
FORMS OF LEGAL PROTECTION FOR LESSORS IN LEASING AGREEMENTS AFTER THE CONSTITUTIONAL COURT DECISION NO. 18/PUU-XVII/2019

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ABSTRACT

Following on Article 15 Paragraph 2 and Paragraph 3 UU 42/1999, so in practice, Finance Companies, as the lessor, always apply a fiduciary guarantee to the leasing object in the leasing agreement. The power of Fiduciary Deed to execute the leasing object automatically if a debtor breaches of contract has amended its meaning after Constitutional Court released The Decision No. 19/PUU-XVII/2019. It is clearly stated that Finance Companies need a court decision to execute the leasing object of fiduciary guarantee if debtor does not want to surrender the object voluntarily. Therefore, based on utility theory, the purpose of this thesis is knowing whether The Decision No. 19/PUU-XVII/2019 has benefit value for Finance Companies. Then, from this thesis, we want to dig deeper regarding the effort to protect financing companies' interest in making leasing agreement with debtor. This research is a normative legal research using statute approach, conceptual approach, and case approach. The conclusion of this research is The Decision of Constitutional Court No. 19/PUU-XVII/2019 does not have benefit value for Finance Companies, and also Finance Companies need to more emphasize the leasing agreement related leasing object execution if debtor breaches the contract, then make the leasing agreement become notarial deed.

Keyword: Financing Company, Fiduciary, Leasing, Decision of Constitutional Court.

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INTRODUCTION

Financial institutions were born and grew in Indonesia with various alternative services offered as a form of implementation of the ASEAN Infrastructure Financing Mechanism Task Force (AIFM Task Force) in order to follow up on the commitments of the 10th ASEAN Finance Ministers' Meeting (AFMM) in 2006 in Cambodia for economic recovery after the economic crisis that occurred simultaneously in the ASEAN region around 1997-1998 (Janis, 2012). This financial institution is an institution that is present in the midst of society to answer all community needs in the economic, social and business fields.

This financial institution is part of a financial institution, only in carrying out its business activities, this financial institution places more emphasis on financing service activities, providing funds, and capital goods without attracting directly from the public. (Abdulkadir, 2004) explained the term financing institution, namely "a business entity that carries out financing activities in the form of providing funds or capital goods by not withdrawing funds directly from the public".

The legal basis for the birth of financial institutions in Indonesia is through the Decree of the President of the Republic of Indonesia No. 68 of 1998 concerning Financing Institutions, which then because since 2012 the position of financial institutions is under the guidance and supervision of the OJK (Financial Services Authority) then the legal basis is the Financial Services Authority Regulation Number 29/POJK.05/2014 concerning the Operation of Financing Companies. Amended and updated through the Regulation of the Financial Services Authority of the Republic of Indonesia Number 35 / POJK.05/2018 concerning the Business Implementation of Financing Companies (POJK 35/2018).

One form of financing that is most favored and needed by the public is leasing. Leasing is one of the business activities of finance companies which is quite popular in the business world because the object of leasing itself is a capital item used by entrepreneurs to support their business activities. Starting from capital goods that are relatively expensive, such as leasing of aircraft by airlines, production machines, to leasing of goods for office and daily needs. Almost all business fields can be said to have been entered by the leasing business, including but not limited to the fields of transportation, industry, construction, agriculture, mining, offices, health, and others.

(Andasasmita, 2001) defines that leasing is related to agreements which in entering into a contract are based on a certain relationship between the duration of a contract and the duration of use (economical) of the goods which are the object of the contract and it is agreed that the one party (the lessor) without relinquishing the rights his/her own by law is obliged to hand over the right of enjoyment of the item to another party (lessee), while the lessee is obliged to pay adequate compensation for enjoying the item without the intention of owning it (*juridichie eigendom*).

This capital goods financing (leasing) carries a considerable risk, given that the leasing transaction is a transaction that involves a large amount of capital and the possibility of default by the lessee. Especially in a developing country such as Indonesia, in order to ensure the smooth and orderly payment of rents (rentals) and prevent losses for the lessor, the facts on the ground state that most finance companies as lessors require the existence of another guarantee institution which is expected to guarantee security of the lessor, because the object of the lease is a movable object. In practice, there are several financing companies that use fiduciary guarantees, where the object of the fiduciary guarantee is the object of the leasing.

Fiduciary guarantee is one of the material guarantees known in positive law (Mulyadi & Widjaja, 2005). Fiduciary guarantees provide a position by prioritizing fiduciary recipients over other creditors. Fiduciary guarantee objects are divided into two categories, namely:

1. Movable objects both tangible and intangible;
2. Immovable objects, especially buildings that are not encumbered with mortgage rights. Fiduciary guarantees are also referred to as material guarantees, in the process of transferring ownership of an object that is used as collateral from a debtor called a fiduciary giver to a creditor called a fiduciary recipient, with no transfer of physical control of the object so that the owner remains in control of the object. The point is that only the ownership is temporarily transferred to the creditor until the debtor settles his debt obligations and the debtor can still use the object for his daily needs or his business needs.

The form of proof of a fiduciary guarantee holder is a fiduciary guarantee certificate. The function of the fiduciary guarantee certificate is that the creditor has the right to sell objects that are the object of the fiduciary guarantee on his own power if the debtor is in breach of contract (default). If you look at Law Number 42 of 1999 concerning Fiduciary Guarantees (UU 42/1999), in paragraph (1) the words on the fiduciary guarantee certificate are stated "FOR JUSTICE BASED ON THE ALMIGHTY GOD". The existence of these words has the same executorial power as a court decision that has permanent legal force. Executorial power is a type of power of execution of state instruments which are authorized by the Court to implement decisions. "... this executorial title has a juridical consequence that the holder of the Fiduciary Guarantee Certificate has the same position as the person who has held a court decision that has permanent legal force, so that the holder of the Fiduciary Guarantee Certificate has the authority to execute the object of the Fiduciary Guarantee" (Prasetyo, 2020).

Before the decision of the Constitutional Court was issued, the fiduciary guarantee institution allowed the fiduciary giver to control the guaranteed objects, to carry out business activities financed from loans using fiduciary guarantees. Furthermore, "the execution of objects that are objects of fiduciary guarantees can be carried out by the fiduciary recipient if the fiduciary giver is in default." The reason for the execution of the object of the fiduciary guarantee is to obtain the repayment of the receivables as referred to in Article 29 paragraph (1) of Law 42/1999.

The existence of the Constitutional Court Decision No. 18/PUU-XVII/2019 has a great impact on finance companies, especially those engaged in leasing, which have been implementing fiduciary guarantee practices for leasing objects, especially in the form of protection for finance companies in the future, especially in terms of the debtor performs actions that are contrary to the principle of good faith.

METHOD

Legal research is a process to find the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced. This research uses normative juridical law research or known as doctrinal research. According to Terry Hutchinson (Marzuki, 2008):

"Doctrinal research: research which provides a systematic exposition of the rules governing a particular legal category, analyzes the relationship between rules, explains areas of difficulty and, perhaps, predicts future development".

Which when translated means:

"Doctrinal research is research that provides a systematic explanation of the rules governing a particular category of law, analyzes the relationship between regulations, explains areas of difficulty and perhaps predicts future development".

So, it can be interpreted that doctrinal research is research that provides a systematic explanation of the rules governing certain legal categories, analyzes the relationship between rules,

Explains difficult things. This research can be done by using the concept of Law in book, namely by conducting a literature review (Soekanto and Mamudji, 2004).

Through a process to find the rule of law, legal principles and legal doctrines so as to be able to answer the legal issues studied. This type of research is normative, which is carried out by examining various formal legal rules such as laws, regulations and also literature on theoretical concepts so that they can be related to the problems to be studied.

RESULTS AND DISCUSSION

1. Legal Aspects of Financing Institutions

Along with the development of community needs in the economic field, it has an impact on increasing the interaction of interests in society. In essence, humans cannot fulfill their own needs, for example someone has money but the desired item is in the power of another person, so there is a buying and selling interaction. There are people who want to own a car, but do not have the cash to buy it, on the other hand, there are people who have excess funds and want to invest their funds in the form of capital so that their money continues to grow, so there is a practice of buying and selling in installments and so on which forms the interaction between those who have capital and need capital.

The interaction between those who have capital and who need capital in its development creates a legal institution known as a financial institution which is an alternative source of funds for individuals or business entities that need funds to meet their needs.

Article 1 of Presidential Decree 9/2009 states that: "Financing Institutions are business entities that carry out financing activities in the form of providing funds or capital goods", then paragraph (2) determines: "Financing Companies are business entities specifically established to carry out business leases, Factoring, Consumer Financing, and/or Credit Card business".

The same definition is also given in Article 1 number 2 of the Minister of Finance Regulation 84/2006 which stipulates: "Financing Company is a business entity outside of Banks and Non-Bank Financial Institutions specifically established to carry out activities that are included in the business field of Financing Institutions.

Since the establishment of OJK through Law Number 21 of 2011 concerning the Financial Services Authority, the implementation of an integrated regulatory and supervisory system for all activities in the financial sector has been implemented by OJK. The regulatory and supervisory duties carried out by the Financial Services Authority include financial service activities in the Banking sector, financial service activities in the Capital Markets sector, and financial service activities in the Insurance, Pension Fund, Financing Institutions, and Other Financial Services Institutions sector. Legal certainty regarding financing institution regulations was revoked and turned to OJK, so that the legal basis for financing institutions is POJK 35/2018.

Article 1 paragraph (1) of POJK 35/2018 stipulates that a finance company is: "A business entity that carries out financing activities for goods and/or services". The types of business activities of finance companies based on Article 2 of POJK 35/2018 consist of 4, namely as follows:

- a. Investment Financing;
 - b. Working Capital Financing;
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- c. Multipurpose Financing; and/or;
- d. Other financing business activities based on the approval of the Financial Services Authority.

2. History and Definition of Lease/Leasing

The existence of leasing legal institutions in Indonesia only occurred in the early 1970s and the regulation was born around 1974. Several regulations in 1974 were the spearhead of the history of the development of leasing law in Indonesia. The regulations are:

- a. The leasing business activity was only introduced in 1974 through the Joint Decree of the Minister of Finance, Minister of Industry and Minister of Trade of the Republic of Indonesia No. KEP - 122/MK/IV/2/1974, No.32/M/SK/2/1974, No.30/Kpb/1/1974 dated 7 January 1974 concerning Leasing Business Licensing.
- b. Decree of the Minister of Finance of the Republic of Indonesia No. KEEP. 649/MK/IV/5/1974 dated 6 May 1974 concerning Leasing Business Licensing.
- c. Decree of the Minister of Finance of the Republic of Indonesia No. Kep. 650/MK/IV/5/1974 dated May 6, 1974 concerning Affirmation of Provisions on Sales Tax and Amount of Stamp Duty on Leasing Business.
- d. Announcement of the Director General of Monetary Number: Peng 307/DJM/II.1/7/1974 dated July 8, 1974 concerning Guidelines for the Implementation of Leasing Regulations.
- e. Presidential Decree No. 61 of 1988 and Decree of the Minister of Finance No. 1251/KMk.031/1988 dated December 20, 1988.

Since 1980 the number of leasing companies has increased from year to year to finance the provision of capital goods in the business sector. Capital financing activities are either on a finance lease or an operating lease for use by the lessee for a certain period of time.

Leasing comes from the English word "lease", which means to rent out. The definition of Leasing according to Article 1 number 5 of Presidential Decree 9/2009 is: "Financing activities in the form of providing capital goods, either by Lease with an option (Finance Lease) or Lease without an option (Operating Lease) to used by the Lessee (Lessee) for a certain period of time based on installment payments". This is also confirmed in Article 1 point 5 of POJK 35/2018 which states: "Finance Lease, hereinafter referred to as Financing Lease, is a financing activity in the form of providing goods by a Financing Company to be used by debtors for a certain period of time, which substantially transfers the benefits and risks of the goods being financed".

According to Brian Coyle (2000) regarding the notion of leasing, is as follows: "A lease is an agreement in which the owner of an item, for example a business asset or a piece of real estate, allows someone else to use it for a specified time, in return for a rental. The owner of the leased asset is the lessor and the user of the asset is the lessee". Suandy stated that a lease is: "An agreement between the lessor and the lessee". The lessor provides an option to the lessee to use capital goods for a certain period of time with a payment in stages from the lessee whose value is based on what was agreed. At the end of the contract period, the lessee may be given the option to purchase capital goods. Therefore, during the contract period, ownership of capital goods remains with the lessor (Siregar et al., 2021).

(Sunaryo, 2014) argues that: "In general, leasing is an equipment funding, which is a financing activity in the form of equipment or capital goods for the company to be used in the

production process." Abdulkadir Muhammad provides a definition: "Leasing is a special form of leasing, namely in the form of company financing in the form of providing capital goods used to run its business by paying rent for a certain period of time" (Murniati, 2004).

When viewed from a legal aspect, leasing has 4 characters, including:

- a. Agreement between the lessor and the lessee;
- b. Based on the leasing agreement, the lessor transfers the right to use the goods to the lessee;
- c. The lessee pays the lessor the lease fee for the use of the asset;
- d. The lessee returns the goods to the lessor at the end of the specified period for a period less than the economic life of the goods (Siregar et al., 2021).

Based on the explanation above, the concept of leasing or leasing is a lease. In a leasing relationship between the lessor and the lessee, the legal owner of the object of the lease is the party who rents it out, not the lessee. The position of the tenant here is only to have the right to control the object of the lease and enjoy the results of the use of the object of the lease with limitations as agreed with the party who rents out in a lease agreement. The theoretical principle of ownership of the object in the lease agreement also applies to the leasing agreement. This is expressly regulated in Article 3 paragraph (3) of the Minister of Finance Regulation 84/2006 concerning Financing Companies, which reads as follows: "As long as the Lease Agreement is still valid, the ownership rights to the capital goods of the object of the Lease transaction are with the Financing Company".

It can be said that the ownership of capital goods as the object of lease in a leasing agreement is legally owned by the lessor. The lessee only controls the goods to be used for its usefulness to support the smooth running of its business. According to leasing theory, in a leasing transaction, sometimes the lessee is given the opportunity to own capital goods, namely if the lessee exercises the purchase option. Thus, if the lessee exercises his purchase option, the legal position of the lessee at that time changes, namely from the lessee to the owner of the leasing object. If the lessee wants to become the owner of the goods, the consequence is that the lessee must pay a certain amount of money to the lessor. If the lessee does not exercise his purchase option, then for whatever reason, the status of the lessee remains as a lessee until the lease agreement ends.

The parties involved in leasing business activities are:

- a. Lessor, which is a company or manufacturer as a party that provides or sells capital goods needed by the lessee. In a finance lease, the lessee aims to obtain financing in the form of goods or equipment by means of installment payments or periodic payments. As for the operating lease, the lessee aims to meet the labor needs of the equipment in addition to the operator and maintenance of the equipment without risking the lessee to damage.
- b. Lessee is a company or party that obtains financing in the form of capital goods from the lessor.
- c. Suppliers, namely companies that procure or provide goods for sale to the lessee with payment in cash by the lessor. In a finance lease, the supplier lessee directly delivers the goods to the lessee without going through the lessor as the party providing the financing. As for the

operating lease, the supplier sells the goods directly to the lessor with payment according to the agreement of both parties, either in cash or periodically.

- d. Creditors are usually banks that play an important role in providing funds to lessors. Creditors or banks can also provide credit to suppliers for the purchase of capital goods which will then be sold as leased objects to the lessee or lessor.

3. Types of Leasing

Actually there are various forms of leasing. However, as regulated in Presidential Decree 9/2009 jo. Minister of Finance Decree 1169/1991 and judging from the transaction technique between the lessor and the lessee, in principle, leases can be divided into 2 types, namely finance leases and operating leases, which are explained in the next paragraph below.

Finance leases, often also called full pay out leases or capital leases, are a type of lease that is more often applied in practice by finance companies. In this type of finance lease, the lessee contacts the lessor to select, order, inspect, and maintain the required capital goods. During the lease term, the lessee pays the rent periodically from the total amount plus the payment of the residual value.

Based on Article 11 of the Minister of Finance 1169/1991, if the lessee chooses to purchase the leasing object, the lessee is obliged to pay the payment of the remaining value of the leased capital goods. However, if the lessee chooses to extend the term of the agreement, the salvage value of the leased capital goods is used as the basis for determining the lease receivables. At the end of the contract, the lessee can exercise the option that has been agreed upon at the beginning of the lease term. The option is that the lessee can choose to buy the leasing object or extend the term of the lease agreement, or return the leasing object.

The characteristics of a finance lease according to (Fuadi, 2021) are:

- a. Leased objects or capital goods owned by the lessor can be in the form of movable or immovable objects and have a maximum age equal to the economic useful life of the goods.
- b. The lessee is obliged to make payments to the lessor periodically in accordance with the agreed amount and time period.
- c. The lessor cannot unilaterally cancel the contract or terminate the contract period with the agreed term of the agreement.
- d. The lessee at the end of the contract period has the right/purchase option to purchase the leased object according to the residual value.

An operating lease, also known as a service lease, is a type of lease in which the lessor only provides capital goods to be rented by the lessee with no option rights at the end of the contract period. The calculation of the amount of rent in installments that must be paid by the lessee does not include the total costs incurred by the lessor to obtain the capital goods.

4. Fiduciary Guarantee in Leasing Business Activities

Fiduciary is an institution originating from the western civil law system whose existence and development is always associated with the civil law system. The term civil law comes from the Latin word "ius civile", which was applied to Roman society. In addition to ius civile, there is also a law that regulates Roman citizens with foreigners known as "ius gentium" (Kamelo, 2014).

In his book, (Kansil, 1992) explains that the Indonesian legal system has a close relationship with Dutch law because of historical links based on the principle of concordance (*concordantie beginsel*), as well as the Dutch legal system which has historical links with French law derived from Roman law. In the 6th century Roman law was collected and codified by order of Emperor Justinian in a law book called *Corpus Iuris Civilis*. With the expansion of the Roman empire into Western Europe, Roman law also became widely applicable.

Fiduciary as a guarantee institution has long been known in Roman society, which initially grew and lived in habit. Based on historical links, fiduciary guarantee institutions are further regulated in jurisprudence and have now received recognition in law.

The Romans recognized two forms of fiduciary, namely *fiduciary cum creditore* and *fiduciary cum amico*. Both arise from an agreement called *pactum fiduciae* which is then followed by the transfer of rights or *in iure cessio*. In *fiduciary cum creditore*, a debtor submits an item in the possession of the creditor, the creditor as the owner has an obligation to return the ownership of the item to the debtor if the debtor has fulfilled his obligations to the creditor. *Fiduciary cum creditore* was born in Rome because of the pressing need of Roman society for collateral law, but at that time it was not regulated in written law.

From the word "*cum creditore*" we can already guess that the handover is not intended to actually constitute a transfer of ownership, but only as collateral - - not to be owned by creditors - - and indeed, according to the institution, the creditor does not have full authority as that of the creditor. an owner. After the debtor has fulfilled his obligations, the creditor is obliged to return it to the ownership of the debtor. Because the debtor acts with the belief that the creditor - - after the debtor has paid off his obligations - - will not break his promise by still having the collateral object (and considers himself to be the full legal owner), then such a relationship is called a relationship based on *fides* or fiduciary relationships (Satrio, 2007).

At that time this fiduciary institution was born before the pawn and mortgage institutions, because the community needed it. However, because the legal construction used is the transfer of property rights from the debtor to the creditor, the debtor must believe that the creditor will not abuse his authority as the owner of the goods. The debtor's trust only has moral strength and not legal power so that the position of the debtor is very weak and if the creditor does not want to return the ownership rights to the goods submitted by the debtor as collateral, the debtor cannot do anything, this is where the weakness of the fiduciary in its initial form lies.

The weakness of *fiduciary cum creditore*, which does not guarantee a balanced position between debtors and creditors, resulted in when *pand* and mortgage developed as material security rights, the fiduciary was forced until it disappeared completely from Roman law.

The emergence of the *pand* guarantee institution, whose collateral object is movable property and requires that the collateral be physically handed over by the debtor to the creditor (*inbezitstelling* condition), and the mortgage guarantee institution, whose object is a fixed object (land), replacing the fiduciary position because the two institutions considered more appropriate, namely that it has provided balanced rights between the creditor as the recipient of the guarantee and the debtor as the guarantor, as well as providing more legal certainty considering that both forms of guarantee have been regulated in written law.

In addition to fiduciary cum creditore, the Romans also knew fiduciary cum amico. Fiduciary cum amico occurs when a person surrenders his authority to another party or hands over an item to another person to be taken care of (Tiong, 1984). Fred B.G. Tumbuan explains that:

“Fiduciary cum amico is a trust institution known in Roman law. This institution was often used by a priest familias who had to leave his family and land for a long period of time because he had to make a long journey or travel to war. In this case, the familias will entrust his familia, namely his family and all of his wealth to a friend who will then take care of his land and wealth and provide guidance and protection to the family left behind by the familias. Of course, between Fr Familias and his friend a promise was made that the friend would return ownership of the familia when Fr Familias had returned from his trip (Kamello & SH, 2022).”

As described above, it can be said that Fiduciary cum amico is a relationship that is not intended for the purpose of guaranteeing debt. The relationship between the giver and the recipient is property management. The recipient of the property exercises authority in accordance with the interests of the giver of the property. According to O.K. Brahn (Kamello & SH, 2022), fiduciary cum amico is a fiduciary concept in American Anglo Saxon law known as trust. Fiduciary, thus in the following discussion is a fiduciary whose meaning and purpose is as a guarantee of debt or fiduciary cum creditore in Roman law.

The disappearance of the fiduciary after the existence of the pand and mortgage institutions, resulted in the fiduciary not participating in the reception when Roman law was accepted by Dutch law, but only accepting two types of guarantee institutions, namely pand and mortgage. Therefore, the Dutch Burgerlijk Wetboek (BW) does not contain a fiduciary regulation, as well as the Indonesian BW, which according to the principle of concordance is adapted to the Dutch BW, does not recognize fiduciary duties, but knows pands and mortgages.

In Indonesia, this fiduciary practice also occurs because the Pand (pawning) institution is considered to be less able to meet the legal needs of the community as felt by the Dutch community. The first case in Indonesia regarding fiduciary guarantees was the case of Bataafsche Petroleum Maatschaappij v. Pedro Clignett who was dumped on 18 August 1932 by Hooggerechtschhof (Hgh). The birth of this decision laid the first basis for jurisprudence that was influenced by Bierbrouwerij Arrest in the Netherlands so that this decision was the initial milestone for the birth of fiduciary in Indonesia and was the first jurisprudence as a way out to overcome problems in guaranteeing a pledge as regulated in Article 1152 BW.

From history, it can be concluded that the fiduciary institution is an example of the invention of the judge (rechtersrecht) which is called the extension (uitbouw) of the pawn law (pandrecht), which was born because there was an imbalance between the needs of the community and the development of the guarantee law.

5. Fiduciary Guarantee Principles

According to experts A. Hamzah and Senjun Manulang (1991) have their own understanding of Fiduciary, namely "Agreement is an agreement in which two or more parties bind themselves to carry out something in the field of wealth.". Fiduciary has the following principles:

- a. The principle of specialization on fixed loans, the object of fiduciary guarantees becomes collateral for debt repayment, so there must be clarity regarding the amount of debtor debt.
- b. Accessor, a follow-up agreement from the main agreement, namely a debt agreement or credit agreement.
- c. The principle of preference rights, there is a position of rights that is carried out on creditors against debtors, in essence, these rights take precedence if the debtor is in bankruptcy or in default.
- d. The one who gives the fiduciary must be the owner of the object (object of guarantee).
- e. It is allowed to give to more than one recipient or a fiduciary representative.
- f. There is a prohibition for re-fiduciary of the object of fiduciary guarantee, if it has been registered.
- g. The principle of the *droit suite*, fiduciary guarantees must follow objects that are objects of fiduciary guarantees wherever these objects are located, but there are exceptions if the transfer of rights to receivables and inventory objects.

The conditions that are met for the transfer of fiduciary rights are: 1) Making a *zakelijk* agreement, 2) There is a point for a transfer of rights, 3) The authority to control the object from the person who handed over the object, and 4) In the submission by way of *Constitutum Prossessorium* for the object. Tangible move. Article 27 of the Fiduciary Guarantee Law contains provisions, namely:

- a. Fiduciary recipients have priority rights over other creditors.
- b. The priority right as referred to in paragraph (1) is the right of the Fiduciary Beneficiary to take the settlement of his receivables on the results of the execution of the object that is the object of the Fiduciary Guarantee.
- c. The priority rights of the Fiduciary Recipient are not nullified due to the bankruptcy and or liquidation of the Fiduciary Giver.

Like other material guarantees, fiduciary guarantees are born from the realization of a debt agreement followed by a fiduciary agreement. The nature of the fiduciary guarantee agreement is *acesoir* or additional because the principal is in the loan agreement. Based on its form, fiduciary agreements are generally in written form, not infrequently even stated in a notarial deed with the aim of providing legal certainty and protection for creditors (Triargono, 2017).

6. Ownership as a fiduciary guarantee institution principle

The term fiduciary comes from the Dutch language, namely *fiducie*, while in English it is called fiduciary transfer of ownership, which means trust. In various literatures, fiduciary is commonly referred to as FEO, namely the transfer of property rights based on trust (Prajitno, 2011). The word 'fiduciary' comes from Latin. The word is a noun which means trust in someone

or something, great hope. In addition, there is the word "fido" which is a verb which means to trust someone or something.

According to (R Subekti, 2021) argues: "That in fiduciary the word 'fides' means trust, the debtor believes that the debtor has the goods only for collateral", and in another book, Prof. Subekti also explained the meaning of the word "fiduciair", namely: "Fiduciair is a trust given reciprocally by one party to another, that what comes out is seen as a transfer of property, in fact (internal, internal) is only a guarantee for a debt.

According to (Kamello & SH, 2022), fiduciary is a term derived from Roman law, which has two meanings, namely as a noun and an adjective. As a noun, the term fiduciary means someone who is given the mandate to take care of the interests of third parties in good faith, full of accuracy, being careful and frank. People who are entrusted with the obligation to perform actions for the benefit of others. As an adjective, the term fiduciary shows an understanding of matters relating to trust.

In fiduciary, there are legal subjects and objects of fiduciary guarantee institutions. The parties who are fiduciary subjects are fiduciary givers or debtors and fiduciary recipients or creditors. The meaning of each party according to UUJF is as follows:

Article 1 section 5

Fiduciary Giver is an individual or corporation that owns the object that is the object of the Fiduciary Guarantee.

Article 1 section 6

Fiduciary Recipients are individuals or corporations who have receivables whose payments are guaranteed by Fiduciary Guarantees.

Meanwhile, the objects of fiduciary law according to Law 42/1999 are as follows:

- a. Movable objects, both tangible and intangible;
- b. Immovable objects that cannot be encumbered with mortgage or mortgage rights, namely buildings on land owned by other people, for example flats, apartments.

The definition of object as a fiduciary object here is everything that can be owned and transferred, both tangible and intangible, registered or unregistered, movable or immovable which cannot be encumbered with mortgage rights.

From the legal provisions above, it can be said that the basic principle of the notion of fiduciary here is more emphasized on two things, namely "transfer of ownership rights" and "control of the object as collateral remains with the owner of the object".

Fiduciary guarantees are identical with the control of collateral objects that remain with the debtor or called *constitutum possessorium* and this character is the basis for the difference between fiduciary and pawn. In this case, the question as well as a discussion that is quite important is the concept of transferring ownership rights to a collateral object where the object is still in the power of the fiduciary debtor.

The definition of ownership of objects that are the object of fiduciary guarantees in the law of guarantees includes ownership rights to objects and ownership rights to objects. According to the fiduciary theory, the fiduciary giver trusts his property rights as collateral for the debt to the fiduciary recipient. The transfer of property rights is not perfect as the transfer of property

rights in the sale and purchase agreement as regulated in Article 1459 BW (BW), which states that the transfer of property rights occurs when there is delivery of goods or levering according to articles 612, 613 and 616 BW (BW). Meanwhile, in a fiduciary guarantee, the surrender of ownership rights to an object by trust is more focused on the juridical surrender that has occurred, but is limited to debt guarantees only.

UUJF stipulates that the creditor's status is limited to the owner of the collateral object. This means that the fiduciary recipient or creditor has not been able to fully become the owner of the object. According to the engagement theory, the fiduciary recipient can fully become the owner of the collateral object if it meets the formidable requirements as stated in Article 1263 BW which reads:

An engagement with deferred terms is an engagement that depends on an event that is still to come and will not necessarily occur, or which depends on something that has already happened but it is not known by both parties. In the first case, the engagement cannot be executed before the event occurs; in the second case, the engagement is effective from the moment it occurs.

In this case, the transfer of ownership rights to the object can be fully transferred if the fiduciary giver is in default. However, based on Article 19 paragraph (2) of Law 42/1999, the transfer of rights is legal as long as the fiduciary guarantee agreement has been registered with the Fiduciary Registration Office. The birth of ownership of fiduciary collateral for creditors receiving fiduciary is at the time of registration at the fiduciary registration office. Then if the debtor defaults, then the juridical rights over the collateral in full are transferred to the fiduciary recipient creditor.

Because the fiduciary guarantee agreement is an accessor of the debt agreement and the debtor is the debtor, the collateral used as the fiduciary object is in the form of objects that actually belong to the debtor. When the object is fiduciary and at the time the fiduciary agreement takes place, the ownership of the object is half the property of the debtor and half of the creditor. It is said that way because prior to the default by the debtor, the creditor's position was not yet fully the owner of the object, only limited to being the owner of the collateral, so the debtor still had rights to the object, even though it was limited. From the description above, it can be concluded that the legal principles of FEO that were born from jurisprudence have been stated in the form of Law 42/1999, namely specifically regarding the concept of ownership of fiduciary objects.

7. Forms of Legal Protection for Financing Companies as Lessors in Leasing Agreements

The Constitutional Court's Decision Number 18/PUU-XVII/2019 in the end greatly affected the position of the financing company (creditor) as a lessor and fiduciary recipient, but the Constitutional Court's Decision Number 18/PUU-XVII/2019 is final and binding, therefore a form of protection for the According to the author, the post-MK financing company is returning to the dignity and the actual form of the leasing agreement itself.

The author has described in CHAPTER I previously, that in the community there has been a misunderstanding (misunderstanding) related to leasing/leasing. The concept of leasing or leasing is a lease. In a leasing relationship between the lessor and the lessee, the legal owner of the object of the lease is the party who rents out, not the lessee. The position of the tenant here is only to have the right to control the object of the lease and enjoy the results of the use of the object of the lease with limitations as agreed with the party who rents out in a lease agreement. The theoretical principle of ownership of the leased object in the lease agreement also applies to the leasing agreement. Ownership of capital goods as a rental object in a leasing agreement is legally owned by the lessor. The lessee only controls the goods to be used for its usefulness to support the smooth running of its business. This is explicitly regulated in Article 3 paragraph (3) of the Minister of Finance Regulation 84/2006 concerning Financing Companies, which reads as follows: "As long as the Lease Agreement is still valid, the ownership rights to the capital goods of the object of the Lease transaction are with the Financing Company".

The description above shows that the juridical ownership of the leasing object remains with the lessor, so there is no need to be charged with a fiduciary guarantee, because in a fiduciary guarantee, the legal ownership rights remain with the fiduciary giver. The transfer of ownership rights is not a legal transfer of ownership, so the fiduciary recipient (creditor) is not legally allowed to take any legal action on the goods whose ownership rights have been transferred by the fiduciary giver to the fiduciary recipient. Therefore, this fiduciary guarantee agreement is an accessor of the debt agreement and the debtor is the debtor, so the collateral used as the fiduciary object is in the form of objects that do belong to the debtor, so it is not appropriate if the fiduciary guarantee is applied to the leasing object.

A finance company should implement a leasing agreement, where in the leasing agreement itself a clause is clarified regarding when the debtor is declared in default and a voluntary surrender clause is added along with the stages of delivery. This leasing agreement needs to be read out thoroughly and in detail to the parties, or if necessary, the leasing agreement can be signed before a notary, to reduce the risk that the debtor will later state that he agrees in a forced state and does not understand the contents of the agreement.

The leasing agreement also needs to apply related to a dispute settlement clause, when a problem between a creditor and a debtor can be resolved through a court institution, meaning that if there is a problem between a creditor and a debtor, then what must be taken first is mediation (non-litigation) or prioritizing a non-litigation settlement. -litigation, after non-litigation fails, then dispute resolution through the court is allowed.

Then it is necessary to make a special attachment in the leasing agreement related to the procedures/procedures of the delivery and/or withdrawal of the leasing object if the debtor defaults. This clause must reflect the values of humanity and justice in its implementation, in order to avoid ways of withdrawing physical and psychological violence, for example by giving advance notice to the debtor, and when the withdrawal is carried out in a reasonable manner witnessed by the head of the neighborhood and the police to avoid commotion.

CONCLUSION

The form of protection for finance companies after the Constitutional Court Decision Number 18/PUU-XVII/2019 is to return to the dignity and form of the leasing agreement itself, without the imposition of a fiduciary guarantee. In the leasing agreement itself, a clause is clarified regarding when the debtor is declared to be in breach of the promise and a voluntary surrender clause is added along with the stages of delivery. This leasing agreement needs to be read out thoroughly and in detail to the parties, or if it is necessary, the leasing agreement is made in the form of a notarial deed, then the addition of a dispute resolution clause and the inclusion of a special attachment in the leasing agreement related to the procedures/procedures of the delivery and/or withdrawal of the leasing object if the debtor defaults.

This research has implications for economic activities in the community, specifically for leasing business activities, namely finance companies as lessors, no longer need to apply fiduciary guarantees to leasing objects, because the ownership of the leasing object remains with the lessor. The finance company needs to review the lease agreement it has, by adding several clauses as a guarantee of protection to both the lessor and the lessee.

The government through the Financial Services Authority and other law enforcement officers is more strict and careful in carrying out supervision and enforcement of sanctions against financial institutions that carry out arbitrary actions (physical and psychological violence) against the withdrawal of leasing/fiduciary objects.

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