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FORMULATING MOVABLE PROPERTY GUARANTEE ARRANGEMENTS IN *LEASING AGREEMENTS* IN INDONESIA

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Abstract

Formulate movable property guarantee arrangements in *leasing* agreements in Indonesia. The purpose of this study is to analyze: 1) how is the imposition of movable property guarantees in *leasing* agreements in Indonesia currently in Indonesia? 2) To know and analyze the background, it is necessary to formulate movable property guarantee arrangements in leasing agreements in Indonesia*. 3) To make an ideal formulation of fiduciary guarantee arrangements* in leasing agreements *in* Indonesia that can provide legal certainty and protection for the parties? The research method used is empirical juridical with a statutory approach, concept approach, and case studies.

The results showed that: 1) Leasing in Indonesia began in the 1970s, precisely in 1973 and only received formal juridical recognition on February 7, 1974 in the form of a Joint Decree of the Minister of Finance, Minister of Industry and Minister of Trade of the Republic of Indonesia Number Decree 122/MK/2/1974, Number 32/M/SK/2/1974, Number 30/Kpb/I/1974 concerning Leasing Licensing. 2) The fiduciary agreement becomes an integral part of the underlying agreement which Making a fiduciary can be translated as a basis of rights used to transfer ownership rights as stipulated in article 584 of the Civil Code, but the possibility of such transfer of rights is only intended as a guarantee grant, without any actual delivery of the goods or things and such a transfer of rights does not provide all the implications as is also applied to the normal transfer of property rights. 3) In the literature there can be found different types of leasing, which are viewed from several angles. However, the usual difference in leasing can be broadly divided into 2 types, namely: *Finance Lease* and *Operating Lease*. Finance Lease is an agreement / contract between the lessor and lessee that is *cancelable* for the lessee, which requires the lessor to hand over capital goods whose ownership rights remain with him, to the lessee for use in his company with periodic payments the amount agreed by both parties during a specified period of time

Keywords: Formulating, Arrangement, Guarantee, Movable Objects, Agreement, Leasing, Indonesia.

INTRODUCTION

Background

Leasing plays an important role in meeting the needs of companies in the provision of capital goods to run a business in order to meet human needs in the economy.[1] Leasing is a form of business that can be used as an alternative to overcome capital difficulties in the context of financing a company. The presence of leasing for companies has an

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important role in helping entrepreneurs in Indonesia, both for small, medium and large businesses. Through leasing activities, these entrepreneurs will quickly be able to overcome financing methods to obtain the equipment and capital goods they need.[2] with non-burdensome requirements and a flexible funding system, entrepreneurs like it very much. This condition among others causes the leasing business in Indonesia to develop quickly.

The legal relationship of the parties in the procurement of capital goods through *leasing is essentially an agreement, that is,* a leasing agreement*.* According to Article 1313 of the Civil Code "A covenant is an act by which one or more persons bind themselves to one or more other persons". An agreement in the narrow sense is an agreement by which two or more parties bind each other to carry out a material thing in the field of property. In Subekti's opinion, "A covenant is an event where one person promises to another or where two people promise each other to do a certain thing"[3].

The definition of agreement according to Achmad Busro[4] is "An agreement by which two or more people bind each other to carry out a thing in the field of wealth". In essence, the agreement creates an alliance between the parties, so the agreement is one of the sources of engagement[5]. According to J. Satrio, an engagement is a legal relationship between two parties in the field of property law where on one side there are rights and the other party has obligations. What is meant by rights and obligations in this case is to achieve.[6]

There are two parties *leasing* agreements, namely the *lessor* and *the lessee. The lessor*, which is the party that provides capital goods for the *lessee,* is a finance company licensed by the Financial Services Authority. *Lessee* is a party who gets financing from *lessors* or parties who need/use capital goods.[7] in practice in finance companies, usually the agreement between *the lessor and* the lessee *has been prepared in advance by* the lessor *in* the form of a standardized form. Collateral that is often used in *leasing activities* is a fiduciary guarantee against movable objects. The definition of fiduciary guarantee can be seen in Article 1 Number 2 of Law Number 42 of 1999 concerning Fiduciary Guarantee, hereinafter referred to as the Fiduciary Guarantee Law. The provision states that "Fiduciary Guarantee is a security right over movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered with dependent rights as referred to in Law Number 4 of 1996 concerning Dependent Rights that remain in the control of the Fiduciary, as collateral for the repayment of certain debts, which gives priority to the Fiduciary over other creditors". From this understanding it can be seen that in fiduciary the legal relationship between the parties is based on trust. According to Budi Santoso, in a relationship based on *trust* and based on confidence, the parties will respect each other's rights and obligations. This relationship is often called *fiduciary duties*.[8]

In this fiduciary guarantee there is a transfer of ownership rights to the fiduciary security object. Meanwhile, in the guarantee of the *leasing agreement* at the time the agreement was made, the object has not become the property of the *lessee* who uses the services

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of a finance company. The leasing property only becomes the property of the lessee at the end of the term if the option has been exercised to elect that the property was purchased by the lessee. This raises its own problem whether it is possible for objects that have not belonged to the *lessee* to be the object of fiduciary guarantee. Problems also occur in the event that the debtor does not carry out its obligations in *the leasing* agreement with movable property guarantees. There are various problems that arise in the guarantee of movable objects in leasing *agreements while special rules regarding* leasing agreements do not yet exist. This can cause legal uncertainty and has the opportunity to cause an imbalance in relations between the parties that can harm one party.[9]

Problem Statement

1. What are the arrangements for the imposition of movable property guarantees *in leasing* agreements in Indonesia that currently exist in Indonesia?;
2. To know and analyze the background, it is necessary to formulate movable property guarantee arrangements in *leasing agreements* in Indonesia?
3. To make an ideal formulation of fiduciary guarantee arrangements in *leasing* agreements in Indonesia that can provide legal certainty and protection for the parties?

THEORETICAL FRAMEWORK

In the *leasing agreement*, the creditor in this case is the lessor *has* a great risk because it finances capital goods by means of installment payments. Therefore, usually in *leasing* agreements, finance companies always ask for material guarantees.

M. Bahsan defines collateral as "everything that the creditor receives and submits to the debtor to secure a debt in society". According to Sutarno[10], the definition of collateral is "anything that has an easy value to cash that is bound by a promise as collateral for payment of debtors based on credit agreements made by creditors and debtors".

From Article 1131 of the Civil Code it can be seen that everyone is responsible for his debts, this responsibility is in the form of providing his wealth both movable and immovable objects (fixed objects), if necessary sold to pay off his debts (*schuld* and *haftung principles*). This principle is very fair, in accordance with the principle of belief in the law of engagement, that is, everyone who gives a debt to someone believes that the debtor will fulfill his achievements in the future. Everyone is also obliged to fulfill his promises, a moral principle that the framers of the law reinforces as a legal norm.[11]

Guarantees can be divided into two types, namely general guarantees and special guarantees. This is stipulated in Article 1131 of the Civil Code, which specifies that "all the property of a debtor, whether movable or immovable, whether existing or new will exist in the future, becomes security for all personal engagements of the debtor. From Article 1131 of the Civil Code it can be seen that everyone is responsible for his debts,

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RESEARCH METHODOLOGY

In the research method used, this is normative legal/juridical research.[13] Normative juridical research refers to legal norms contained in laws and regulations and legal norms that exist in society. In addition, by seeing the synchronization of a rule with other rules in a hierarchical manner.[14] Law that applies at a certain time and place, that is, a written rule and norm officially established and promulgated by the ruler, in addition to written laws that effectively regulate the behavior of members of society.[15]

The method of data collection in this study with library research or commonly called literature study, this method is carried out to obtain secondary data both in the form of primary legal material and secondary legal material. After being inventoried, a review is carried out to make the essence of each regulation concerned. Data is collected by studying literature sources in the form of literature books, laws and regulations, and collecting existing data in the form of data that is directly related to the research conducted.[16]

In this study, a statutory approach and a comparative approach were used.[17] Legal research conducted by examining library materials or secondary data.[18] Statute approach: an approach taken by examining laws and regulations related to the focus of research. Then, the data collection taken in this study uses literature studies, namely data collection by searching, examining and reviewing secondary data.[19] In this research, document studies will be carried out as a means of collecting data related to the problems raised, namely literature studies / document studies (documentary study), sourced from laws and regulations, books, official documents, publications and research results.[20]

RESEARCH RESULTS

Leasing in Indonesia that currently exists in Indonesia

Leasing in its form and content that is known today, according to the Communis Opinio Doktorum comes from Uncle Sam's country, the United States. First used by *The Bell Telephone Company* in 1877 as a company whose business activity is to produce telephone equipment and "*relax*" it to consumers with a payment system through installments. However, the development of leasing did not entirely originate from America. T.M Tom Clark in his book: "*Leasing*" once noted that the beginning of the development of modern leasing occurred in 1850 with the existence of the first leasing company to lease trains.[21]

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This leasing company got a rapid development in the 1960s and then expanded its wings to European countries, such as England recognized leasing institutions in 1960, Belgium and France in 1961. Likewise, this leasing institution expanded to Asia such as entering South Asia and Indonesia in the early 1970s. Until 1993. As previously said that leasing in Indonesia began in the 1970s, precisely in 1973 and only received formal juridical recognition on February 7, 1974 in the form of a Joint Decree of the Minister of Finance, Minister of Industry and Minister of Trade of the Republic of Indonesia Number Decree 122/MK/2/1974, Number 32/M/SK/2/1974, Number 30/Kpb/I/1974 concerning Leasing Licensing. In the Joint Decree (SKB) of the three ministers, it is said that those who can do leasing business are:

1. Financial Institutions within the meaning of the Decree of the Minister of Finance No. 38/MK/IV/I/1972.
2. Other business entities that are not financial institutions engaged in leasing, including subsidiaries of a sole representative financial institution (*sole agency*).

Furthermore, in the Decree of the Minister of Finance of the Republic of Indonesia Decree Number 649 / MK / IV / 5 / 1974 concerning Leasing Business Licensing, article 2 paragraph (1) says that leasing business can be carried out by:

1. Financial institutions.
2. Separate business entities in the form of national companies and mixed companies.

Companies that will carry out leasing business activities must obtain permission from the Minister of Finance, after fulfilling the requirements stipulated by the third Decree of the Minister jo Decree of the Minister of Finance No. 649/MK/IV/5/1974 jo Announcement of the Director General of Monetary Announcement Number 307/DjM/III.1/7/1974 concerning Guidelines for the Implementation of Leasing Regulations.[22] Leasing companies are further found in Presidential Decree No. 61 of 1988 concerning Financing Institutions and Decree of the Minister of Finance No. 1251/KMK.013/1988 concerning Provisions and Procedures for the Implementation of Financing Institutions. This leasing financing institution was then refined through the Decree of the Minister of Finance No. 1169 / KMK.01 / 1991 concerning Leasing Activities dated November 27, 1991.[23]

In the leasing agreement the parties involved in the leasing agreement consist of: First, the Lessor is the party who delivers the goods, can consist of a company. These parties are also called *investors, equity holders, owner participants* or *Trusters owne*. Second, the Lessee is the party who enjoys the goods by paying rent and holding option rights. Third, creditors of lenders are also called *debts holders* or *loan participants*. Fourth, Suppliers are sellers and owners of goods for rent, can consist of companies (*manufacturers*).[24]

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Movable Property Guarantee Arrangements in *Leasing Agreements* in Indonesia

In the literature there can be found different types of leasing, which are viewed from several angles. However, the usual difference in leasing can be broadly divided into 2 types, namely: *Finance Lease* and *Operating Lease*. According to Rochmat Soemitro, what is meant by Finance Lease is an agreement / contract between the lessor and lessee that is *cancelable* for the lessee, which requires the lessor to hand over capital goods whose ownership rights remain with him, to the lessee to be used in his company with periodic payments the amount agreed by both parties during a specified period. [25]

In this *Finance Lease*, the lessee can be considered as an economic owner or economic owner, because he bears all the risks of the goods in the lease, both the risk of falling in the value of the goods or damage to the goods or the risks expressly agreed in the leasing contract. As a "*legal owner"* or "*nominal owner*" is a person who has property rights, namely lessors.[26] Thus, in the *Finance Lease* contract, the lessee is entitled to obtain economic benefits by using the capital goods that are the object of the leasing, while the ownership rights over the capital goods remain with the lessor.[27]

According to Rochmat Soemitro*, Operating Lease* can be equated with a lease with a shorter term that is *cancelable*, so that at any time the lessee can be terminated in accordance with the terms of the agreement.[28] Usually the lessee does not have the right to buy or purchase options and when the lessee's contract ends there is no transfer of ownership of the goods. In *this Operating Lease*, the lessor purchases capital goods and then leases them to the lessee for a certain period of time. Usually the lessor is responsible for the maintenance of capital goods. However, the risk of the value of the goods, damaged can be agreed to end, the lessor renegotiates a new leasing contract to the lessee or looks for a new prospective lessee. In this Operating Lease there is clearly no specified option.

In addition to the two types of leasing described above, *Sale and Lease Back* are known as part of *Finance Lease.*[29] *Sale and Lease Back* is a form of leasing transaction, where the lessee sells his capital goods to the lessor. At the same time, the goods are handed back to the lessee. In implementing this *Sale and Lease Back* agreement, a sale and purchase agreement is first made between the lessor and the lessee, then a leasing agreement is made. Therefore, in this *Sale and Lease Back* there is no physical movement of capital goods. Usually this *Sale and Lease Back* agreement is done because the lessee needs cash (cash) which is used for additional working capital or for other purposes.

Based on the definition of leasing as stated in the joint decree of the Minister of Finance, Minister of Industry and Minister of Trade in 1974 Jo. Decree of the Minister of Finance Number 1169 / KMK.01 / 1991, it can be concluded that in principle leasing activities are capital goods financing activities needed by a company (lessee). These capital goods are used to produce output in the form of goods or services. Therefore, this leasing activity aims at things that are productive, not consumptive. Capital goods that are the object of

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leasing can be classified into movable objects adopted in the understanding of the Civil Code, these goods include for example, printing machines, industrial / textile machinery, motor vehicles (cars), transportation equipment (trucks), construction equipment (bulldozers), agricultural equipment (tractors), pharmaceutical equipment in laboratories, electronic / electrical equipment, computers. Capital goods during the leasing period are the property of the lessor. Physically, capital goods are in the lessee's power, this is in accordance with the utilization of capital goods needed by the lessee for the smooth running of its business. So the documents related to capital goods remain in the possession of the lessor.[30]

In the case of delivery of capital goods, the lessor makes the following provisions:

1. The lessor is not responsible for delays in the delivery of capital goods made by suppliers.
2. The lessor is not responsible for damage or incompatibility of capital goods.
3. The lessee must inspect the capital goods and upon receipt of the goods then sign the minutes of handover which is the usual sign of acceptance,
4. If the lessee suffers losses due to late delivery of capital goods or non-delivery of capital goods, the lessee has the right to claim compensation to the supplier provided that the lessor does not guarantee that the compensation is granted by the supplier.

For the maintenance and use of capital goods, it is determined that the lessor affixes the mark and mark to the capital goods. This means that the capital goods belong to the lessor, as well as the transfer of location from the capital goods can only be done by the lessee if it has received approval from the lessor. The capital goods must be maintained by the lessee as a good user if the capital goods are damaged, then the lessee must repair them. Otherwise, the lessor will repair the damage himself and then the lessor has the right to withhold the goods (r*etentierecht*) until the cost of repairing the damage to the capital goods is reimbursed by the lessee to the lessor. For leasing objects in the form of movable goods, it is affirmed by the lessor that the lessee may not attach, bind, invest the capital goods to land and buildings or other immovable objects. This provision is also made to reaffirm the ownership of capital goods in the hands of the lessor. This premise is that objects are attached to the land and buildings. To overcome this, if the lessee wants movable goods as leasing objects to be attached to immovable goods, then the attachment must be affirmed that the movable goods are not a unit or ownership of the owner of immovable goods. In other respects, the movable property remains the property of the lessor.

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The mechanism of the leasing agreement can be described as follows:

1. The lessee comes to the lessor's company office and wants to need certain capital goods, such as textile making machines.
2. The lesoor shows the capital goods in the supplier's *showroom*, and the lessee makes a choice of the type of machine.
3. The lesoor party entered into a leasing agreement with the lessee.
4. If the lessor is able to finance the capital goods, there is no need to involve the bank. If the price of capital goods is high, the lessor borrows money (capital assistance) from the bank by making a bank credit agreement.
5. The lessor enters into a capital goods sale and purchase agreement with the supplier.
6. The supplier, sending capital goods in accordance with the choice of the lessee to the lessee company. The lessee signs proof of receipt of goods from the lessor.
7. The lessee pays the financing installments to the lessor as agreed.[31]

Make an Ideal Formulation of Fiduciary Guarantee Arrangements in *Leasing* Agreements in Indonesia that can Provide Legal Certainty and Protection for the Parties

The existence of fiduciaries and their arrangements in Indonesia has a long history, starting from the reign of the Dutch East Indies with the rule of law based on jurisprudence. Fiduciary guarantees exist as an answer to overcome deficiencies in collateral in the lien process whose execution is carried out through the release of objects from the lien / creditor (inbezitstelling) for the validity of the lien, which means the existence of the object is with the lien, (Civil Code) so that the lien cannot enjoy the object. While in fiduciary power remains with the owner of the object, the transfer of property rights from property is based on (Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantee, Supplement to the State Gazette of the Republic of Indonesia Number 3889, 1999), so what is handed over from the owner of the object is only evidence of ownership rights of the object that is the fiduciary guarantee so that it means that juridically the object pledged to the creditor is his ownership right while The object can be economically enjoyed and remain in the possession of its owner. The fiduciary agreement becomes an integral part of the underlying agreement which makes the fiduciary can be translated as a basis of rights used to transfer ownership rights as stipulated in article 584 of the Civil Code, but the possibility of such transfer of rights is only intended as a guarantee grant, without any actual delivery of the goods or things and such transfer of rights does not provide all implications as also applied to normal transfer of property rights.[32]

In the fiduciary agreement, the object used as the object of the fiduciary guarantee is to remain in the possession of the owner of the object (debtor) and is not controlled by the creditor, so in this case it is the transfer of ownership of the object without physically

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surrendering the object.[33] Article 23 paragraph (2) of the Fiduciary Guarantee Law, hereinafter referred to as the UUJF states that the Fiduciary is prohibited from transferring, mortgaging, or leasing to other parties objects that are the object of the Fiduciary Guarantee that are not inventory objects, except with the prior written consent of the Fiduciary Beneficiary.

The *droit de suite* principle is part of Indonesian legislation in relation to the absolute right to property. Fiduciary Assurance has a *droit de suite* nature, meaning that Fiduciary Guarantee covers the object of the Fiduciary Guarantee in the hands of whoever the object is. However, this property is excluded for Fiduciary Guarantee objects in the form of *inventory* objects. The nature of droit de suite can be exemplified, the object of the Fiduciary Guarantee object in the form of a car, bus, or truck that the owner of the object resells to another party, then with the nature of *droit de suite* if the debtor defaults, the creditor as a fiduciary beneficiary can still execute the collateral object of the car, truck or bus even though the debtor has been sold and controlled by another party or a third party. So the sale of the object of the Fiduciary Guarantee by the owner of the object does not deprive the creditor of the right to execute the object of the Fiduciary Guarantee. The recognition *of the droit de suite principle* that the fiduciary security right follows the object in the hands of whoever it is located provides legal certainty for the creditor to obtain repayment of the debt from the proceeds of the sale of the fiduciary guarantee object if the debtor defaults. So, legal certainty of this right is not only when the object of the Fiduciary Guarantee is still in the power of the debtor but also when the object of the Fiduciary Guarantee has transferred or is in the power of a third party.[34]

So based on the property rights attached to the Fiduciary Guarantee and the *droit de suite* principle where the right continues to follow the object handled whatever the object is, if the debtor transfers the object of the Fiduciary Guarantee to a third party, there will be a legal effect where the creditor has the right or force to withdraw the object of the fiduciary guarantee from the third party by execution. Although the UUJF has provided quite clear rules in Article 20 regarding the provision of rights to collateral objects attached to their objects, the debtor does not pay attention to these provisions and transfers the collateral objects to other parties. Likewise, as stipulated in Article 36 of the UUJF, criminal provisions against debtors who transfer without permission will be given criminal sanctions and fines.[35] The transfer of the right to ownership of objects that are used as objects pledged in fiduciaries is carried out through the *mechanism econstitutum possessorium* (transfer of ownership of objects not through physical delivery of objects), namely the transfer of ownership of a material object through the process of continuing control over the material object as intended which has implications for the fiduciary who will then control the property rights for the benefit of the fiduciary guarantor.

For credit agreements made between creditors and debtors with fiduciary guarantees, the provisions on fiduciary guarantees as stipulated in Article 11 paragraph (1) of the UUJF that objects encumbered with fiduciary guarantees must be registered. The registration is currently based on Government Regulation Number 21 of 2015 concerning the procedure

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for registering fiduciary guarantees and the cost of making fiduciary guarantee deeds, which states that the registration of fiduciary guarantees is carried out online. Therefore, if the fiduciary guarantee object is registered and has a fiduciary guarantee certificate, the applicable provisions in Law Number 42 of 1999 concerning Fiduciary Guarantee may apply and be binding, including provisions on criminal liability or provisions on criminal sanctions if there is a prohibition or unlawful act from the law.[36]

Law No. 42 of 1999 specifically stipulates in Article 23 paragraph (1) that the use, transfer of objects or the results of objects into objects of fiduciary guarantees approved by the fiduciary beneficiary does not result that he will lose fiduciary guarantees for certain objects. This arrangement needs to be remembered that in general, the object of fiduciary guarantees is various movable goods. In connection with that, there is a clear prohibition in Article 23 paragraph (2) of Law No. 42 of 1999 that "to multiply, mortgage or lease to other parties objects that are objects of fiduciary guarantee that are not objects of inventory, except with the prior written consent of the fiduciary recipient".[37]

CONCLUSION

The results showed that;

1. Leasing in Indonesia began in the 1970s, precisely in 1973 and only received formal juridical recognition on February 7, 1974 in the form of a Joint Decree of the Minister of Finance, Minister of Industry and Minister of Trade of the Republic of Indonesia Number Decree 122/MK/2/1974, Number 32/M/SK/2/1974, Number 30/Kpb/I/1974 concerning Leasing Licensing.
2. The fiduciary agreement becomes an integral part of the underlying agreement which makes the fiduciary can be translated as a basis of rights used to transfer ownership rights as stipulated in article 584 of the Civil Code, but the possibility of such transfer of rights is only intended as a guarantee grant, without any actual delivery of the goods or things and such transfer of rights does not provide all implications as also applied to normal transfer of property rights.
3. In the literature there can be found different types of leasing, which are viewed from several angles. However, the usual difference in leasing can be broadly divided into 2 types, namely: *Finance Lease* and *Operating Lease*. According to Rochmat Soemitro, what is meant by Finance Lease is an agreement / contract between the lessor and lessee that is *cancelable* for the lessee, which requires the lessor to hand over capital goods whose ownership rights remain with him, to the lessee to be used in his company with periodic payments the amount agreed by both parties during a specified period.

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Footnotes

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