Legal analysis of the Fiduciary Agreement between lessor and lessee

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As social beings, humans need others in their lives because they cannot live alone. Efforts to fulfill human needs are realized in society through bartering, or exchanging services and goods. The exchange of services and goods is carried out by implementing the terms agreed upon by each party in the cooperative relationship within a contract. Various forms of agreements exist in society, including lease agreements (leasing) and agreements with fiduciary guarantees. Leasing financing requires certain guarantees so that the funds expended by the lessor, plus certain profits, can be repaid by the lessor. In leasing, the capital goods that are the object of the financing agreement serve as collateral for the debt under the financing guarantee. In practice, various possibilities can arise, rendering the lessor's position less secure than initially anticipated. The purpose of this study is to examine the legal analysis of fiduciary agreements between lessors and lessees. The research method used is normative research using primary and secondary legal materials. Legal materials are obtained through library studies such as books, journals, laws and regulations, and other documents related to the research. The results of the study explain that in the Fiduciary agreement between the Lessor and the Lessee, in essence, it is only a loan-borrowing relationship, however, the relationship provides benefits to both parties so that a standard, legal agreement is made so that the agreement is more binding and can be implemented with a full sense of responsibility. Fiduciary registration is mandatory for the fiduciary giver and fiduciary recipient, at the time after the fiduciary agreement is made because if this is not done it will be detrimental to both parties. Therefore, in addition to the deed of agreement with fiduciary guarantees, it is necessary to make another special agreement between the lessor and lessee where the substance of the agreement is to strengthen commitment, responsibility and brotherhood in carrying out the contents of the main agreement.
Keywords : Legal analysis, Fiduciary Agreement, lessor and lessee

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1. Introduction

In today's society, each person has different needs, ranging from clothing and food to shelter. Given the diverse needs of society, humans, as social beings, also need others in their lives because they cannot live alone. In Indonesia, the law governing individual interests and relationships between legal entities is regulated in the "Civil Code (Burgelijk Wetboek voor Indonesie)."

Efforts to meet human needs are realized in society through bartering, or the exchange of services and goods. The exchange of services and goods is carried out by implementing the terms agreed upon by each party in the cooperative relationship within the agreement. Essentially, an agreement contains the comparison (the provisions concerning the parties involved), the premise (the content of the agreement), the substance (the terms and conditions agreed upon by each party), and the conclusion of the agreement.

An agreement is an event in which one person promises to another, or where two people mutually promise to perform something, which as a result creates an obligation for both parties to fulfill a certain achievement as the object of the agreement (Djohari Santoso and Achmad Ali, 1989: 45). Agreements or contracts are made due to differing interests between parties who attempt to unite through negotiation to

reach an agreement for the common good. The urgency of contract regulation in business practice is to ensure the exchange of interests (rights and obligations) takes place proportionally for the parties, thus establishing a fair and mutually beneficial contractual relationship (Agus Yudha Hernoko, 2014: 6). Various forms of agreements that occur in society include lease agreements (leasing) and agreements with fiduciary guarantees. According to the Decree of the Minister of Finance No. 1169/KMK.01/1991 dated 21 November 1991 concerning Leasing Activities: Leasing is a financing activity in the form of providing capital goods either by way of a finance lease with an option right (finance lease) or a finance lease without an option right (operating lease), to be used by the lessee for a certain period of time based on periodic payments.

Leasing activities involve the procurement of capital goods for the lessee, either with or without the option to purchase the goods. Therefore, leasing is divided into two forms: finance lease and operating lease. A finance lease is a lease in which the lessee has the option to own the leased asset at the end of the lease term by paying a specified amount. Operating leases, on the other hand, are leases without the option; after the lease term expires, the leased asset must be returned to the lessor (Khotibul Umam, 2010: 11).
In principle, the leasing financing system consists of two parties:

1. The lessor, the party providing financing through leasing to the party in need. In this case, the lessor can be a multi-finance company, but it can also be a company specialized in leasing.
2. The lessee, the party requiring the capital goods, which are financed by the lessor and allocated to the lessee.
3. Suppliers are parties who provide capital goods that are the object.

Leasing, which is paid by the Lessor to the supplier for the benefit of the Lessee. Normatively and empirically, there are two types of leasing, each with different characteristics, namely operating lease and financial lease. In an operating lease, the goods handed over by the lessor to the lessee are finished goods. Conversely, in a financial lease, the goods to be used by the lessee are actually ordered in advance by the lessee with the lessor's financing (Anuar Syarifudin: 2). In a leasing financing agreement, the principles of freedom of contract and the principle of consensualism are used as the basic guidelines in formulating the contents of the leasing financing agreement that will bind the parties during the implementation period of the leasing financing agreement. The principle of freedom of contract in question means that people are free, whether or not to make an agreement, are free to determine the contents, validity and terms of the agreement, with a certain form or not and are free to choose which law will be used for the agreement. Meanwhile, the principle of consensualism is an agreement that is generally not made formally but consensual, meaning that the agreement is completed due to agreement of will or consensus alone.

Leasing financing requires certain guarantees so that the funds disbursed by the Lessor plus certain profits can be received back by the Lessor. In leasing, capital goods that are the object of the financing agreement become collateral for the debt in the financing guarantee. In practice, various possibilities can occur that cause the Lessor's position to be less secure than initially expected. For example, the Lessee transfers the leased goods to another person without the Lessor's knowledge or the Lessee does not want to return the leased goods properly, even though the Lessee is in default, or the price of the leased goods drops for an unanticipated reason, and various other problems.

2. Research Methods

The research method used is normative research using primary and secondary legal materials. Legal materials are obtained through library research and then analyzed qualitatively. The main focus of the

study is law conceptualized as norms or rules that apply in society and become a reference for everyone's behavior. Therefore, normative legal research focuses on the inventory of positive law, legal principles and doctrines, legal discoveries in concrete cases, legal systematics, levels of synchronization, legal comparisons and legal history. The data in this writing are secondary data, namely library materials that include official documents, bibliographic books, laws and regulations, scientific works, articles, and so on. Documents related to the research material. Primary legal materials, namely all legal materials/materials that have binding legal force. Primary legal materials consist of laws and regulations related to the research, and secondary legal materials, namely materials or materials related to and explaining the problem. Primary legal materials consist of books and literature related to the Legal Analysis of Fiduciary Agreements between lessors and lessees.

3. Results and Discussion

Legal Analysis of Fiduciary Agreements Between Lessors and Lessees

Article 1233 of the Civil Code states that every obligation arises either by agreement or by law. This can be interpreted to mean that an obligation arises from an agreement or law. In other words, law and agreement are the sources of an obligation. According to Article 1313 of the Civil Code, an agreement is an act by which one or more persons bind themselves to one or more other persons. From this formulation, it can be concluded that an agreement in this article is an agreement that creates an obligation (verbintenisscheppende overeenkomst) or an obligatory agreement (J. Satrio, 2003). According to Abdulkadir Muhammad (2003: 224-225), in his book "Indonesian Civil Law," the definition of an agreement formulated in Article 1313 of the Civil Code has several weaknesses, namely:

a. Only involves one party.
b. This can be seen from the formulation of the verb "to bind oneself," which implies only one party, not both. The formulation should be "to bind oneself to each other," so that there is consensus between both parties.
c. The word "action" also includes the term "without consensus."
d. The definition of an agreement is too broad.
e. The definition of an agreement also includes marriage agreements regulated in family law, when in fact, it refers to the relationship between a debtor and a creditor regarding property. The agreements regulated in Book III of the Civil Code actually only cover material agreements, not personal ones;
f. They do not specify a purpose or have an unclear purpose.
g. Article 1313 of the Civil Code does not specify the purpose of the agreement, so the parties are not clear about the purpose for which they are binding themselves. According to Subekti, an agreement is defined as a legal relationship (regarding property) between two or more people in which one party has the right to demand something from the other party, which gives one party the right to demand something from the other party, and the other party is obligated to fulfill that demand. The term "action" also includes actions to maintain interests (zaakwarneming) and unlawful acts (onrechtmatige daad) that do not involve consensus, so the term "agreement" should be used.

According to (R. Setiawan, 49), the formulation of Article 1313 of the Civil Code is not only incomplete but also very broad. This formulation is considered incomplete because it only concerns agreement to "acts," thus also encompassing voluntary representation (zaakwaarneming) and unlawful acts (onrechtmatigedaad). In this regard, he proposed amending the definition of the agreement, namely:

a. Acts must be interpreted as legal acts, namely acts by a legal subject intended to produce legal

consequences intentionally desired by the legal subject.

b. Adding the phrase "or more mutually binding themselves" to Article 1313 of the Civil Code.

According to the author, a legal agreement is certainly different from a general agreement. A legal agreement is an agreement that has a good purpose, because the agreement must be in accordance with the legal objectives. Therefore, regarding a fiduciary agreement, each party must receive benefits and advantages from the agreement. Therefore, when intending to bind oneself in an agreement, the most important thing to consider is the content of the agreement. An agreement under law is considered unlawful if it is made only by one party and/or not mutually agreed upon. Therefore, an agreement must be based on law, as stated in Article 1320 of the Civil Code, which states that the valid requirements for an agreement are the agreement of those who bind themselves, the capacity to make an agreement, regarding a specific matter and for a lawful reason.

Regarding the intent of Article 1320 of the Civil Code, the author is of the opinion that an agreement between two parties is a mutual agreement, meaning that all contents of the agreement have been understood and agreed upon together. Then the parties who enter into an agreement are competent and perfect people, because if it is done by people who are not perfectly rational or capable, it will make an unfair agreement for each party. Likewise, in the explanation of Article 1320, an agreement must be clear what is agreed upon, meaning that the agreement is certainly not an ordinary agreement but a mutually beneficial agreement. The agreement must be something good and not contrary to legal norms. The agreement has been agreed upon together without any element of pressure or deception from one of the parties (Irwan: 4).

The UUJF stipulates that a fiduciary agreement must be made with a notarial deed. Moreover, considering that the object of fiduciary guarantees is generally unregistered movable property, it is only natural that the law concerns the object of fiduciary guarantees. In addition, an authentic deed is evidence because it is made by a State official or Notary (Jatmiko Winarno: 48). Fiduciary guarantees are known in positive law as collateral (Fairuz Afra: 69). Fiduciary has long been known as one of the non-possessory movable property collateral instruments. In contrast to possessive movable property collateral, such as pawns, fiduciary guarantees allow the debtor as the guarantor to retain control and benefit from the movable property that has been pledged.

Prior to Law No. 42 of 1999 concerning Fiduciary Guarantees, there was practically no strong legal framework for fiduciary as a type of non-possessory guarantee for movable property. This made fiduciary less popular in its use. Subsequently, business actors attempted to cover this need by extensively using other instruments, namely mortgages and mortgages. Meanwhile, this shortcoming was covered by placing trust instruments in the form of personal guarantees (PG) or corporate guarantees (CG) as an effort to obtain debtors' commitments for various goods, generally without granting any preferential rights.

Historically, fiduciary obligations began as agreements based solely on trust. However, over time, legal certainty has become necessary in practice to protect the interests of the parties. Fiduciary obligations are guarantees based on a principal agreement. Therefore, they are a byproduct of a specific principal agreement, such as a credit/debt agreement where movable property is the collateral. Fiduciary obligations are regulated by Law Number 42 of 1999. The existence of the fiduciary law demonstrates the government's significant commitment to assisting business actors in carrying out their business activities.

Fiduciary Guarantee according to Law Number 42 of 1999 is a guarantee right on movable objects, both tangible and intangible, especially buildings that cannot be burdened with mortgage rights that remain in

the control of the Fiduciary Giver, as collateral for certain payments that give priority to the Fiduciary Recipient over other creditors. In the Fiduciary Guarantee Law, the legislators do not explicitly state the legal principles of fiduciary guarantees that are the foundation for the formation of legal norms. Therefore, to find the legal principles of fiduciary guarantees, they are sought by examining the articles of the Fiduciary Guarantee Law.

A Fiduciary Guarantee is a subsidiary agreement and a principal agreement that creates an obligation for the parties to fulfill a certain obligation. The encumbrance of an object with a Fiduciary Guarantee is executed by a notarial deed in Indonesian and constitutes a Fiduciary Guarantee deed. A fee is charged for the preparation of a Fiduciary Guarantee deed, the amount of which is further regulated by Government Regulation. A Fiduciary Guarantee Deed must contain at least:

a. The identity of the Fiduciary Grantor and Recipient;
b. Data on the principal agreement secured by the Fiduciary Guarantee;
c. A description of the object subject to the Fiduciary Guarantee;
d. The value of the guarantee; and
e. The value of the object subject to the Fiduciary Guarantee.

The application is submitted to the Minister of Law and Human Rights of the Republic of Indonesia through SABH Online, as is the case with fiduciary obligations. The Fiduciary Guarantee Certificate includes the words "FOR JUSTICE BASED ON THE ALMIGHTY GOD." Article 15 paragraph (1) of Law Number 42 of 1999. If the debtor or Fiduciary Provider defaults, execution of the assets subject to the Fiduciary Guarantee can be carried out in the following ways:

a. Execution of the executorial title by the Fiduciary Recipient;
b. Sale of the assets subject to the Fiduciary Guarantee under the Fiduciary Recipient's own authority through a public auction, with the proceeds being used to settle the receivables;
c. Private sale based on an agreement between the Fiduciary Provider and the Fiduciary Recipient.

The cause of the seizure is default, which is a condition where due to negligence or error, the debtor cannot fulfill the performance as determined in the agreement (Tangges Dines: 10). If in this way the highest price can be obtained that is profitable for both parties. The sale is carried out after 1 (one) month has passed since the written notification by the Fiduciary Giver and Recipient to the interested parties and announced in at least 2 (two) newspapers circulating in the relevant area. The Fiduciary Giver is obliged to hand over the Object that is the object of the Fiduciary Guarantee in the context of implementing the execution of the Fiduciary Guarantee.

According to the author, a fiduciary agreement is a subsidiary agreement to a principal agreement. A fiduciary agreement is entered into to provide a guarantee of trust to the lessor that the lessee will properly fulfill the terms of the agreement, specifically providing business capital to assist business owners in carrying out their business activities. Based on the provisions of Article 5 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees, the encumbrance of an object with a fiduciary guarantee is formalized through a notarial deed. Furthermore, Article 11 paragraph (1) stipulates that an object encumbered with a fiduciary guarantee must be registered. These two provisions indicate that the encumbrance of a fiduciary guarantee is formalized through an authentic deed, namely a notarial deed, and the object is subsequently registered with the Fiduciary Registration Office. However, if the fiduciary guarantee deed is not registered, there are no strict sanctions stipulated in the Fiduciary Guarantee Law. This has led to controversy over whether registration of a fiduciary guarantee deed is mandatory.

In practice, credit agreements involving fiduciary collateral often involve the transfer of the object to a third party before registration, and then registration with the Fiduciary Registration Office. The Fiduciary

Registration Office cannot reject the application for fiduciary collateral registration. This is because the Fiduciary Guarantee Law does not specify provisions regarding the expiration date for fiduciary collateral registration. Failure by the Lessee/Buyer to fulfill their obligations as agreed constitutes a breach of contract, which is a business risk for leasing companies. It is not uncommon for the Lessor to lose the leased object. This action is very detrimental to the financing company (Rianda Dirkareshza: 164). The transfer of the fiduciary collateral by a lessee whose fiduciary collateral has not been registered will result in legal consequences that are not applicable to the provisions contained in the agreement. in the Fiduciary Guarantee Law, because according to Article 14 paragraph (3) it is stated that "fiduciary guarantees are born on the same date as the date the fiduciary guarantee is recorded in the Fiduciary Register Book". Consequently, legal events that occur before the fiduciary guarantee is registered are not subject to the provisions of the Fiduciary Guarantee Law. Thus, the agreement to encumber a fiduciary guarantee using a fiduciary guarantee deed that has not been registered, but has been transferred to a third party, then the fiduciary guarantee is not attached to property rights. Because an unregistered fiduciary guarantee agreement is only an "obligatoir" agreement, meaning an agreement that only creates obligations for the parties who enter into the agreement. An unregistered fiduciary guarantee also does not contain the principle of publicity which will later bind third parties to know the object that has been encumbered with the fiduciary guarantee.

Therefore, according to the author, fiduciary registration is mandatory for both the fiduciary giver and the fiduciary recipient, after the fiduciary agreement is made because if this is not done, it will be detrimental to both parties. For example, if the object of the fiduciary guarantee has not been registered or does not have a fiduciary certificate, then the lessor does not have the power of executor to execute the fiduciary guarantee object if the debtor defaults or the object that is the object of the fiduciary guarantee moves into the hands of a third party. Likewise, if the lessee defaults, he can maintain the surrender of the fiduciary guarantee object to be confiscated by the creditor by force and unfairly because the object has a fiduciary certificate.

Legal Status of Fiduciary Agreements Between Lessors and Lessees.

In essence, a fiduciary agreement is based on trust, however, in order for that trust to be accountable, a fiduciary agreement is made in a written agreement that is binding on both parties. The rights and obligations of each party, namely the Lessor and Lessee, are inherent in the fiduciary agreement. With the birth of Law Number 42 of 1999 concerning Fiduciary Guarantees (UUJF), as mentioned in the section considering sub c, the aim is to provide a more comprehensive regulation than the existing one, and to provide better protection for the parties involved. interested parties. Based on this, the UUJF adopts the principle of fiduciary guarantee registration. This registration is expected to provide legal certainty to the fiduciary giver and recipient. In a Fiduciary agreement, the fiduciary creditor or lessor has a preferential right, namely the right to be prioritized over concurrent creditors. In contrast to the position of fiduciary creditors, concurrent creditors must go through the process of paying receivables according to the provisions of Article 1132 of the Civil Code based on a balanced distribution which is generally considered less secure (Subekti: 31). The nature of this droit de preference can be read from the formulation of the legal definition of Fiduciary Guarantee mentioned in the provisions of the UUJF which are further regulated in Articles 27 and 28 of the Fiduciary Law. Fiduciary recipients are classified as creditors who have the strongest position, such as pawn, mortgage, and security holders, whose receivables must be fulfilled before other creditors taken from the proceeds of the execution of the object that is the object of the fiduciary guarantee.

Article 28 of the UUJF provides the possibility that the same object can be burdened with more than one fiduciary guarantee agreement, so that there are first-rank, second-rank, third-rank fiduciary recipients

and so on. In other words, based on the provisions of Article 28 of the UUJF, it is possible for a re-fiduciary to occur by the creditor who provides the fiduciary. The provisions of Article 28 of the UUJF state: "If the same object becomes the object of a Fiduciary Guarantee in more than 1 (one) Fiduciary Guarantee agreement, then the priority rights as referred to in Article 27, are given to the party who first registers it at the Fiduciary Registration Office." If the fiduciary giver, for the collateral object that has been registered, is not authorized to fiduciate it again to another creditor, then what still needs to be considered is whether there is still the possibility of re-fiduciary guaranteeing the same collateral object to another creditor.

Preferential rights will be very useful for creditors when the debtor at the same time has more than one credit, so that the creditors will exercise their claim rights based on their respective positions in the first position of the separate creditor holding the material guarantee will get the first right to take repayment from the collateral object, then followed by the preferred creditor and the last position is the concurrent creditor who will take repayment from the debtor's remaining assets. If there is only one creditor then the preferential rights become less important because the creditor is not faced with competition to make repayment of the debtor's assets (D.Y. Witanto: 117).

Legal Protection in Fiduciary Agreements is a protection provided to legal subjects in the form of legal instruments, both preventive and repressive, both written and unwritten. The legal principle is that in the law through its provisions, it is intended to protect certain parties or people, so the law grants certain rights to the person or party concerned and in such an event, it is up to the party or person to be protected to use or not use these rights. Legal protection can be divided into two, namely:

1. Preventive legal protection is protection provided by the government with the aim of preventing violations before they occur. This is contained in laws and regulations with the aim of preventing violations and providing guidelines or limitations in carrying out obligations.
2. Repressive Legal Protection.
   Repressive legal protection is final protection in the form of sanctions such as fines, imprisonment, and additional penalties imposed when a dispute has already occurred or has already been committed. Legal Protection for Parties in a Fiduciary Agreement is a violation.

In a financial lease agreement, each party, whether the lessor as the leasing company, the lessee as the party renting the goods, or the vendor (lever) as the party selling the goods, can be said to have both advantages and disadvantages that will be accepted in a financial lease agreement (Kavin Ludgerus Dimpudus: 226).

In the Civil Code, the granting of credit refers to the legal provisions of the agreement regulated in Book III of the Civil Code, however, of the various forms of agreements regulated in the Civil Code, there are no provisions regarding credit agreements, even the Banking Law itself does not specify the definition of a credit agreement. The provisions of Article 1754 of the Civil Code only state the definition of a loan agreement as follows: "A loan agreement is an agreement by which one party provides another party with a certain amount of goods that are used up due to use, with the condition that the latter party will return the same amount of the same type and condition. (Subekti: 13) states:

> "In whatever form a credit is provided, in essence what occurs is a loan agreement as regulated in Articles 1754 to 1769 of the Civil Code."

This opinion is supported by Mariam Darus (Badrulzaman, 19), who argues:

> "A credit agreement is a preliminary agreement (vooruverenkoms) regarding the transfer of money. This preliminary agreement is the result of an agreement between the creditor and the debtor regarding the relationship between the two (creditor and debtor)."

In principle, the legal owner of the leased object is the lessor, and ownership will only transfer once the lessee's obligations have been fulfilled and the purchase option (in a financial lease) is exercised (Alivia Z A. Pasaribu, 2022). According to the author, the relationship between the lessor and the lessee is essentially a loan-borrowing relationship, but this relationship benefits both parties, so a standard, legal agreement is created to make the agreement more binding and enforceable with a full sense of responsibility.

4. Conclusion

In a fiduciary agreement, the relationship between the lessor and lessee is essentially a loan-borrowing relationship. However, this relationship benefits both parties, so a standard, legal agreement is created to make the agreement more binding and enforceable with a full sense of responsibility. Therefore, in addition to a deed of agreement with fiduciary collateral, a special agreement between the lessor and lessee, recognized by the local government where the lessee is domiciled, is necessary. The substance of this agreement is to strengthen commitment, responsibility, and brotherhood in carrying out the contents of the principal agreement.

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