

Leasing Contract Law as Alternative Procurement of Capital Goods Based on Justice Value

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Abstract: Leasing is one of the alternative procurement of capital goods formulated in a contract between the parties, where on the one hand is the person who needs capital goods in the contract. It is not much different from an engagement or an agreement. In this research using qualitative sociological juridical research method, in collecting data with field study approach to obtain data directly with the respondents, as well as literature review obtained from legislation and book libraries and related journals. From the research result, it can be seen that there are weaknesses, among others, the unbalanced position between Lessor as a leasing company has a very superior position both in financial terms and in terms of experience in contracting and legal understanding, so that in determining the terms of agreement of Lessor parties already preparing for the generally applicable contracts of interest, insurance and so on compared with the Lessee and that provisions made by the government on leases are not sufficient to protect the Lessee so often stuck or incurring losses that are not small for the Lessee, either on the pre contract, contract period or post contract. In the future there may be renewal in the law of leasing or procurement of capital goods.

Keywords: Leasing, alternative procurement of capital goods, justice.

INTRODUCTION

Things that may be faced by someone who will do business activity is the financial limitation in holding of capital goods and for that people use Leasing Institution as one of alternative of procurement of capital goods, and money or fund that was originally to buy capital goods can be used for other purpose; Leasing Agency as one of the alternative procurement of capital goods is formulated in a contract between the parties, where on the one hand is the person who needs capital goods in the contract referred to as the Lessee and on the other side is referred to as the Lessor, ie as the party owning capital goods or financial ability for procurement of capital goods required by Lessee parties.

Law is one of the indispensable instruments to support the development so it is indispensable for a new reform or the formation of a new law in a progressive manner, whereby the rules of the law are expected to function properly to be the channel of the desired direction of community activity in a planned change, and certainly by not forgetting the function of law as one means of the system of social control [1].¹

Regarding the need for contracting, the public tends to seek to find a new contract law institution that can progressively fulfill its need to enter into a contract if it turns out that the requirement can not be fulfilled by a pre-existing legal institution and it is most likely to be done in our legal system by the existence of an open system in the field of contractual law that is with the principle of freedom of contract in the field of civil law as regulated in Article 1338 of Indonesia's Civil's Code, which is certainly not freedom of contract as embraced by liberalism with the character of capitalistic individualism, but must be freedom of contract based justice in accordance with the personality of the Indonesian nation (value of personality law) is a contract that can be accountable both vertically to God Almighty and horizontally to the just humanity as well as civilized.

As mentioned by R. Subekti in his book "Various Agreements" the principle of freedom of contract can be inferred from Article 1338 of the Third Book of the Criminal Code of BW, which among other things states: "All legally-made agreements act as laws for those who make them [2]."²

¹ Soeryono Soekanto, *Kesadaran Hukum dan Kepatuhan Hukum*. Cet. I, Jakarta CV Rajawali 1982, p.9.

² R. Subekti Dan R. Tjitrosudibyo. *Kitab Undang-Undang Hukum Perdata*, Jakarta: Pradnya Parmita, 1996p.142.

In Indonesia, leasing institutions began to be known around 1974, namely by the issuance of Decree of 3 (three) Ministers namely Minister of Finance, Minister of Industry and Minister of Trade respectively with Number: Kep-122 / MK / IV / 2/1974, Number: 32 / M / SK / 2/1974 and Number: 30 / Kpb / I / 1974 regarding leasing licenses. In the Decree, it is stated that the definition of Leasing is quoted as follows: "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 voting rights (option) for the company to purchase the capital goods concerned or extend the lease term based on the mutually agreed value of the remainder [3].³

Regulation of the Minister of Finance of the Republic of Indonesia No. 84 / PMK.012 / 2006, article 1 letter c states that: "Leases are" activities in financing in the form of provision of capital goods either on lease with option rights (finance lease) or lease without option (operating lease) for use by the lessee for a specified period based on installment payments".

In the United States, Bell Telephone Co., in 1877 began to "lease" its telephone equipment to the users / customers telephone without having to sell it and in 1877 this is considered as the first year of emergence leasing in America and then spread to Europe and Asia including to Indonesia [4].⁴

From an economic point of view, leasing is a financial method in financing capital goods, but nowadays in daily practice not only the capital goods which become the object of leasing but also to the procurement of office goods and the procurement of motorized vehicles has nothing to do with the necessities of capital goods, whereas from the legal standpoint of contract or contract law, leasing is a legal institution in the field of contract. Closely related to the above legal understanding is undeniable that with the swift capital inflows in Indonesia, the owners of capital (Lessor) has a more dominant position than the Lessee (the party that uses capital goods) in determining the conditions included in a Leasing contract.

That in the decision of the Minister of Finance No.1251 / KMK.013 / 1988 on the Provisions and Procedures for Implementation of Financing Institution is stipulated in Jakarta December 20, 1988 where in Article 17 mentioned the existence of supervision on Leasing Company And Presidential Decree No. 61 of

³SK bersama Menteri Keuangan, Menteri Perindustrian dan Menteri Perdagangan Nomor: Kep. 122/MK/IV/2/1974, Nomor 32/M/SK/2/1974, Nomor 30/Kpb/I/1974, Pasal 1 ayat 1.

⁴World Leasing Yearbook 1982 Conggeshall, Essex, UK, Hawkins Publishers Ltd, p.13

1988 on Financing, which in Article 6 states that the Minister supervises and guides the business of the Financing Company. That the above provisions still need to be tested through a study, considering the many problems in the lease contract that cause losses and injustice to the parties, especially for the Lessee party, so the minimum requirement that must be contained in a lease contract as mentioned above must be reconstructed in order not to cause injustice or at least reduce adverse consequences for both the Lessor and the Lessee parties. In other words, the arrangement as mentioned in Article 9 paragraph (2) of Decree of the Minister of Finance of the Republic of Indonesia No. 1169 / KMK.01 / 1991 as mentioned above is materially inadequate to protect the Lessee from possible injustice in a Leasing Contract. Likewise in the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988) that the participants in this convention see or perceive the need to remove regulatory hurdles in Finance Leasing while still paying close attention to the interests of the parties related in a Finance Leasing agreement as cited below :

The States Parties To This Convention, Recognising the importance of removing certain legal impediments to the international financial leasing of equipment, while maintaining a fair balance of interests between the different parties to the transaction [5],⁵

The States Parties To This Convention, Recognizing the importance of removing certain legal impediments to the international financial leasing of equipment, while maintaining a fair balance of interests between the different parties to the transaction, Hal this also means that a balance of interests between the parties in a Leasing contract must be maintained which is essential in the principle of the value of justice that must be reflected in a Leasing contract. Thus it is interesting to examine more closely the current leasing nature in Indonesia is in accordance with the leasing contract principle that should embrace the value of justice that must be reflected in every contract including Leasing contract and Leasing Leasing contract deficiencies at present which can cause harm both to Lessee and Lessor.

MAIN PROBLEM

Based on the problem mentioned above the authors would like to present a main problem that will be discussed in this research, namely:

- What is The Current Leasing System in Indonesia Adopting the Justice Value?
- What are The Weaknesses of Current Leasing Contracts That Can Bring Good Losses to Lessees and Lessors?

⁵www.unidroit.org/leasing-ofdate accessed 12 Desember 2017 pukul 20.09 WIB

DISCUSSION

The Current Leasing System In Indonesia Adopting the Justice Value

According to Hans Kelsen that justice is used in law in terms of conformity with positive law especially in conformity with the law, and assumes justice is merely a normative and fair match is just another word of truth [6].⁶

John Rawls states that the concept of justice is an attempt to mentesis liberalism and socialism so conceptually Rawls explains that justice as a fairness with the principles that people are free and rational and willing to develop their interests, should be fundamentally gained the same position at the time will enter the association they want [7].⁷

Utilitarian is etymologically derived from the Latin meaning utility, useful (useful), useful and beneficial. Utilitarianism argues that to judge all things in terms of an expediency assessment that is defined as happiness and does not matter fair or unjust, but starting from whether the law can give happiness as much as possible or not.⁸

The Utilitarian School is a school of legal thought which holds that something is said to be true when an act brings happiness, it emphasizes benefit as the ultimate goal of law. Jeremy Bentham (1748-1832) in his book: Introduction to the principles of moral and legislation, formulates a utilitarian principle which, according to Bentham, must be based on politics and legislation [8].⁹

In Indonesia, in general, Leasing is known starting in 1974 with the issuance of Letter of Decree of 3 (three) Ministers namely Minister of Finance, Minister of Industry and Minister of Trade respectively with Number: Kep-122 / MK / IV / 2/1974, Number: 32 / M / SK / 2/1974 and Number: 30 / Kpb / I / 1974 regarding Licensing Leasing, although in 1972 Leasing was already known in Indonesia, and on July 2, 1982 the Indonesian Leasing Association was established and then on July 20, 2000 Lease Asset Indonesia is transformed into the Association of Indonesian Financing Companies (APPI) that can conduct business activities: 1) leasing, 2) factoring, 3) consumer finance, 4) credit card (credit card). In Japan Leasing has been

known since 1963 and at this time Leasing in Japan is estimated to be the second largest after the United States.

From an economic point of view, leasing is a financial method in financing capital goods, although in daily practice not only capital goods but nowadays it has reached the procurement of office goods and the procurement of motor vehicles that have nothing to do with the need office, whereas from the legal point of contract or agreement then leasing is a legal institution in the field of contract. This is closely related to the notion of law as a system of braided values, while the value is as an idea that is the driving of human towards the fulfillment of life's desires [9].¹⁰ According to Equipment Leasing Company London, Leasing is an agreement between Lessor and Lessee to lease a certain type of capital goods selected / determined by Lessee [10].¹¹

In the field or needs of contracting, the public tends to seek to find a new legal institution in accordance with its needs, this is made possible by our legal system that is with the principle of freedom of contracting in the field of civil law which is certainly not freedom of contract as embraced by liberalism with the character of individualism and capitalism but must be a freedom of contract in accordance with the personality of the Indonesian nation (value of personality law) is a contract that can be accounted for vertically to God Almighty and horizontally to the just and civilized humanity, which means everyone in the sense the person or legal entity may enter into any contract as long as it is not contrary to decency and public order. It is a fact that the law is certainly influenced by other areas outside the law such as politics, economics, religion, defense of security and other fields, and the law also has an increasing influence on other fields.¹²

Leasing contracts / agreements may be validly valid in Indonesia in the presence of an open principle as provided for in Article 1338 paragraph (1), paragraph (2) and paragraph (3) of the Civil Code, and the provisions of Article 1338 paragraph (3) shall be general principles and limits freedom of contract adopted by BW (KUHPerdata) which should be interpreted as a limitation to maintain economic and social lag so as not to one party to dominate the other party. Whereas as provided for in Article 1319 of the Civil Code, the lease as a legal institution in the field of contract law shall be subject to the principles of the general rules mentioned in Chapter I and Chapter II of

⁶Hans Kelsen, *Pengantar Teori Hukum*, Penerbit Nusa Media Bandung, 2009, p. 20.

⁷ E. Fernando Manullang, 2007, *Menggapai Hukum Berkeadilan*, Buku Kompas, Jakarta, P.20.

⁸H.R. Otje Salman Soemadiningrat, *Filsafat hukum – Perkembangan dan Dinamika Masalah*. Bandung, PT. Refika Aditama. 2012p.254.

⁹Fans Magnis Suseno, *13 Tokoh Etika (Sejak abad Junani sampai abad 19)*. Yogyakarta. Kanisius 1997. P 180.

¹⁰ Purnadi Purbacaraka dan Soeryono Sukanto, *Filsafat Hukum* Cet. III Jakarta CV Rajawali 1982. p 14.

¹¹BPHN Kementerian Hukum dan HAM RI, *Kompilasi Bidang Hukum Tentang Leasing*, Jakarta 2011 p.18.

¹²Purnadi Purbacaraka dan Soeryono Sukanto, *Op. Cit.* p 8.

the Engagement / Contract Law. which is explicitly mentioned in article 1319 of the Civil Code which states that:

"All covenants, whether of a special name, or not known by a particular name, are subject to the general rules contained in this and the last chapter".¹³

This means that the general principles contained in the third book of the Civil Code control the lease contracts / agreements as well. Possessing means that general principles The third book of the Civil Code should apply to lease agreements / contracts. objects used for public purposes shall be regarded as items outside the trade (*buiten de handle*) so as to not be a cause or object in a treaty, the *causa* referred to as the condition of the validity of the agreement shall be distinguished by the provisions of article 1336 of the Civil Code which mentions that although it is not called a *causa* when in fact there is a permissible *causa* [11].¹⁴ Although Leasing is an unnamed legal institution that is not regulated in the Civil Code but a set of rules has been issued by the government, among others :

- Decree of 3 (three) Ministers namely Minister of Finance, Minister of Industry and Minister of Trade respectively with Number: Kep-122 / MK / IV / 2/1974, Number: 32 / M / SK / 2/1974 and Number: 30 / Kpb / I / 1974 regarding Licensing Leasing,
- Decree of Minister of Finance No. 649? MK / IV / 5/1974, concerning Leasing Permit.
- Decree of the Minister of Finance No. 1251 / KMK.013 / 1988, concerning Provisions and Procedures for Implementation of Financing Institutions which amended by Decree of the Minister of Finance No. 1256 / KMK.00 / 89.
- Minister of Finance Decree No. 634 / KMK.013 / 90, concerning Procurement of Capital Goods with Corporate Leasing Facility.
- Minister of Finance Decree. 1169 / KMK.01 / 91, concerning Lease Activities or Leasing.
- Minister of Finance Decree. 172 / KMK.03 / 2002, regarding the Amendment to the Decree of the Minister of Finance Nos. 448 / KMK.017 / 2000 on Financing Company.
- Minister of Finance Decree. 84 / KMK.012 / 2006, concerning Business Activities of Financing Companies.
- Announcement of the Director General of Monetary No. Peng-307 / DJM / III.1 / 7/1974 on Guidelines for Implementation of Leasing Regulations.
- Presidential Decree No. 61 of 1988 and Presidential Regulation no. 9 Year 2009 on Financing Institution.

¹³*Ibid.* p. 339.

¹⁴ R. Subekti, *Pokok-pokok Hukum Perdata* Jakarta PT. Intermedia 1978 p 114.

- Presidential Regulation no. 9 of 2009 on Financing Institutions covering 3 (three) Companies namely: 1) Financing Company. 2) Venture Capital Company. 3) Infrastructure Financing Company..

In terms of financing of capital goods leasing is defined as an activity of financing of capital goods, which can be interpreted as one of the alternative procurement of capital goods. From the legal point of view of the contract, leasing is a binding contract for the parties, on what rights and obligations of each party to exercise. Whereas as mentioned above that all nameless or unnamed agreements shall be subject to the general provisions and general principles of contract law as provided for in Article 1319 of the Civil Code which states: "All good agreements which have a special name or not known with a certain name, subject to general rules, contained in this chapter and the last chapter.."¹⁵

While it is true that there is a provision of legislation made by the Minister of Finance as the things that should at least be contained in a Leasing contract that is as is contained in the Decree of the Minister of Finance No. RI. 1169 / KMK.01 / 1991 referred to in Article 9 paragraph (2) provides that:

"The agreement referred to in paragraph (1) of this Article shall at least contain the following:

- Type of lease transactions.
- Name and address of each party.
- Name, kind, type and location of capital goods usage.
- Acquisition cost, financing value, lease payments, principal installments, lease payments, residual value, guarantee deposits, and insurance provisions on leased capital goods;
- The period of lease;
- Provisions concerning the termination of accrued lease transactions, and the determination of losses to be borne by Lessee in the case of leased capital goods with option rights lost, damaged or non-functioning for any reason whatsoever;
- Option for the lessee in the case of lease transactions with option rights;
- Responsibility of the parties to capital goods leased

Weaknesses of Current Leasing Contracts That Can Bring Good Losses To Lessees And Lessors

In Article 1313 of the Indonesia's Civil Code (BW) provides the meaning or meaning of the covenant as follows: A covenant is an act, whereby one or more persons commit themselves to one or more persons [2].¹⁶

¹⁵*Ibid.* p 339.

¹⁶ R. Subekti dan R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata*, Jakarta: Pradnya Parmita, 1996, p 338.

According to Subekti, the agreement is equivalent to the agreement in which both parties agree to do something. So the agreement is an event in which a person promises to another or where the two men promise to do something [12].¹⁷While Wiryono Projodikoro, gives the understanding of the agreement as a legal relation of property between two parties in which one party promised or considered promised to do something or not do something while the other party has the right to demand the execution of that promise [13].¹⁸

It is said that the principle of consensualism is an absolute element in the law of covenant and for legal certainty [14].¹⁹Consensualism comes from the word consensus which means agreement, whereas consensualism means a covenant born after / since the achievement of an agreement on the principal matter of the treaty and from that time also arise rights and obligations that are binding for the parties.

The existence of this legal certainty is expected to provide protection for anyone who is disadvantaged due to an engagement or a legal event. Some of the drawbacks that occur in existing Leasing contracts that can lead to injustice in lease agreements can occur in several ways including :

- Determination of interest and expenses incurred by Lessor.
- Interest, in determining the interest almost certainly bargaining power Lessee Party is very low especially if we associate with the urgent need for capital goods, as well if the capital goods referred to in the form of motor vehicles such as cars, motorcycles, flowers can reach 7% s / d 8% per year, well above the deposit or interest rate in long term lease is up to 5% a year. Interest may increase if the Lessor is not fully financing the leased item, but using the bank or other financial institution to finance the capital goods, of course in addition to interest from the bank, of course, the Lessor Party also takes advantage of the interest margin of the bank such as on leverage leasing, or as in Vendor Program Leasing.

In Financing Lease as in the Leverage Lease, the Lessor Party generally only finances 20% to 40% of the price of the capital goods and the rest is financed by the bank or other financial institution even though the Lessor is juridically the owner of the goods, but it is almost certain that the Lessor will still taking advantage of the interest of the

bank charged on the goods which certainly incurs an increased interest expense for Lessee.

Likewise with Vendor Program Leasing, that the Lessor Party who, after making an engagement / contract with the Lessee, the Lessor makes payments to the factory producing the goods, and it is certain that the Lessor keeps taking profits that are entered into the price of the goods then leased-use ("lease") to Lessee, and this also adds the interest expense Lessee has to bear.

It should be that in determining interest as maintained by the Saudi Arabian Monetary Agency (SAMA) it must be determined that interest should not be too burdensome to Lessee with the sanction that if interest is too burdensome to Lessee then the Lessor may lose his right to obtain payment from the Lessee Party.

- Insurance
In general, insurance is also charged to the lessee, whereas ontologically the nature of leasing as described above, Leasing Contract is almost the same as the lease agreement, which gives the enjoyment of capital goods to the lessee with the obligation to make payments on a regular basis. In the lease, the leasing party is obliged to:
 - Submit the leased goods to the lessee.
 - Maintain leased goods, during the term of the lease agreement.
 - Provide pleasure to the tenants tenth.In lease the law puts the risk in the hands of the leasing party as can be concluded the contents of Article 1553 Civil Code which states that with the loss of goods leased then the lease agreement is void by law. Similarly, the lease, which is essentially the same as the lease, should cover the obligation to cover the insurance laid on the Lessor, but in practice the insurance premium payment is charged to the Lessee which is included in the payment periodically, while in case of loss the lessor receives the payment from the insurer.
- Liability to repair damage to goods or assets that are in "Lease" especially the damage causing the "Leased" goods became unusable either partly or as a whole, as it ought to be an obligation to the Lessor, it is important to remember that the enjoyment of the "Lease" goods that Lessee should have gotten is disturbed by it..

The judgment of the Pekanbaru District Court of Pekanbaru District Court [15]²⁰ that examines and adjudicate the case concerning the decision of the Consumer Dispute Settlement Board shall, at the first instance, make the following decision in the case between: PT.BFI FINANCE INDONESIA, Tbk, as the Petitioner against RAFDINAL as the Respondent, with the Appeal Letter dated September 16, 2015 attached

¹⁷ R. Subekti, *Hukum Perjanjian*. Jakarta, PT. Intermedia 2010, p 1.

¹⁸ R. Wiryono Projodikoro, *Azas-azas Hukum Perjanjian*, Bandung, Sumur Bandung, 1981, p. 9.

¹⁹ R. Subekti, *Aspek-aspek Hukum Perikatan Nasional*, Bandung, Alumni 1980, p.13.

²⁰Direktori Putusan Mahkamah Agung, putusan.mahkamahagung.go.id.

with the decision of the Consumer Dispute Settlement Board received and registered at the Registrar of the Pekanbaru District Court on September 18, 2015 in Registry Number 194 / Pdt.Sus / BPSK / 2015 / PN Pbr, has filed an objection as the following: In the case of consumer dispute No. 52 / Pts / BPSK / VII / 2015, BPSK Pekanbaru City has issued a ruling on September 8, 2015 which, among the following:

- Granting a claim of Complainant to some of them;
- Declare that Lease Financing Agreement No.4021402806 is legally flawed;
- Punishing the defendant to submit instantly and at once an object unit of 1 (one) Mitsubishi Fuso Bak Iron BM 8150 JU to the Complainant withdrawn in respect of Lease Financing Agreement No.4021402806 which is deemed legally flawed;
- Punishing Claims to pay arrears in arrears of 3 (three) months plus fines dated July 15, 2015 of Rp.31.992.587, - (thirty one million nine hundred ninety two thousand five hundred eighty seven rupiah);
- Refuse for the rest;

The reasons and legal basis of the Plaintiff's objection are as follows:

“This objection is filed within the time frame stipulated by the Consumer Protection and Regulation Law of the Supreme Court of the Republic of Indonesia, thus the Pekanbaru District Court is authorized to accept, examine and adjudicate this objection”.

CONCLUSION

From the above discussion it can be concluded that:

1. The essence of leasing in Indonesia is a condition in which community members need certain goods, while financial circumstances at that time are not possible to buy them in cash, as well as on the other side there are producers who have manufactured goods but can not sell them because the public who can not afford it, then by way of leasing such circumstances can be overcome that is by hiring the capital goods from the owner of the goods, and make payments periodically for a certain period and at the end of the contract, Lessee has the right to choose whether to choose to buy goods in lease or lease at a previously agreed price known as a finance lease, while the other lease model is Lessee without the right of an optie known as an operating lease. The construction of such legal act is referred to as a lease which is legally defined as a contract between two or more parties agreeing to one party (Lessor) to hold a capital goods for the use of another party (Lessee) by making a regular payment and at the end of the agreed period of time, with an optie or no right with an optie right for Lessee to purchase purchased capital goods at a pre-agreed residual price, or extend the existing lease contract.

2. Weaknesses in lease contracts both on the pre-contract, the contract implementation period and the post contract that is an unbalanced position between the Lessor as a leasing company has a very superior position both in terms of financial and in terms of experience in contracting and legal understanding, so that in stipulate the terms of the agreement the lessor has prepared on a contractual basis to be generally applicable, whether of interest, insurance and so on compared to the Lessee and that provisions made by the government concerning leases, is not sufficient to protect the Lessee so often trapped or incurring losses that are not small for the Lessee, both on pre-contract, contract period and post contract, and put Lessee in a very heavy position so often not mampu continue or fulfill its obligations to make payments on a regular basis ahirnyamenim incur less loss for Lessee either to continue using the leased capital goods or to execute his right to purchase the said capital goods. Likewise, in the case of the occurrence of wanprestasi, there is often a protracted settlement and resulted in a solution that is only based on the law, whether the settlement by the arbitrator or the court, which does not consider well and correctly the respective interests of the parties both the Lessor and the Lessee in particular on the post contract. And the absence of a provision concerning the terms of return of capital goods on lease due to default is often not included in the contract which causes difficulties for the Lessor to take the goods or otherwise and the Lessor improperly takes the capital goods of the contract object by not going through proper procedures and it is reasonable for that on the grounds that legally the ownership of leased capital goods is still the right of the Lessor and this situation does not satisfy the element of decency or justice.

RECOMMENDATION

- Default arising from burdens that are too burdensome for the Lessee, the Lessor shall provide an opportunity for the Lessee under more lenient terms to continue his business by using leased capital goods for business.
- Risk, if the risk arising has been guaranteed by the Insurance Party, then the Lessor shall replace or refine capital goods in lease in order to remain usable by Lessee.
- Force Condition;
- Interest (Lease payments).
- Obligation to provide a safe guarantee of enjoyment for Lessee

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