

Is Fiduciary Deed Suitable for Aircraft in Indonesia

by Febrian Febriab

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Is Fiduciary Deed Suitable for Aircraft in Indonesia?

Y. Annalisa*, Murzal Zaidan, M. Syaifuddin, Febrian,
Nurhidayatuloh and Elmadiantini

Abstract— This article explores the imprecise notary legal reasons for making an aircraft fiduciary deed when it is based on the principles of applicable law and the concept of collateral law. This examines also the legal protection of creditor as the recipient of the guarantee when the debtor fails to fulfill his/her duty. It is normative legal research trying to find the basic rules of collateral law, fair values, the validity of the rule of law and legal norms. It uses historical and comparative approaches. The result shows that it is imprecise if the notary makes an aircraft fiduciary deed in an aircraft financing loan agreement. The reasons are, firstly, the fiduciary law explicitly states that the guarantee of an aircraft is in the form of a mortgage. Secondly, aircraft is a registered object which is analogous to an immovable object. For these reasons, it is more precise to use a collateral figure in the form of a mortgage deed as applied to ship in shipping law.

Keywords— Aircraft, Deed, Fiduciary.

I. INTRODUCTION

Notary is an authorized public official who makes an authentic deed and has other authorities as referred to in Article 1 paragraph (1) of Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning Notary Position¹. In addition to having the authority to make an authentic deed, the notary is given another authority² as mentioned in Article 15 (1) Notary Position, which "...is authorized to also make an authentic deed regarding all actions, agreements and stipulations required by statutory regulations and / or as desired by the parties concerned for stated in an authentic deed, guarantee the certainty of the date of making the deed, keep the deed, give the *grosse*, copy and quote the deed, all of it as long as the making of the deeds are not also assigned or excluded to other officials or others who are determined by the law". Other developments also emerged when the deed could also be made *online* which certainly has its own consequences for the making of the deed³.

Y. Annalisa*, Faculty of Law, Universitas Sriwijaya. E-mail: annalisayahanan62@gmail.com

Murzal Zaidan, Faculty of Law, Universitas Sriwijaya.

M. Syaifuddin, Faculty of Law, Universitas Sriwijaya.

Febrian, Faculty of Law, Universitas Sriwijaya.

Nurhidayatuloh, Faculty of Law, Universitas Sriwijaya.

Elmadiantini, Faculty of Law, Universitas Sriwijaya.

¹Annalisa Yahanan and Elmadiantini, 'Akta Notaril: Keharusan Atau Pilihan Dalam Peralihan Kekayaan Intelektual', *LamLaj*, 4.1 (2019), 119–28.

²Yahya Agung Putra, Annalisa Yahanan, and Agus Trisaka, 'Video Konferensi Dalam Rapat Umum Pemegang Saham Berdasarkan Pasal 77 Undang-Undang Perseroan Terbatas', *Repertorium Jurnal Ilmiah Hukum Kenotatan*, 8.1 (2019), 35–50.

³Tanty Maharani, Lalu Parman, and Lalu Muhammad Hayanul Haq, 'Cyber Notary System the Order of Norms in Indonesia and Australia (Comparative Study in Notary Service Improvement Strategies)', *International Journal of Scientific Research and Management (IJSRM)*, 7.05 (2019), 32–40 <<https://doi.org/10.18535/ijprm/v7i5.11a03>>.

Based on both Article 1 (1) and Article 15 (1) of the Law concerning Notary Position, the Notary in Indonesia as a public official is given another authority to make an authentic deed and has other authority such as making a deed of the General Meeting of Shareholders, deed of intellectual property right⁴ or deed in a collateral agreement that is an additional agreement from a credit agreement (loan)⁵. Providing credit facilities will always require collateral. A guarantee deed that can be made by a notary is in the form of a deed of mortgage right, fiduciary deed and mortgage deed⁶.

Fiduciary initially referred to collateral in the form of movable property, but over time had also been used against fixed objects⁷. For immovable property that cannot be guaranteed by Mortgage Rights, Soedewi Masjchoen Sofwan suggests using a fiduciary institution⁸.

The birth of the guarantee deed is because there is a loan agreement as mentioned in Article 1754 Civil Code: "loan is an agreement whereby one party gives the other party an amount of objects or money spent due to usage, on condition that the party recently will return the same amount of the same type and condition". The provision of Article 1754 CIVIL CODE indicates that a person who lends a certain amount of money or objects to another party requires the latter to return the same amount of money in accordance with the agreed agreement.

In Ukraine, the agreement between the creditor and the debtor on the establishment of a mortgage is formalized by a special document⁹ that is different from Indonesia, which is formalized in the form of a general agreement, namely a credit agreement that is further regulated in banking law. For this reason, credit agreements are always followed by collateral agreements. If the debtor is in default (unable to repay debt), the creditor can file for bankruptcy with the Commercial Court¹⁰.

The funding needs can be obtained through credit activities provided by financial institutions and financial institutions in the form of credit facilities. So far, the activities of lending and borrowing with credit facilities use mortgage or collateral rights as stipulated in Law No. 4 of 1996 concerning Mortgage Right on Land along with Objects Related to Land¹¹.

⁴Yahanan and Elmadiantini⁸

⁵Y. Annalisa and others, 'Aircraft Mortgage in Indonesia: Alternative Object of Material Guarantee as a Debt Settlement', *International Journal of Recent Technology and Engineering (IJRTE)*, 8.2 S 9 (2019), 601–7 <<https://doi.org/10.35940/ijrte.B1126.0982S919>>.

⁶Dwi Tiara Kurnilasari, Annalisa Yahanan, and Rohani Abdul Rahim, 'Indonesia's Traditional Knowledge Documentation in Intellectual Property Rights' Perspective', *Sriwijaya Law Review*, 2.1 (2018), 110–30 <<https://doi.org/10.28946/slrev.vol2.iss1.114.pp110-130>>.

⁷Iswi Hariyani, 'Comparison of Warehouse Receipt, Pawn and Fiduciary in The Security Law Perspective', *Yustisia*, 6.3 (2017), 649–71.

⁸Sri Soedewi Masjchoen Sofwan, 'Beberapa Masalah Pelaksanaan Lembaga Jaminan Khususnya Fiducia Di Dalam Praktek Dan Pelaksanaannya Di Indoensia (Some Problems of Enforcement of Fiduciary Special Guarantee Institution in Practice and Its Enforcement In Indonesia)' (Universitas Gajah Mada, 1977).

⁹Violetta Kharabara, 'Analysis of Mortgage Lending in Banks in Ukraine', *Baltic Journal of Economic Studies*, 3.3 (2017), 59–63 <<https://doi.org/10.30525/2256-0742/2017-3-3-59-63>>.

¹⁰Sobandi Sobandi, 'The Issue of the Commercial Court Limited Competency in Settling the Commercial Disputes', *Sriwijaya Law Review*, 3.1 (2019), 26–33 <<https://doi.org/10.28946/slrev.vol3.iss1.250.pp26-33>>.

¹¹A M Afdal Batara Agung and others, 'Legal Analysis of The Official Issuing Land Deeds And Notary In A Different Position of Place', 1.2 (2017), 195–211.

Besides that, other collateral rights that are widely used are guarantees in the form of Fiduciary² as stipulated in Law No. 42 of 1999 concerning Fiduciary¹². Also collateral in the form of a mortgage is regulated in Law No. 17 of 2008 concerning Shipping.

In the aviation industry, the need for financing the aircraft industry can use credit facilities with the aircraft as collateral object. However, this form of guarantee is still looking for the right figure. This results in different interpretations of which guarantee institutions are used and how they are carried out in people's lives¹³. In addition there will be obstacles to the foreclosure implementation of aircraft¹⁴.

In a credit agreement, the creditor usually asks for a guarantee in order to obtain legal certainty in the payment if the debtor breaks the promise¹⁵, namely by making an additional agreement called a guarantee agreement in the form of a deed made before a notary¹⁶. Debtors have the obligation to sign a guarantee agreement. With the force of law, the outcome will be the same as if he/she had signed the agreement¹⁷.

If the debtor fails to repay the loan (credit) as agreed in the deed¹⁸, the creditor can execute the collateral object. Problems arise because up to now there is no specific arrangement regarding aircraft as objects of debt collateral. So the notary uses the form of fiduciary deed¹⁹ or deed of mortgage right. Collateral agreements with aircraft objects have developed and are used in communities where in practice there are found guarantee certificates with aircraft objects made by notaries in the form of fiduciary deeds²⁰, whereas Article 3 of Law No. 42 of 1999 concerning Fiduciary (Fiduciary Law) explicitly stated that the provisions of aircraft mortgages did not apply the provisions of the Fiduciary Law. This means that the aircraft as collateral is in the form of a non-fiduciary mortgage deed. The formulation of the aircraft mortgage certificate is also strengthened by the Elucidation of Article 15 paragraph (3) of the Law of Notary Position, which states the notary's authority to make a mortgage deed.

Although the parties are given the authority and freedom to make agreements as regulated in book III of CIVIL

¹²R. Suharto, 'Problematika Akta Jaminan Fidusia (Suatu Studi Tentang Akta Jaminan Fidusia Setelah Berlakunya Siste³ Pendaftaran Fidusia Secara Online)', *Diponegoro Private Law Review*, 1.1 (2017), 255 <??>.

¹³Siti Malikhatus Badriyah, 'Problematika Pesawat Udara Sebagai Jaminan Pada Perjanjian Kredit Dalam Pengembangan Industri² Penerbangan', *Masalah Masalah Hukum*, 43.4 (2014), 546–53.

¹⁴Hazar Kusumayanti, 'Penerapan Dan Permasalahan Eksekusi Pesawat Terbang Berdasarkan Hukum Acara Perdata Dalam Perjanjian Perawatan Mesin Pesawat', *Jurnal Bina Mulia Hukum*, 1.1 (2016), 26–35 <<https://doi.org/10.23920/jbmh.v1n1.3>>.

¹⁵Wieke Dewi Suryandari, 'Reconstruction Of Legal Liability Of Registration By Notary Fiduciary Based On PP No. 21 of 2015', *Jurnal Pembaharuan Hukum*, v.2 (2018), 252–61.

¹⁶Anonim, 'Decree for Specific Performance as a Warranty Deed', *Harvard Law Review*, 29.7 (1916), 770–71.

¹⁷Anonim, 'Agency . Undisclosed Principal . Warranty in Deed . Effect of Statute', *The Yale Law Journal Company, Inc. Agency.*, 29.2 (2019), 229–30.

¹⁸Kezia Damayanti Aron, 'Tanggung Gugat Debitur Atas Jaminan Fidusia Dalam Bentuk Benda Persediaan Dan Keterkaitannya Dengan Akta Jaminan Fidusia.', *Jurnal Magister Hukum Udayana*, 6.3 (2017), 353–68.

¹⁹Mispansyah Santi Rosiana Lestari, Ichsan Anwary, 'Position Offenses By Notary In Making Authentic Deed: Reviewing The Notary Responsibility', *Lamlaj*, 2.2 (2017), 1–10. ³

²⁰Aprilianti Aprilianti, 'Fungsi Sertifikat Jaminan Fidusia Menurut Uu No. 42 Tahun 1999 Jaminan Fidusia', *Fiat Justisia*, 4.3 (2010), 79–84 <<https://doi.org/10.25041/fiatjustisia.v4no3.274>>.

CODE, but that freedom needs to be limited²¹ so that the rights and obligations of the parties are more controlled and do not harm other parties on the basis of using the principle of good faith. But the authority of the Notary mandated by the notarial law to make an airplane mortgage deed is a difficult thing to do, due to the unavailability of special regulations for it. Based on the problems faced as described above, the legislators should immediately make laws regarding aircraft mortgages.

The absence of special regulations regarding aircraft guarantee, causes notaries to take advantage of Fiduciary Guarantee regulations for aircraft objects. The problem is whether the notary public makes a fiduciary deed with the object of the aircraft guarantee in relation to the financing agreement. Based on the problems faced as outlined above, the legislators should immediately make a law regarding airplane guarantees (mortgages).

II. LITERATURE REVIEW

In a broad sense the object is defined as anything that can be the object of law or can be judged by people according to the law and has economic value²². Whereas in the narrow sense, the understanding of objects is limited to everything that is tangible, that is, things that can be captured by the five senses. Material law is a set of legal provisions governing the direct legal relationship between a person and objects, which give birth to various material rights. The material rights give a person direct power in the control and ownership of an object wherever the object is located. Including the power to provide collateral as an additional agreement of the credit agreement which is the principal agreement, wherein in the guarantee agreement the collateral object can be in the form of a mortgage, fiduciary, pawn or mortgage right and will run well if parties such as creditors, debtors and regulators are subject to existing legal regulations²³ so that they do not cause disputes in the future. The credit agreement and the guarantee agreement between the creditor and the debtor, whereby the wishes of the parties as an interested party are poured into a deed made before a notary with a sense of responsibility²⁴.

It can be said that the provision of loans with material security is a method of accumulation of financial resources, effective instruments of bank activity, and important factors in the overall economic development of the country²⁵. A credit agreement coupled with a collateral agreement whether for movable or immovable objects made before a notary public is a form of the implementation of the precautionary principle of the bank²⁶.

The material rights are absolute rights to an object, and it is a civil right. This right gives direct power over an object and can be defended against anyone. The material rights have certain characteristics and superior features

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²¹Nurhidayatulloh and others, 'Does Limitation Rule in International and Regional Human Rights Law Instruments Restrict Its Implementation?', *International Journal of Recent Technology and Engineering (IJRTE)*, 8.2 S9 (2019), 597–600 <<https://doi.org/10.35940/ijrte.B1125.0982S919>>.

²²Annalisa and others.

²³Latour Bruno, 'Nature of Collective Agreements in Nigeria: A Panoramic Analysis of Inherent Implementation Challenges', *Global Journal of Politics and Law Research*, 5.6 (2017), 1689–99 <<https://doi.org/10.1017/CBO9781107415324.004>>.

²⁴I Nyoman Widana, 'Enforcement Of The Credit Agreement With The Guarantee Of The Mortgage For The Developer Of Residential Construction With Credit', *Yustisia*, 6.3 (2017), 620–36.

²⁵Kharabara.

²⁶Etty Mulyati, 'The Implementation of Prudential Banking Principles to Prevent Debtor with Bad Faith', *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)*, 5.1 (2018), 89–108 <<https://doi.org/10.22304/pjih.v5n1.a5>>.

when compared with individual rights. The material rights in Civil Code can be divided into two, namely the material rights that provide guarantees including pawning, mortgages, mortgages, fiduciary rights, and property rights that give pleasure, including ownership and property rights²⁷.

In material laws in Indonesia, according to Sri Soedewi Masjchoen Sofwan based on Article 504 CIVIL CODE, objects are divided into 2 (two), namely immovable and immovable objects. Immovable objects are regulated in Article 506 - Article 508 CIVIL CODE. As for movable objects, are regulated in Article 509 - Article 518 CIVIL CODE.

The importance of the division of movable and immovable objects is related to the loading of an object or the name of a guarantee of an object²⁸. In a credit agreement which is the principal agreement in general, it is always followed by a guarantee agreement as an additional agreement to avoid bank risk if the debtor defaults²⁹. A credit agreement coupled with a collateral agreement whether a guarantee of movable or immovable object made before a notary public is a form of the implementation of the precautionary principle of the bank³⁰.

2.1 Immovable Objects

Frieda Husni Hasbullah states that "for immovable objects, they can be divided into three groups"³¹:

1. Immovable objects because of their nature (Article 506 CIVIL CODE) for example, land and everything that is attached to or erected on it, or trees and plants whose roots are embedded in the soil or fruits on trees that have not been picked, likewise mining objects.

2. Immovable objects due to their purpose or intended use (Article 507 CIVIL CODE), for example, factories and the objects they produce, mills, and so on. Also housing along with objects attached to boards or walls such as mirrors, paintings, jewelry, etc. then those related to land ownership such as manure, honey in trees and fish in ponds, etc.; and building materials derived from building debris that will be used again to build the building, and others.

3. Immovable objects due to statutory provisions, for example, usufructuary rights, and usufructuary rights on immovable property, land tenure rights, reef rights, business rights, etc. (Article 508 CIVIL CODE). In addition, according to the provisions of Article 314 Commercial Code, ships with a gross weight of 20 m3 and above can be recorded in a vessel register so that they are categorized as immovable objects.

Just as immovable objects, movable objects can also be used as collateral for debt, for example in the practice of

²⁷Trisadini Prasastinah Usanti, 'Lahirnya Hak Kebendaan', *Perspektif*, 17.1 (2012), 44 <<https://doi.org/10.30742/perspektif.v17i1.93>>.

²⁸Moch Isnaeni, *Pengantar Hukum Jaminan, Kebendaan* (Surabaya: PT. Revka Pertra Media, 2016).

²⁹Sahal Afhami, 'Standard Bank Credit Agreement Based on the Value Of', *International Journal of Law Reconstruction*, I.1 (2017), 55–73.

³⁰Mulya³

³¹Frieda Husni Hasbullah, *Hukum Kebendaan Perdata: Hak-Hak Yang Memberi Kenikmatan*, pertama (Indonesia: Indonesia Hill Company, 2002).

leasing³². For an airplane if it is associated with 3 (three) categories above, then an airplane is more suitable to enter into the (three) category, because its weight if it exceeds 7 Tonnage is called a registered object. As such, guarantees can be burdened (Article 71 of Law No. 1 of 2009 concerning Aviation).

In Indonesia for immovable objects as previously explained, the form of collateral is mortgage and mortgage right. At present the mortgage applies to ships as registered objects in accordance with Law No. 17 of 2008 concerning Shipping. While the aircraft for now there is no specific arrangement and are still looking for figures to naming guarantees for aircraft. Thus a bank loan agreement whether it guarantees movable or immovable object always minimizes the risks, the bank analyzes the credit thoroughly, impose fiduciary security officials perfectly and performs monitoring of credits regularly to avoid misconduct committed by the debtor³³.

2.2 Movable Objects

For movable objects, according to Frieda Husni Hasbullah can be divided into two groups, namely:

1. Movable objects because of their nature, namely objects that can be moved or can be moved, for example chickens, goats, books, pencils, tables, chairs, etc. (Article 509 CIVIL CODE). Also included as movable objects are ships, boats, mills and bathing places installed in boats and so on (Article 510 CIVIL CODE).

2. Movable objects due to statutory provisions (Article 511 CIVIL CODE) for example:

- a. Usufructuary rights and usufructuary rights over movable objects;
- b. The right to the agreed interest;
- c. Billing or accounts receivable;
- d. Shares or shares in trade partnerships, and others.

Just as immovable objects, movable objects can also be used as collateral for debt, for example in the practice of leasing³⁴. Thus in general the law of guarantee is the whole of the legal rules that govern the legal relationship between the giver and the recipient of the guarantee in relation to the imposition of collateral to obtain facilities / credit³⁵. Agreements made by the parties by providing guarantees will provide a sense of security to the creditors³⁶.

2.3 Registered and Unregistered Objects

In accordance with the times and also driven by technological advances and the emergence of new discoveries, has forced some countries often have to change the rule of law to the problem of this object, with the aim no other

³² Ahmad Fauzi, 'Benda Bergerak Sebagai Jaminan Hutang Dalam Praktek Leasing Ahmad Fauzi Universitas Muhammadiyah Sumatera Utara Email : Ahmadfauzi@umsu.Ac.Id', *Jurnal Notarius*, 3.2 (2017), 15–28.

³³ Trisadini Prasastinah Usanti, 'Subsequently Acquired Assets as Fiduciary Security on Bank Loans', *Journal Dinamika Hukum*, 16.2 (2016), 113–19.

³⁴ Fauzi.

³⁵ Lathifah Hanim, 'Comparative Study Of Guarantee Laws According To Islamic Law And Civil Law In Positive Law In Indonesia', in *The 4rd International Conference and Call for Paper Faculty of Law 2018 Sultan Agung Islamic University*, 2018, pp. 324–37.

³⁶ Frances L. Edwards Miner, Rogers E, Al.H. Ringlep, *The Legal Environment of Bussines*, 10th edn (Canada: Nelson Education Ltd, 2009).

than to bring better welfare for the environment³⁷.

Objects have an important role in social life. Objects as a buffer for human needs in their social life, have a very strategic role. Even with the objects that are owned, a person can do various acts against him such as selling it, renting it out, exchanging it with other objects, gifting it, guaranteeing it, entrusting it, and so on. Previously the types of objects that could be guaranteed were movable and immovable objects as mentioned in CIVIL CODE. Along with developments in society, there are other types that are not regulated in the material law system, namely registered and unregistered objects.

In the development due to economic needs in society and to add to the division of new types of objects other than those already familiar in CIVIL CODE, also known as registered objects and unregistered objects³⁸. Registered objects are objects that are registered in a general register that is managed by an agency that is authorized to do so, while unregistered objects are objects that are not registered in a public register. Registered objects tend to follow the rules of the rules of immovable objects³⁹.

The significance of the distinction between registered and unregistered objects lies in proving their ownership⁴⁰. Registered objects are proven by proof of registration, generally in the form of certificates or documents in the name of the owner, such as land, motor vehicles, aircraft⁴¹, copyrights and so on. It is easier for the government to exercise control over registered objects, both in terms of the orderly administration of ownership and the payment of taxes. Registered objects such as airplanes are very necessary because they are related to the exercise of jurisdiction in case of violations aboard the ship⁴².

Unregistered objects are difficult to know with certainty who is the legal owner of the object, because the principle of 'who controls the object is considered to be the owner'. For example: jewelry, household appliances, electronic objects, clothing and so on. Unregistered objects can be analogous to movable objects so that the collateral is in the form of fiduciary⁴³.

The division of movable and immovable objects in CIVIL CODE is related to the name of the guarantee. If the object owned by the debtor is classified as movable object, bound by a material security agreement, then the concrete form of the agreement is a pawn guarantee agreement. Whereas if the collateral object is an immovable object, then is bound by a material agreement, then the concrete form is the mortgage guarantee agreement. Mortgage and mortgage agreement are stipulated in Book II of CIVIL CODE. Likewise the distribution of registered and unregistered objects has relevance to the form of collateral, by applying the analogy interpretation. In MochIsnaeni's opinion, for a registered object is analogous to a fixed object, so the collateral name is a mortgage as

³⁷Moch. Isnaeni, 'Benda Terdaftar Dalam Konstelasi Hukum Indonesia', *Jurnal Hukum*, 7.13 (2000), 47–64 <<https://doi.org/10.20885/iustum.vol7.iss13.art4>>.

³⁸Moch. Isnaeni, 'Benda Terdaftar Dalam Konstelasi Hukum Indonesia'.

³⁹Moch. Isnaeni, *Pengantar Hukum Jaminan Kebendaan* (Surabaya: PT. Revka Pertra Media, 2016).

⁴⁰Moch. Isnaeni, 'Benda Terdaftar Dalam Konstelasi Hukum Indonesia'.

⁴¹Kemis Martono, Sandriana Marina, and Aditya Wardana, 'Domestic Air Transport Regulations in Indonesia', *Jurnal Manajemen Transportasi Dan Logistik*, 3.1 (2017), 9 <<https://doi.org/10.25292/j.mtl.v3i1.137>>.

⁴²Amand Sudiro and K Martono, 'Aviation Criminal Laws Applicable In Indonesia', *IOSR Journal of Applied Chemistry* (IOSR-JAC), 9.2 (2016), 49–61 <<https://doi.org/10.9790/5736-09214961>>.

⁴³Moch. Isnaeni, *Noktah Ambigu Norma Lembaga Jaminan Fidusia* (Surabaya: PT. Revka Pertra Media, 2017).

applied to ships in Law No. 17 of 2008 concerning Shipping. While for unregistered objects, there is still a way out, which is analogous to moving objects, then the guarantee is in the form of fiduciary⁴⁴.

The existence of a pawn agreement and a mortgage guarantee agreement is in the context of supporting the principal agreement, namely the credit agreement that gives birth to the right to collectively classified as a personal right. Credit agreements as obligatory agreements are subject to Book III CIVIL CODE including personal rights. The existence of the main agreement followed by an additional agreement is a general pattern that applies in the banking world when channeling loan funds (financing agreements) by applying the precautionary principle. Loan funds submitted in the form of loan agreements with collateral are needed by airlines to improve air transportation development⁴⁵, considering that Indonesia is an archipelagic country of around 17,000 islands⁴⁶.

In the development of collateral law in Indonesia, currently the collateral institutions are not only limited to mortgages and mortgages as stipulated in CIVIL CODE. However, with the entry into force of the Basic Agrarian Law, if land rights are offered as collateral, then the institution used is the security rights provided for in Law No. 4 of 1996. Then came the fiduciary guarantee institution contained in Law No. 42 of 1999 aimed at moving objects. Thus, Indonesia currently has 4 (four) types of material guarantee institutions, namely fiduciary, mortgages and mortgages right the rules of which are contained in the CIVIL CODE and Law No. 17 of 2008 concerning Shipping⁴⁷.

The four guarantee institutions mentioned above can be utilized in business, especially the banking world. No exception to aircraft that can be used as objects of property security rights. Based on the categories of objects mentioned above, aircraft are not included in the category of movable or immovable objects, but are classified as registered objects as mentioned in Law No. 1 of 2009 concerning Aviation, which states that aircraft can be burdened with material security rights. But it was not confirmed what the name of the guarantee was. Related to the aviation industry that needs financing, of course the agreement requires a guarantee. Related to that aircraft is one object that can be used as collateral⁴⁸.

III. METHODOLOGY / MATERIALS

This research is a normative study aimed to find the rule of law, the values of the validity of the rule of law, legal concepts and legal norms⁴⁹ related to the authority⁵⁰ of a notary in making fiduciary deeds or mortgages as objects of debt collateral. The approach used to support this research is the historical approach, conceptual approach and the

⁴⁴Moch. Isaeni, *Hipotek Pesawat Udara (Seberkas Pelangi 4.0 Di Langit Euphoria Indonesia)* (Surabaya: CV Revka Prima Media, 2018).

⁴⁵Adya Paramita Prabandari; Wahyu Satrio Utomo; Martono, 'Indonesian Aviation Human Resources: An Evaluation', *OSR Journal Of Applied Chemistry*, 9.6 (2016), pp 20-30.

⁴⁶Martono, Marina, and Wardana.

⁴⁷Sulfandi Kadaou, 'Tinjauan Yuridis Jaminan Hipotik Kapal Laut Dan Akibat Hukumnya', *Lex Crimen*, 5.4 (2016), 107-15.

⁴⁸ABNR Freddy Karyadi and Nina Cornelia Santoso, *Lending and Taking Security in Indonesia: Overview* (Indonesia, 2019).

⁴⁹Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2010).

⁵⁰Soerjono Soekanto, *Perbandingan Hukum*, (Bandung: Alumni, 1997).

statute approach. Normative legal materials used⁵¹ in this study were analyzed with a historical, conceptual and legal approach to develop and compile a mortgage deed model as well as to deny the existence of fiduciary deeds which are unsuitable for use as mortgage institutions with airplane collateral. Normative research is supported by empirical legal research to explain how to investigate the role of legislation, regulations, legal policies, and other legal arrangements that apply in society⁵². Furthermore, this normative research results in a descriptive analytical study.

IV. RESULT AND FINDINGS

4.1 *The urgency of aircraft guarantee regulations as collateral objects*

Aircrafts that have Indonesian registration and nationality marks can be burdened with mortgages and follow the national law provisions stipulated in CIVIL CODE. Thus the aircraft can be guaranteed⁵³. But after the issuance of Law No. 1 of 2009 concerning Aviation, there are no strict rules governing that an aircraft or helicopter can be burdened as collateral for a mortgage as mentioned in Article 71 of the 2009 (Aviation Law) states that "Objects of aircraft may be burdened with international interests arising from agreements granting material security rights ..."

Furthermore, in the 2009 Aviation Law the guarantee is only mentioned as far as international interests and can be promised by the parties, without determining in the context of material laws in Indonesia, aircraft must be categorized as what objects. Is the object moving or not moving. The explanation of this article is motivated by the International Convention on mobile equipment (Convention on international interest in mobile equipment) and protocols concerning special problems in aircraft equipment (Protocol to the Convention on interest in mobile equipment on matters specific to Aircraft equipment), as the consequences of ratification of the "Cape Town Convention" conventions and protocols.

Furthermore, the guarantee agreement is explained, what is meant by "the granting of a security agreement" is an agreement whereby the giver of the rights of the guarantee gives or agrees to give the recipient a material guarantee right (an interest) including an interest (including ownership interest) on aircraft objects to ensure fulfillment of obligations incurred or to be incurred from the material security rights giver or third parties. Therefore, in a research written that for the benefit of material security with the object of guarantee is the aircraft in the context of guarantee law in Indonesia.

The use of this type of fiduciary guarantee by placing parts of the aircraft as collateral objects (for example: aircraft engines, etc.) because there is no specific arrangement, the question is whether the arrangement using this fiduciary deed is appropriate? Because if MochIsnaeni's statement is traced as previously mentioned, using the analogy interpretation of registered aircraft, mortgage guarantees can be used in the future as applied to ships registered under the Shipping Law.

⁵¹Ronny Hanitjo Soemitro, *Metodelogi Penelitian Hukum Dan Jurimetri* (Jakarta: Ghalia Indonesia, 1988).

⁵²Frans L. Hans Schmeets, Leew, *Empirical Legal Research a Guidance Book for Lawyers, Legislator And Regulator* (USA: Edward Elgar Publishing Limited, 2016).

⁵³Hazar Kusmayan, 'Penerapan Dan Permasalahan Eksekusi Pesawat Terbang Berdasarkan Hukum Acara Perdata Dalam Perjanjian Perawatan Mesin Pesawat', *Jurnal Bina Mulia Hukum*, 1.1, 27–35.

As an archipelagic state that is developing rapidly in the aviation industry, it strongly supports the development of national economic development in Indonesia⁵⁴. In addition, it is also a development of international air transport so as to ensure the safe and secure growth of international civil aviation around the world⁵⁵. Therefore there is an urgency to make an airplane mortgage law⁵⁶. In addition, it is also necessary to create a model of reformulation of power of attorney to install a mortgage and an airplane mortgage deed which is a notary's authority. The absence of specific arrangements regarding aircraft mortgages can create legal uncertainty that can affect aircraft execution when debtor defaults (of course this can lead to legal uncertainty which will impact the execution of the aircraft when the debtor fails to make an agreement).

4.2. Reasons for the Notary to make an aircraft fiduciary deed

Based on Article 1 (1) of Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning the Position of Notary, it is stated that the Notary Public is authorized to make an authentic deed and has other authorities as referred to in this Law or based on other laws. Furthermore, in the Elucidation of Article 15 (3) of the Law of Notary Position states the authority of the notary to make an aircraft mortgage deed. However, in practice there are two types of deeds related to loan agreements with aircraft guarantees namely fiduciary deeds and power of attorney deed to install mortgages⁵⁷.

Until now there is a legal vacuum regarding aircraft mortgage arrangements, while in economic development and transportation it already requires what kind of figure for the name of the object guarantee aircraft in the future. Meanwhile notary services are needed in conducting business in various sectors⁵⁸, including the banking sector in relation to credit agreements⁵⁹. Such matter becomes a dilemma for the notary as the authorized party in making an authentic deed⁶⁰.

Law No. 42 of 1999 concerning fiduciary applies to collateral objects in the form of movable property. In addition, the fiduciary law precisely states that for aircraft mortgages and mortgages on ships weighing 20m3 do not apply fiduciary law (Article 3). The term "aircraft mortgage" is clearly alluded to in the Fiduciary Law in article 3. But why in practice the notary prefers to make an airplane guarantee agreement in the fiduciary deed.

What are the reasons notaries prefer fiduciary deeds? This condition was chosen by the notary because, *firstly*, he wanted to use the facilities of Law Number 42 of 1999 Concerning Fiduciary Guarantees, even though Article 3

⁵⁴Gunawan Djajaputra, Ahmad Redi, and K. Martono, 'The Civil Aviation, Climate Change Reduction and Legal Aspects of Forest Fires in Indonesia', *IOSR Journal of Applied Chemistry*, 10.1 (2017), 33–47 <<https://doi.org/10.9790/5736-1001013347>>.

⁵⁵Ariawan, Gunardi, and K. Martono, 'Global, Regional and National Aspects Related to 2018 New Holidays: Air Transport, Tourism, Economy and Security', *International Journal of Mechanical Engineering and Technology (IJMET)*, 9.3 (2018), 1163–70.

⁵⁶Annalisa and others.

⁵⁷Annalisa and others.

⁵⁸Deviana Yuanitasari, 'The Role of Public Notary in Providing Legal Protection on Standard Contracts for Indonesian Consumers', *Sriwijaya Law Review*, 1.2 (2017), 179–90 <<https://doi.org/10.28946/slrev.vol1.iss2.43.pp179-190>>.

⁵⁹Totok Sujatmiko and Munsharif Abdul Chamim, 'Responsibility of Notary in The Making of Agreement Which Impacted to The Credit Loss in Bank Mega Branch of Kudus', *Jurnal Akta*, 5.3 (2018), 695–700.

⁶⁰Badriyah.

gave a signal that for airplanes the guarantee was a mortgage. *Secondly*, Law Number 42 of 1999 Concerning Fiduciary Guarantees explicitly states that fiduciary cannot be imposed on aircraft. However, there is no prohibition on making aircraft parts such as aircraft engines and/or aircraft parts to be used as fiduciary security objects⁶¹. On the other hand, if the guarantee of an aircraft using a mortgage as it is currently taking place does not result in giving rise to preferential rights for creditors because all that can be carried out is only the Power of Attorney Charging Mortgage. *Thirdly*, if collateral is used in the form of fiduciary, the objects (not aircraft in full form) that are guaranteed are still controlled by the guarantor, so that the objects can still be used for air transport operations. *Fourthly*, the pawn guarantee also cannot be charged to the aircraft because the debtor must release the aircraft from his authority and hand it over to the creditor. In addition, aircraft also may not be charged with mortgage rights because the object of the mortgage rights is the right to land and other objects that are one unit with the land.

Henceforth how the actions of the notary as the party authorized to make the deed. In this condition, the notary public generally prefers not to make fiduciary deeds for airplane collateral. Likewise the banks in Indonesia as creditors, of course, will ask for guarantees whether they are movable or immovable objects⁶². However, if the object of the guarantee is an airplane, most creditors in Indonesia are not willing to make a guarantee agreement.

Legal issues will arise in the financing (credit) agreement with the object guarantee aircraft when there are parties who feel unsafe. This also applies in the United States and Canada, which must provide security to investors and may not limit airlines in operations or transactions⁶³.

Because there is no rule that can protect the creditor if the debtor defaults, then the best step is that Indonesia immediately makes laws about aircraft objects.

V. CONCLUSION

The absence of special arrangements for aircraft guarantees in Indonesia can lead to legal uncertainty for both creditors and debtors and notaries. Therefore, the parties concerned with aircraft financing agreements are less respectful in preparing guarantee agreements which objects are aircrafts. This will have a legal impact when the debtor defaults, then the creditor cannot claim as the preferred creditor which results in the weak position of the creditor in executing the aircraft. Indonesia is a rapidly developing country in the aviation industry and national economic development. So, it is becoming an urgency to make laws of airplane guarantees. In addition, it is also necessary to create a model of reformulation of power of attorney to install mortgages and aircraft mortgage deeds which are the authority of a notary public as mandated by the notarial law. Thus it will create legal certainty for the parties.

The reason that the notary uses fiduciary deeds for aircraft, because there is no prohibition on making aircraft parts such as aircraft engines and / or aircraft parts as objects of fiduciary security even though the Fiduciary

⁶¹Inayati Noor Thahir, 'Hak Jaminan Atas Pesawat Udara Setelah Berlakunya Undang-Undang Nomor 1 Tahun 2009 Tentang Penerbangan.' (fakultas Hukum Universitas Sriwijaya, 2010).

⁶²Douglas J, *Secured Transactions* (: Chicago: WhaleyHarcourt Brace Legal and Professional Publication, Inc, 1991).

⁶³David I. Johnston, 'Legal Aspects of Aircraft Finance (Part I)', *Journal of Air Law and Commerce*, 29.3 (1963), 15–25.

Guarantee rules explicitly state that fiduciary guarantee rules do not apply to mortgages on aircraft. The next reason is that if collateral in the form of fiduciary is used, the object (not the aircraft in full form) that are guaranteed are still controlled by the guarantor, so that the goods can still be used for air transport operations. Nevertheless, it is not appropriate for airplanes to guarantee using a fiduciary deed. It would be more appropriate if an aircraft is registered as a collateral object, by using analogy interpretation, in the future regulations made by the Government of Indonesia are in the form of an aircraft mortgage deed as it applies to registered vessels.

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