International Journal of Law
www.lawjournals.org
ISSN: 2455-2194
Received: 25-01-2023, Accepted: 09-02-2023, Published: 27-02-2023
Volume 9, Issue 1, 2023, Page No. 226-230

Legal reconstruction of fiduciary collection imposition in lease financing agreements to realize just and legal leasing agreements

Gunarto[1*], Tajuddin Noor[2], Anis Mashdurohatun[1]
[1] Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia
[2] Doctorate Student, Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

Abstract
The purpose of this study is to find out the weaknesses of the regulation on the imposition of fiduciary guarantees on current leasing agreements, as well as to find out the legal reconstruction on the imposition of fiduciary guarantees to realize fair and legal leasing agreements.
From the research results it can be seen that the regulation regarding the imposition of fiduciary guarantees in leasing agreements has not been based on the value of justice and legal certainty for the parties in accordance with the principles of the agreement, the concept of leasing, and the principle of fiduciary guarantees. The weakness in imposing fiduciary guarantees is that the process for providing guarantees is not in accordance with the legal principles of fiduciary guarantees in the case of parties entitled to provide fiduciary guarantees. Reconstruction of regulations on the imposition of fiduciary guarantees on leasing agreements, namely in Article 3 paragraph (1) PMK No. 84 of 2006 stipulates that the use of option rights can only be carried out at the beginning of a leasing agreement, Article 3 paragraph (2) objects that can be used as objects of transactions are objects in the form of capital goods and Article 3 paragraph (3) stipulates that the imposition of fiduciary guarantees can only be carried out by the *lessee* on goods the property of the *lessee*.

Keywords: legal reconstruction, fiduciary, lease, justice

Introduction

One of the types of business activities carried out by finance companies as stipulated in Presidential Decree No. 9 of 2009 concerning financing institutions and Minister of Finance Regulation No. 84/PMK.012/2006 concerning finance companies is financing in the form of leasing or better known in the community as leasing financing. In principle, leasing is present in the midst of the community (Business Actors) as a financing alternative that makes it easy for the community (Business Actors) to run their business in the procurement of goods or business capital (Dines, 2022) [2].

In leasing finance companies, the entrepreneur (*lessee*) does not need to provide collateral, because the assets obtained through leasing financing can be used as collateral by the leasing finance company (*lessor*).

In the leasing agreement, the leasing company also requires certain guarantees as an effort to provide protection to the leasing company from possible losses that will be experienced if the *lessee* defaults, namely by not carrying out the obligations agreed in the leasing agreement (leasing).

Charging with a fiduciary guarantee is a form of collateral used in leasing financing as an additional guarantee to provide a sense of security for the leasing finance company (*lessor).*

Using the legal construction of imposing fiduciary guarantees on financing by leasing will cause injustice and legal uncertainty in its implementation, due to the incompatibility of the leasing concept and also the fiduciary guarantee institution in its application.

In the concept of leasing, the owner of the object that becomes the object of leasing is the *lessor*, not the *lessee*. This is as stated in Article 3 paragraph 3 of the regulation of the Minister of Finance Number 84 of the PMK 012/2006 concerning finance companies which states that as long as the leasing agreement is still valid the ownership rights to the capital goods object of the leasing transaction are with the company. financing (*lessor*) While the correct construction of fiduciary guarantees in leasing transactions should be the *lessee* as the owner of the goods which then hands over the ownership rights of the goods in trust to the *lessor*. Construction like this is seen from a fiduciary in its theoretical concept.

If viewed from the concept of practice, A fiduciary is none other than the goods belonging to the *lessee* which are pledged as collateral for the debt, while the *lessee* is still given the opportunity to give the goods that are the object of the leasing.

From the implementation of the imposition of fiduciary guarantees on leasing financing, it can be said that the implementation is not in accordance with the construction of leasing and fiduciary law as stipulated in the provisions concerning leasing and provisions regarding fiduciary.

In the correct construction of imposing fiduciary guarantees in imposing leasing, it should be the owner of the goods who can carry out the imposition of fiduciary guarantees to guarantee repayment of the debtor's debts in a leasing transaction, the debtor is the *lessee*, not the *lessor*. As the debtor, the *lessee* has no right to impose fiduciary guarantees because the *lessee* is not the juridical owner of the object that is the object of leasing. Therefore, Based on this description, the author is interested in conducting research and examining the problem in a scientific paper titled " *Legal Reconstruction Of Fiduciary Collection Imposition In Lease Financing Agreements To Realize Just*

And Legal Leasing Agreements" where the main problem discussed in this article is as follows:

1. What are the weaknesses Of Fiduciary Collection Imposition In Lease Financing Agreements Currently?
2. How to reconstruct the Fiduciary Collection Imposition In Lease Financing Agreements To Realize Just And Legal Leasing Agreements?

Method of Research

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach).* The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables (Toebagus, 2020) [7].

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of (Faisal, 2010) [3]:

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

Research Result and Discussion

Weaknesses of Fiduciary Collection Imposition in Lease Financing Agreements Currently

In an agreement entered into by the parties, things may occur that are never expected when making an agreement, unwanted things will occur. Likewise, what is likely to occur in a leasing financing agreement between a leasing financing company (*lessor*) and the (*lessee*). There may be risks during the lease agreement on capital goods that are the object of leasing. Risks that occur are caused by several circumstances such as the capital goods of the leasing object being damaged, destroyed, or lost as a result of an event that is not due to the fault of the *lessor* or the *lessee*.

The event is a force majeure that cannot be avoided. A force majeure is an event that occurs unintentionally and cannot be foreseen when making a leasing agreement. From this situation, new problems can arise, namely who is responsible for bearing losses arising from force majeure between the *lessor* or the *lessee*.

Risk is the obligation to bear losses arising from coercive circumstances. Both the *lessor* and the *lessee* believe that they are innocent in the occurrence of a loss of the capital goods of the leasing object.

As an agreement that is not regulated by the Indonesian Civil Code (KUH Perdata) or other special laws, an agreement with civil law relations between parties, especially the *lessor* and the *lessee*, is in the form of a leasing agreement that binds the parties only according to the principle of freedom of contract, the principle consensual, the principle of pacta sunt servanda and the principle of decency (Wahyu, 2018) [9].

Until now, the existing regulations regarding financing institutions, in this case, financing companies carried out by leasing companies, were only limited to Presidential Regulations, Decrees of the Minister of Finance / Regulations of the Minister of Finance only regulate administrative matters related to the rights and authorities of the government in fostering and directing and supervising leasing activities as well as in determining what forms of business can carry out leasing activities.

Because it has not been regulated in law, the problem of the risk of resolution cannot be said to have legal certainty. Of course, this is a weakness in the law of leasing agreements. However, by using the principle of propriety known in Civil Law, especially in reciprocal agreements, the risk becomes the burden of the owner of the object or at least becomes the burden of both parties (Wahyu, 2019) [10]. But in accordance with the nature of the agreement made by their parties, they are still given the freedom to determine who is responsible for risks either due to force majeure or due to other unintentional matters.

In the Civil Code, there are articles that regulate risk, namely Articles 1460, 1461, and Article 1462 risks in buying and selling, then risk management is contained in Article 1553 of the Civil Code concerning leasing institutions.

Risks in the sale and purchase agreement are regulated in Articles 1460, 1461, and 1462 of the Civil Code. In article 1460 of the Civil Code, it is determined that if the object being sold is in the form of a certain object, then from the time of purchase the object becomes the responsibility of the buyer, even though the delivery has not been made, the seller has the right to demand the price. What is meant by a certain object is an object which at the time the sale and purchase take place exists and is appointed by the buyer based on his choice. If a certain object is damaged, destroyed, or missing before being handed over to the buyer (before being received by the buyer) the risk is borne by the buyer, therefore the buyer must pay the price.

Article 1461 of the Civil Code stipulates that objects sold by weight, amount, or size are the responsibility of the seller until the object is weighed, counted, or measured, the object is separated from the object belonging to the seller and becomes a specific object purchased by the buyer. already weighed, counted, and measured to be the responsibility of the buyer even though it has not been delivered. So the problem of risk in Article 1461 is the same as in Article 1460 of the Civil Code.

In Article 1462 of the Civil Code, it is stipulated that objects sold according to piles are the responsibility of the buyer

even though they have not been weighed, counted, or measured. The meaning is that objects that have been stacked are separate from other seller's objects and become certain objects that are purchased by the buyer. becomes the responsibility of the buyer even though it has not been delivered. So the risk in Article 1462 is the same as in Article 1460 of the Civil Code.

In a lease agreement, it can happen that the object that is the object of the lease is destroyed as a result of an event that is not due to the fault of the *lessor* or the *lessee*. The provisions governing leasing are only contained in one article, namely article 1553 of the Civil Code. In this article, it is determined that if during the lease agreement, the leased object completely destroys due to an event that is not the fault of either party, then the leasing agreement is null and void by law. The words aborted by law mean that the lease disappears as if nothing had happened before, neither the *lessee* nor the *lessor* can demand anything from the opposing party. Such a situation results in the loss incurred as a result of the destruction of the rented object to be fully borne by the *lessor*. This is because the party who rents out is the owner of the object. Therefore, a principle can be drawn that in a lease, if a force majeure occurs, the risk is borne by the owner (Toebagus, 2022) [8].

In connection with the issue of risks in leasing agreements, the Minister of Finance of the Republic of Indonesia also regulates risks in leasing in the Decree of the Minister of Finance No.48 of 1991. In Article 8 paragraph (2) point (5) regarding the decision states that the agreement needs to include a stipulation of losses that must be borne by the *lessee* in the event that the capital goods leased with option rights are lost, damaged, or do not function due to any reason. also due to circumstances. According to Syatar (2019) [1], this provision can be interpreted into two possibilities, namely:

a. In case of force majeure, the loss must be borne by the *lessee* himself.
b. In the event of force majeure, losses must be borne by both parties, namely the *lessor* and the *lessor*.

In accordance with the principles adopted by the company, namely the profit-oriented principle, finance companies that carry out financing in the form of leasing also want to get profits or profit from the financing business. As a minimum, the amount of financing can be recovered without any drawbacks. Therefore, from the point of view of the financing company (*lessor*) it is a matter that in a business transaction through a leasing agreement that it has formulated, the finance company (*lessor*) releases itself from all responsibility regarding any risks whatsoever.

If this is seen from the principle of freedom of contract, it is only natural because the parties are free to enter into any agreement as long as it does not conflict with the law, decency, and public order. However, in the case of leasing agreements, the freedom to make an agreement is not felt in a standard agreement, because only one party formulates the contents of the agreement (Johan, 2022) [4].

In its development, it turns out that freedom of contract can lead to injustice because to achieve the principle of freedom of agreement must be based on the bargaining position of the parties that are balanced. In reality, such a situation is impossible to find in an agreement made in the form of a standard that is balanced for both parties.

The existence of an unequal position between the *lessor* and the position of the *lessee* means that in a leasing agreement, the leasing contract made is not fully based on the values contained in the balance principle. This is related to how the provisions burden legal obligations and responsibilities only to the *lessee* to bear the risk of damage, destruction, and loss of capital goods which are the object of the leasing agreement, even for whatever reason.

The existence of an imbalance in the position of the *lessor* and the *lessee* will result in an unfair leasing agreement, which of course, will achieve the goal of making the leasing agreement. Articles made and formulated unilaterally by the *lessor* in practice will not be able to provide balanced legal protection for both parties, because the form is already standard. The *lessee* will be in a weak position and will potentially bear losses (Putri, 2022) [6]. In this situation, there are actually rules that prohibit it in a standard agreement which includes an exoneration clause. The norms governing this matter are found in Article 18 paragraph (1) of Law Number 8 of 1999 concerning consumer protection, which states:

Business actors, in offering goods and or services intended for trading are prohibited from making or including standard clauses in every document and or agreement when declaring the transfer of responsibilities of the business actor.

The transfer of responsibility for business actors in this provision is also expressly stated that a contract that violates this provision is null and void, so it can be concluded that if such a thing occurs, namely a contract that contains or hints at an exoneration clause, will be null and void. so it can be concluded that if such a thing occurs, namely a contract in which there is or contains an exoneration clause, it will be null and void.

There is a discrepancy between the norms governing the prohibition regarding the inclusion of exoneration clauses in standard agreements and the fact that the leasing agreements that are applied are still not guided by norms as in Article 18 paragraph (1) of Law No. 8 of 1999 concerning Consumer Protection shows that in a leasing agreement that is being implemented at this time does not fulfill aspects of legal certainty as should be a legal norm, and this indicates that there are weaknesses in a leasing agreement practice.

Reconstruction of the Fiduciary Collection Imposition in Lease Financing Agreements to Realize Just and Legal Leasing Agreements

In the leasing agreement with a fiduciary guarantee, the value of justice must be the basis for the contractual relationship between the *lessor* and the *lessee*. The application of the value of justice is carried out through the basic principles that always underlie contract law such as the principle of consensual, the principle of freedom of contract, the principle of legal certainty, the principle of good faith, and the principle of balance.

As an agreement that is not regulated in the Civil Code or a separate law, the presence of a leasing agreement in the midst of society as a community need is not prohibited by law. This is evidenced by the justification made by the State by facilitating it through administrative regulations, such as business licenses to carry out leasing.

The Construction of the value of justice that can be seen in the leasing agreement in its form is implemented in the clauses governing the *lessor* and *lessee* parties in the form of their respective rights and obligations. The *lessor* is

obliged in the agreed contract to provide capital goods to the *lessee*, conversely, the *lessee* is also obliged to pay a price to the *lessee* for the provision of these capital goods. The *lessor* is entitled to receive payments for the leased capital goods, while the *lessee* is entitled to receive the leased capital goods.

In practice, in leasing agreements, there are several things that are not implemented in accordance with the principles of the agreement, guarantees, and the principles of leasing itself. In terms of responsibility for the risk of capital goods that are the object of leasing, the burden of this responsibility is entirely borne by the *lessee* regardless of the cause. Of course, this, when viewed from the principle of balance, does not yet reflect the values of justice which should be the main foundation in contractual relations.

Furthermore, regarding the existence of capital goods as objects of leasing which are also bound by fiduciary guarantees, of course, this is not in accordance with the principles of fiduciary guarantees. For the construction of a fiduciary guarantee for a fiduciary guarantee to occur, the fiduciary giver must first have ownership rights to the object that is the object of the fiduciary guarantee. In the leasing agreement, as long as the agreement is still in progress, the ownership rights to capital goods, the leased object is still with the *lessor*, has not yet been transferred to the *lessee*.

Then regarding the exercise of option rights which, according to the leasing concept, can only be carried out at the end of the lease agreement, in practice, it is carried out at the beginning of the agreement. This is done for reasons of efficiency and the possibility that there will be an agreement between the *lessor* and the *lessee* if, at the end of the agreement, the *lessee* will exercise its option, namely paying the residual value that was agreed upon previously.

Another thing that is not in accordance with the concepts and principles of leasing is capital goods that can be used as objects of leasing, namely only capital goods. But in practice besides capital goods, consumer goods are also used as objects of the leasing business. There are also leasing finance companies that give the *lessee* the right to own the object of leasing at the end of the lease agreement without the need to give the option right. So there is no paying the residual value of the price of the leasing object. Examples like this are often proposed in leasing agreements for motorized vehicles (Kaena, 2022) [5]. Therefore, in order for the leasing agreement with fiduciary guarantees to be in accordance with ideal construction, the imposition of fiduciary guarantees on this fiduciary guarantee agreement must still be based on the value of justice which makes the principles of the agreement, the principle of fiduciary guarantees and the principle of leasing to be the basic benchmark in formulating leasing contracts.

Because the capital goods which are the object of leasing are still owned by the *lessor*, according to the leasing principle the *lessee* cannot transfer his ownership rights in trust to the *lessor*. Because how can a debtor (*lessee*) who does not have property rights be able to hand over the property to the *lessor* (the creditor). Therefore, if a fiduciary guarantee is to be made in the leasing agreement, the guarantee is in the form of an additional guarantee in which the object belongs to the *lessee*.

The legal relationship built by the parties in an agreement (contractual) relationship must be able to provide legal certainty for the parties bound in the contractual relationship. In Agreement Law the principle of legal certainty is the principle that always underlies the agreement (contract) made by the parties.

The principle of legal certainty (pacta sunservanda) can be concluded from Article 1338 paragraph (1) of the Civil Code which states: "*All agreements made legally apply as laws for those who make them*".

In the leasing agreement, the principle of legal certainty is of course implemented through clauses that must be implemented by the parties. Because there is no law specifically made to regulate this leasing institution, the only legal rule governing the legal relationship between the *lessor* and the *lessee* is a leasing contract that binds the parties.

If the lease has been bound by a written agreement, the legal aspect arises. Because leasing has not been regulated by law yet, the written agreement regarding leasing is the written legal basis for the parties. The requirement to make a written agreement is specified in article 8 paragraph (1) of the Decree of the Minister of Finance No. 48 of 1991 which reads: "*Every leasing transaction must be bound in a lease agreement*".

In the construction leasing agreement, the norm should ideally regulate several matters relating to the fiduciary guarantee agreement that binds the parties, which must be strictly regulated in a norm and in accordance with the principles and concept of leasing.

So based on the explanation above, the reconstruction proposed by the author is as follows:

a. In Article 3 paragraph 1 it is reconstructed to become: "*Leasing activities are carried out in the form of procuring capital goods for lessees, both with and without option rights to purchase these goods. The use of option rights by the lessee can only be carried out at the end of the leasing agreement by way of the lessee paying the remaining price of the capital goods to buy the capital goods*".
b. In Article 3 paragraph (2) it is reconstructed to become: "*The activities referred to in paragraph (1) procure goods only in the form of capital goods, they cannot be in the form of consumption goods. This can also be done by buying goods from tenants for business purposes, which are then leased for commercial use. The assertion is only to capital goods but not to consumer goods so that it can be a differentiator from other types of financing, namely consumer finance (consumer finance) which is also in a finance company*".
c. Article 3 paragraph (3) is reconstructed to become: "*As long as the lease agreement is still ongoing, the ownership rights to the capital goods of the object of the leasing transaction are still with the leasing company. Lessees cannot charge fiduciary guarantees for objects of leasing transactions. The imposition of Fiduciary Guarantees can only be carried out on objects belonging to the lessee."*

Conclusion

Based on the results of the research, the following conclusions can be drawn:

1. Weaknesses in the application of the imposition of fiduciary guarantees in leasing agreements are that they are not in accordance with the principle of imposition of fiduciary guarantees as stipulated in the fiduciary guarantee law that those who are entitled to provide

fiduciary guarantees are the owners of the objects of fiduciary guarantees.

2. Legal Reconstruction of the Imposition of Fiduciary Guarantees in Just and Legal Lease Financing Agreements proposed by the author In where in Article 3 paragraph 1, it is reconstructed to become: "*Leasing activities are carried out in the form of procuring capital goods for lessees, both with and without the option right to buy the goods. The use of option rights by the lessee can only be carried out at the end of the leasing agreement by way of the lessee paying the remaining price of the capital goods to buy the capital goods*". Then, In Article 3 paragraph (2), it is reconstructed to become: "*The activity referred to in paragraph (1) is the procurement of goods only in the form of capital goods cannot be in the form of consumer goods, it can also be carried out by buying goods from lessees for business purposes which are then leased for cultivation. capital goods but not consumer goods so that it can be a differentiator from other types of financing, namely consumer finance (consumer finance) which is also a finance company*". and lastly, in Article 3 paragraph (3), is reconstructed to become: "*As long as the lease agreement is still ongoing, the ownership rights to the capital goods of the object of the lease transaction are still with the leasing company. Lessees cannot charge fiduciary guarantees for objects of leasing transactions. The imposition of Fiduciary Guarantees can only be carried out on objects belonging to the lessee*".

References

1. Abdul Syatar. Transformation Of Fiqh in The Forms Off Hajj and Zakat Legislation, Mazahibuna: Jurnal Perbandingan Mazhab, 2019, 1(2).
2. Dines Tangges, Kusbianto Kusbianto, Dewi Ayu. Perlindungan Hukum Konsumen Sebagai Pemegang Leasing Yang Wanprestasi Dalam Perjanjian Leasing (Studi Pada Pt. Federal International Finance Group). Law Jurnal,2022:3:1-13. 10.46576/lj.v3i1.2293.
3. Faisal. Menerobos Positivisme Hukum. Rangkang Education, Yogyakarta, 2010, 56.
4. Johan Suwinto. Is leasing a debt? According to suspension of debt payment obligations law. Borobudur Law Review,2022:4:24-32. 10.31603/burrev.6694.
5. Kaena Yosphi. Juridical Review of Default in A Motorcylcle Leasing Agreement (Research Study At. PT Adira Dinamika Multifinance, Tbk). Journal of Law Science,2022:4:29-36. 10.35335/jls.v4i1.1698.
6. Putri Immaculata, Handayani I, Gusti Ayu Ketut Rachmi, Muryanto, Yudho, Ritonga Rena, Boong Vicariya. Forms of Legal Protection for Lessors in Leasing Agreements After the Constitutional Court Decision No. 18/PUU-XVII/2019. Journal of World Science,2022:1:422-437. 10.36418/jws.v1i6.56.
7. Toebagus Galang Windi Pratama. The Urgency for Implementing Crytomnesia on Indonesian Copyright Law, Saudi Journal of Humanities and Social Sciences,2020:5(10):508-514. DOI:10.36348/sjhss.2020.v05i10.001
8. Toebagus Galang Windi Pratama. Peran Integrasi Teknologi dalam Sistem Manajemen Peradilan, Widya Pranata Hukum: Jurnal Kajian Dan Penelitian Hukum, 2022, 4(1). DOI: https://doi.org/10.37631/widyapranata.v4i1.583
9. Wahyu Widodo, Sapto Budoyo, Toebagus Galang, Windi Pratama. The Role of Law Politics on Creating Good Governance and Clean Governance for A Free-Corruption Indonesia in 2030. The Social Sciences,2018:13:1307-1311.
10. Wahyu Widodo, Toebagus Galang. Poverty, Evictions and Development: Efforts to Build Social Welfare Through the Concept of Welfare State in Indonesia, 3rd International Conference on Globalization of Law and Local Wisdom (Icglow 2019), 2019. Dx.Doi.Org/10.2991/Icglow-19.2019.65.