

# 1\_The Legal Consequences of Transferring Receivables with Fiduciary

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### The Legal Consequences of Transferring Receivables with Fiduciary Guarantees in Leasing Agreements

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#### Abstract

Collateral is an important fact<sup>4</sup> in various agreements, including in leasing agreements. One of them is a fiduciary guarantee. Fiduciary guarantees are widely used in business activities, including in leasing agreements to guarantee the security of creditors' receivables. Receivables owned by a creditor may be transferred to other parties to obtain funds externally. In the event that receivables guaranteed by fiduciary guarantees are transferred to other parties, it can cause problems, especially related to legal consequences for <sup>1</sup>w creditors and fiduciary guarantees for these receivables. This study aims to determine and analyze the legal consequences of transferring receivables guaranteed by a fiduciary guarantee in a leasing agreement. The approach

method used in this research is the socio legal approach. In this case, library research and field research will be carried out to find out and analyze the legal consequences of transferring receivables with fiduciary guarantees in leasing agreements. The results of the study show that fiduciary guarantees have a very important function in leasing agreements. A fiduciary guarantee is an agreement that is *accessoir* (additional agreement) from the main agreement. Therefore, by transferring the receivables in the leasing agreement to another party, the fiduciary guarantee will automatically be transferred to the new creditor. Thus, the new creditor will have a position as a preferred creditor and at the same time a separatist creditor.

**Keywords:** Receivables, Fiduciary Guarantee, Transfer, Legal Consequences

#### 1. Introduction

In business activities, business actors often need capital from other parties. Capital is a key factor in the production process that gives rise to various contracts between different businesses (Armstrong *et al.*, 2010) <sup>11</sup>. To obtain capital from other parties, it can be obtained from various financial institutions, both banks and non-bank financial institutions (Badriyah *et al.*, 2021) <sup>14</sup>. One of the efforts made by business actors in obtaining capital is by leasing. In this case, a <sup>1</sup>relationship will arise between the parties who need capital and those who distribute capital for the needs of other parties. The legal relationship between the parties in this case is based on the agreement. In leasing activities, the agreement is a leasing agreement. Leasing is a financing activity in the form of the provision of capital goods either by Leasing with option rights (Finance Lease) or Leasing without option rights (Operating Lease) to be used by the Lessee for a certain period of time based on installment payment <sup>3</sup> (Article 1 point 5 of the Regulation of the President of the Republic of Indonesia Number 9 of 2009 concerning Financing Companies). After the establishment of the Financial Services Authority, the regulation, licensing and supervision of financing companies' rests with the Financial Services Authority. Presidential Regulation Number 9 of 2009 concerning Financing Institutions is repealed by <sup>3</sup>residential Regulation of the Republic of Indonesia Number 110 of 2020 concerning Revocation of Presidential Regulation Presidential Regulation Number 9 of 2009 concerning Financing Institutions. Regulations regarding leasing as one of the business activities of finance companies are regulated in the Regulation of the Republic of Indonesia's Financial Services Authority Number 35/POJK.05/2018 concerning Conducting Financing Company Business which was amended by Regulation of the Financial Services Authority Number 7/POJK.05/2022 <sup>32</sup>.

Leasing is relatively easy financing compared to banking <sup>2</sup> cause the process is simpler and faster. In the leasing agreement an agreement will arise between the parties. An engagement is a legal relationship between parties in the field of property law that creates rights on one party and obligations on the other party in an obligation. The legal relationship in the field of property law means the legal relationship relating to everything related to property. Thus, the legal relationship relates to everything that can be valued in money or has economic value. The parties to the engagement are debtors and creditors. The creditor is the party entitled to an achievement, while the debtor is the party liable for an obligation. This obligation can be in the form of: giving

something, doing something, or not doing something that is desired in the agreement.

In the leasing agreement, the obligation that must be carried out by the lessor is to provide capital goods for use by the lessee. The lessee in this case must make payments in installments to the lessor. This installment payment is risky for the lessor who has financed the procurement of these capital goods. Therefore, in general, in a leasing agreement, the lessor asks for a guarantee from the lessee. This guarantee is very important in an agreement. One of them is material guarantees that have certain objects. In this case, guarantees with objects in the form of movable or immovable objects are needed in the agreement (Calomiris *et al.*, 2017)<sup>[5]</sup>. One of the guarantees that is widely used as collateral. Collateral are one of the considerations for banks to channel financing (Zeng *et al.*, 2019)<sup>[11]</sup>. One of the collaterals that is widely used in this leasing agreement is a fiduciary guarantee.

Article 1 number 1 Law number 42 of 1999 concerning Fiduciary guarantees states that "Fiduciary is the transfer of ownership rights to an object on the basis of trust provided that the object whose ownership rights are transferred remains in the possession of the owner of the object". Furthermore Article 1 point 2 of the Fiduciary Guarantee Law states that "fiduciary guarantee is a guarantee right over movable objects both tangible and intangible and immovable objects, especially buildings that cannot be burdened with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the Fiduciary Giver, as collateral for the settlement of certain debts, which gives the Fiduciary Recipient a priority position over other creditors. Thus, this fiduciary guarantee occurs with the transfer of ownership rights to objects from the fiduciary giver to the fiduciary recipient, while the object remains in the hands of the fiduciary giver".

In a leasing agreement guaranteed by a fiduciary guarantee, there is a possibility that creditors may transfer receivables to other parties to obtain funds. In the event that the receivable is transferred to another party, it will result in guarantees for the settlement of said receivable. In addition, it can also cause problems if the debtor defaults. Therefore, this research is very urgent to do. This study aims to determine and analyze the legal consequences of transferring receivables in leasing agreements with fiduciary guarantees.

## 2. Material

### Concept of Leasing

Leasing is a financing activity for the procurement of capital goods. In this case it can be done with options or without options. Licensing and Supervision of leasing activities is carried out by the Financial services Authority. Leasing is a financing activity for the procurement of capital goods. In this case it can be done with options or without options. Licensing and Supervision of leasing activities is carried out by the Financial services Authority. In the Financial Services Authority Regulation Number 35/POJK.05/2018 it does not explicitly mention leasing, but there are business fields mentioned therein which are basically a type of leasing. The regulation states that there is a Finance Lease, Sale and Leaseback and an operating lease. Finance Lease is a financing activity in the form of providing goods by a Financing Company for use by the debtor for a certain

period of time, which substantially transfers the benefits and risks of the goods being financed. Sale and Leaseback is a financing activity in the form of selling an item by a debtor to a Financing Company accompanied by a lease to refinance the item to the same debtor. The regulation states that there is a Finance Lease, Sale and Leaseback and an operating lease. Finance Lease is a financing activity in the form of providing goods by a Financing Company for use by the debtor for a certain period of time, which substantially transfers the benefits and risks of the goods being financed. Sale and Leaseback is a financing activity in the form of selling an item by a debtor to a Financing Company accompanied by a lease to refinance the item to the same debtor.

### The concept of Fiduciary Guarantee

Based on Article 1 point 1 and point 2 of the Fiduciary Guarantee Law, it can be seen that a fiduciary guarantee is a guarantee for movable or immovable objects that cannot be burdened with fiduciary mortgage rights. A fiduciary guarantee is a guarantee right. Thus, the main function of fiduciary guarantees is to guarantee the implementation of debtor obligations to creditors. The occurrence of fiduciary guarantees is by transferring ownership rights to objects that are objects of fiduciary guarantees in trust. The transfer of property rights in this case is not intended to be permanent, but only as a guarantee for the implementation of the debtor's restoration. Thus, if the principal agreement ends, the ownership rights over the property will be returned to the grantor of the fiduciary (Gai *et al.*, 2016)<sup>[7]</sup>. Fiduciary guarantee objects remain with the guarantor. Fiduciary collateral objects are movable or immovable objects that cannot be burdened with mortgage rights. Fiduciary guarantees give rise to a preference position for fiduciary receiving creditors.

One of the characteristics of a fiduciary guarantee is as an accessory agreement, namely an additional agreement to the main agreement. Article 4 of the Guarantee Law states that "Fiduciary Guarantee is a follow-up agreement to a principal agreement which creates an obligation for the parties to fulfill an achievement".

### 3. Method

The approach method used in this research is socio legal. In this case, library research and field research will be carried out to find out and analyze the legal consequences of transferring receivables with fiduciary guarantees in leasing agreements. The specification of this research is an analytical descriptive. The research was conducted using library research to obtain secondary data and field research to obtain primary data. Secondary data was obtained using literature study techniques, which were obtained from primary legal materials and secondary legal materials. Field research was obtained using interview techniques with informants from the Ministry of Law and Human Rights and the National Legal Development Agency. The data that had been collected was then analyzed using a qualitative descriptive analysis technique, in which the research results were put together with data analysis in the form of descriptions.

### 4. Discussion

Fiduciary Collateral Function in Receivables in Leasing Agreements:

The economic development of various nations in the world is always closely related to financing factors (Maali & Atmeh, 2015) [8]. One of the biggest challenges an entrepreneur faces is getting funding for his project (Crosetto & Regner, 2018) [6]. There are various types of financing carried out by bank financial institutions and non-bank financial institutions (LKBB). One of the financing that is widely used by business actors is financing from finance companies. One of the areas of business carried out by finance companies is leasing. Financing by leasing is based on an agreement between the parties (Badriyah *et al.*, 2019) [3].

Agreements related to business sometimes have complex issues and are already in the form of a standard contract so that one of the parties (who needs it), must agree to the agreement that has been made (standard). In practice, currently there is no financial service that does not use standard agreement formats and clauses in transactions with consumers. This form of agreement clearly positions the consumer as a party with no bargaining power, so that whatever the contents of the standard agreement must be agreed to, even though basically the consumer knows that the contents of the agreement are burdensome to him. In consumer protection discourse, this is known as the take it or leave it principle (Satory, 2015) [10]. Leasing agreements that develop in people's lives are usually also standard agreements. This leasing agreement has not been specifically regulated in laws and regulations. The entry of leasing agreements in Indonesia is based on the principle of freedom of contract (Badriyah & Mahmudah, 2018) [2].

The general provisions contained in the Civil Code based on Article 1319 apply to leasing agreements, which states that all named and anonymous agreements apply to the general provisions contained in the Civil Code.

In the leasing agreement will create a legal relationship between the parties. The legal relationship occurs between the lessor and the lessee (Orabi, 2014) [9]. In this case the lessor is a finance company that provides financing in the form of capital goods to the lessee. Furthermore, the lessee makes payments in installments to the lessor according to the time period agreed in the leasing agreement. In Article 1 point 5 of the Republic of Indonesia's Financial Services Authority Regulation Number 35/POJK.05/2018 concerning the Conduct of Financing Company Business as amended by the Financial services Authority Regulation Number 7/POJK.05/2022 concerning Amendments to Financial Services Authority Regulations it is stated that "Finance Lease hereinafter referred to as Finance Lease is a financing activity in the form of providing goods by a Financing Company for use by the debtor for a certain period of time, which substantially transfers the benefits and risks of the goods being financed.

The existence of payments made not in cash poses a risk to the financing company as the lessor. This is the main reason for the lessor to ask for guarantees from the lessee who has received financing from the lessor. Even though at the beginning of the emergence of leasing in Indonesia was to help small and medium enterprises that should not need collateral, in the development of leasing agreements almost all finance companies require guarantees. Collateral is an important factor for the safety of creditors' receivables. This guarantee is one of the determining factors in the consideration of a finance company to finance or not to finance someone. The guarantee function is basically to

create confidence in finance companies to provide financing. There are many factors that affect the size of the loan, such as monetary policy and bank regulations, however, the value and type of collateral guaranteed are the first order factors in determining the amount of financing disbursed by financial institutions (Zhang *et al.*, 2022) [12].

### Legal Consequences of Transferring Receivables with Fiduciary Guarantees in Leasing Agreements

Receivables is an object. In Article 499 of the Civil Code, it is stated that objects are all goods and rights that can be objects of eigendom rights or property rights. Goods indicate tangible objects, namely objects that can be captured by means of the five senses. The right to show intangible objects, namely objects that cannot be perceived by means of the five senses. Can be the object of eigendom rights means it can be owned by a legal subject. This legal subject includes people and legal entities. Objects in the legal sense must fulfill two conditions, namely they can be valued in money (have economic value) and can be controlled by a person or legal entity. Receivables fulfill two conditions as objects in the legal sense.

Receivables as an object, if the owner of the receivables wants the receivables to be transferred to another party. Receivables are intangible objects. In the leasing agreement, the lessor who has provided financing to the lessee has receivables. These receivables represent the right of collection owned by the lessor to the lessee. As an object, if necessary, the owner can transfer it to another party, for example sold to another party. In the event that receivables secured by fiduciary guarantees are transferred to other parties, it can cause problems, among others, related to new creditors who receive these receivables.

As mentioned in the previous section, a fiduciary guarantee is a guarantee right over movable or immovable objects that cannot be burdened with fiduciary mortgage rights. Thus, in a fiduciary guarantee there is a transfer of ownership rights to objects of fiduciary guarantees. Objects that are the object of collateral remain in the possession of the fiduciary giver.

The process of creating a fiduciary guarantee goes through two stages, namely the imposition of a fiduciary guarantee is made with a notarial deed in Indonesian and is a fiduciary guarantee deed (Article 5 paragraph (1) of the Fiduciary Guarantee Law). Next is the registration stage for Fiduciary Guarantees (Article 11 paragraph (1) of the Fiduciary Guarantee Law. After these two stages have been passed, a fiduciary guarantee occurs. When a fiduciary guarantee occurs, it is when a fiduciary guarantee is registered.

After the fiduciary guarantee occurs, the position of the creditor becomes the preferred creditor. In addition, the creditor receiving the fiduciary also has the position of a separatist creditor. Preferred creditors are creditors who receive repayment prior to other creditors from the sale of fiduciary collateral objects if the debtor defaults. Separatist creditors are creditors who are not affected by the debtor's bankruptcy. With the existence of a fiduciary guarantee, if the debtor defaults, the creditor receiving the fiduciary can directly sell the object of the fiduciary guarantee in accordance with the sales methods as stipulated in Article 29 of the Fiduciary Guarantee Law. Likewise, in the case of a bankrupt debtor, the fiduciary receiving creditor can sell fiduciary collateral objects, because fiduciary collateral objects are not included in bankruptcy assets.

In addition to the creditor's position as a creditor who has a special position, one of the characteristics of a fiduciary guarantee is *accessoir*. *Accessoir* means additional agreement. This means that the fiduciary guarantee is an additional agreement to the main agreement. This is stated in Article 4 Paragraph (1) of the Fiduciary Guarantee Law. In a leasing agreement with a fiduciary guarantee, the main agreement is a leasing agreement, while the additional agreement is a fiduciary guarantee.

As a consequence of its *accessoir* nature, the existence of a fiduciary guarantee depends on the principal agreement. Thus, the occurrence of fiduciary guarantees depends on the presence or absence of a principal agreement. Likewise, if the main agreement is deleted, the fiduciary guarantee will automatically be deleted as well. In the event that the receivables secured by the fiduciary guarantee are transferred to another party, the fiduciary guarantee will also be transferred to the new creditor. In Article 19 Paragraph (1) of the Fiduciary Guarantee Law it is stated that "The transfer of rights to receivables guaranteed by a fiduciary results in the transfer by law of all the rights and obligations of the Fiduciary Recipient to new creditors". In Article 19 Paragraph (2) it is stated that the Transfer of the Fiduciary Guarantee is registered by a new creditor.

As one of the collateral, fiduciary guarantees also give rise to *material* rights. Thus, fiduciary guarantees also have the nature of *droit de suite*, meaning that material rights always follow the object in the hands of whoever the object is, which is a right Article 20 of the Fiduciary Guarantee Law states that "Fiduciary Collateral continues to follow the Object which is the object of the Fiduciary Guarantee in the hands of whoever the Object is in, except for the transfer of inventory objects which are the object of the Fiduciary Guarantee". With fiduciary guarantees, new creditors also have material rights in the form of collateral rights. With the transfer of receivables in the leasing agreement guaranteed by a fiduciary guarantee, all rights of creditors as fiduciary recipients also transfer to new creditors. Thus, the new creditor also serves as a preferred creditor and at the same time a separatist creditor.

## 5. Conclusion

The transfer of receivables in leasing agreements with fiduciary guarantees has legal consequences including the transfer of fiduciary guarantees to new creditors. Thus, the position of the lessor as a fiduciary receiving creditor is also transferred to a new creditor. All rights of the old creditors are transferred to the new creditors. The new creditor is a preferred creditor and at the same time a separatist creditor. Thus, if the debtor is in default, the new creditor has the right to sell the fiduciary guarantee object by way of sale as stipulated in the fiduciary guarantee law without going through a lawsuit in court. Likewise, if the debtor is bankrupt, the new creditor can directly sell fiduciary collateral objects.

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