-123. This format is often painted in a contrasting color on the aircraft's exterior, aligning with standards set in Annex 7 of the 1944 Chicago Convention and Annex 7 of the Convention on International Civil Aviation, which guide international aviation regulations.¹³

The primary purpose of registering an aircraft in a country is to prevent unauthorized third parties from making ownership claims on the aircraft.¹⁴ Aircraft registration serves as a means of identification, which is crucial for parties receiving the guarantee. The benefits of aircraft registration include:

- a. **Ownership and Legality Proof.** Aircraft registration establishes ownership and provides legal proof of the aircraft's status. The registration system records details

¹² Laetitia Kunst-den Teuling and Ruben Elkerbout Jeroen Timmermans and Stek, *Air Transport 2021*, 15th ed. (London: Tom Barnes, 2020).

¹³ H.M Kabul Alyssa Agustia Adrianti, Agus Pramono and Supriyadhie, "Tinjauan Hukum Mengenai Pendaftaran Pesawat Udara Sipil Di Indonesia Berdasarkan Konvensi Chicago 1944 Dan Undang-Undang Nomor 1 Tahun 2009 Tentang Penerbangan.," *Diponegoro Law Journal* 6, no. 2 (2017): 11.

¹⁴ Agus Pramono, "Aspek Hukum Pendaftaran Pesawat Udara," *Pandecta: Research Law Journal* 8, no. 2 (2013): 239–49, <http://journal.unnes.ac.id/nju/index.php/pandecta>.

about the owner or operator, and registration documents serve as evidence of legality. These documents can be used as collateral in primary agreements.

- b. **Safety and Security.** Aircraft registration is a key component of the aviation safety and security regulatory framework. Registration information enables aviation authorities to oversee aircraft operations, ensure proper maintenance, perform inspections, and uphold high safety standards.
- c. **Operational Supervision.** Registration allows aviation authorities to monitor aircraft operations, including flight paths, maintenance activities, and regulatory compliance. This tracking aids in ensuring adherence to aviation regulations.
- d. **Aircraft Transactions and Leasing.** Registration facilitates the sale, purchase,¹⁵ or lease of aircraft, including associated guarantees. It provides legal certainty and trust for all parties involved in these transactions.

Registered assets, such as aircraft, can be utilized as collateral. Creditors who hold collateral rights are afforded preferential treatment for debt repayment over concurrent creditors in the event of debtor default.¹⁶ In essence, collateral rights come into effect only when the debtor fails to meet their payment obligations as outlined in the loan agreement.¹⁷ As noted by Sterven, collateral is an inherent aspect of lending, either implicitly or explicitly, and plays a crucial role in the credit market, influencing factors such as the interest rate applied to the loan.¹⁸

Collateral law stipulates that creditors cannot include a clause in the agreement that grants them ownership of the collateral object upon debtor default. Such a clause, if present, renders the agreement null and void.¹⁹ This provision is designed to protect the debtor and is articulated in Article 12 of the Mortgage Law, Article 33 of the Fiduciary Law, and Article 1178 of the Civil Code. In the Netherlands, a similar stipulation is enshrined in Article III: 235 of the New Civil Code (NBW), which states that "any provision that grants the pledgee or mortgagee the right to appropriate the secured property is null and void." The rationale for this regulation is to safeguard the debtor's interests. Without such protection, an imbalance between debtor and creditor could lead to the

¹⁵ Bryan Dennis Longdong, Hengky A. Korompis and Fernando J. M. M. Karisoh, "Pengaturan Hukum Mengenai Pendaftaran Pesawat Udara Menurut Undang-Undang No. 1 Tahun 2009 Tentang Penerbangan," *Lex Privatum* 9, no. 3 (2021): 151–61.

¹⁶ Evie Christy, Wilsen Wilsen, and Dewi Rumaisa, "Kepastian Hukum Hak Preferensi Pemegang Hak Tanggungan Dalam Kasus Kepailitan," *Kanun Jurnal Ilmu Hukum* 22, no. 2 (2020): 323–44, <https://doi.org/10.24815/kanun.v22i2.14909>.

¹⁷ Wirsamulia, "The Legal Problem of Aircraft Mortgage in Indonesia."

¹⁸ Steven E. Plaut, "The Theory of Collateral," *Journal of Banking and Finance* 9, no. 3 (1985): 401–19, [https://doi.org/10.1016/0378-4266\(85\)90041-X](https://doi.org/10.1016/0378-4266(85)90041-X).

¹⁹ Ian Curry-Summer Hans Warendrof, Richard Thomas, *The Civil Code of The Netherlands* (Netherlands: Kluwer International BV, The Netherlands, 2013).

creditor improperly benefiting from the collateral,²⁰ particularly if the collateral's value exceeds the debt. Thus, it is essential to ensure that legal protections are balanced between the parties involved.

When an aircraft is used as collateral for bank loans, the appropriate form of collateral security depends on its classification. If the aircraft is considered an immovable object, it is secured through a mortgage. Conversely, if only certain parts of the aircraft, such as the engine, are used as collateral, those components are classified as movable objects. In Indonesia, movable objects are typically secured using a fiduciary arrangement. However, Article 3 of Law No. 42 of 1999 concerning Fiduciary specifically excludes aircraft from fiduciary collateralization. This provision indicates that the Fiduciary Law does not apply to aircraft mortgages. Therefore, employing a mortgage guarantee system is more suitable for aircraft collateral.²¹

According to Law No. 17 of 2018 concerning Shipping, ships, as a form of transportation, are governed by Article 60, which specifies that registered ships, when used as collateral, are secured through a mortgage institution. By analogy, since aircraft are also classified as registered objects, the most appropriate form of collateral security for aircraft would similarly be a mortgage institution, analogous to the treatment of ships. Additionally, Law No. 1 of 2009 concerning Aviation also supports the use of mortgage guarantees for aircraft. Article 71 of this law implicitly permits aircraft to be encumbered with international interests arising from collateral agreements, conditional rights, and/or leases. Therefore, among the four types of collateral institutions in Indonesia—pawn, mortgage, collateral, and fiduciary—the mortgage institution appears to be the most suitable and promising option for securing aircraft.

The lack of regulatory frameworks for aircraft mortgages in Indonesia presents a significant legal challenge. Despite the authority granted to Notaries²² under the Notary Law to draft aircraft mortgage deeds, this authority remains limited by regulatory constraints. For comparative insight, we can examine the aircraft mortgage models in the United Kingdom, New York, and Australia.²³

According to Thomas Conlon, the expansion of the international air transportation sector has heightened interest in international agreements concerning the recognition of collateral rights (mortgages) on aircraft. The United Kingdom, for instance, has demonstrated increased engagement with mortgage conventions through Statutory Instrument Number 1268 of 1972 and the Civil Aviation Act 1968. These regulations

²⁰ Wirsamulia, "The Legal Problem of Aircraft Mortgage in Indonesia."

²¹ Y. Annalisa et al., "Is Fiduciary Deed Suitable for Aircraft in Indonesia?," *International Journal of Psychosocial Rehabilitation* 24, no. 2 (2020): 2175–88, <https://doi.org/10.37200/IJPR/V24I2/PR200518>.

²² Solechan, "Asas-Asas Umum Pemerintahan Yang Baik Dalam Pelayanan Publik," *Administrative Law and Governance Journal* 2, no. 3 (2019): 541–57, <https://doi.org/10.14710/alj.v2i3.541-557>.

²³ Wirsamulia, "The Legal Problem of Aircraft Mortgage in Indonesia."

established the groundwork for ratifying the "International Recognition of Rights in Aircraft" convention, known as the Geneva Convention of 1948, which governs international security interests in aircraft. This convention emerged from a broad consensus among manufacturers and airlines, recognizing that substantial investments are necessary to advance the aviation industry. However, financial institutions are reluctant to invest without assurances for their security interests, particularly when aircraft are subject to foreign jurisdiction.²⁴ This raises concerns for bankers regarding the enforceability of aircraft mortgages if such mortgages are not recognized by courts in the countries where the aircraft operates.

Article 1, Paragraph 1 of the Geneva Convention of 1948 stipulates that countries ratifying the convention must acknowledge that pledges, mortgages, and similar rights over aircraft are established contractually to secure debt repayment. In practice, the primary legal frameworks for aircraft mortgage agreements are those used in the United Kingdom and Australia. Additionally, New York Law incorporates specific provisions mandated by U.S. Federal Law to validate aircraft mortgages.²⁵

The United Kingdom (UK) employs aircraft as collateral for loans, with the process regulated under Statutory Instrument Number 1268 of 1972, known as the Mortgaging of Aircraft Order 1972, alongside the Civil Aviation Act 1968, which supports the UK's ratification of the Geneva Convention 1948.²⁶ According to Article 4 of the Mortgaging of Aircraft Order 1972, aircraft mortgages must be registered with the Civil Aviation Authority (CAA), and this registry is known as the Aircraft Mortgage Register. The CAA oversees civil aviation regulation in the UK. Registering a mortgage with the CAA adheres to the principles of transparency and publication, ensuring that the existence of a mortgage is publicly known.²⁷ As specified in Article 14 of the Mortgaging of Aircraft Order 1972, creditors with a registered aircraft mortgage hold a preferential position over other creditors. This approach mirrors the regulations in Indonesia's Guarantee Law, which also mandates registration of both immovable and movable collateral to ensure transparency, publicity, and an enhanced position for creditors.

In the United Kingdom, for an aircraft to be mortgaged, it must be physically situated within the UK airspace or in another jurisdiction that meets the necessary criteria. This implies that English law may be applied in other locations as well. Additionally, in 2015, the UK ratified the Convention on International Interests in Mobile Equipment, signed in Cape Town on November 16, 2001 (commonly referred to as the Cape Town Convention

²⁴ Thomas Conlon, "The Aircraft Mortgages Convention : The United Kingdom Moves Toward Ratification" 43, no. 4 (1977).

²⁵ Wirsamulia, "The Legal Problem of Aircraft Mortgage in Indonesia."

²⁶ Conlon, "The Aircraft Mortgages Convention : The United Kingdom Moves Toward Ratification."

²⁷ Wirsamulia, "The Legal Problem of Aircraft Mortgage in Indonesia."

2001). This convention establishes universal regulations for international aircraft financing guarantees.

The UK also enforces the Irrevocable Deregistration and Export Request Authorization (IDERA) procedure, which applies to aircraft registered with the Civil Aviation Authority (CAA). This measure is designed to safeguard the interests of international creditors. In cases where conflicts arise between a mortgage holder and an IDERA holder, the mortgage holder may lose priority unless the mortgage registration occurred before 2015. This situation reflects the precedence of international law over domestic legislation. Furthermore, English law remains unaffected by the debtor's bankruptcy, and creditors' interests are preserved through mortgages registered with the CAA. In the event of a debtor's bankruptcy, aircraft secured by such mortgages remain under creditor control, ensuring that creditor claims are protected from the liquidation process managed by the liquidator (curator).²⁸

In the United States, aircraft mortgages must be registered with the Federal Aviation Administration (FAA), which is the regulatory body for civil aviation. This requirement is outlined in Title 14 of the Code of Federal Regulations, Part 49, which details the procedures for recording mortgages and other security interests.²⁹ The registration of aircraft mortgages has significant legal implications for third parties and other creditors, ensuring transparency regarding aircraft used as collateral. If an aircraft mortgage involves a foreign interest, it can also be registered with The International Registry (IR) to indicate its status as a "foreign interest."³⁰ The FAA Aircraft Registry facilitates this process in accordance with the Cape Town Convention.

In contrast, Australia does not register aircraft mortgages with the Australian Civil Aircraft Register. Instead, the Personal Property Securities Act mandates that such mortgages be recorded on The Personal Property Securities Register (PPSR). This approach places aircraft mortgage registration under the realm of security law rather than aviation law. The PPSR, established in 2012, handles registrations for various types of property, including aircraft. Prior to the PPSR, aircraft mortgage registrations were managed by the Corporate Encumbrances Register of the Australian Securities and Investments Commission under the Corporations Act 2001. Registration on the PPSR adheres to the principle of publicity and provides priority over other creditors. Specifically, for aircraft mortgages in Australia, the PPSR categorizes aircraft into engines, frames, helicopters,

²⁸ Yetniwati, Taufik Yahya, and Pahlefi. "Legal Constructions of Apprenticeship for Notary Candidates in the Framework of Rechtsidee." *Jambe Law Journal* 4, no. 1 (2021): 93-110.

²⁹ ICLG.Com, USA Aviation Law 2019, retrieved <https://iclg.com/practice-areas/aviation-laws-and-regulations/usa>, on August 12, 2024.

³⁰ Amanda Applegate, The International Registry: Understanding Its Process and Protection, BusinessAir.com

<http://www.businessair.com>, retrieved on August, 2024

and small aircraft, allowing mortgages only on engines. Despite differences in registration practices, all three models—U.S., U.K., and Australian—highlight the critical role of registering aircraft mortgages.³¹

Registration with the PPSR embodies the principle of transparency, granting priority to registered creditors over others. In the context of aircraft mortgages, the PPSR categorizes aircraft into distinct groups: engines, frames, helicopters, and small aircraft. Consequently, in Australia, mortgage rights can only be applied to aircraft engines. Despite variations in the models of aircraft mortgage registration across different jurisdictions, all three systems underscore the critical importance of registering aircraft mortgage rights.

4. Legal Challenges of Notary's Authority in Making Aircraft Mortgage Deeds

The execution of state administration and government functions must be grounded in legitimacy, which is derived from legal authority. The essence of the principle of legality lies in authority, or the capacity to perform specific legal actions. This principle applies to the authority of Notaries as public officials to create authentic deeds and other official acts. Authority represents a legitimate power that must be recognized and sanctioned. It allows individuals, groups, or institutions to perform designated functions.³²

The system of government administration in Indonesia is governed by Law Number 30 of 2014 on State Administration. This law delineates three types of authority: attribution, delegation, and mandate.³³ Notaries, as public officials, are granted authority through attribution, which is a formal power bestowed by law. According to Article 1, Number 22 of the Law, attribution involves the conferral of authority to government agencies and officials by the 1945 Constitution or other regulations.

The authority granted to a Notary as a public official is established by Law Number 2 of 2014, which amends Law Number 30 of 2004 concerning the Position of Notary (Notary Position Law). According to Article 1, Number 1 of the Notary Position Law, "a notary is a public official authorized to create authentic deeds and exercise other powers specified in this law." Further details regarding a Notary's authority are outlined in Article 15 of the Notary Position Law. The authority granted to a Notary is followed by various other provisions that follow it.³⁴ Article 15, Paragraph (1) specifies that "a Notary has the authority to create authentic deeds for all acts, agreements, and decisions required by

³¹ Wirsamulia, "The Legal Problem of Aircraft Mortgage in Indonesia."

³² Ramlan Subakti, *Memahami Ilmu Politik*, (Jakarta:PTGramedia, 2001), hlm. 57

³³ Ridwan HR, *Hukum Administrasi Negara*, Jakarta: PT RajaGrafindo Persada, 2006, hal. 104

³⁴ Denico Doly, "Kewenangan Notaris Dalam Pembuatan Akta Yang Berhubungan Dengan Pertanahan," *Notarius* 12, no. 2 (2020): 679–90.

laws or requested by the interested parties to be recorded in an authentic deed. This includes ensuring the date of the deed, storing the deed, and providing copies and extracts, provided that such tasks are not assigned to or excluded by other officials or persons designated by law." The role of the Notary, as a legally authorized public official, is essential for the Indonesian people. Consequently, this authority must be exercised appropriately and professionally. Additionally, Article 15, Paragraph (3) of the Notary Law notes that "beyond the authority described in Paragraphs (1) and (2), a Notary has other powers as regulated by laws and regulations." These additional authorities are further detailed in the Explanation of Article 15, Paragraph (3) of the Notary Law.

"What is meant by 'other authorities regulated in laws and regulations' includes, among others, the authority to certify transactions carried out electronically (cyber notary), make deeds of waqf pledges, and aircraft mortgages." [translated by the author]

According to the Explanation of Article 15, Paragraph (3), Notaries are explicitly granted the authority to create aircraft mortgage deeds. However, the exercise of this attributed authority is impeded by the lack of specific laws and regulations that would facilitate this process. This absence of legal framework poses a challenge, as it limits the application of the Notary's authority in drafting aircraft mortgage deeds.

The issue of legal certainty regarding the use of commercial aircraft as credit collateral remains unresolved. This certainty is crucial for fostering investment in the aviation sector. Every aircraft operating in Indonesia must display a registration mark. The current registration process involves both registration and nationality marks as outlined in the Regulation of the Minister of Transportation Number PM 26 of 2021, which amends Regulation PM 52 of 2018 concerning Civil Aviation Safety Regulation Part 47. If a debtor defaults, these registration marks can be revoked, allowing the aircraft to be transferred to an international creditor or lessor. This provision aligns with the 2001 Cape Town Convention and the Aviation Law.

Indonesia ratified the Cape Town Convention through Presidential Regulation Number 8 of 2007, which covers the Convention on International Interests in Mobile Equipment and the Protocol on Aircraft Equipment. This ratification enables aircraft or helicopters registered and operated in Indonesia to be encumbered with collateral according to foreign laws. The IDERA, prepared by a Notary, authorizes the registration of collateral in another country where the aircraft mortgage is registered. IDERA facilitates the bureaucratic process for removing aircraft from Indonesian territory,³⁵ granting creditors the authority to deregister and relocate the aircraft. The implementation of the Cape

³⁵ Irma Devita, "Pemberian Jaminan Atas Pesawat Terbang Dan Helicopter," Irmadevita.com, 2011, <https://irmadevita.com/2011/pemberian-jaminan-atas-pesawat-terbang-dan-helicopter/>.

Town Convention is essential for Indonesia, an archipelagic nation with significant transportation needs.³⁶

However, to date, there is no Government Regulation in place as required by Article 12 of Law No. 15 of 2009 concerning Aviation, which specifies that "Aircraft and helicopters with Indonesian registration and nationality may be encumbered with a mortgage." The lack of such regulation hampers the application of legal provisions, creates regulatory gaps, and complicates the enforcement of laws within the aviation sector. In cases of contract breaches, there is no document with executorial power to facilitate enforcement. Securing an execution letter necessitates a lengthy court process, which is disadvantageous to creditors who may not recover their due rights and may experience a decrease in the economic value of their collateral, while debtors may continue to use the aircraft as collateral. Consequently, aircraft are typically only used as supplementary collateral in banking, rather than as primary collateral.

The advancements in aviation law have been remarkable. Simplifications in collateral arrangements have introduced options that align with the nature of the guarantee object. The resolution of outstanding issues in general legal jurisdictions, combined with streamlined legal remedies across various civil law countries, offers a dependable and practical framework for regulating credit secured by aircraft.³⁷ The legal factors can significantly impact law enforcement, producing both positive and negative effects depending on their content. These legal factors primarily include laws or written regulations established by the government. Problems arise when the law itself is flawed or lacks necessary implementing regulations, such as Government Regulations needed to enforce the law.³⁸

For instance, Law No. 15 of 1992 concerning Aviation lacks the Government Regulation for enforcing aircraft mortgages as outlined in Article 12. This gap creates a legal vacuum and uncertainty, highlighting the urgent need for regulations on aircraft mortgages. Such regulations are essential to support parties seeking operational funding to advance Indonesia's aviation industry and air transportation. The absence of these regulations could hinder industry development by restricting access to necessary funds. Government actions must adhere to the principle of legality, ensuring that legislation meets the principles of legal justice, certainty, and benefit³⁹ as outlined in Law Number 13 of 2022, which amends Law Number 12 of 2011 on Legislative Formation. Consequently, the attribution authority granted to notaries for creating aircraft mortgage deeds, as detailed

³⁶ Mochamad Januar Rizki, "Mendorong Kepastian Hukum Pesawat Terbang Sebagai Jaminan Kredit."

³⁷ S A Bayitch, "Aircraft Mortgage : A Study in Comparative Aviation Law of the Western Hemisphere," *University of Miami Law Review* 13, no. 4 (1959).

³⁸ Soerjono Soekanto, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*, 14th ed. (Jakarta: Rajawali Pers, 2016).

³⁹ Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar* (yogyakarta: Liberty, 1999).

in Article 15, paragraph (3) of the Notary Law, remains unimplemented. This regulatory gap results in the creation of various deeds related to aircraft as collateral, driven by debtors seeking credit loans using aircraft as collateral objects.

5. Developments in the Practice of Aircraft Guarantee Deeds

Financial institutions or banks require legal instruments to safeguard their interests when providing loans and receiving collateral.⁴⁰ The principle of prudence in financial operations is non-negotiable for banks, making legal frameworks for securing collateral rights crucial for the industry. Credit and collateral agreements between creditors and debtors are formalized in deeds prepared by notaries and executed with due diligence.⁴¹ To mitigate the risk of debtor default, the credit agreement serves as the primary contract, often accompanied by supplementary agreements, such as those involving aircraft as collateral, which reflect the bank's commitment to precautionary measures.⁴²

In practice, various methods have been used in Indonesia to use aircraft as collateral for debt, despite the international business standards that recognize three types of security interests in aircraft: Pledge, Hypotheca, and Chattel Hypothec.⁴³ Mortgages remain a prevalent form of security in Indonesia, as evidenced by Law No. 17 of 2008 on Shipping, which clearly allows registered ships to be secured through mortgages. Similarly, Law No. 1 of 2009 on Aviation implicitly acknowledges the potential for aircraft to be mortgaged.

The lack of regulations on aircraft mortgages has led to the creation of various deeds with differing titles in society. These include documents such as "Power of Attorney to Install Mortgage (SKMH)," "Power of Attorney to Install Mortgage and Sell," "Power of Attorney to Sell," "Fiduciary Guarantee Deed,"⁴⁴ "Deed of Agreement for Transfer of Guarantee and Grant of Power of Attorney," as well as agreements like "Power of Attorney to Install Mortgage on an Aircraft"⁴⁵ and "Deed of Transfer and Guarantee of Power of Attorney."⁴⁶

⁴⁰ Newfriend N. Sambe, "Fungsi Jaminan Terhadap Pemberian Kredit Oleh Pihak Bank Menurut Undang-Undang Nomor 10 Tahun 1998," *Lex Crimen V*, no. 4 (2016): 76–83.

⁴¹ I Nyoman Widana, "Enforcement Of The Credit Agreement With The Guarantee Of The Mortgage For The Developer Of Residential Construction With Credit," *Yustisia* 6, no. 3 (2017): 620–36.

⁴² Etty Mulyati, "Asas Keseimbangan Pada Perjanjian Kredit Perbankan Dengan Nasabah Pelaku Usaha Kecil," *Jurnal Bina Mulia Hukum* 1, no. 1 (2016): 36–42, <https://doi.org/10.23920/jbmh.v1n1.4>.

⁴³ Bayitch, S.A. "Aircraft Mortgage: A Study in Comparative Aviation Law of The Western Hemisphere." (University of Miami Law Review, Vol.13 No. 2, 1958), 152

⁴⁴ Yurisa Martanti, "Perjanjian Jaminan Dalam Perjanjian Kredit Dengan Objek Pesawat Udara Dikaitkan Dengan Idera Sebagai Upaya Kepastian Hukum Dalam Rangka Pembangunan Lembaga Hukum Jaminan Nasional" (Padjadjaran, 2015).

⁴⁵ An interview with Ms. Alya Ganie, a member of the Indonesian Notary Association (Ikatan Notaris Indonesia), Sumatera Selatan Regional Office, October 2020.

⁴⁶ Murzal, Annalisa Y, Muhammad Syaifuddin, *Hukum Hipotek Pesawat Udara: Perkembangan Hukum Dan Praktik Penjaminan Pesawat Udara Sebagai Objek Hipotek Di Indonesia*, 2021.

In practice, mortgage creditors often delay the formal process of registering a mortgage on the asset in question. Instead, creditors might consider their right to repayment sufficiently secured merely by holding a power of attorney to impose a mortgage from the debtor. This hesitation to immediately register the mortgage is partly due to the time-consuming process involved from signing the mortgage deed to completing the registration.⁴⁷ This delay is particularly problematic for short-term credit arrangements. The costs associated with registering a mortgage are relatively high compared to creating a Power of Attorney to Install/Charge a Mortgage. For smaller loans, these costs can be burdensome, and creditors (or banks) may feel adequately protected by the power of attorney alone. The actual registration of the mortgage is typically only pursued if the creditor or bank perceives a significant risk in the debtor's financial condition.

In practice, some experts suggest that the most appropriate way to secure collateral for airplanes and helicopters is through a Power of Attorney to Install a Mortgage. Although an encumbrance deed might be an option, the issue arises with the registration of the Mortgage deed. Without proper registration—which aligns with the principles of publication and specificity—the deed will not grant creditors preferential rights to enforce their claims in the event of debtor default. This presents a dilemma, as aircraft can be registered for ownership purposes under Law Number 1 of 2009 concerning Aviation, but this law does not address the registration of the provision of collateral.⁴⁸ As a workaround, one solution is to secure aircraft collateral through fiduciary guarantees on key components such as engines, turbines, and propellers, which are integral to the aircraft's operation. Since engines are crucial for the plane's functionality, including them in fiduciary guarantees ensures that the aircraft's core assets are adequately secured.

The emergence of a Power of Attorney to Install a Mortgage aims to provide security for the lender (bank). In the event of a debtor defaulting on a credit agreement, this Power of Attorney authorizes the creditor (bank) to execute the collateral and claim the proceeds from its sale. It is essential for creditors and other involved parties to have protection through a guarantee institution that ensures legal certainty for all parties. However, the lack of specific regulations for aircraft guarantees creates challenges for notaries when preparing aircraft mortgage deeds as required by the Notary Law. Consequently, the Guarantee agreement often employs a "Fiduciary Deed" to cover collateral in the form of essential aircraft components such as engines, turbines, and propellers.⁴⁹

⁴⁷ J. Satrio, 2007, *Hukum Jaminan Hak Kebendaan*, PT. Citra Aditya Bakti, Bandung, hlm. 242.

⁴⁸ Irma Devita, "Pemberian Jaminan Atas Pesawat Terbang Dan Helicopter."

⁴⁹ Annalisa Yahanan, "Universitas Sriwijaya," *Hipotek Pesawat Udara Di Indonesia: Alternatif Objek Jaminan Kebendaan Sebagai Pelunasan Hutang*, 2019.

In the Netherlands, the process of creating an aircraft deed for a mortgage guarantee involves several steps. First, the bank or creditor conducts research on the aircraft to be used as collateral, including verifying ownership documents and assessing the aircraft's condition. Next, an evaluation is performed to determine the value of the mortgage guarantee, considering factors such as market value, age, and condition of the aircraft. Once the value is established, the bank or creditor prepares the necessary documentation, including an aircraft mortgage deed, which must be drafted by a notary according to Dutch regulations. This deed includes details about the parties involved—such as the creditor (bank or financial institution), the debtor (aircraft owner), and any relevant third parties—as well as specific information about the aircraft, including its type, registration number, year of manufacture, and condition.

The final step is registering the aircraft mortgage deed with the authorized Aircraft Mortgage Guarantee Registration Office in the Netherlands. Mortgages on aircraft are registered in the Public Register of Aircraft, managed by the Netherlands Civil Aviation Authority (NCAA). The process in the Netherlands is similar to that in Indonesia, but while Indonesia lacks specific aircraft mortgage regulations, the Netherlands follows regulations outlined in The Civil Code of The Netherlands, Title 9: Rights of Pledge and Mortgage, Section 4 The Right of Mortgage, Articles 260-275. Once registered, the aircraft serves as valid mortgage collateral, and the bank or creditor has the right to sell or auction the aircraft if the debtor defaults.

6. Conclusion

In Indonesia, aircraft are classified as registered assets similar to ships, meaning they can be considered immovable objects and potentially used as collateral for mortgages in credit agreements that require additional security. However, aircraft are typically used as supplementary collateral rather than primary collateral in banking. Notaries, as public officials, are granted the authority by the Notary Law to create aircraft mortgage deeds. Nonetheless, this authority remains unutilized due to the lack of specific regulations governing aircraft mortgages, which affects the principle of legality. The absence of such regulations has led to the emergence of various types of deeds, reflecting the community's need for financing related to aviation operations. To address this legal gap, it is crucial to establish regulations for aircraft mortgages. In the meantime, exploring the use of fiduciary guarantees, particularly for aircraft engines, may be a necessary step before such regulations are enacted.

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