

Contribution of National Civil Aviation
to
The International Civil Aviation: Legal Aspects

By
Prof.Dr.K.Martono

ABSTRACT

This article deals with introduction; Civil Aviation Act of 2009; the Chicago Convention of 1944 and its amendment; public air law instruments; Cape Town Convention of 2001 including the background of Cape Town Convention of 2001, the content of the Cape Town Convention of 2001, the benefit of the Cape Town Convention of 2001, the most important provisions related to the implementation, the implementation of the Cape Town Convention of 2001 and its protocol in Indonesia, the advantages to ratification of the Cape Town Convention of 2001, international interest in aircraft objects and definitions, the best practices and conclusion; Montreal Convention of 1999 including a historical background of Montreal Convention of 1999, scope of application, compensation, advance payment, insurance of liability, jurisdiction and ratification of Montreal Convention of 1999.

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1. Introduction

Taking into consideration that Indonesia is a member of the Chicago Convention of 1944,¹ Indonesia communicates closely cooperation with the ICAO. This communication has been proven in relating to compliances of the recommendation provided by the ICAO in return the role of ICAO in assistance on providing technical assistance. ICAO has provided technical assistance to the Directorate General Air Communications (DGAC) Indonesia for some 40 years under the United Nations Development Program (UNDP) and Government of Indonesia cooperation,² especially in major areas such as airworthiness; navigation and air traffic management; training center such as human resources development and capacity building; regulatory matters, airport and aerodrome; safety and security; industry development including airlines, aircraft manufactures, airports, aircraft maintenance; inspection, surveillance and audit. For the purpose of implementation, the ROI issued the Civil Aviation Act of 2009,³ however this article focusing in a legal's aspects related to international civil aviation.

2. Civil Aviation Act of 2009

The Indonesian Civil Aviation Act that came into force on 12 January 2009 aims to promote the development of Indonesian air transportation.⁴ It regulates a host of matters related to aviation, from sovereignty in airspace, aircraft production, operation and airworthiness of aircraft to aviation security and safety, aircraft procurement, aviation insurance, the independence of aircraft accident investigation, and the licensing of aviation professionals. The 2009 Act also regulates scheduled as well as non-scheduled air transportation, airline capital, the ownership of aircraft, aircraft leasing, fares, the liability of air carriers, air navigation facilities, airport authorities and services, and law enforcement related to air transportation. The Act also has provisions aimed at supporting the development of national and international air transportation in Indonesia, including provisions regarding the creation of a public services institute to further those goals.⁵ Almost all the provisions of the Chicago Convention of 1944 has been adopted by the Civil Aviation Act of 2009. Thus, Indonesia has fully complied with the Chicago Convention of 1944.

3. Chicago Convention of 1944 and Its Amendment

Indonesia has ratified Chicago Convention of 1944,⁶ and its amendment such as Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 93 *bis*),⁷

¹ Indonesia adhered the Chicago Convention of 1944 on 27 April 1950, see Paul Stephen Dempsey Ed., *Annals of Air and Space Law*, 2005 Volume XXX-Part I. Toronto : The Carswell Company Ltd, p.52 [hereinafter Chicago Convention of 1944].

² Muzaffar Ismail on behalf of Santosa Eddy Wibowo, *Indonesia Civil Aviation Growth and Technical Cooperation*, Submitted to the Global Aviation Cooperation Symposium, ICAO Head Quarters, Montreal , 30 Sept-3 October 2014.

³ Act *Concerning Civil Aviation*, Act no.1 of 2009. State Gazette of the ROI No.1 of 2009, Supplement State Gazette of the ROI Number 4956 [Civil Aviation Act 1 of 2009].

⁴ Act concerning Civil Aviation, Act No.1 of 2009 [Civil Aviation Act], Ministry of Transportation Republic of Indonesia, online:Directorate General of Civil Aviation <http://hubud.dephub.go.id/?en/uu>

⁵ Martono and Amad Sudiro, *Current Air Transport Regulations In Indonesia*, published in Volume XXXVIII *Annals of Air and Space Law* 55-9 (2013).[Martono & Amad Sudiro in Current]

⁶ Chicago Convention of 1944, *supra* note 1 p.52

⁷ Indonesia ratified on 17 July 1961,Ibid ., *supra* note 1 page 84.

Protocol to an Amendment to the Convention on International Civil Aviation (Article 45) signed at Montreal On 14 June 1954,⁸ Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 489a)] signed at Montreal on 15 September 1962,⁹ Protocol Relating to an Amendment to the International Civil Aviation (Final Clause-Russian Text) signed at Montreal, on 30 September 1977,¹⁰ Protocol Relating to an Amendment to the convention on International Civil Aviation (Article 83 bis) signed at Montreal on 6 October 1980,¹¹ Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 56),¹² Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 509a)] signed at Montreal on 26 October 1990.¹³

4. Public Air Law Instruments

With regard to public international air law instruments, Indonesia has ratified Tokyo Convention of 1963, signed at Tokyo on 14 September 1963, The Hague Convention of 1970 signed at The Hague on 16 December 1970 and the Montreal Convention of 1971, signed at Montreal on 23 September 1971.¹⁴ It is worthwhile to note here with regard to the Hague Convention of 1970, Indonesia made reservation to paragraph 1 of Article 12 of the Convention. In relation to private air law instrument, Indonesia has adhered to the Warsaw Convention of 1929¹⁵ and ratified Cape Town Convention of 2001 as well.

5. Cape Town convention of 2001

a. The Background of Cape Town Convention of 2001

On 16 November 2001, a Diplomatic Conference held in Cape Town, South Africa, under the co-sponsorship of the International Civil Aviation Organization (“I.C.A.O.”) and the International Institute for the Unification of Private Law (“UNIDROIT”), adopted an international treaty (“Cape Town Convention”) specifically designed to facilitate asset-based financing and leasing. Fifty-three (53) States signed the Final Act of that Conference. The Cape Town Convention of 2001 (technically, the Convention on International Interests in Mobile Equipment, (“Convention”), as applied to aircraft equipment through a protocol (“Protocol”), came into force three months after the eight (8) ratification, acceptance, or accession to, the Protocol.

⁸ Indonesia ratified on 24 November 1959, *Ibid.*, *supra* note 1 page 92.

⁹ Indonesia ratified on 19 February 1963, *Ibid.*, *supra* note 1 page 100.

¹⁰ Indonesia ratified on 20 November 1990, *ibid.*, *supra* note 1 page 118

¹¹ Indonesia ratified on 5 August 1994. *Ibid.*, *supra* note 1 page 136.

¹² Indonesia ratified on 6 November 1995, *ibid.*, *supra* note 1 page 154

¹³ Indonesia ratified on 6 November 1995, *ibid.*, *supra* note 1 page 162

¹⁴ Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo 1963, Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970 and Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on 23 September 1971 has been ratified Indonesia on 27 August 1976 by Act concerning Ratification of Tokyo Convention of 1963, The Hague Convention of 1970 and Montreal Convention of 1971, Act. Number 2 of 1976 The Republic of Indonesia State Gazette Number ...; Supplement of State Gazette Number[Act of Ratification].

¹⁵ By note dated 2 February 1952, Indonesia declares that it considered itself bound by the Convention (before Indonesia became independent, acceptance of the Convention was effected by the Netherlands on 1 July 1933. *Ibid.*, *supra* note 1 page 368.

The Cape Town Convention of 2001 creates a uniform international legal framework to protect investors in aircraft objects. It provides an International Registration for creditors and debtors to register their security interests (similar to the land titles system for real property), and creates a set of basic remedies in the event of debtor default. The Protocol complements the Cape Town Convention of 2001 and adapts its provisions to meet the particular requirements of financing mobile equipment such as aircraft. For example, it provides additional remedies for creditors, such as the ability to request the deregistration and export of an aircraft object. These measures increase the security of creditors and reduce their risks, which may lead to reduce the cost and more accessible financing of aircraft objects for those countries that are party to the Cape Town Convention of 2001.¹⁶

b. The Content of the Cape Town Convention of 2001

The Cape Town Convention of 2001 consist of fourteen (14) Chapters and sixty-two (62) Articles namely Chapter I provides sphere of application and general provisions; Chapter II provides constitutional of an international interest; Chapter III provides default remedies; Chapter IV provides international registration system; Chapter V provides other matters relating to registration; Chapter VI provides privileges and immunities of the supervisory authority and the registrar; Chapter VII provides liability of the registrar; Chapter VIII provides effects of an international interest as against third parties; Chapter IX provides assignments of associated rights and international interests, rights of subrogation; Chapter X provides rights or interest subject to declaration without registration; Chapter XI provides application of the convention to sales; Chapter XII provides jurisdiction; Chapter XIII provides relationship with other convention, and Chapter XV provides final provision.

c. The Benefit of the Cape Town Convention of 2001

The Cape Town Convention 2001 will reduce risk applicable to asset-based financing and leasing transactions by establishing an international legal framework, backed by convention relations to and where necessary, implementing national laws. The risk of reduction will increase the availability and reduce the cost of aviation credit, thus broadening the spectrum of financing alternatives available to aircraft operators.

The Cape Town Convention of 2001 benefit for the government, airlines, commercial aircraft manufacturers and their supplier, aviation industry investors and passengers and other end users. The beneficiaries of the government are first through reduced debt levels to governments whose credit in the form of sovereign guarantees or national debt is used to finance aircraft acquisitions, secondly as risk reductions to government providing export credit supporting aircraft sales, and thirdly to enhance privatization potential where applicable, whilst the beneficiaries for the airlines, is through reduced financing costs and enhanced access to funds and funding sources, increased operating efficiency and improved profitability.¹⁷

The benefit for commercial aircraft manufacturers and their supplies is through higher sales, output and employment levels, as well as expanded markets, whilst the benefit for aviation

¹⁶ *Regulation Impact Statement "Implementation of the Cape Town Convention*, paper unpublished.

¹⁷ Cape Town Convention of 2001, *supra* note 7, see also LON18625548/1,p.3

industry investor is through increased returns on, and higher valuations of, investments, as well as enhanced security and the benefit for passengers and other end users is to by-pass-through price reductions and increased levels of services.

The cost-savings and external debt-level reduction benefits are slanted in favor of developing economics, whose systems do not currently reflect asset-based financing principles. In these countries, the Cape Town Convention of 2001 would generate the greater relative improvement. Conversely, the fleet planning, export and employment related benefits are, as a general proposition, slanted in favor of developed economies.

d. The Most Important Provisions Related to the Implementation

In line with the Declarations Indonesia made when ratifying the Convention, it is worthwhile to note here that the most important provision related to (1) declaration to Article 39(1) (a) and (b) relating to non-consensual rights or interests which according to Indonesian Law have priority, such as the wages of workers, taxation claims and claims of services in respect of an aircraft object; and Declaration to Article 40, regarding recordation non-consensual rights and interest;¹⁸ (2) Declaration to Article 53 regarding determination of courts for the purpose of Article 1 and Chapter XII on Jurisdiction and Article 13(1)(a),(b),(c) and Article (4) on Relief pending final Determination to obtain from a court a speedy relief by the creditor for the preservation of the object and its value, which should be read in line with Article 8 on Remedies of Chargee;¹⁹ (3) Declaration to Article 54 (2), regarding Remedies, whereby a Contracting State shall declare whether or not any remedy is available to the creditor under any provision of this Convention which is not there expressed to require application to the Court may be exercised only with leave of the Court; (4) Article XXX(1) re Article VIII, re Article XII, re Article XIII regarding the application of Article VIII on Choice of Law, Article XII on Insolvency assistance and Article VIII on deregistration/export request authorization; (5) Article XXX(2) re Article X regarding the application of Article X(2) on the speedy relief means; (6) Article XXX(3) re Article XI making effective alternative A for Indonesia.²⁰

e. The Implementation of the Cape Town Convention and Its Protocol in Indonesia

Indonesia has ratified the Cape Town Convention of 2001 and its protocol,²¹ by the Presidential Decree No. 8/ 2007. This Convention is one of the reasons Indonesia changed the Civil Aviation Act of 1992 by the Civil Aviation Act of 2009, and this is reflected in the explanation chapter of this Act. Cape Town Convention 2001 and its Protocol, regulates the four elements in Security Interest on Mobile Equipment specifically on Aircraft. Those are the International Interest, the International Registration, the Priority Rules and the Default Remedies. These four elements should be implemented in the national laws of Indonesia as a state party to this Convention. The Civil Aviation Act of 2009 has incorporated the elements of the

¹⁸ Mieke Komar Kantaatmadja, *The 2001 Cape Town Convention on International Interest in Mobile Equipment/the Aviation Protocol and Relevant Issues in Indonesian Aviation Law*. Volume 8, Number 4 July 2011, p.633 [hereinafter Mieke Komar Kantaatmadja]

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Convention on International Interest in Mobile Equipment*, 16 November 2001, 2307 UNTS 2855, UN Doc.A/AC105/C.2/2002/CRP.3 (entered into force 1 April 2004)[Cape Town Convention].

Convention and its Protocol in Chapter IX, from Article 71 to 82. This ratification to this Convention and Protocol will support the aircraft procurement for the national airlines of Indonesia.²²

Beside the Civil Aviation Act 2009, other international obligations arising out of the Cape Town Convention has been set up. Those regulations are Ministerial Decree Number KM 49 of 2009 Civil Aviation Safety Regulation Part 47 on Registration of Aircraft²³ and Director General Air Communication Regulations No. SKEP/166/VII/2009 Staff Instruction (SI) regarding IDERA (*Irrevocable Deregistration and Export Request Authorization*).

In general, Article 71 to 82 of the Civil Aviation Act 2009, regulates a number of principles mentioned in the Cape Town Convention 2001 and its protocol. Article 71 defines the aircraft as an object of an international interest as a result of a security agreement, a title reservation agreement, and/or a leasing agreement. Aircraft Objects include airframe, aircraft engine and helicopter as regulated in the Cape Town Convention 2001. Furthermore, the definition of airframe, aircraft engine and helicopter can be found in the explanation chapter of this Act. By this article, the definition of an International Interest, means a (security) interest obtained by a creditor based on security agreements, a title reservation agreement, and/or a leasing agreement, under the Cape Town Convention 2001.

Article 72 of the Civil Aviation Act of 2009 gives the right to the parties to choose the choice of law and jurisdiction of the agreement as regulated in Article 71. This agreement being in essence an international contract , should consider the principle on choice of law and choice of jurisdiction based on private international law . If the agreement is made under Indonesian Law, it should be made on an authentic deed which contains the identity of the parties, the identity of the aircraft objects and the rights and duties of the parties, as stipulated in Article 73 of the Act.

In regard with the implementation of the agreement between the debtor and creditor which establishes an international interest, when a debtor is in default or does not comply to the obligations of the agreement , the creditor may request the deregistration of the aircraft to the Minister with an the application of an irrevocable de-registration and export authorizing request The Deregistration can be enforced only by a power of attorney made by the debtor, which has to be acknowledged by the minister, and can not be annulled without the approval from the creditor as regulated in Article 74. Upon the creditor's request, the Minister shall remove the registration and the nationality of the aircraft or helicopter within a maximum of 5 (five) days from the request. These provisions are regulated in article 75 of this Act. Article 74 and 75 provide default remedies, when a default is caused by the debtors, and therefore giving rights to the creditors to submit the deregistration request to the Minister Article 76 provides the remedies to be enforced by the minister of transportation and the assistance of other related ministers to expedite the enforcement of those remedies. Remedies and creditors rights referred to in the

²² Based on this provision, Indonesian airlines have procurement no less than 299 aircraft from Boeing and Airbus to fulfill the country's aircraft needs.

²³ Ministerial Decree *Concerning Aircraft Registration*. Ministerial Decree No.KM 49 of 2009 (10 June 2009) [Ministerial Decree]

previous articles are established upon the signing of the agreement by the parties in accordance with Article 77.

The International interest registered in the international registration has priority over other interests, including national interests in accordance to the Article 78. The International Registration is the facility managed by the International Civil Aviation Organization (ICAO). Furthermore, Article 79 provides in the situation of a debtor's default, the creditors may request provisional measures from the court based on the agreement mentioned in Article 71 without the submission of the case to be decided in the Indonesian court and without complying to the mediation procedure required in the general courts. These measures are in line with the declaration made by Indonesia when ratifying the convention.

In the situation of a debtor's bankruptcy, the court, the curator, and/ or debtor shall hand over the control of the aircraft object to the creditor within the time limit provided by the Law. In the situation of a debtor's bankruptcy, a number of invoices may have priority over the international interest of the aircraft object. This regulation on bankruptcy is regulated in Article 80 and 81 of the Civil Aviation Act of 2009. These regulations differ from the Indonesian existing law on bankruptcy and hence needs to be harmonized.

Article 82 provides that the international convention on International Interest on mobile equipment and the Aircraft Protocol, are legally binding to Indonesia and shall be implemented as *lex-specialist* in Indonesian Law. In the Explanation Chapter, the definition of *lex specialis* means that in the case of inconsistency or discrepancy between the provisions of the Convention, protocols and declarations with Indonesian Law, the provisions of the Convention, the Protocol and the declaration shall prevail.

f. The Advantages to Ratifications of the Cape Town Convention of 2001

Some Indonesian airlines have taken the advantages of the Cape Town Convention of 2001 and its Protocol, for the purpose to facilitate aircraft financing, guarantees, and securities, which are useful for fleet modernization. In terms of the economic results, this Convention has been very helpful for Indonesian airlines; between 2009 and 2013, Indonesian national airlines have procured at least 299 aircraft with the support of the Civil Aviation Act of 2009, which is supposed to incorporate the financing facilities provided by the Cape Town Convention and its Protocol.

g. International Interest in Aircraft Objects and Definitions

The definitions contained in the Indonesia legislation are very similar to the definitions in the Cape Town Convention of 2001 and its associated Protocol to the Convention on Interest Mobile Equipment on Matters Specific to Aircraft Equipment.²⁴ Thus, "aircraft objects" are aircraft frame or skeletons, air engines, and helicopters. An "aircraft frame" or skeleton is a skeleton of an aircraft (other than those frames used for military, customs, or police aircraft), provided that an aircraft engine suitable for the aircraft frame/skeleton is installed into it, and that it will be certified by an authorized aviation agency for transporting at least eight persons,

²⁴ Protocol to the Convention on Interest Mobile Equipment on Matters Specific to Aircraft Equipment, 16 November 2001 (entered into force 1 March 2006).

including the crew, or goods weighing more than 2,750 kg, along with all of its installed equipment, components, and other devices, which are either built-in or attached to the aircraft (other than the aircraft engine) and all data, guide books and notes associated with it.²⁵

“Aircraft engines” are engines (other than those used for military, customs, or police force aircraft) moved by jet propulsion or turbine or piston power. In case of an aircraft engine with a propulsion jet, it must have a thrust/propulsion power of at least 1,750 lbs or the equivalent to qualify under this definition. Aircraft engine are driven by a turbine or piston, and they must have average capacity of at least 550 horsepower similar for take-off, along with all modules and installed equipment, components and other devices, built-in or attached to the aircraft, and all the data, guide books and notes associated with it.²⁶

A helicopter is a certain helicopter (not used for military, customs or police use) certified by an authorized aviation agency for transporting at least five persons, including the air crew, or goods more than 450kg along with all the installed equipment and devices, whether built-in or attached to the helicopter (including the rotors) and all data, guide books and notes associated with it.²⁷ Meanwhile, an “international interest” is an interest obtained by a creditor arising from a security agreement, the reservation agreement and/or leasing agreement that is subject to the Convention on International Interest in Mobile Equipment and the Protocol to the Convention on Interests in Mobile Equipment on Matters Specific to Aircraft Equipment.²⁸

A “security agreement” is an agreement whereby the charger of an aircraft object gives or agrees to give to the charge of the security agreement an interest (including ownership or /title) in the aircraft object in order to guarantee delivery of obligations incurred or to be incurred by the charger or third party.²⁹ Meanwhile, a “title reservation agreement” is a sale agreement for any aircraft object with a provision that ownership/title shall be transferred until the requirements under the agreement have been met.³⁰ A “leasing agreement” is an agreement whereby the lessor gives his/her rights to the lessee to possess the aircraft object (with or without the option to purchase) in exchange for a rent or any other payment as compensation.³¹

h. The Best Practices

Indonesia as a state party of this Convention and its protocol has an obligation to implement the rules of this Convention and its Protocol in its national laws. As earlier discussed the objectives of this Convention is to facilitate the airlines aircraft procurement, to obtain the economic advantages such as reducing the cost of the procurement. On the other hand, to obtain the economic advantages from this convention, a number of documents are required to be prepared by debtors and creditors.

²⁵ See Civil Aviation Act, *supra* note 22, art 1(2)(e)

²⁶ *Ibid.*, art 71, explanatory notes. See also Protocol, *supra* note 88, arts 1(2)(b)(1) and 1(2)(b)(ii)

²⁷ *Ibid.*

²⁸ *Cape Town Convention*, *supra* note 85, art I(o)

²⁹ *Ibid.*, art I(ii)

³⁰ *Ibid.*, art I(II)

³¹ *Civil Aviation Act*, *supra* note 22, art 71; Martono K and Amad Sudiro, *supra* note 29, at 84; See also *Cape Town Convention*, *supra* note 85, art I(q).

The implementation of Cape Town Convention and its protocol in Indonesia, is based on Article 71 to 82 Civil Aviation Act of 2009, Presidential Decree No. 8/ 2007 as the ratification instrument which contains the declarations, Ministerial Decree KM No. 49/ 2009 about IDERA. The implementation of the international obligations based on the Cape Town Convention and its Protocol in Indonesia will be described in a number of practices here under³².

In regard to the implementation of IDERA, the International Interest and the International Registration, Enny Purnomo Widya as a Partner of Mochtar Karuwin and Komar Law Firm,³³ said that in practice our national laws are sufficient enough to implement the obligation based on the Cape Town Convention 2001 and Its Protocol. So far, the important thing is the implementation of IDERA stipulated in Article 74 and 75. Based on these articles, there are two kinds of documents that should be prepared, after the airline has procured a new aircraft object with the right in the aircraft, registered as an international interest. The documents are the consent letter between the parties or the agreement that establishes the international interest and secondly, the power of attorney that should be acknowledged by the minister. The obstacle of the implementation of this regulation is the time limit to obtain the acknowledgement from the minister. It is supposed to be only 5 days, but in fact, it could be more than 5 days. The problem is in the time limit, when exceeded it may cause a potential default, and harm the rights of the creditor for requesting the deregistration of the aircraft to the minister. The mechanism of IDERA can be enforced in the process of a leasing agreement, restructuring and refinancing of the aircraft. In the case of bankruptcy and the regulations related to bankruptcy in Indonesia in general, prove to be contrary to the bankruptcy process in IDERA.

The other practice in IDERA, relates to airlines designated for pioneer flights meaning those flights to remote areas in Indonesia. One of the airlines had the experience with the IDERA mechanism. The airline was in default and the creditor requested the Deregistration for one aircraft from that airlines. Unfortunately, because of the important public purpose of the pioneer flights, the Minister of Transportation did delayed on deregistration process of this aircraft for more than 5 (five) days. Based on mutual consent, the parties had to conduct the mediation process before the deregistration process. This process is not required both under the Civil Aviation Act of 2009 and Cape Town Convention 2001. The Mediation process before the deregistration process is required because the pioneer flights are important for public purposes in Indonesia.

Garuda Indonesia, as one of the national airlines in Indonesia, do not have so far any experience in regard with deregistration. It is means that they were able to comply with the obligations of the agreement, which establishes an international interest of rights. In line with the Garuda Indonesia experience, the implementation of the Cape Town Convention 2001 and its Protocol has not been tested in practice, specifically with the deregistration request.

Furthermore it is interesting to look at one of the successful airlines established in Indonesia in recent years. Lion Air is a privately owned airline founded in 1999, which today is the largest privately domestic carrier in Indonesia. The airline's success owes much to purchase of a new generation of Boeing aircraft, which have lower operating costs, which in turn

³² Nama2 Narasumber

³³ Based on the interview with Mrs. Enny Purnomo Widya, Partner from MKK Lawfirm on 22 October 2015

translates to lower fares. Indonesia's ratification of the Cape Town Convention of 2001 and the associated Protocol greatly assisted Lion Air's growth and expansion, as it provided an internationally recognized standard on the rights of creditors should a debtor (in this case, an airline) default or become insolvent..³⁴

i. Conclusion

The Civil Aviation Act of 2009 was an ambitious legislative attempt to adopt almost all the provisions of the Chicago Convention of 1944 and implementation all of the standards and recommended practices of the International Civil Aviation Organization (ICAO) in one uniform national legislation.

Perhaps the most successful element of the Civil Aviation Act of 2009 is the incorporation of elements of the Cape Town Convention of 2001 and its Protocol. These successful elements have been proven by Garuda Indonesia, Lion Air, Airfast and Sriwijaya Airlines in relation to the procurements of aircraft. In the future, the role of the Civil Aviation Act of 2009 will be very important for the development and stimulation of Indonesia's aviation industry, as well as national economic development more generally. For the sake of legal uniformity and clarity, there is no valid reason national airlines should not comply with the Civil Aviation Act of 2009.

Based on number of practices, the implementation of Cape Town Convention 2001 and its protocol is sufficient enough, in regard with the Act and Regulations, namely Civil Aviation Act of 2009 and Minister Decree. The Act provides regulation on the International Interest, International Registration, Priority Rules, and Default Remedies. Those are the four elements provides in Cape Town Convention 2001 and its Protocol.

One of the obstacles in the implementation of Cape Town Convention 2001 and its Protocol in Indonesia, is the harmonization of the existing national laws specifically on bankruptcy and security to the regulations provides in Cape Town Convention 2001. At present Indonesia is in the making of a law regarding Security Rights in Indonesian Aircraft, as one of the effort to harmonize the law.

The aim of the Cape Town Convention of 2001 is to reduce the costs of raising finance for large, high value mobile assets which routinely cross borders. The Convention provides a over-arching framework for the financing of this type of assets whilst the accompanying protocols currently in existence – aircraft equipment. Indonesia has ratified the Cape Town Convention of 2001,³⁵ and for that reason the Civil Aviation Act of 2009 has incorporated the elements of the Convention that regulates international interests in aircraft objects.³⁶ This provision is purported to support aircraft procurement by the national airlines of Indonesia.³⁷ Based on the Civil Aviation Act of 2009, an aircraft object may be held with international

³⁴ Martono K and Amad Soediro, *supra* note 34, at

³⁵ *Convention on International Interest in Mobile Equipment*, 16 November 2001, 2307 UNTS 2855, UN Doc.A/AC105/C.2/2002/CRP.3 (entered into force 1 April 2004)[Cape Town convention].

³⁶ See Presidential Decree No.7 of 2008

³⁷ Based on this provision, Indonesia airlines have bought no less than 299 aircraft from Boeing and Airbus to fulfill the country's aircraft needs.

interests arising as a result of security agreements, title reservation agreements and/or leasing agreements.

The definitions contained in the Indonesia legislation are very similar to the definitions in the Cape Town Convention of 2001 and its associated Protocol to the Convention on Interest Mobile Equipment on Matters Specific to Aircraft Equipment.³⁸ Thus, “aircraft objects” are aircraft frame or skeletons, air engines, and helicopters. An “aircraft frame” or skeleton is a skeleton of an aircraft (other than those frames used for military, customs, or police aircraft), provided that an aircraft engine suitable for the aircraft frame/skeleton is installed into it, and that it will be certified by an authorized aviation agency for transporting at least eight persons, including the crew, or goods weighing more than 2,750 kg, along with all of its installed equipment, components, and other devices, which are either built-in or attached to the aircraft (other than the aircraft engine) and all data, guide books and notes associated with it.³⁹

“Aircraft engines” are engines (other than those used for military, customs, or police force aircraft) moved by jet propulsion or turbine or piston power. In the case of an aircraft engine with a propulsion jet, it must have a thrust/propulsion power of at least 1,750 lbs or the equivalent to qualify under this definition. Aircraft engine are driven by a turbine or piston, and they must have average capacity of at least 550 horsepower similar for take-off, along with all modules and installed equipment, components and other devices, built-in or attached to the aircraft, and all the data, guide books and notes associated with it.⁴⁰

A helicopter is a certain helicopter (not used for military, customs or police use) certified by an authorized aviation agency for transporting at least five persons, including the air crew, or goods more than 450kg along with all the installed equipment and devices, whether built-in or attached to the helicopter (including the rotors) and all data, guide books and notes associated with it.⁴¹ Meanwhile, an “international interest” is an interest obtained by a creditor arising from a security agreement, the reservation agreement and/or leasing agreement that is subject to the Convention on International Interest in Mobile Equipment and the Protocol to the Convention on Interests in Mobile Equipment on Matters Specific to Aircraft Equipment.⁴²

A “security agreement” is an agreement whereby the charger of an aircraft object gives or agrees to give to the charge of the security agreement an interest (including ownership or /title) in the aircraft object in order to guarantee delivery of obligations incurred or to be incurred by the charger or third party.⁴³ Meanwhile, a “title reservation agreement” is a sale agreement for any aircraft object with a provision that ownership/title shall be transferred until the requirements under the agreement have been met.⁴⁴ A “leasing agreement” is an agreement whereby the lessor

³⁸ Protocol to the Convention on Interest Mobile Equipment on Matters Specific to Aircraft Equipment, 16 November 2001 (entered into force 1 March 2006).

³⁹ See Civil Aviation Act, *supra* note 22, art 1(2)(e)

⁴⁰ *Ibid.*, art 71, explanatory notes. See also Protocol, *supra* note 88, arts 1(2)(b)(1) and 1(2)(b)(ii)

⁴¹ *Ibid.*

⁴² *Cape Town convention*, *supra* note 85, art I(o)

⁴³ *Ibid.*, art I(ii)

⁴⁴ *Ibid.*, art I(II)

gives his/her rights to the lessee to possess the aircraft object (with or without the option to purchase) in exchange for a rent or any other payment as compensation.⁴⁵

The parties to an agreement may choose the law that will regulate their contractual rights and obligations. Based on the agreement between the parties, there may or may not be any link between the law chosen and a party to the agreement or the implementation of the obligations under the agreement. The parties to the agreement may also have the freedom to choose the court or jurisdiction of a State Party to the Convention or Protocol mentioned above, with or without any linkage between the chosen court and the parties or the transactions arising from the agreement.⁴⁶ If the agreement is subject to Indonesian laws, the agreement must be created in an authentic form containing at least the identities of all parties, the identity of the relevant aircraft objects and the rights and obligation of the parties.⁴⁷

A debtor may issue an authorization to request the annulment of the irrevocable registration and export the aircraft object to the creditor within the meaning of the Convention and Protocol for the purpose of applying for registration annulment and export of an aircraft or helicopter already displaying Indonesian registration marks and Indonesian nationality. The power of attorney for deregistration must be acknowledged and recorded by the MOC and may not be annulled without concurrence of the creditor. It will remain valid at the time the debtor declares default or if the debtor does not have the ability to pay debts. The creditor is the only party authorized to submit a request for annulment on the aircraft of helicopter registration in accordance with the terms of the request for the deregistration authorization mentioned above.⁴⁸

In the case of a breach of contract by the debtor, the debtor may submit a request to the MOC, in accordance with the power of attorney for deregistration. The registration marks and nationality of the airplane or helicopter will be cancelled or annulled no later than five working days after the request is received. The MOC and other governmental agencies will have to assist with and expedite any recovery attempts contemplated by a creditor based on such an agreement.⁴⁹

Some Indonesian airlines have taken advantage of the Cape Town convention of 2001 and its Protocol, for they contain provisions which easily facilitate aircraft financing, guarantees, and securities that are useful for fleet modernization. In terms of the economic results, this Convention has been very helpful for Indonesian airlines; between 2009 and 2013, Indonesian national airlines have procured at least 299 aircraft with the support of the Civil Aviation Act of 2009, which is supposed to incorporated the financing facilities provided by the Cape Town Convention and its Protocol. In the case of the above, and to assess how the 2009 Civil Aviation Act has been implemented (or not) in practice, it is interesting to look at one of the most successful and profitable airlines to be establish in Indonesia in recent year.⁵⁰

6. Montreal Convention of 1999

⁴⁵ *Civil Aviation Act, supra* note 22, art 71. See also *Cape Town Convention, supra* note 85, art I(q).

⁴⁶ *Cape Town Convention, supra* note 85, art 72

⁴⁷ *Ibid.*, art 73

⁴⁸ *Civil Aviation Act, supra* note 22, art 74

⁴⁹ *Ibid.*, arts 75-76

⁵⁰ Martono & Amad Sudiro in Current, *supra* note 1 page

a. A Historical Background of Montreal Convention of 1999

The Diplomatic Conference which was held by the ICAO at Montreal on May 10~28, 1999 replaced six different legal System instruments,⁵¹ with a single legal instrument. Victims of international aircraft accidents will be better protected and compensated following the historic air law agreement embodied in the Montreal Convention concluded on May 28, 1999 among the Contracting States of ICAO at Montreal, Canada. The new instrument adopted by the Diplomatic Conference on 28 May 1999 is a separate and distinct new Montreal Convention of 1999, not an amendment of the Warsaw System by means of a further Protocol.

The ICAO succeeded in adopting a new regime for air carrier liability, replacing the Warsaw Convention of 1929 and five other related legal instruments with a single convention that provided for unlimited liability in relation to passengers. The Montreal Convention of 1999 is the result of the efforts of the ICAO to reform the Warsaw Convention of 1929 through wholesale amendment rather than inter-carrier agreement.⁵² The stated goals of the Montreal Convention of 1999 were the need to modernize and consolidate the Warsaw Convention of 1929 and related instruments and recognition that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention was the most adequate means of achieving an equitable balance of interests.

The Montreal Convention of 1999 is basically the consolidation of the original Warsaw Convention of 1929 and the subsequent protocols, namely, the Hague Protocol of 1955, the Montreal Protocol Nos. 3 and 4 of 1975, the Guatemala City Protocol of 1971, and the Guadalajara Supplementary Convention of 1961. Victims of international air accidents will be better protected and compensated as a result of the historic air law agreement adopted by among the Contracting State's delegates of ICAO. From 11 to 28 May 1999 the ICAO headquarters at Montreal hosted a Diplomatic Conference convened to consider, with a view to adoption, a Draft Convention intended to modernize and replace the instruments of the *Warsaw* system. Some 525 participants from 121 Contracting States of ICAO attended,⁵³ one non-contracting State, 11 observer delegations from international organizations, a total of 544 registered participants took part in the historic three-week conference which began on 10 May.

⁵¹ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at Warsaw on 28 September 1955; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955, signed at Guatemala City, on 8 March 1971; Additional Protocol No.1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, signed at Montreal on 25 September 1975; Additional Protocol No.2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975; Additional Protocol No.3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 2 September 1955, and at Guatemala City on 25 September 1971; Additional Protocol No.4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975, see Paul Steven Dempsey. .Ed. *Annals of Air and Space Law*, Vol.XXX-2005 Part I. Toronto : The Carswell Company Ltd.

⁵² Prof. Dr. Doo Hwan Kim

⁵³) While this is a very impressive attendance, it represents only 65.4% — less than two — thirds — of the total ICAO membership which now stands at 185.

The Montreal Conference was a success since it adopted a new *Convention for the Unification of Certain Rules for International Carriage by Air*. The new Montreal Convention adopted by the diplomatic conference entered into force as soon as it had been ratified by 30 States. Fifty-two States including USA, China, EU etc. signed the new Montreal Convention at the conclusion of the historic diplomatic conference. This Montreal Convention entered into force on November 4, 2003. At present, 108 countries including the United States, the United Kingdom, Canada, France, Germany, Korea, Japan, Italy, China, Sweden, Brazil, Spain etc. are affiliated with the 1999 Montreal Convention.⁵⁴

b. Scope of Application

The Montreal Convention of 1999 applies to carriage of persons, baggage or cargo performed by aircraft for reward in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two State Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of the Montreal Convention of 1999. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

Carriage to be performed by several successive carriers is deemed, for the purposes of Montreal Convention of 1999, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under form of a single contract or of a series of contracts, and it does not lose its international character entirely because one contract or a series of contracts is to be performed entirely within the territory of the same State. Montreal Convention of 1999 applies also to combine carriage subject to the terms contained therein'

c. Compensation

The carrier is liable for damage sustained in case of death or bodily injury of passengers upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. In case of death or injury of passengers, the compensation will not exceed 100,000 Special Drawing Rights (SDR) for each passenger, and the carrier cannot exclude or limit its liability.

The carrier is not be liable for damages in case of death or injury of passengers, to the extent that they exceed for each passenger 100,000 (SDR) if the carrier proves that (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; (b) such damage was solely due to the negligence or other wrongful act or omission of a third party. With regard to the Air Asia QZ8501 crash, the compensation does not apply taking into account that Indonesia has not ratified the Montreal Convention of 1999.

⁵⁴) http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf

d. Advance Payment

In accordance with Article 38 of the Montreal Convention of 1999, that in the case of aircraft accidents resulting in a passenger's injury or death, if required by its national law, the air carrier shall provide advance payments without delay in order to assist entitled persons in meeting immediate economic needs. The amounts paid will be deductible from the final settlement and do not constitute a recognition of liability. In relation to this provision, the Conference also adopted a Resolution that encouraged States to take appropriate measures, under their respective national law, to promote such action by carriers.⁵⁵

e. Insurance Liability

A mandatory insurance requirement is set forth at Article 50 of the Montreal Convention of 1999. At the core of this provision is the right of any State Party to request, from an air carrier operating into that State, to furnish evidence to the effect that adequate insurance coverage is maintained by the carrier. Proposed by the ICAO Legal Bureau and supported by the study group and later by the SGMW, a mandatory insurance clause had become, at least in principle, a matter of consensus during the preparatory stages of the Convention. It is expected that the heightened degree of vigilance resulting from this clause and the involvement of the insurance sector will have a positive effect for the overall safety of air transport operations.⁵⁶

f. Jurisdiction

With regard to jurisdiction, an action for damages must be brought, at the option of the plaintiff, in the territory of one of the State Parties, either

- (a) before the court of the domicile of the carrier; or
- (b) before the court of its principal place of business, or
- (c) before the court where it has a place of business through which the contract was made; or
- (d) before the court at the place of destination.

In addition, in respect of damage resulting from the death or injury of a passenger, an action may be brought in the territory of a State Party in which at the time of the accident the passenger had his or her principal and permanent residence and or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement. In this regard "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air, whilst "principal and permanent residence" means the one fixed and permanent abode of the passenger shall not

⁵⁵ Ludwig Weber and A. Jakob, *The Modernization of the Warsaw System : The Montreal Convention of 1999*, in Milde M.Ed., *Annals of Air and Space Law*, Vol.XXIV-1999. Toronto : The Carswell Company Ltd, p.343

⁵⁶ *Ibid.*,p.345

be the determining factor in this regard. In relation to Air Asia QZ8501 the fifth jurisdiction does not apply because Indonesia has not yet ratified Montreal Convention of 1999.

g. Ratification of Montreal Convention of 1999

With regard to ratification of Montreal Convention of 1999, basically, after Focus Group Discussion (FGD) in which participated by Prof. L. Weber (Legal Adviser of the DGAC) in Solo, Central Java, on 5 October 2015 Indonesia intends to ratify the Montreal Convention of 1999. This focus discussion participated from airlines, Indonesian National Air Carriers Association (INACA), International Air Transport Association (IATA), Supreme Court, Law and Human Rights Ministry, Foreign Affairs Ministry, the Directorate General of Air Communications (DGAC) and other stakeholders related to aviation activities. Actually, for the purpose of ratification has been prepared legal drafting to fulfill the formalities file to the Parliament of the Republic of Indonesia (ROI).