

THE BREEDING OF THE CONTRACT LAW PRINCIPLES (THE STUDY OF THE LEASING AGREEMENT IN CIVIL LAW AND COMMON LAW SYSTEM)

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ABSTRACT

Leasing in its development derives from America (Common Law System). In Nederland (Civil Law System), leasing contract into a rent contract and fiduciaire eigendoms overdracht. In Indonesia, leasing contract application rise legal problems caused of many violation against the principles of contract law and leasing principle. Leasing contract made in the standard contract. In this case the rights and obligations of the parties have been determined by the lessor. As a maker of agreement, the lessor is easier to anticipate the possibility of the loss on his side, while the lessee just accepts or rejects the agreement, so the lessee can be said to be on the weak side. For answering the problems, the writer used qualitative method tradition, constructive paradigm, it used the triangular concept of legal pluralism approaching, the documentary and field researching. Lessor and lessee are key informan. Legal relationships that are not balanced, deviations of the contract law principles and the principles of an leasing agreement as a result of the conflict of interest, legal cultural differences be explained by the theories the principles of contract law, the principles of economical law, Sibernetica, Complexities, Legal Pluralism, Progressive Law, Responsive Law and Prismatic Society. From the research, it can be concluded that in the leasing contract practice, there are some deviations from the principles of contract law and the leasing principles, so that they create inbalancing in the legal relations; the breeding of contract law principles becomes an important thing which must be done immediatly in order to have a fair and balancing legal relations; the principle of contract law as the result of breeding is the harmony principle as prismatic principles of contract. The harmony principles that integrated of the principle of the reasonableness/equity, laras, rukun, the balancing and the proportionality.

Key Word: breeding, the principle of contract law, financial, leasing,

Introduction

Capital is an important requirement for. There are various ways that can be achieved for the accomplishment of capital goods by the company; one of them is through leasing. Leasing is financing activities in the form of capital goods supply either leased with an option (finance lease) or leased without the option (operating lease) for being used by the lessee for a definite period based on periodic payments.¹ The legal relationship of leasing is essentially based on leasing contract. Leasing contract are not regulated in the Civil Code. Leasing in its development derives from America. The emergence of leasing contract in Indonesia is because of the principle of freedom of contract (Article 1338 Civil Code). This contract is subject to pursuant to Article 1319 of Civil Code, which specifies that all contract either specified contract or unspecified contract, subject to the general rules in this chapter or previous chapter.

In general, leasing contract made in the standard contract. In this case the rights and obligations of the parties have been determined by the lessor. As a maker of contract, the lessor is easier to anticipate the possibility of the loss on his side, while the lessee just accepts or rejects the contract, so the lessee can be said to be on the weak side. As a result, often in the leasing contract there are various violations against the principles of contract law and the principles of leasing and there are many deviations in the practice of leasing.

There are two prominent legal system in the world: common law and civil law.² Indonesian law get influence from the Netherlands who embrace civil law systems, but in this time especially after globalization many contract of the common law system into Indonesia. Common law system is always based on the principles of law. Contract law principles which is the basis of the contract in Indonesia, including leasing contract. There are three kinds of consensus principles implicitly in Article 1320 paragraph (1) Civil Code, the principle of freedom of contract implied in Article 1338 paragraph (1) Civil Code and the principle tie forces contract (*pacta sunt servanda*) implied in article 1338 paragraph (1). It turns out that in practice there are leasing contract deviations, so that the breeding of contract law principles becomes a necessity in order to arise the contract of the legal relationship balance between the parties and the public.

¹ See Backman and Joosen in Siti Ismijati Jenie (1992), *Tinjauan Umum Mengenai Leasing dan Peranannya dalam Usaha Memenuhi Kebutuhan Akan Barang-barang Modal/ Alat-alat Produksi*, Penataran Dosen Hukum Perdata/Dagang, 16-28 Nopember /30 Nopember-12 Desember, Yogyakarta, p.23. See *Black's Law Dictionary*.

² Imran, [HTTP//kistobing.blog.plasa.com](http://kistobing.blog.plasa.com), accessed on 1 March 2015

Research Design

A. Research Problems and Research Method

There are three problems proposed in this paper namely:

1. How are the legal relationships between the parties and the application of the principles of contract law in the leasing agreement within the community?
2. Why should the breeding of the principles of contract law be made by the parties in legal relations on the leasing agreement in the community?
3. How are the principles of contract law of the breeding that can make a balanced legal relationship among the parties?

To answer these three problems, the research uses **qualitative research method** with the **Legal Pluralism approach**. qualitative method is a method of research used to be able to find meaning hidden away behind the object and the subject under study . Researchers want to study group and the experiences of the unknown.

B. Discussion

1. Legal Relationship Between the Parties in the Leseang Contract

Legal relationship between the parties in the *leasing contract*, between the *lessor* and the *lessee* is a legal relationship based on the Contract. Sudikno Mertokusumo³ said “*contract as an agreement between two parties or more giving rise wich are juridical effect*”.

According to Treitel⁴ said “*contract as an agreement giving rise to obligations wich are enforced or recognized by law. The factor wich distinguishes contractual fropm other legal obligations is that they are based on the agreement of the contracting parties.*

The leasing contract has been experiencing rapid development due to its wide range of benefits in improving the economy of society, especially in the provision of capital goods, however, in practice there are many deviations, even though specific rules on leasing does not exist yet. Leasing is often misinterpreted with other agreements which are similar with leasing. Based on the research, each finance company is identical with leasing, so that every activity undertaken by a finance company is leasing, in fact leasing is only one of the business fields that can be done by a finance company in addition to factoring, consumer finance, and credit card business. In this research, leasing is very often misinterpreted with consumer finance , especially in the practice of leasing vehicles, actually both of the agreements have the different legal consequences, especially in terms of transfer of ownership rights from one party to another party. Various deviations and imbalances among the parties can be seen from various factors, namely:

A. The Process of Leasing Contract

According to van Dunne the process of *leasing Contract* which includes three phases i.e. pre-contractual, contractual, and post-contractual. such contract is referred to as a contract of adhesion⁵ At the stage of pre-contractual, there should be negotiations among the parties, but in the practice it is not clear, because the lessee only has the choice whether to accept provisions that have been defined or not at all (take it or leave it). such contract is referred to as a unconcious contract⁶.

The second stage is contractual stage. According to Indonesian contract law, in accordance with Civil Code article 1320, paragraph (1) that agreement occurs with concensus of both parties. In this stage, the commitments between both parties, namely the legal relationship between the creditor and the debtor in the legal context of wealth properties leading to rights on the one party and obligations on another party in some achievement. Lessee signs a leasing agreement which is made by lessor. After the signing of the leasing contract, the lessee is deemed to have accepted and bound by all things attaching in the leasing contract, although in reality the agreement is emphasized more on obligations rather than rights of the lessee. Conversely, for the lessor, the agreement is more emphasized on rights rather than obligations the lessor. Furthermore, at post-contractual phase, there is a delivery of the goods to the lessee and the payment to the lessor. In the case if the lessee conducts defaults on its obligations, the lessor is generally doing some ways of disputes that are not in accordance with legislation and demonstrating the authority, especially doing the withdrawal of goods directly and unilaterally canceling the

³ Sudikno Mertokusumo, 1996, *Mengenal hukum Suatu Pengantar*, IVth Edition, Liberty, Yogyakarta. 10

⁴ Treitel in Paul Richards, 1993, *Law of Contract*, Pitman Publishing, London, p 10

⁵ Van Dunne in Sudikno Mertokusumo (1992), *Catatan Kapita Selektu Hukum Perjanjian*, Makalah disampaikan pada Penataran Dosen Hukum Perdata/Dagang , 18-20 Nopember/30 Nopember-12 Desember 1992, Universtias Gadjah Mada, Yogyakarta.

⁶ Saleilles in Mariam Darus Badruzaman (1994), *Aneka Hukum Bisnis*, Alumni, Bandung.

agreement. In the practice of leasing agreement, it can be said that the momentum of the occurrence of these agreements is a series that can not be separated from each other.

B. Form of Leasing Contract

The form of leasing contract in society is a standard contract. In practice, the a priori leasing agreement has been prepared unilaterally by the lessor. Lessee can just choose to accept or reject the agreement forms prepared by the lessor. Thus, the leasing agreement meets the characteristics of a standard contract. In this case the lessor determines the contents of the agreement. Concerning the contents of the agreements that have been defined by the lessor, the lessee does not have the rights to change it, the lessee is only faced with two choices, namely approving (receiving) all of the things having absolutely determined in it or refusing it at all (take it or leave it). Even if any negotiation, it is only the amount of installment options and a choice of repayment period which is usually already made in the list, so the *lessee* can just choose according to the ability or business conditions. After the signing of the leasing agreement, the lessee is deemed to have accepted and bound by all of the things attaching in the leasing agreement, although in fact the agreement emphasizes more on obligations rather than rights of the lessee.

C. The Substance of Leasing Contract

- a. The subject of the leasing contract are the lessee and the lessor. Leasing should be used for the provision of capital goods, so that either the lessor or the lessee should be business doers, but in practice very often a lessee is also a consumer.
- b. Leasing is financing activities in the form of capital goods supply either leased with an option (finance lease) or leased without the option (operating lease) for being used by the lessee for a definite period based on periodic payments.⁷ Based on the provisions of the lease should only be used for the financing of the capital goods, but in practice, leasing object not only capital goods but also consumer goods, although there are also some companies that actually use leasing as a business activity for the supply of capital goods. For companies that use *leasing* as non-capital goods are actually not in accordance with the principles of leasing.
- c. Rental fee, other costs and payment methods have generally been determined by the lessor and included in a separate enclosure that is a not-separated part of the relevant leasing agreement. It turns out that the provisions regarding rental fees are determined by finance companies as the lessor have no certainties for the lessee, because at any time it can be changed by the lessor without the consent of the lessee. In general, leasing costs are also at the cost for the purchase of capital goods, not rental fee for leasing object, because generally the right option to choose which should be used by the lessee at the end of the agreement, precisely it has to be signed by the *lessee* in conjunction with the signing of the leasing agreement, although it mentions in the agreement of payment of lease rental goods. Thus, in the leasing agreement it is similar with a buy-sell agreement on installments.
- d. Duration or Leasing Term in its practice, there is a possibility that before the leasing period expires, the lessor has the right to decide or to cancel the agreement unilaterally at any time without the knowledge or consent of the lessee, i.e. if there is negligence of the lessee or due to government policy or any causes which result in an increasing rates, while on the contrary, the lessee can not decide the agreement during the term of the agreement is still running.
- e. In leasing contract in its practice, it is proven to emphasis more on the leasing obligations, while the rights are listed only few of the many requirements set out in the agreement. On the contrary, the rights of a lessor are included more, and obligations of lessor are only slightly touched upon in the agreement. This shows there is an imbalance of rights and obligations between the parties in a leasing agreement as a result of unequal bargaining position, because in this case the lessor is in a strong position, because as a maker of agreement can make any rules more favorable for his/her party and can anticipate the emergence of losses in the future, especially considering that the finance companies engaged in the provision of financial services have a big risk.
- f. Form of leasing contract is a standar form, which is determined unilaterally by the lessor, while the lessee only has the opportunity to accept or reject the whole at all (take it or leave it). In this case the lessor makes an agreement that actually shows imbalances between the obligations of lessor and lessee.
- g. Residual value is determined unilaterally by the lessor, while the lessee can not participate in determining or changing it at all
- h. Option rights is the right of the lessee in the leasing contract of the kind of financial lease to choose whether to purchase capital goods which become the object of leasing or will extend leasing or return leasing goods the end of the leasing agreement. In practice there is a multifinance company in which the option to purchase capital goods has actually been used at the beginning of the agreement making.

⁷ See Backman and Joosen in Siti Ismijati Jenie, *Op.Cit*, p.23. See *Black's Law Dictionary*.

- i. Insurance is stipulated unilaterally by the lessor, the lessee does not have the right to change it.
- j. Collateral can indeed be one thing that can be used to convince creditors to provide financing. However, if referring to the principles of leasing financing, one of the goals is to help small and medium entrepreneurs to obtain financing fee easily and it should be with no collateral, for this can become obstacles for entrepreneurs who do not have enough properties to be used as a guarantee. It turns out that in the practice of leasing, it always requires guarantees for lessees who get financing with leasing. One of the collateral often used is fiduciary guarantee, and there are some companies who practice on fiduciary guarantee with leasing object itself. Such a case is not in line with fiduciary principles, because in terms of the fiduciary guarantee, the giver of fiduciary (lessee) should be the owner of the property that becomes the object of the fiduciary guarantee, and property rights at the giver of this fiduciary is delivered to the recipient (lessor). In the leasing agreement, the goods which become the object of leasing turn to the lessee. It is if the lessee period of prolongation at the end of the agreement to use the option to buy leasing goods. As such, the lessee has become a giver on fiduciary guarantee on property whose the ownership rights to the objects has not been available to him or her, so in such a case it should not happen to fiduciary guarantee.
- k. A result of default it has been stipulated in the agreement, but the provisions made by the lessor shows the existence of incompatibility with the Civil Code, especially regarding the unilateral cancellation, withdrawal of goods directly without going through a lawsuit in court. In addition, the provision of this default is intended only for default of the lessee, while the lesser is not regulated at all. This shows an imbalance of deviations and the legal relationship among the parties.
- l. Ideally if it appears Overmacht, so a debtor should be exempted from the obligation, but in the practice of the agreement it is stated explicitly that although it emerges overmacht events, the settlement made without reducing the rights of *the lesser* as specified in the agreement.
- m. In practice concerning the settlement of the dispute it has been stipulated by the lessor, i.e. by using the meeting first, if not managed, it goes through the courts. In this case, the resolution is usually better solved by consensus. However, the alternative of dispute resolution offered and has been implemented so far failed to give protection to the lessee. All of the alternatives are beneficial only to protect the interests of the lessor, while the interests of lessees have been ignored. Even the provision of default is intended only for the breach of the lessee, while the breach of the lessor is not regulated in the agreement.
- n. Choice of law is determined unilaterally by the lessor

2. Violation Against the Principles of Contract Law and Leasing Principles

In the practice of leasing in Indonesian society, there are many violations against the principles of contract law, both consensus principles, the principle of freedom of contract and the principle of *pacta sunt servanda*, in fact the principles of treaty law should be the basis for the entire Indonesian nation to perform certain actions, i.e. in making the contract. Therefore, the breeding of the principles of contract law becomes an urgent matter that must be done in order that the contract (including leasing contract) can really create a balanced legal relationship to the parties.

According PS. Atiyah⁸ contract have three three main purpose: *first, it is inspired by the desire to enforce promises and to protect the reasonable expectations which are generated both by promises and by other forms of conduct; secondly, contract law itself is also powerfully influenced and affected by the idea that unjust enrichment should not be permitted; thirdly, contract law is also designed to prevent certain kinds of harm, particularly harm of an economic nature, or at least to compensate those who suffer such harm to prevent certain kind of harm).*

The violation of the leasing contract in practice can be seen on the following:

- a. Violations against the principles of consensus are seen in various stages of agreement, both phases of the pre-contractual, contractual, or post-contractual. Ideally in an agreement there is an agreement between the pre-party, but in practice the deal is not clear, because the lessee has no right to determine or alter the agreement. Lessee only has the option to accept or reject the agreement. Even in the implementation of agreement, lessor at any time can change the terms of the agreement without the knowledge or consent of the lessee.
- b. Violations against the principles of freedom of contract can be seen from the three stages in the agreement. In this case the parties, both lessor and lessee should be free to determine whether or not enter into an agreement, parties in the agreement, the form of agreements, content of agreements, choice of law. In practice, this freedom is not clear, because

⁸ P.S. Atiyah in Herlien Budiono (2006), *Het Evenwichtsbeginsel voor het Indonesisch Contractenrecht op Indinesische Beginsel Geschoeid*, Dietrjemahkan oleh Tristam P. Moeliono dengan judul *Asas keseimbangan bagi Hukum Perjanjian Indonesia, Hukum Perjanjian Berlandaskan Asas-asas Wigati Indonesia*, PT Citra Aditya Bakti, Bandung, p.. 308.

the lessee does not have the freedom to participate in determining the content and the form of agreement at all. Lessee only has the option to accept or reject all provisions of the agreement altogether.

- c. Violations against the power principles of tying agreements are seen in the post-contractual stage. In the implementation of the agreement, it should consider various factors, either autonomous or heteronomy factor. Autonomous factor is agreed by both parties, while factor heteronomy i.e. factors outside the parties themselves, such as the regulations, public order, justice, and decency within the community. In practice, it is very often either autonomous or heteronomy factor is ignored.

3. Breeding of Contract Law Principles

Because of The violation to the principles of the contract law and the principles of leasing, so the breeding of the principles of contract law must be done. A breed is a domesticated race or type of an animal or plant. The term may also be used as a verb. In this way, to breed an animal is to make sure that it has offspring that improves the next generation's qualities. This is also often referred to as breeding. A breeder is a person who maintains and creates different breeds of animals or plants.⁹

According to Oliver Wendell Holmes, *The life of law has not been logic but it has been experience.*¹⁰ Brian Z. Tamanaha¹¹ said that the law and the public have a frame called "The Law - Society Framework" which has the characteristics of a particular relationship. The relationship is shown with two basic components. The first component consists of two main themes, namely the idea that the law is a mirror of society and the idea that the function of law is to maintain "social order". The second component consists of three elements, namely: custom / consent; morality / reason; and positive law. Custom / consent and morality / reason can be understood in the thinking of Donald Black as culture¹². The theory of the mirror (the Mirror Theory), illustrates that the law in a society is a reflection of the values that exist in the community. According to Ron Jue,¹³ the values underlying legal norms is called the principle of law.

Therefore, legal principles and values of the society should be a major concern in the development of law. In this paper, breeding principles of contract law use "prismatic theory of Fred W. Riggs". Prismatic society is the integration of "fused types of society (tradition, collectivism)" and "diffracted types of society (modern, individualism)".

Breeding of Contract Law Principles is made by integrating the principles of main contract law principles integrated with other legal principles, especially principles of economic law with a philosophy based on Pancasila and the Constitution of the Nation (UUD 1945) which is a prismatic law, so it produces the harmony. The harmony principles is made by integrating the principles of economic principles¹⁴, UNIDROIT Principle and values those are developing in the society, especially equity (reasonable), fairness, *laras, rukun*, balance, proportionality that can create a balanced legal relations between the parties. Legal principles of this contract includes the principle of consensus, the principle of freedom of contract, the principle of binding force of the contract (*pacta sunt servanda*), the principle of balance, the principle of state interference. With the principles of the law of this breeding result, so the contract is not only juridical, but also sociological, philosophical, which not only heeding material aspect, but also respecting the religious moral dimension.

In such a case the contract is not only based on state law but also the natural law (natural law / moral / religious), and the law remaining in the society (the living law). Law approach is done by a legal pluralism approach¹⁵ that unites the philosophical, juridical, socio legal approach. The way to have such the law is very appropriate to have a progressive law basing the perspective that law is for man, so that the legal existence is for happiness of society, law should be able to achieve a balance between the values of divinity (religious morality), humanity (humanistic) social (nationalistic, democratic and social justice).

Paradigm transformation in the practice of leasing contract which is originally only the economic aspect oriented to get profit as many as possible for individual interests needs to be changed. The contract should be able to create a harmony/balance

⁹ <http://en.wikipedia.org>, accessed in March 1, 2015.

¹⁰ See Oliver Wendell Holmes in Esmi Warassih (2005), *Pranata Hukum Sebuah Telaah Sosiologis*, PT Suryandaru Utama, Semarang, p. 175. See Raymond Wacks, 2008, *Law, A Very Short Introduction*, Oxford University Press, p. 24. *The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unavowed, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it can not be dealt with as if it contained only the axioms and corollaries of a book of mathematics.*

¹¹ Brian Z. Tamanaha, A-, (2006) *General Jurisprudence of Law and Society*, Oxford University Press, New York, p. 1-2.

¹² Donald Black, *The Behaviour of Law*, Academic Press, New York, , p. 61.

¹³ Lihat Ron Jue in Kusnu Goesniadhie S (2006), *Harmonisasi Hukum Dalam Perspektif Perundang-undangan (Lex Specialis Suatu Masalah)*, PT. Temprina Media Grafika, Surabaya, hlm. 34-35.

¹⁴ See Sri Redjeki Hartono (2007), *Hukum Ekonomi Indonesia*, Bayumedia Publishing, Malang, p. 62. The principles of economic law those are very deserving of attention for example: the principle of balance of interests, the principle of public scrutiny, the principle of state intervention on economic activity

¹⁵ Werner Menski, (2006), *Comparative Law in A Global Context, The Legal Systems of Asia and Africa*, Second Edition, United Kingdom: Cambridge University Press, p.187-188.

between the values of divinity (religious morality), humanity (humanistic) and social (nationalistic, democratic, social justice). In order to realize a harmony/balance in the contract (including *leasing* contract), so the regulation maker needs to set *leasing* contract in the special regulations by relying on the breeding of the principles of contract law. The interference of the state through regulation, monitoring based on the breeding of the principles of contract law becomes very urgent in order that the welfare of society can be realized. In addition, public awareness and willingness to do business with a legal relationship based on the breeding of the contract law principles becomes an immediate need because actually the main basis of the contract is the equilibrium value. With the breeding of the principles of contract law, it will change the legal culture of society in economic activities by means of holding a legal relationship through the contract, not only material-oriented, but also emphasizing more on balance of the value of Divinity, Humanity, and Community. If the contract is not based on the breeding of contract law principles, renegotiation should be made between the parties (renegotiation), so that the objective to realize the balance of the agreement can actually be realized. With the contract based on the breeding of contract law principles, the justice, usefull and the legal certainty will be realized.

C. Conclusion

1. Legal relationship between the parties in the *leasing contract*, between the *lessor* and *the lessee* is a legal relationship based on the Contract. In the practice of leasing in Indonesian, there are many violations against the principles of contract law and leasing principles.
2. Because of there are many violation to the principles of the law contract and the principles of leasing, so the breeding of the principles of contract law must be done.
3. Breeding of Contract Law Principles is made by integrating the principles of main contract law principles integrated with other legal principles, especially principles of economic law with a philosophy based on Pancasila and the Constitution of the Nation (UUD 1945) which is a prismatic law, so it produces the harmony.

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Civil Code (*Burgerlijke Wetboek*)
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