Default In Leasing Committed By The Lessee And Its Law According To The Civil Law Code

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Abstract

Leasing is a form of providing funds for capital goods for entrepreneurs but in practice leasing companies often experience disputes in the form of defaults made by the lessee. The purpose of this article is to find out what things cause defaults by lessees and what legal protection for leasing companies. This research uses normative legal research. Protection is carried out through the clauses contained in the leasing agreement itself, through certain guarantees as legal guarantees for the lessor to repay the debt and the protection given to the lessor through general provisions regarding the law of ties regulated in book III of the Civil Code.

Keyword: *Default, Leasing, Legal Protection.*

Abstrak

Sewa guna usaha atau Leassing merupakan bentuk penyediaan dana untuk barang-barang modal bagi pengusaha namun dalam prakteknya Perusahaan leasing sering mengalami sengketa berupa wanprestasi yang dilakukan oleh pihak lesse. Tujuan dari artikel ini ialah untuk menegetahui hal apa saja yang menjadi sebab terjadinya wanprestasi oleh lesse dan apa perlindungan hukum bagi Perusahaan leasing. Penelitian ini menggunakan penelitian hukum normatif. Perlindungan dilakukan melalui klausula-klausula yang terdapat dalam perjanjian leasing itu sendiri, melalui jaminan tertentu sebagai jaminan hukum bagi lessor untukpelunasan hutangnya dan perlindungan yang diberikan kepada lessor melalui ketentuan-ketentuan umum mengenai hukum perikatan yang diatur dalam buku III KUH Perdata.

Kata Kunci: Wanprestasi, Leasing, Perlindungan Hukum

A. Introduction

The development of a society can be seen from the development of existing institutions in that society, both in the economic, social, cultural and political fields. In line with the increasing activities of National Development, the participation of the private sector in the implementation of development is also increasing. This situation, either directly or indirectly, will require more active activities in the field of financing. Various efforts to raise public funds have been made through several government policies. In essence, business expansion requires financing of funds and capital equipment.[1]

[1] Amin Widjaja Tunggal dan Arif Djohan Tunggal, 1994, Aspek Yuridis Dalam Leasing, Cet. I, PT Rineka Cipta, Jakarta, Hal. 1.

In the Netherlands the use of the English term 'lease' or 'leasing' is not limited to a specific legal meaning. Rather, it is an economic term used to describe a financing arrangement that has certain characteristics. In general, leasing involves one party (Lessor) granting the use of certain capital goods to another party (Lessee) in exchange for certain (periodic) payments.[2]

Leasing or better known as leasing is a form of business that can be used as an alternative to overcome this. The presence of leasing for companies has an important role in helping entrepreneurs, especially in Indonesia, both for small, medium and large businesses. Through this activity the entrepreneurs will quickly be able to overcome the problem of financing to obtain the equipment and capital goods they need. Leasing or leasing does not provide burdensome requirements and with its flexible funding system causes this business to grow quickly in Indonesia.[3]

As an agreement, leasing has a legal basis which is basically the principle of freedom of contract. As contained in Article 1338 of the Civil Code, which states [4]:

"All agreements made legally shall be valid as laws for those who make them.An agreement cannot be revoked other than by agreement of both parties, or for reasons stated by law as sufficient for that.An agreement must be carried out in good faith."

In general, leasing is an equipment funding, which is a financing activity in the form of equipment or capital goods to companies to be used in the production process. Several definitions of leasing, including:[5]

According to Article 1 paragraph (1) of the Joint Decree of the Minister of Finance, Minister of Industry, and Minister of Trade No. 122, No. 32, No. 30 of 1974 concerning Licensing of Leasing Business, it is determined that what is meant by leasing is any corporate financing activity in the form of providing capital goods for use by a company for a certain period of time, based on periodic payments accompanied by an option for the company to purchase the capital goods concerned, or extend the leasing period based on a mutually agreed residual value.

Article 1 point (9) of Presidential Decree No. 61 of 1988 concerning Financing Institutions stipulates that a leasing company is a business entity that conducts financing business in the form of providing capital goods, either on a finance lease or operating lease basis for use by the lessee for a certain period of time based on periodic payments.

Leasing is a loosely regulated business, where the protection of the parties is only limited to the intention of each party as outlined in the form of a leasing agreement. In this case there is a possibility that one of the parties to the agreement cannot carry out its obligations in

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[3] Sunaryo, 2013, Hukum Lembaga Pembiayaan, Edisi I, Cet. III, Sinar Grafika, Jakarta, Hal. 46.

[4] Indonesia, kitab hukum undang-undang perdata Pasal 1338

[5] A.A Sagung Wiratni Darmadi, perlindungan hukum terhadap lessor dalam objek leasing apabila lesse wanprestasi, universitas udayana.

accordance with the agreement, for example the negligence of the lessee in maintaining capital goods in the midst of the leasing implementation process concerning avoiding risk is the binding of a lessee to the possibility of loss or damage to the leassed object, because the anticipation of these circumstances has been transferred to insurance, in terms of payment of rent or other payments that are the obligations of the lessee in the agreement.[6]

Default is meant that during the term of the leasing agreement contract, one party or both parties do not do what is promised, or do something but not as promised, or do what is promised but late, or do something that according to the agreement should not be done. In this case, it is emphasized on the breach of promise (default) committed by the lessee so that the existence of such a guarantee institution is needed in the provision of leased goods.

If you look at what happens in the field, there is often a delay in payment or even the transfer of rights by the Lessee due to economic reasons, forced to transfer efficiency either through leasing or transfer in the context of buying and selling leasing objects to other parties, this action has legal consequences, for the leasing financing agreement made between the Lessee and the Lessor, as well as legal consequences for the leasing object and concerning the rights of third parties who receive the transfer.

The description above places the position of the finance company (lessor) in terms of supporting the need for the fulfillment of lessee capital goods (communities and business entities) with various characters, of course, it is also very vulnerable to the risk of returning lessee obligations (insolvency) which of course can cause losses to the lessor in the future. Such conditions are of course very necessary legal means in providing protection guarantees for financing institutions which have recently grown very rapidly in the midst of the wider community, as a solution to the need for capital goods in stimulating fresh funds to the community.

Violation of the agreement in the form of negligence on the part of the lessee can harm the lessor, especially if the negligence directly affects the leasing object. For this reason, it is necessary to hold legal protection efforts against the interests of the lessor in order to avoid the risk of loss or loss of leasing objects. This type of research is normative juridical. Normative legal research or library research is research that examines document studies, namely using various secondary data such as laws and regulations, court decisions, legal theories, and can be in the form of scholars' opinions. The nature of this research is descriptive analytical, which means that this research is expected to obtain a detailed and systematic description of the problems to be studied. Analysis is carried out based on the facts obtained and will be carried out carefully how to answer the problem in concluding a solution as an answer to the problem.

[6] Indonesia, KUH Perdata Pasal 1338

B. Disscussion

1. Matters that can lead to the occurrence of default in the Financial Lease Agreement

An agreement that has fulfilled the legal requirements of an agreement sometimes cannot also be carried out as agreed. In treaty law there are two things that cause the non-performance of an agreement, namely: default (breach of promise) and overmacht. Default (negligence or neglect) is the non-performance of an agreement due to the fault or negligence or breach of promise of the parties. The word default comes from the Dutch "wanprestatie", which means not fulfilling the obligations set out in the agreement. So if the debtor (debtor) does not do what has been promised, it is said that he is in default.[7]

There are four defaults (negligence or negligence) of a debtor:[8]

1. Failing to do what one undertakes to do;
2. Performing what is promised, but not as promised;
3. Doing what he promised but late;
4. Doing something that according to the agreement he should not do.

In the event of default, it can result in one party suffering losses, because there is a party that is harmed, the party that causes the loss must be responsible. A debtor who commits default will be subject to sanctions or penalties. There are four kinds of penalties or consequences for debtors who have defaulted, namely:

1. Compensate the loss suffered by the creditor or compensation (Article 1234 of the Civil Code).
2. Cancellation of the agreement through a judge (Article 1266 of the Civil Code).
3. Transfer of risk to the debtor from the time of default (Article 1237 paragraph 2 of the Civil Code).
4. Paying court costs if brought before a judge (Article 181 paragraph 1 HIR).

To find out whether the debtor has actually committed a default, considering that default has such important consequences, it needs to be proven before a judge. According

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[7] Kavin Ludgerus Dimpudus, Terjadinya Ingkar janji (Wanprestasi) Dalam perjanjian Financial Lease serta Pelaksanaan Hukumnya, LEX PRIVATUM, Vol.9 No.12 (2021)

[8] Achmad Yusuf Sutarjo, Akibat Hukum Debitur Wanprestasi Pada Perjanjian Pembiayaan Konsumen Dengan Obyek Jaminan Fidusia Yang Disita Pihak ketiga. PRIVAT LAW Vol.6, no 1 hal 93

to Article 1267 of the Civil Code, in its application it is stipulated that creditors can choose alternative demands as follows:Pemenuhan perjanjian;

1. Fulfillment of the agreement is accompanied by compensation;
2. Indemnification only;
3. Cancellation only;
4. Cancellation of the agreement with compensation

In a leasing agreement, default or default caused by negligence on the part of the lessee (debtor) is about the matter of payment of rent or other payments that have become the obligation of the lessee in connection with the implementation of the agreement and also about the violation or non-observance of obligations or prohibitions for the lessee as stated in the agreement.

In the implementation of the leasing agreement, defaults are generally made by the lessee, both in a temporary form in the sense of arrears and then paying, and also permanent in the sense that the problem is resolved through legal proceedings.

The things that can result in the occurrence of breach of promise / default, among others:[9]

1. *The lessee delays the payment of rent that should be paid or only pays a certain number of days after a certain date, or he makes payments, but not as agreed.*
2. *Failure to pay the penalty for late payment of the rent or late payment of the penalty;*
3. *In a state of being unable or unwilling to pay the rent, this occurs with the possibility of the lessee falling into bankruptcy so that he is unable to pay the rent of the leased goods or deliberately the lessee does not pay the rent that is due for payment;*
4. *Performing actions that clearly violate the leasing agreement itself, for example, the lessee without the lessor's permission (in writing) transferring the leased goods to another party, making the goods as collateral against his debt; or selling the goods with the aim of, among others, releasing himself from the lease payments he violated; or removing the goods label and so on.*

[9] Kavin Ludgerus Dimpudus, *Op cit* hal 228

In principle, there are three types of termination of a leasing agreement, namely due to Consensus, Default, and due to Force Majeur. However, this article will only focus on default. Default or breach of contract is one of the causes so that the running of the contract is stopped. In this case what is meant by default is that one or more parties do not carry out their obligations in accordance with the contract. If we look at Article 1365 of the Civil Code which reads, that every unlawful act, which brings harm to another person, obliges the person whose fault caused the loss, to compensate for the loss.[10]

As explained above, as a result of the default of the lessee, the lessor has the right to take back the lease object that is in the power of the lessee. [11] If the retrieval of the goods is not impeded by the lessee, then no problem will arise. However, problems will arise if the lessee unlawfully prevents or hinders the return of the lessor's goods.

To avoid such difficulties, it is better if the leasing agreement includes a clause stating that in the event of default by the lessee, the lessee gives irrevocable consent / permission to the lessor to enter the yard or place where the leased goods are located, and take back the goods that are the object of the lease, with or without the help of the police. The taking back of the lease object is what is referred to as termination or cancellation of the unilateral leasing agreement by the lessor.

As is known that the leasing agreement cannot be terminated unilaterally, but with the event of default charged to the lessee raises the right for the lessor to terminate the leasing agreement in question. And according to article 1266 of the Civil Code, it is determined that even though the void condition has been included in a reciprocal agreement, and one of the parties does not fulfill its obligations, the termination of a reciprocal agreement unilaterally must be carried out by a judge's decision. However, because the provisions of Article 1266 of the Civil Code are only regulatory in nature, they can be overridden by the parties. Therefore, in a leasing agreement, a clause that overrides the applicability of Article 1266 of the Civil Code should be included.

The regulation of the event of default is actually not a characteristic of financial lease agreements, but there are things that require special attention. So in the event of default by the lessee who owes, basically, it must first be stated formally, namely by warning the debtor or lessee that the creditor or lessor wants immediate payment or a specified short

[10] *Ibid*

[11] Ni Luh Ayu Regita Cahyani, Perlindungan Hukum Bagi Perusahaan Leasing Terhadap Debitur Wanprestasi, Jurnal Preferensi Hukum, Vol. 2 No. 2 (Juli 2021) hal 257.

period of time. In short, the debt must be collected and the lali must be reprimanded with a warning or "sommatie".[12] However, in accordance with Article 1238 of the Civil Code, the obligation to give a statement of default or warning can be eliminated by specifying in the agreement, that a default committed by the lessee is sufficiently proven by the passage of time for payment of rent installments, or from the time of committing acts prohibited by the agreement, without the need for a written statement or warning from the lessor. It should also be noted that Article 1238 of the Civil Code is regulative (regelent recht) and not obligatory (coercive). Furthermore, it can be seen in Article 1365 of the Civil Code which reads, that every unlawful act, which brings harm to another person, obliges the person whose fault caused the loss, to compensate for the loss. To avoid such difficulties, it is better if the leasing agreement includes a clause stating that in the event of default by the lessee, the lessee gives irrevocable consent / permission to the lessor to enter the yard or place where the leased goods are located, and take back the goods that are the object of the lease, with or without the help of the police. Retrieval of the lease object is what is referred to as termination or cancellation of the unilateral leasing agreement by the lessor.

In this connection, it should be explained that in practice the inclusion of such a clause may not be effective, because the judge may examine the case and reject the exception based on the clause. Nevertheless, the inclusion of such a clause will also be useful, because it will at least have a psychological effect on the lessee to accept an out-of-court settlement.

In the event of unilateral cancellation of the lessor due to an event of default, according to practice, the lessor is entitled to collect all installments and fees that have not been paid in full and receive the return of the goods. As is known that in a leasing agreement, it is actually not justified to terminate the agreement unilaterally, but due to the event of default charged to the lessee which gives rise to the right for the lessor to terminate the leasing agreement in question.

Actually this is felt to be unfair to the lessee, especially when the agreement has only been running for some time. And due to the unilateral termination of the leasing agreement, the lessor's financial position will be better when compared to the situation if the leasing agreement is not terminated, because in this case the lessee will get a large amount of remaining rent plus new goods. This can be referred to as "obtaining wealth unfairly".

2. Legal Protection Against Losses Experienced by Lessor Due to Default by Lessee

[12] Ibid

Leasing is a loosely regulated business, where the protection of the parties is only limited to the intention of each party which is realized in the form of a leasing agreement. So that there is a possibility that one of the parties to the agreement cannot carry out its obligations in accordance with the agreement (default).[13]

The relationship between Lessor and Lessee is a reciprocal relationship, concerning the implementation of obligations and the transfer of a right or demand for obligations from the enjoyment of using financing facilities, for that between Lessor and Lessee a financial lease agreement / leasing contract or a financing agreement is made. For the Lessor, the benefits to be achieved in the financial lease agreement with the Buyer/Lessee, rest solely on the creation of legal certainty of an agreement, about a series of payments by the Lessee for the use of assets that become the object of the lease, including the Lessee's recognition of the control of the object by the Lessee whose ownership is still held by the Lessor, thus giving birth to legal rights for the Lessor, in the event of default by the Lessee to sell or confiscate the lease object.[14]

In the event that the lessee commits one of the forms of default, then in its legal implementation the law requires the creditor (lessor) to give a statement of negligence to the debtor (lessee). This can be read in article 1238 of the Civil Code which reads as follows:[15]

"The debtor is delinquent if he has been declared delinquent by warrant or similar deed, or by his own agreement, if this stipulates that the debtor shall be deemed delinquent by the lapse of a specified time".

However, in accordance with Article 1238 of the Civil Code, the obligation to give a statement of default or warning can be eliminated by specifying in the agreement, that a default committed by the lessee is sufficiently proven by the passage of time for payment of rent installments, or from the time of committing acts prohibited by the agreement, without the need for a written statement or warning from the lessor. And also need to know that Article 1238 of the Civil Code is regulating (regelent recht) and is not obligatory (compelling).

The responsibility of the lessee to the lessor for the object of the leasing agreement in the practice of leasing agreements is generally influenced and determined by the type of financing in the agreement. The types of financing that are usually used in the practice of

[13] Munir Fuady, 2002, Hukum Tentang Pembiayaan (Dalam Teori Dan Praktek), Cet. III, PT Citra Aditya Bakti, Bandung,, Hal. 29-30.

[14] A.A Sagung Wiratni Darmadi, *op cit*

[15] Rianda Dirkareshza, Optimalisasi Hukum Terhadap Lessee Yang Melakukan Wanprestasi Dalam PerjanjianLeasing, Jurnal Ilmiah Penegakan Hukum, vol 8, desember 2021 hal.163

leasing agreements are financial lease and operating lease types. In the type of financial lease, the arrangement regarding the responsibility for the object of the leasing agreement is entirely borne by the lessee, including all risks arising from the use of the object, while in the operating lease, the arrangement regarding the responsibility for the object of the leasing agreement is entirely borne by the lessor, including all risks arising from the use of the object. The arrangement in the operating lease is the same as the arrangement in the ordinary lease agreement.[16]

The responsibilities of the lessee against the lessor for the object of the leasing agreement contained in the practice of the leasing agreement are regarding: Use of leasing goods, Maintenance of leasing goods, Loss and damage to leasing goods due to any cause, Default or breach of promise of the lessee, Financing of leasing goods Which includes insurance costs, taxes, interest, and others.154 The implementation of an achievement of the lessee's responsibility to the lessor for the object of the leasing agreement in practice must be in accordance with the law, custom, and propriety, as stipulated in Article 1338 paragraph 3 of the Civil Code.155 Arrangements regarding the responsibilities mentioned above by the parties in the leasing agreement must be carried out based on good faith and justice, as stipulated in the provisions of Book III of the Civil Code, all provisions regarding agreements & obligations that apply in the law of agreements must also be made in the division.

The occurrence of default caused by the non-performance of the Lessee's obligations as agreed is one example of problems in the Lessor's relationship with the Lessee and it is a business risk carried out by the Lessee by ignoring the contents of the agreed agreement. Leasing agreements made between Lessordan Lesseedis called a lease agreement.

In the event of a default by the lessee that causes losses to the lessor, Civil Code Article 1239 determines that in the event of a party defaulting, the other party can demand compensation in the form of costs, losses and interest. In addition, the obligations arising for the lessee for the default committed can be in the form of:

1. Compensate for losses.
2. The object of the obligation from the moment of non-fulfillment of the obligation becomes the responsibility of the lessee.
3. If the obligation arises from a reciprocal agreement, the lessor may request cancellation (termination) of the agreement.

[16] Munir Fuady II, *Op.cit.,* Hal. 6.

In addition, leasing agreements in their implementation are not only binding on the parties to the agreement but also binding on the heirs who acquire rights and third parties, as regulated in articles 1315-1318 and Article 1340 of the Civil Code. So that if the lessee dies, the leasing agreement will remain in effect and all obligations of the lessee including his obligations arising from the default must be borne by his heirs.

The legal effort that can be done by the lessor in guaranteeing that the funds can be returned plus the profits, is to use collateral. Because, in the funding system, including the funding system in the form of leasing, then as soon as the funds are disbursed and given by the lessor, then from that moment the lessor's position becomes facing the risk of not returning the funds. Nevertheless, collateral in leasing is still not so crucial compared to collateral for bank loans, for example in leasing, the capital goods themselves will become quite effective debt collateral. So that the lessor is not disadvantaged, the amount of the minimum installment price should be in line with the amortization value of the capital goods. So, whenever the lessee defaults, the capital goods can be resold at a price that can cover the remaining debt, so the lessor is still safe. In practice, various possibilities can occur, which makes the lessor's position not as safe as originally thought, for example, the lessee transfers the leased goods to another person without the knowledge of the lessor, 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 dramatically due to causes that were not anticipated before, and various other problems.

The last legal effort taken by the leasing party in dealing with defaulted lessees is to withdraw the vehicle. After the vehicle is withdrawn, the lessee is asked to pay the remaining installments and vehicle withdrawal fees. If the lessee does not want to settle the leasing fee, execution of the vehicle that has been withdrawn is carried out. To make this possible, it is usually stipulated in the leasing contract that if the installments of the leasing price by the lessee to the lessor are in default, the contract is terminated and the lessee is obliged to pay all arrears plus interest and fees. Furthermore, the lessee is invited to find a buyer for the leased goods within a certain time.[17]

In addition, the lessor can also execute other additional guarantees, such as pledge of shares, mortgages, transfer of deposits, acknowledgment of debt, and corporate or personal guarantees. Everything will run smoothly if the lessee is cooperative. But if the lessee is not cooperative, then execution is not easy to do, because the settlement must go through the court, and by using ordinary procedures which are very inefficient in terms of time and cost with unpredictable decisions. In such cases, the benefits of guarantees such as pledges,

[17] SAMMY F KAMBEY, Perlindungan Hukum Terhadap Perusahaan Pembiayaan Dalanm Perjanjian Leasing, Jurnal Ilmu Hukum Legal Opinion Edisi 3, Volume 3, Tahun 2015, hal 7

mortgages or deeds of acknowledgment of indebtedness, which, at least theoretically, can be executed more quickly due to the availability of special procedures for execution, are felt. Although in practice it turns out that these guarantees are also not so easy to execute.[18]

Provisions regarding sanctions have been regulated in article 1237 paragraph 2, 1 243 - 1252, article 1266 of the Civil Code and article 181 HlR. In addition to the parties involved in the agreement, the leasing party can also determine the sanctions that they will impose on the agreement data that has been mutually agreed upon with the conditions and limitations contained in the Civil Code.

C. Conclusion

In principle, the juridical owner of the leasing object is the lessor and will only transfer if the lessee's obligations have been settled and the right of purchase option (on financial lease) is exercised. So that in the event of a default by the lessee in leasing which causes the lessee to be unable to exercise its purchase option right, the juridical owner of the leasing object concerned is the lessor. The form of legal protection to the lessor in the leasing object if the lessee defaults is done in several stages, namely protection is done through the clauses contained in the leasing agreement itself, through certain guarantees as a legal guarantee for the lessor for the repayment of the debt and the protection given to the lessor through the general provisions of the law of ties regulated in book III of the Civil Code.

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[18] Salim, 2010, Perkembangaan Hukum Kontrak Innominaat di Indonesia, Cet. V, Sinar Grafika, Jakarta hal. 178

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