

JURIDICAL STUDY OF THE USE OF AIRCRAFT AS MATERIAL COLLATERAL OBJECTS IN TERMS OF THE LAW OF GUARANTEES

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Abstract

This study aims to review; 1) What is the form of aircraft property status in guarantee law in Indonesia? 2) Implementation of Aircraft Guarantee in Indonesia Based on Guarantee Law?. The research method used is normative juridical research, which is research focused on examining the application of rules or norms in positive law. The results showed that; 1) When viewed from the nature of moving aircraft, aircraft are classified into moving objects and resulting in provisions governing them are civil law regarding moving objects. However, according to Mieke Komar Kantaatmadja, the legal nature of aircraft as objects is different from moving objects in general because aircraft must be registered and have a national mark. This is why legal experts give an exception to the status of aircraft as movable objects that have special arrangements and call it moveable *property sui generis*. *This sui generis* hints at the special characteristics of its own aircraft. 2) The regulation of the imposition of material guarantees on aircraft is not regulated in the Aviation Law, in Article 71 of the Aviation Law explains that "Aircraft objects may be burdened with international interests arising from agreements granting property security rights, conditional rights binding agreements, and/or lease agreements.

Keywords: Review, Juridic, Use, Aircraft, Object, Guarantee, Material, Law of Guarantee.

INTRODUCTION

Background

Indonesia, which used to have laws and regulations on aircraft, namely Law Number 15 of 1992 concerning Aviation (hereinafter referred to as the old aviation law) was the starting point that the Government of Indonesia at that time was serious in developing this country. According to the old aviation law article 1 number 3 namely "*Aircraft is any device that can fly in the atmosphere due to the lift force of the reaction of air*". Then, in 2009 a new aviation law was passed, namely law number 1 of 2009 concerning Aviation. Through article 456 of the aviation law, with the enactment of the new aviation law immediately the old aviation law was declared repealed and invalid.¹

Procurement of aircraft is a matter that requires large costs. Boeing aircraft with type 737, one of the best-selling Boeing aircraft types, sold at the cheapest price of US \$ 89.1 million or equivalent to Rp 1.2 trillion per unit with type 737-700 and the latest type, Boeing 737 MAX 8 sold for US \$ 121.6 million or equivalent to Rp 1.7 trillion per unit. Because the procurement of aircraft requires very large financing, the existence of external sources of funds outside the founder's capital and company cash is an inevitable factor. It can even be said that it is impossible to meet the needs of the company's own aircraft procurement.² So airlines must find funding sources by utilizing the services of financing institutions through leasing mechanisms.

Parties involved in leasing financing include leasing companies (lessors) as leasing parties to leasing objects, and airline companies (lessee) as lessees or parties who obtain leasing objects. Lessees who finance through leasing can save costs because they avoid taxes, maintenance costs, and insurance.³ The Lessee in acquiring the capital goods does not have to buy but can enjoy the economy of the goods where the ownership rights of the leasing object remain on the lessor while the physical control of the goods is in the hands of the Lessee. Therefore, leasing companies as creditors need certainty that the airline / debtor will carry out its obligations, including paying rent or payment installments so that in the financing process through leasing, it uses collateral institutions.

Registration marks must be owned by an aircraft, as contained in Article 24 of Law Number 1 of 2009 concerning Aviation. Matters concerning the registration of aircraft rights, assignment of rights, designation of property security rights, privileged claims, and confiscation are based on the determination of where the legal status of the aircraft is registered to obtain a national mark. Aircraft that have been registered and have Indonesian nationality marks, then legal regulations regarding property security rights, transfer of rights and confiscation are enforced by Indonesian law that regulates it.⁴

Based on Article 71 of Law Number 1 of 2009 concerning Aviation states that: "*Aircraft objects may be burdened with international interests arising from agreements granting property security rights, conditional rights binding agreements, and/or lease agreements.*"

The phrase "agreement granting property security rights" in the above provisions is the basis that the object of guarantee can be an aircraft, but Law Number 1 of 2009 does not specify with certainty what material guarantee institutions may be imposed on aircraft. In Indonesia, various kinds of material guarantee institutions are known, namely mortgages, liens, liens, and fiduciaries. There is no regulation on material guarantees that explicitly regulates the material guarantee institutions to be imposed on aircraft.⁵

Problem Statement

1. What is the form of aircraft property status in guarantee law in Indonesia?
2. Implementation of Aircraft Guarantee in Indonesia Based on Guarantee Law?

Theoretical Framework

The main theory or *Grand Theory* that is the basis of the analysis knife in this study is the Theory of Banking Law. The definition of a bank according to Law No. 10 of 1998 concerning amendments to Law No. 7 of 1992 concerning banking is a business entity that collects funds from the public in the form of deposits and distributes them to the public in the form of credit and/or other forms in order to improve the standard of living of many people.⁶

And explained in Law Number 21 of 2008 which states that banks with conventional principles are banks that carry out their business activities conventionally whose activities provide services in payment traffic. In carrying out its activities, conventional commercial banks apply

two methods, namely setting interest on selling prices and purchase prices on their products or known as spread based, and applying fees in other services known as fee based.⁷

Furthermore, *Middle Theory* in this study uses the Hierarchy Theory of Legislation. Hans Kelsen in the "General Theori of Law and State" translation of the general theory of law⁸ and state elaborated by Jimly Assihiddiqie⁹ under the title Hans Kelsen's theory of law among other things that legal analysis, which reveals the dynamic character of the system of norms and the functions of basic norms, also reveals a further peculiarity of law: law governs its own formation because one legal norm determines the way to create another legal norm, and also to some degree, determine the content of the other norms. Because, one legal norm is valid because it is made in a way determined by another legal norm, and this other legal norm is the basis for the validity of the first legal norm.

Legal regulations regarding guarantees seem to be focused only on regulating the rights of creditors, and do not pay attention to the rights of debtors. Even though the subject of guarantee law study does not only concern creditors, but is closely related to debtors, because the object of guarantee law study is collateral objects from debtors. It can be explained that the law of guarantee is "the entirety of the legal rules governing the legal relationship between the grantor and recipient of the guarantee in relation to the imposition of collateral to obtain a credit facility".¹⁰ Because of the above risks that are not accompanied by the development of Guarantee Law in Indonesia, it is sufficient to state that the Guarantee Law system, especially in aircraft guarantees in the Aircraft Law in Indonesia, does not have good legal certainty. Therefore, legal certainty is needed in the regulation regarding aircraft guarantees in an effort to protect the law, so that the rights and obligations of each party can be fulfilled.

With legal certainty, it will guarantee that someone can carry out a behavior that is in accordance with the provisions in the applicable law and vice versa. Without legal certainty, an individual cannot have a standard provision for carrying out a behavior. In line with this goal, Gustav Radbruch also explained that legal certainty is one of the goals of the law itself.¹¹

According to Sudikno Mertokusumo, legal certainty is a guarantee that the law must be carried out in a good way. Legal certainty requires legal regulation efforts in legislation made by authorized and authoritative parties, so that these rules have a juridical aspect that can guarantee certainty that the law functions as a regulation that must be obeyed.¹²

RESEARCH METHODOLOGY

This research was prepared using a type of normative juridical research, which is research focused on examining the application of rules or norms in positive law.¹³ Normative Juridical, which is an approach that uses a positivist legis conception. This concept views law as identical to written norms created and promulgated by authorized institutions or officials. This conception views law as a normative system that is independent, closed and independent of real community life.¹⁴ In legal research there are several approaches, the approaches used in legal research are *the statute approach*, *case approach*, *historical approach*, *comparative approach*, and *conceptual approach*.¹⁵

RESEARCH RESULTS

Forms of Aircraft Property Status in Guarantee Law in Indonesia

The Chicago Convention is a convention governing international civil aviation, this convention applies only to civil aircraft and does not apply to state aircraft.¹⁶ An aircraft is any machine or device that can fly in the atmosphere due to lift from the reaction of air, but not because of the reaction of air to the earth's surface used for flight. Another definition of Aircraft according to the Chicago Convention in *Annex 7* is any engine that can support in the atmosphere from air reactions other than air reactions to the Earth's surface.¹⁷ In addition to aircraft, other terms used in the Aviation Act are airplanes and helicopters. Airplanes are heavier-than-air, fixed-wing, and self-powered aircraft. A helicopter is a heavier-than-air, rotary-winged aircraft whose rotors are driven by engines.¹⁸ As provided in *Annex 7 of the 1944 Chicago Convention* modified 1967 must be supplemented by the limitations accepted in Article XVI of the 1948 Geneva Conventions. An aircraft shall include the fuselage, engines, propellers, radio devices, and all other items intended for use in the aircraft to which it is fitted or temporarily separated from it.¹⁹ From this understanding, it can be concluded that airplanes and helicopters are part or can be said to be aircraft.

In Article 1 paragraph 3 of the Aviation Law, it is stated that the definition of an aircraft is any machine or device that can fly in the atmosphere due to lift from air reactions, but not because of air reactions to the earth's surface used for flight. In addition to aircraft, other terms used in the Aviation Law are aircraft and helicopter. An airplane is a heavier-than-air, rotary-winged aircraft whose rotors are driven by engines.²⁰

When viewed from the nature of moving aircraft, aircraft are classified into moving objects and resulting in provisions governing them are civil law regarding moving objects. However, according to Mieke Komar Kantaatmadja, the legal nature of aircraft as objects is different from moving objects in general because aircraft must be registered and have a national mark. This is why legal experts give an exception to the status of aircraft as movable objects that have special arrangements and call it moveable *property sui generis*. *This sui generis hints* at the special features of its own aircraft character.²¹ In its development, some civil law experts began to have the view that the current classification of objects, especially regarding movable and immovable objects, is considered irrelevant to the reality and interests faced today.

In its development, some civil law experts began to have the view that the current classification of objects, especially regarding movable and immovable objects, is considered irrelevant to the reality and interests faced today. The need now is to add a distinction between registered and unregistered objects that can be applied to movable and immovable objects.

The same thing has also been stated by the National Legal Development Agency (BPHN) in the Text of the Bill of Objects, which proposes that the classification of objects is divided into:

1. Land objects, registered and unlisted
2. Non-land, registered and unregistered objects
3. Tangible or intangible, registered and unregistered movable objects

BPHN's opinion is very realistic where reality shows that moving objects can be classified into registered and unregistered objects. If movable objects are registered with collateral, then mortgage institutions are used.²²

Material security is absolute power over certain assets that are objects of guarantee with the aim of one day being sold to obtain debt repayment money if the debtor does not carry out its obligations. Property security contains *preferential rights*, which hand over the right to creditors to take precedence in repaying debt payments from the auction of debtors' assets which are the object of guarantee as if bankruptcy did not take place because the objects subject to collateral were not included in the *bankruptcy boedel*.

Currently, Indonesia recognizes various material guarantees, including:

1. Pawns whose arrangements are contained in Article 1150 – Article 1160 of the Civil Code
2. Fiduciaries whose arrangements are contained in Law Number 42 of 1999 concerning Fiduciary Guarantees
3. Right of Dependents whose regulation is contained in Law Number 4 of 1996 concerning Rights of Dependents on Land and Objects Related to Land
4. Mortgages whose arrangements are contained in Article 1162 – Article 1178 of the Civil Code.

The four material guarantee institutions above have their own characteristics that distinguish them, one of the most important is about the criteria for objects that can be used as collateral objects. Material guarantee institutions that are often used for the implementation of collateral charges with aircraft objects are mortgages and fiduciaries. Article 1162 of the Civil Code states that:

"A mortgage is a material right over immovable property, to take substitution thereof for the repayment of an engagement."

Then it was reaffirmed by the provisions of Article 1164 letter (a) of the Civil Code which states that mortgages can only be charged against immovable objects that can be moved and transferred. Both Articles regulate the object of mortgage security is immovable property, which consists of immovable property because of its nature, designation, and because of the law.

In its development in developed countries, such as in England, the United States and also the Netherlands in property law according to the regulations in each of these countries has made a distinction between registered and unregistered objects. In the Civil Code, it is mentioned about registered objects (*registergoederen*), namely objects that are objects registered at the place of general registration or general register (*openbare register*), which registration has absolute properties for the registered object, because it has a publicity aspect. Registration of a registered object proves ownership of the object.²³

Aircraft operated in Indonesia must bear a registration mark.²⁴ Without a registration mark, it is clear that an aircraft cannot function as a means of air transport, nor will it be possible to obtain an Indonesian nationality mark. So aircraft registration is a functional necessity that must be carried out by the manager according to the desired designation in order to operate. The act of registering an aircraft other than for inherent functional purposes, will also result in civil aspects of the aircraft as a legal object.

In Indonesia, Article 24 of Law Number 1 of 2009 requires registration for every aircraft operating in Indonesia. Article 25 of Law Number 1 of 2009 mentions civil aircraft that can be registered in Indonesia, including:

1. Does not have another country's registration mark;
2. The ownership is owned by an Indonesian citizen (WNI) or an Indonesian legal entity;
3. The ownership is owned by a foreign national (WNA) or foreign legal entity but operated by an Indonesian citizen or Indonesian legal entity for at least 2 consecutive years of use based on an agreement;
4. Its ownership is owned by government institutions, both central and regional, and the aircraft concerned is not used for law enforcement purposes; or
5. Its ownership is owned by foreigners or foreign legal entities controlled by Indonesian legal entities based on an agreement regarding the supply, charter, and/or trade of law-abiding aircraft mutually agreed upon by the parties.
6. All tax obligations related to aircraft imports have been fulfilled under Indonesian law.

Aircraft operating in Indonesia are required to have a registration mark as stipulated in Article 24 of Law Number 1 of 2009. Aircraft that have registration marks result in the aircraft being likened to an immovable object. In addition, when looking at aircraft in terms of total weight exceeding 20m³, it strengthens the previous description that aircraft are also included in the category of immovable objects similar to ships. Article 314 of the Criminal Code states that:

"Indonesian ships measuring more than 20m³ can be recorded in a ship register. On ships recorded in the ship register, ships on the books and shares in ships may be put mortgages."

Registration is carried out with the aim of notifying third parties about the legal relationship of the object concerned with several parties, and third parties are obliged to respect the contents of the notice. In addition, the effect of the registration is the problem of registration (registration) of rights to an aircraft, transfer of rights, determination of property security rights, special claims, and division subject to the law in which the aircraft is registered and obtains a nationality mark. Thus, if an aircraft has an Indonesian nationality mark, it is subject to the laws of the State of Indonesia, one of which is regarding the determination of material security rights²⁵

The aircraft registration mark is issued by the aviation authority authorized for it in each country, in Indonesia the authority belongs to the Director General of Civil Aviation, Ministry of Transportation of the Republic of Indonesia.²⁶ Therefore, considering that the existence of aircraft in the aviation industry requires registration as required in the provisions of legislation in Indonesia, it is no longer relevant if aircraft are categorized as movable objects as the size applied by the Civil Code, this is also realized by the framer of the Aviation Law. Outwardly / physically, an aircraft is a movable object, but functionally new, then if the aircraft has been registered and has a nationality. The pattern of registration then distinguishes the position of the aircraft to be irrelevant to qualify as a moving object, despite the nature of being able to move places. Then another result, aircraft are no longer subject to provisions regarding moving objects, because of their distinctive nature. For example, it is no longer subject to guarantee rules for movable objects. Conversely, if it is categorized as an immovable object, because it is no longer considered a moving object, because it is no longer considered a moving object, it is also inappropriate.

The aircraft itself that has been registered acquires property rights, then it will have the nature of *Sui Generis*, that is, if the aircraft has been registered, it can be burdened with collateral rights. To obtain *Sui Generis* properties, the aircraft must be registered nationally and internationally through: <https://www.internationalregistry.aero>, it is also mandatory to record it at the Directorate of Airworthiness and Aircraft Operation (DKUPPU) at the Directorate General of Civil Aviation, but this second stage is only administrative.²⁷

Implementation of Aircraft Guarantee in Indonesia Based on Guarantee Law

Given that aircraft and ships have almost similar characteristics, mortgages can also be placed on aircraft just as mortgages can be placed on ships with a displacement of at least 20m³. However, the main obstacle in the implementation of aircraft mortgage charges is that there are no clear regulations. Mortgages are used with the intention of providing protection of creditors' interests for the payment of receivables by debtors. However, in fact, the implementation of aircraft mortgage charges does not provide protection to creditors because in the process it never gives birth to material collateral.²⁸

The birth of material guarantees is based on the application of the Publicity Principle, namely that all material guarantees must be registered with the aim of providing information to third parties that the objects used as objects of guarantee are subject to guarantees. Similarly, the provisions of Article 1179 of the Civil Code have explained that:

"The bookkeeping of all mortgage engagements shall be made in the general registers provided for it. If such bookkeeping is not done, then a mortgage has no power whatsoever, even against debtors who do not have a mortgage bond."

The provision expressly states that the encumbrance of a mortgage must be registered and if such registration is not made, then the mortgage has no meaning whatsoever. That is, the creditor does not have the right of parate execution where the creditor has the authority to confiscate the collateral object when the debtor does not perform his obligations.

In practice, every aircraft mortgage charge is indeed reported to the Directorate General of Civil Aviation, Ministry of Transportation of the Republic of Indonesia to be recorded in the aircraft Recordation Book in a transparent manner that can be seen by the general public. However, the recording carried out by the Directorate General of Civil Aviation is different from the recording listed in Article 1179 of the Civil Code because the recording by the Directorate General of Civil Aviation does not produce a Grosse Mortgage Deed as proof of property rights, but simply issues a Certificate announcing that data collection of aircraft mortgages has been carried out in the aircraft *Recordation* Book.

Regarding the conditions of imposition, there are several important articles that need to be stated here, including:

Article 2 states that an aircraft that can be encumbered with a mortgage is an aircraft that already has an Indonesian registration and nationality mark. This provision is mentioned in Article 12 of Law No. 15 of 1992. Then Article 3 states that:

1. An aircraft mortgage must be made in the form of an authentic deed, this also relates to Article 1171 BW;
2. Authentic Deed as referred to in paragraph (1) is a deed made before an official appointed by Ministerial Decree;
3. The costs related to making a mortgage deed as referred to in paragraphs (1) and (2) shall be determined by the Minister.

Regarding the practice of loading aircraft with fiduciaries, the provisions of Law Number 42 of 1999 state that the object of fiduciary guarantee consists of:

1. Tangible moving objects
2. Intangible moving objects
3. Immovable objects in the form of buildings that cannot be encumbered with the right of dependents.

Furthermore, in Article 5 paragraph (3) of the Government Regulation on the Recording of Aircraft Mortgages and other Property Rights, also in Article 7 paragraph (2) of the Concordance, the conditions that must be met by aircraft mortgage registrants are as follows:²⁹

1. Proof of ownership of aircraft issued by the Minister or a copy of the "*bill of sale*" or other copies of proof of ownership;
2. A copy of the debt-receivable agreement between the debtor and the bank or other financial institution acting as a creditor;
3. A copy of the mortgage deed made before a notary or an official appointed by the Minister;
4. A copy of the registration mark and nationality of the aircraft issued by the Minister;
5. Proof of payment of aircraft mortgage listing fee;
6. Copy of proof of aircraft insurance agreement, if the aircraft concerned is insured.

In the Explanation to Article 7 paragraph (2) of the Concordance, it is stated that the conditions mentioned above must be met by aircraft mortgage registrants to provide legal certainty and supervision. According to Article 1171 BW, a mortgage must be made by an authentic deed meaning a deed made before an official authorized to make an authentic deed. Given that in practice so far the official related to aircraft is the Minister or an official appointed by the Minister, it is considered appropriate if the aircraft mortgage deed other than made before a notary can also be made before the Minister or an official appointed by the Minister or an official appointed by the minister. Then according to Article 6 of the Government Regulation on Mortgage Registration, other guarantee agreements other than mortgages must be recorded in the mortgage registration book and must be made in the form of an authentic deed.³⁰

When assessing an aircraft by its nature and form, it is classified as a tangible object that moves and is moved so that it meets the qualifications as an object of fiduciary guarantee. However, Article 3 of Law Number 42 of 1999 expressly regulates the prohibition to carry out the binding of aircraft guarantees as a whole. As a solution, aircraft are not charged with fiduciaries over the entire aircraft, but rather the components of the aircraft separately. Further researching, in the provisions of Law Number 42 of 1999 there is no prohibition to impose guarantees on all movable goods that make up one aircraft, meaning that components in an aircraft structure can be used as objects of debt guarantee with fiduciary imposition.

In the process of loading aircraft components with fiduciaries, registration must be carried out as fulfillment of the principle of publicity. In contrast to the imposition of mortgages on aircraft that experience difficulties in the mortgage registration process due to the absence of provisions governing which institution is authorized as the place of mortgage registration, Article 14 of Law Number 42 of 1999 has stipulated that the Fiduciary Registration Office is an institution authorized to accept registration of all fiduciary guarantee objects without exception and issue a Fiduciary Guarantee Certificate for aircraft components that will handed over to the finance company as a fiduciary beneficiary.

Fiduciary encumbrance of aircraft components will provide creditors with protection based on clear laws and regulations. However, the imposition of fiduciary guarantees on aircraft components has risks and disadvantages, including aircraft components are very easy to move and move, both at home and abroad, resulting in obstacles for creditors when they will confiscate the collateral object if the debtor does not carry out its obligations. Thus, in the implementation in Indonesia, the binding of material guarantees on aircraft (as a whole) cannot be carried out but the implementation of binding material guarantees on aircraft components separately using fiduciary guarantees.³¹

In the end, the implementation of aircraft guarantee imposition in Indonesia is currently carried out by referring to the provisions of international conventions which are then re-agreed between the parties and implemented based on the agreement of the parties. This results in the creditor's position only as a concurrent creditor who is equated with other creditors and does not have the privilege to prioritize the repayment of receivables. Such a situation results in creditors not having protection and certainty for their receivables and the creditor's position as a concurrent creditor is weak. The *2001 Cape Town Convention* stipulates the protection of creditors in terms

of executing collateral objects by revoking aircraft registration marks and holding aircraft sales abroad (*export*) suddenly or suddenly without the need for a court decision first or called IDERA (*Irrevocable Deregistration and Export Request Authorization*), but in its implementation related to IDERA, it still needs to be agreed in advance that the debtor will provide a power of attorney that is not allowed to be recalled, in which the power of attorney contains authorization to the creditor to revoke the registration mark and carry out the sale of aircraft abroad (*export*).

So it can be concluded that the regulation of imposing material guarantees on aircraft is not regulated in the Aviation Law, in Article 71 of the Aviation Law explains that "*Aircraft objects can be burdened with international interests arising from agreements granting property security rights, conditional rights binding agreements, and/or lease agreements*".

The implementation of aircraft guarantees based on the agreement is solely carried out based on the principle of good faith related to the integrity of the parties, namely carrying out their respective obligations and responsibilities contained in the agreement and has been agreed with the aim of maintaining the good name and reputation of each party in the business community so that they can be trusted if they want to carry out a cooperation or agreement.³²

In imposing guarantees on aircraft, it is also necessary to pay attention to the risks when making aircraft as collateral objects, including.³³

1. The decrease in the value of aircraft technical shrinkage caused by the constant use of aircraft so that aircraft prices rely on aircraft maintenance and repair;
2. The magnitude of the probability of an aircraft having an accident caused by something other than the aircraft itself, resulting in the collateral object suffering heavy damage or even destruction;
3. Aircraft are constantly on the move, which can make it difficult for creditors to confiscate the aircraft;
4. In the country concerned, in this case Indonesia, there is very little market share for used aircraft;
5. In many countries there are still no arrangements for the necessity of civil recording of property rights imposed on aircraft, resulting in the possibility that security rights holders or creditors are not recognized according to local law;
6. The arrangement of storing aircraft components is separate from the aircraft so that it will be difficult to use the same assurance system to guarantee aircraft components with the aircraft concerned.

The amount of risk inherent in aircraft does not close the interest of aircraft as an object of guarantee so that it is a necessity between creditors and debtors to obtain legal certainty through an institution of collateral rights that according to law can be placed on aircraft as collateral objects.³⁴

CONCLUSION

Based on the results of research and discussion, several things can be concluded as follows:

1. When viewed from the nature of moving aircraft, aircraft are classified into moving objects and resulting in provisions governing them are civil law regarding moving objects. However, according to Mieke Komar Kantaatmadja, the legal nature of aircraft as objects is different from moving objects in general because aircraft must be registered and have a national mark. This is why legal experts give an exception to the status of aircraft as movable objects that have special arrangements and call it moveable *property sui generis*. *This sui generis hints* at the special features of its own aircraft character.
2. The regulation of the imposition of material guarantees on aircraft is not regulated in the Aviation Law, in Article 71 of the Aviation Law explains that "Aircraft objects may be burdened with international interests arising from agreements granting property security rights, conditional rights binding agreements, and/or lease agreements".

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