

The Implementation of Irrevocable Deregistration and Export Request Authorization (IDERA) as International Obligation of State under Cape Town Convention 2001

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Abstract:

Convention on International Interests in Mobile Equipment (Cape Town Convention) is one of international treaties that has been ratified by The Republic of Indonesia Government. Cape Town Convention rules on international commercial transaction specifically on law of the mobile equipment asset such as an aircraft. One of the essential matters in Cape Town Convention is a remedy known as Irrevocable Deregistration and Export Request Authorization (IDERA). IDERA is a mechanism that allows Creditor/Lessor of the aircraft to procure the deregistration of the aircraft which is in possession of Debtor/Lessee and procure the export and physical transfer of the aircraft object from the Debtor's territory. The IDERA shall be execute if the Debtor/Lessee ndefault to perform an obligation under a leasing agreement in order to pay the lease. To be emphasized, ratification gives consequences to a State in order to implementing obligation under the treaty properly. This study aims to analyze implementation of IDERA in Indonesia and relation between the implementation and state responsibility. This study uses normative legal research with legislative, conceptual, and analytical approaches. In conclusion, this study finds that Indonesia has been implementing IDERA properly with several adjustments since Director of Airworthiness and Flight Operations (DAFO), as Indonesia Government's representative, needs to set several adjustments such as mediation and settlement which is not regulated specifically. However, some adjustments are required in order to settle special circumstances in terms of execution of IDERA and to conform to the international obligation as a part of state responsibility under the Cape Town Convention 2001.

Keywords: Mobile Equipment, Convention, Implementation

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I. INTRODUCTION

In November 2001, The International Institute for the Unification of Private Law (UNIDROIT), International Civil Aviation Organization (ICAO), and various stake holders drafted Convention on

International Interests in Mobile Equipment (Cape Town Convention/the Convention) and Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Aircraft Protocol). The treaty has been

named as one of the most successful international secured transactions instrument ever implemented. By the time of this writing, Cape Town Convention has been ratified by 80 states. Indonesia is one of the contracting states to Cape Town Convention. Indonesia's Government has ratified Cape Town Convention through the enactment of the President Regulation Number 8 of 2007 concerning the Ratification of Convention on International Interests in Mobile Equipment and Protocol to the Convention on International Interest in Mobile Equipment on Matters Specific to Aircraft Equipment (President Regulation No. 8 of 2007).

Cape Town Convention is designed to provide for the creation, enforcement, registration and prioritization of international interests. International interest is an interest held by a Creditor/Lessor emerging under a security agreement, title reservation agreement, or leasing agreement. Thus, the interest can be charged to: aircraft, aircraft engines and helicopters; railway rolling stock; and space assets. It is important to note that international interest shall be separated from Creditor's right under municipal law. The international interest is registered on a 24-hour a day, 7 days a week, 365 days a year, first-to-file electronic registry called the International Registry as provided on Cape Town Convention. Once the Creditor/Lessor of the aircraft holds an international interest, the Creditor/Lessor is entitled to beneficial remedies regulated on the Cape Town Convention. For instance, Aircraft Protocol constitutes Irrevocable Deregistration and Export Request Authorization (IDERA) as a remedy when Debtor/Lessee conducted default.

Under the Cape Town Convention, Indonesia has acquired rights and obligations to be performed. One of the essential rights and obligations arising from the Convention is IDERA as one of remedies that Creditor/Lessor could request in time Debtor/Lessee conduct default to the contract between Creditor/Lessor and Debtor/Lessee. However, Indonesia has to comply, harmonize, and implement it in its municipal law in order to perform Cape Town Convention properly. It is a fundamental

principle in law of treaties that every treaty in force is binding upon the parties to it and must be performed in good faith (*pacta sunt servanda*).

This study aims to analyze the implementation IDERA in Indonesia. This study focuses on two issues. First, how is IDERA regulated in Indonesia? Second, how is the implementation of IDERA on Indonesia's municipal law? Subsequently, this study will be divided into two parts. The first part will discuss establishment and execution of IDERA based on Law Number 1 of 2009 Concerning Aviation (Law no. 1 of 2009), Ministry of Transportation Republic Indonesia Regulation Number 52 of 2018 Concerning Civil Aviation Safety Regulation Part 47 Concerning Aircraft Registration (PM 52 of 2018), and Director of Airworthiness and Flight Operation of Republic Indonesia Regulation Number KP 347 of 2018 Concerning Staff Instruction CASR Part 47-02 (Irrevocable Deregistration and Export Request Authorization) (KP 374 of 2018). The second part will discuss the implementation of establishment and execution of IDERA in Indonesia.

II. IDERA REGULATION UNDER INDONESIA'S MUNICIPAL LAW

As a contracting state, Indonesia acquires rights under the Cape Town Convention. One of the rights that has impacted Indonesian airline company as a Debtor/Lessee is international interest which leads Indonesian airline company to ease aircraft financing in terms of leasing. By international interest, Creditor/Lessor becomes more secure and confident about the aircraft financing considering that the Debtor/Lessee's state has ratified the Cape Town Convention. This security and confidence from the Creditor/Lessor make financing more efficient, longer terms, and cheaper. Thus, as the financing gets more efficient and cheaper, Indonesian airline companies also obtain benefits from this business-friendly condition.

However, the right is also followed by an obligation to be performed. As a contracting state, Indonesia Government has to ensure that the Cape Town Convention is performed properly. This means that Indonesia has to fulfill Creditor/Lessor's right in time Indonesian airline company conducts any default, and Indonesia Government shall proceed the remedies under the Cape Town Convention. The Convention provides several forms of remedies that can be requested by Creditor/Lessor in time Debtor/Lessee conducts a default. By the time Debtor/Lessee conducts any default to the contract, Creditor/Lessor may terminate the agreement and take possession or control to the aircraft. The definition of Default can be found on Article 11 of the Cape Town Convention which defines it as those which substantially deprives the creditor of what it is entitled to expect under the agreement.

Since the Cape Town Convention and Aircraft Protocol shall be interpreted as a single instrument, Creditor/Lessor can request remedies that are provided on Cape Town Convention and Aircraft Protocol. Article 10 of the Cape Town Convention provides remedies which regulate that Creditor/Lessor may terminate the agreement and take possession or control of the aircraft. Additionally, Aircraft Protocol also provides remedies for Creditor/Lessor. Based on Article IX(1)(a) and (b), in order to specify remedies in Cape Town Convention, the Aircraft Protocol allows Creditor/Lessor to procure the de-registration of the aircraft and procure the export and physical transfer of the aircraft object from the territory in which it is situated by IDERA. Moreover, Article 3 of the Cape Town Convention stipulates that IDERA as a remedy can only be requested to the contracting state to Cape Town Convention. Hence, Indonesia as contracting state to Cape Town Convention is bound to implement IDERA as an international obligation.

As mentioned above, Indonesia has adopted international interest and IDERA into its municipal law. As Indonesia's source on aviation law, Law No. 1 of 2009 has already recognized the international

interest and IDERA concept specifically on Section IX. Law No. 1 of 2009 has incorporated those essential concepts by only 11 articles (article 71-82). The international interest is regulated under Article 71 Law No. 1 of 2009 which writes: "An aircraft object may be borne with international interests arising as a result of security agreements, title reservation agreement, and/or leasing agreement". This Article has already complied with Article 2(2) of the Cape Town Convention where the convention covers those agreements to be borne with international interests.

IDERA itself is regulated in Article 74 Law No. 1 of 2009. It is provided in the Article that: "a Debtor may request an authorization for deregistration request to the creditor for the purpose of applying for registration annulment and export on the airplane or helicopter already obtaining an Indonesian registration marks and Indonesian nationality". This provision opens up opportunities for Debtor/Lessee to request for an IDERA establishment which will be executed only if the Debtor/Lessee conduct default(s) to Creditor/Lessee. Creditor/Lessee shall be the only party authorized to submit a request for annulment on the aircraft related to IDERA. Based on this Article, we can also conclude that The Ministry of Transportation (Ministry of Transportation) of Republic Indonesia is the entity appointed to implement IDERA.

Ministry of Transportation regulated implementing rules concerning IDERA in PM 52 of 2018 and KP 378 of 2018. Those two regulations regulate more technical and operational issue in regard to the establishment and execution IDERA. Therefore, Ministry of Transportation designates the Director of Airworthiness and Flight Operations (DAFO) as registry authority to maintain establishment and execution of IDERA in Indonesia.

A. IDERA Establishment

Based on PM 52 of 2018 section 47.95, IDERA establishment shall be proceeded as the following:

1. Debtor (Authorizer) could request IDERA to Creditor (Authorized) for an aircraft or helicopter that has already been registered in Indonesia and has an identity of the nation of Indonesia.
2. An Issued and a legitimate IDERA therefore has to be registered by DAFO and shall not be irrevocable without the consent of Creditor.
3. The IDERA document consists of Debtor and Creditor, where the Creditor is the only one with the authority to request IDERA execution.
4. Creditor can appoint Certified Designee to request IDERA execution on behalf of Creditor.

B. IDERA Execution

Based on PM 52 pf 2018 Section 47.101, IDERA execution shall be proceeded as the following:

1. Creditor or Certified Designee could request IDERA execution to DAFO by submitting these following documents:
 - a. Legitimate application form that has been signed by Creditor or Certified Designee;
 - b. DCGA Form No.47-26 (Application for Cancellation of Aircraft Registration);
 - c. Legitimate power of attorney that has been legalized by notary and Republic of Indonesia embassy in Creditor position only if the Creditor has appointed Certified Designee;
 - d. DCGA Form No.47-03 (Irrevocable Deregistration and Export Request Authorization/IDERA) that has been registered by DAFO only if the Creditor/Lessor requested by itself;

- e. Return legitimate DCGA Form No. 47-06 (Certified Designee Letter) that has been registered and recorded by DAFO if Certified Designee requested the execution; and
 - f. IDERA Statement Letter for Registration or Certified Designee Letter Statement Letter for Deregistration that state shall not sue Ministry of Transportation regarding to IDERA execution.
2. DAFO shall de-regist the registration of aircraft within 5 (five) workdays after the request is accepted compactly as provided by the regulation.
 3. Inspector of Airworthiness and Flight Operations evaluate the documents with DCGA Form No. 47-16 (Check List for Deregistration Aircraft).

III. IDERA IMPLEMENTATION IN INDONESIA

A. IDERA Establishment

As mentioned before, in order to possess international interests, firstly Debtor/Lessee shall request the IDERA establishment. Then, after the DAFO issued IDERA documents Creditor/Lessor legally hold international interests. DAFO issue IDERA based on PM 52 of 2018 and KP 374 of 2018.

One of Indonesian airline company that had requested IDERA establishment was Garuda Indonesia (GIA). In this case, GIA was acting as Debtor/Lessee and on the other side, Industrial and Commercial Bank of China (ICBC) was acting as Creditor/Lessor. In 2015, GIA purchased several Boeing's aircraft with type Boeing 777-300ER. The purchase was using leasing as a payment method.

However, the purchase details are:

No.	Aircraft type	Manufacturer's Serial Number (MSN)	Registration Code
1.	Boeing 777-300ER	29144	PK-GIH

2.	Boeing 777-300ER	29145	PK-GII
3.	Boeing 777-300ER	29146	PK-GID
4.	Boeing 777-300ER	29147	PK-GIE
5.	Boeing 777-300ER	29148	PK-GIF
6.	Boeing 777-300ER	40072	PK-GIJ
7.	Boeing 777-300ER	40073	PK-GIK
8.	Boeing 777-300ER	40074	PK-GIA
9.	Boeing 777-300ER	40075	PK-GIC

As an example, GIA requested IDERA establishment to DAFO for their Boeing 777-300ER with registration code PK-GIH. GIA requested PK-GIH with paying fee for Rp.1.500.000 based on Government Regulation Number 11 of 2015 Concerning Type and Fee on Non-Tax State Income for Ministry of Transportation. However, DAFO has completed the IDERA establishment within 3 (three) workdays after the request received by DAFO. Then, the aircraft was operated for the first time on 11th May 2015. DAFO has completed the IDERA establishment without any means of trouble.

B. IDERA Execution

In Indonesia, IDERA execution as a remedy to an aircraft that has been registered by DAFO is a rare case. Its rarity is due to the fact that most Indonesian airline companies remain obedient in fulfilling their payment obligation to their Creditor/Lessor. Practically, it is a common situation in Indonesia that even when Debtor/Lessor conducts default to the Creditor/Lessor, the IDERA execution

is still not taken. In this situation, Debtor/Lessee and Creditor/Lessor re-negotiate the payment obligation. Small Indonesian airline companies or pioneer air transportation acting as Debtor/Lessee frequently conducts this re-negotiation. The re-negotiation is also necessary for both sides because in one-side Debtor/Lessee needs the aircraft for business activities and on the other side, Creditor/Lessor needs the payments.

In DAFO point of views, if IDERA execution has been requested, beside the fact that it cannot be revoke, there are some consequences that will be beared by both Creditor/Lessor and Debtor/Lessee. For an example, the consequences arising from the execution is settlement for aircraft parking fee when the aircraft was not operating and registry for the aircraft to new Debtor/Lessee (whether in Indonesia or outside Indonesia territory). Therefore, IDERA execution could be the last option when Debtor/Lessee conduct a default to the contract.

In past 4 (four) years, there are only 2 (two) cases on IDERA execution that has been done by DAFO, as follows:

Year	Ammount of IDERA Execution
2016	1
2017	0
2018	1
2019	0

In 2017, IDERA execution was conducted by DAFO to an air transportation company named Air Born Indonesia Ltd. (Air Born). In 2018, IDERA execution was executed to Alfa Trans Dirgantara Ltd. (ATD).

One of Indonesian airline companies' cases on IDERA execution was execution for ATD. The request for de-registration and export with IDERA mechanism was requested by American leasing company named Textron Financial Corporation

(Textron). The request was applied on 13th November 2018 with by certified designee (Textron's Lawyer) on behalf of Textron. Thus, the

IDERA execution was requested for 3 aircraft that was operated by ATD, as following:

No.	Aircraft Type	MSN	Registration Code
1.	Cessna 208B	208B2183	PK-ASA
2.	Cessna 208	20800539	PK-ASC
3.	Cessna 208	20800571	PK-ASE

On that execution process, there were several issues experienced by Textron as Creditor/Lessor, ATD as Debtor/Lessee, and DAFO as the authority. The main issue on the process was the differences on default situation. On Textron view, Textron requested the IDERA execution due to ATD's inability to conduct payment obligation under the leasing agreement. On the other side, ATD assumed that ATD was still able and willing to fulfill their payment obligation. Consequently, due to the differences, several high value documents to the aircraft such as aircraft's maintenance record that in possession of ATD was detained by them. The detainment was a disadvantage to Textron as Creditor/Lessor since the maintenance record is a high value document attached to every aircraft. This situation was arisen due to the legal vacuum of DAFO authority scope limitation on PM 52 of 2018 and KP 374 of 2018. However, based on the main principle and main function of IDERA, as authorized party Textron as Creditor/Lessor requested the IDERA execution to DAFO. The de-registration was completed on 14th December 2018.

After the de-registration had been completed, DAFO denominated ATD and Textron to conduct mediation to settle the export of the 3 (three) aircraft explained above. DAFO assumed that the denomination was necessary for the export as an adjustment to settle the issue arisen from the IDERA execution.

IV. CONCLUSION

This study aims to analyze the implementation IDERA specifically on IDERA establishment and IDERA execution in Indonesia. The IDERA itself

shall be implemented by Indonesia Government as an obligation due to Indonesia's ratification of Cape Town Convention with President Regulation No. 8 of 2007. The Indonesia government has conform Indonesia's aviation law with Cape Town Convention through Law No. 1 of 2009, PM 52 of 2018, and KP 374 of 2018. Those regulations have incorporated the Cape Town Convention provisions from the international interest concept to more technical issue such as IDERA establishment and IDERA execution.

The IDERA implementation in Indonesia is implemented and controlled by DAFO as Registry Authority that has authority to issue IDERA establishment and de-registration followed by the export of an aircraft in Indonesia by IDERA mechanism. The DAFO shall refer to PM 52 of 2018 and KP 374 of 2018 in order to register that requested by Debtor/Lessee and execute IDERA that requested by Creditor/Lessor or Certified Designee.

The implementation of IDERA by DAFO is not only referring to the written law in terms of DAFO having to make some adjustment in order to complete the IDERA implementation, specifically on IDERA execution. From the case mentioned above, we can conclude that DAFO denominated both parties, Creditor/Lessor and Debtor/Lessee to complete the aircraft export. This initiation was conducted by DAFO since there is a legal vacuum on DAFO authority scope.

As far as the implementation is done properly by DAFO, there shall be updates to the PM 52 of 2018 and KP 374 of 2018 or even Law No. 1 of 2009 due to IDERA implementation. The regulation has focused only to the technical issue on how to

establish IDERA and execute IDERA. Indeed, the PM 52 of 2018 and KP 374 of 2018 has already complied with the Cape Town Convention in IDERA establishment and IDERA execution yet those two regulations do not give DAFO any limitation authority scope. If the regulation gives the authority scope of limitation and how far the DAFO could act regarding to the IDERA implementation it would be more efficient and much even better to implement IDERA in Indonesia.

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