



The Enforceability of Interim Relief (Repossession) Under the Cape Town Convention and the Indonesian Aviation Law in Practice

Background

The Convention on International Interests in Mobile Equipment ("Cape Town Convention") and Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment ("Protocol") were concluded in Cape Town on 16 November 2001, and entered into force on 1 March 2006. They are to be read and interpreted as one instrument.

Aiming to improve legal certainty in the aircraft business, the Cape Town Convention and the Protocol are designed to reduce risks for creditors and consequently, reducing the leasing costs of their borrowers. This should lead to granting more credit for the acquisition or leasing of more modern and efficient aircraft.

On 20 February 2007, Indonesia ratified the Cape Town Convention under Presidential Regulation No. 8 of 2007 ("PR 8/2007"), and applies all the provisions of Article X of the Protocol, which are related to Article 13 of the Cape Town Convention and supposedly, overcome several important issues related to "relief pending final determination". A creditor (lessor or chargor) is therefore legally entitled to "speedy relief" from a court under a certain court order pending the final ruling on the lawsuit.

Of all the reliefs available, this advisory only discusses the legal issues associated with applying for relief in the form of the repossession of aircraft and only from the lessor's perspective.

Practical Legal Issues

As a result of ratifying the Cape Town Convention, Indonesian Law No. 1 of 2009 on Aviation ("Aviation Law") acknowledges the eligibility of a creditor (lessor) to obtain "speedy" interim relief from the courts to, among other things, request the repossession of its aircraft from a defaulting debtor (see Article 13 of the Cape Town Convention *jo.* Article 79 of the Aviation Law *jo.* PR 8/2007) within 10 (ten) calendar days.

Despite Indonesia's decision to apply Article X of the Protocol, several legal issues have been left unresolved by the Aviation Law which affects its enforceability in practice. The following issues under Article 79 (1) of the Aviation Law could hinder the enforceability of the clause. Below is an excerpt from Article 79 (1) of the Aviation Law:

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Article 79 (1) of the Aviation Law:

"In the event the debtor breaches the agreement, the creditor may obtain an order from a district court for interim relief based on the agreement referred to in Article 71 without first submitting a lawsuit on the merits of the case to enforce its claims in Indonesia and without having all the parties undergo mediation ordered by the court."

The Elucidation of Article 79 (1) of the Aviation Law:

"What is meant by a "district court" is a court of the country chosen by the parties concerned or the Indonesian district court with relative jurisdiction, in the event no choice of court is stated in the agreement."

1. Timeframe, Parties and Legal Procedure (*Hukum Acara*)

1.1. Timeframe

The question is, is it possible in practice, for the Indonesian District Court of first instance to complete hearings in 10 days as of receipt of the registration of the petition referred to in the Aviation Law given that the Court must summons the parties and then hold the hearings? Does the time limit under this law apply to a petition for interim relief if the domiciles of the petitioner and other relevant parties are not the same or within the jurisdiction of the Indonesian District Court which must decide on the petition for interim relief given that the Court must first summons the relevant parties?

Further, although it sets a time limit for the court of first instance, the Cape Town Convention and the Aviation Law are silent on any time limit for the court of appeal (in Indonesia, the Supreme Court) to hand down its ruling if the debtor appeals against the ruling of the court of first instance. In practice, obtaining a ruling from the Supreme Court usually takes more than one year. This loophole in the regulation effectively eliminates the "speedy" aspect intended by the Cape Town Convention and the Aviation Law.

Furthermore, due to the absence of a clear procedure for filing for interim relief, the following procedural matters are left unexplained:

1.2. Parties

Under Article 79 of the Aviation Law, it is clear that interim relief is to be requested by submitting a petition, not a lawsuit. However, there is no further regulation which explains whether the petition is a voluntary petition or a contentious petition.

1.3. Procedure

The court deciding on the petition has no specific administrative procedure to follow to meet the short deadline under the Aviation Law. For example, there is no guideline for when the court must appoint a judge to decide on the petition or when the court must summons the parties involved. In practice, it takes at least a week for a court summons to reach the summonsed party, or three weeks if the summonsed party is not domiciled in the same city as the court. Given this, it is unlikely that the short deadline can be met.

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- A Debtor's Default Without a Court Ruling

Although it is understandable that to achieve "speedy" court relief, the interim relief must be granted pending the final ruling on a lawsuit. In practice, given that an aircraft business dispute will likely involve complex business transactions and the short deadline for trying disputes, the courts can be expected to be reluctant to grant relief without having a legally binding ruling at hand.

Moreover, since the Aviation Law does not limit the definition of a "default", ideally, it should be interpreted that a "default" occurs if the conditions under the event of default clause of the lease agreement are met. The debtor will use this issue as their argument to reject the interim relief. Nevertheless, the creditor can also respond that the court trying the interim relief should be able to decide right away whether the debtor is in default or not, and hand down the interim relief afterwards, as long as the debtor failed to perform its obligation as described in the event of default clause in the aircraft lease agreement. This should be in line with the purpose of obtaining the interim relief under the Aviation Law.

- The Debtor's Consent

Under Article 13 of the Cape Town Convention, one of the requirements for granting the creditor relief is the debtor's consent. Although this requirement is not acknowledged under Article 79 of the Aviation Law, a debtor may still argue referring to the Cape Town Convention, that without its consent, the creditor cannot obtain relief.

- Determining the Court with Jurisdiction

Under the Cape Town Convention, a court can be (i) a court of law or (ii) an arbitral tribunal. However, according to the elucidation of Article 79 of the Aviation Law, the court authorized to grant repossession (and immobilization) relief is the district court chosen by the parties or if none, the Indonesian district court with jurisdiction over where the airframe(s) and aircraft engine(s) are located. Moreover, since Article 79 also refers to mandatory mediation, it should be interpreted that Article 79 refers to a district court, not an arbitration body. Enforcement of Article 79 can be problematic.

First, if the chosen district court is a foreign court, the court foreign ruling will not be directly enforceable in Indonesia.

Second, since the request for the immobilization of the disputed aircraft should also be submitted to the district court with jurisdiction over where the airframe(s) and aircraft engine(s) are located, unless there is a choice of jurisdiction, the creditor will have difficulty determining the district court with jurisdiction as by their nature, airframes and aircraft engines do not have a fixed location.

- The Execution of the Court Order

If a lessor does obtain a favorable repossession interim relief court order, it will still face obstacles when trying to execute the court order because Indonesian court bailiffs can only execute court rulings, not court orders.

Because the prolonged execution of interim relief can be detrimental to the aircraft, ideally, considering the speedy relief principle and how long an appeal to the Supreme Court can take, we believe the court should grant an *uitvoerbaar bij voorraad* (immediately executable) request although the Aviation Law is silent on this matter.

Conclusion

Although it has been more than 10 years since the Indonesian Government ratified the Cape Town Convention and its Protocol, and enacted the Aviation Law, in practice and to our knowledge, we have yet to see a single interim relief petition granted by the Indonesian courts for the repossession of aircraft under Article 13 of the Cape Town Convention *jo.* Article 79 of the Aviation Law. Given that there is no precedent and the short deadline for the judge to decide on the default element, judges can be expected to declare the petition as inadmissible than granting it.

To overcome the above legal issues, issuing implementing regulations to resolve the above issues are imperative, such as one empowering the relevant government authority to ground legally disputed aircraft without a court order/ruling upon a request from the owner of the aircraft, establishing a timeframe for the District Courts and the Supreme Court to issue their decisions on interim relief petitions, and grant an *uitvoerbaar bij voorraad* request for interim relief petition.

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