The Seybold Report
ISSN 1533-9211
DOI: 10.5281/zenodo.10205622

IDEAL CONSTRUCTION OF LEGAL PROTECTION FOR THE *LESSOR* IN THE LEASING OBJECT IF THE *LESSEE* DEFAULTS

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Abstract

Ideal construction of legal protection for the *lessor* in the leasing object if the *lessee* defaults. The purpose of this study is to analyze: 1) What is the form of legal protection against lessors for defaults made by the lessee in the current leasing financing agreement? 2) Why is the construction of legal remedies made by the lessor for default made by the lessee in the current leasing financing agreement less than ideal? 3) How to construct the ideal legal protection of the *lessor* in the leasing object if the *lessee* defaults. The research method used is empirical juridical with a statutory approach, concept approach, and case studies. The results showed that: 1) The relationship between the Lessor and the 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* the Lessor and *the* Lessee *a* financial *lease* agreement is made/lease contract or a financing agreement. 2) The types of financing that are usually used in the practice of leasing agreements are the types of *financial lease* and *operating lease*. In the type *of financial lease, the regulation regarding responsibility for the object of the lease 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 responsibility for the object of the lease agreement is entirely borne by the* lessor, including any risks arising from the use of the object. 3) If there is a default on the part of the lessee, the *lessor* has the right to take back the lease object that is in power. The event of default charged to the lessee gives rise to the right for the *lessor* to terminate the leasing agreement concerned. And according to article 1266 of the Civil Code, it is determined that even if a void condition has been included in a reciprocal agreement, and one of the parties does not fulfill its obligations, but the termination of a unilateral mutual agreement must be carried out by a judge's decision.

Keywords: Construction, Ideal, Legal Protection, Lessor, Leasing Object, Default.

INTRODUCTION

Background

The need for funds or capital for someone today is very important, to meet the needs of funds or capital, a financing institution is needed. Banks as financial institutions are not capable enough to cope with the needs of funds or capital needed by the community. This is due to the limited range of credit dissemination by the Bank, limited sources of funds, and other limitations that result in less flexibility in performing its functions[1]. Thus creating funding institutions that have been flexible, and in certain cases a higher level of risk known as financing institutions, which offer new forms of funding or financing. The definition of leasing according to the Decree of the Minister of Finance of the Republic of Indonesia Number 1169 / KMK. 01/ 1991 is:

> "A financing activity in the form of providing capital goods either by lease with option rights ("finance lease") or lease without option rights ("operating lease") for periodics.

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As an agreement, leasing has a basic legal basis, namely the principle of freedom of contract.[2] As contained in Article 1338 of the Civil Code, which states:

> "All agreements made lawfully are valid as Law for those who make them. An agreement is irrevocable other than by agreement of both parties, or for reasons which the Act declares sufficient for it. An agreement must be executed in good faith".[3]

The relationship between the lessor and the *lessee* is a reciprocal relationship, concerning the implementation of obligations and the transfer of a right or claim of obligation from the enjoyment of using financing facilities, for that between the lessor and lesseedi make a financial lease agreement leasing contract, where the agreement contained and agreed must be in the form of a written agreement, there is no specific provision whether it must be in the form of an authentic deed or a deed below hand.

In connection with this guarantee, what must be done by the lessor *if* the lesse neglects its obligations or defaults in the form *of defaulting on the lesse* fulfilling its obligations when the repayment of the debt is ripe for collection, then in such an event, *the lessor can carry out its execution on the collateral?* [4] Then it is the execution of the guarantee that causes legal problems in practice.

Leasing includes a loosely regulated business, where the protection of the parties is only limited to the intentions of each party as stated 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 performance in accordance with the agreement, for example the lessee's negligence in maintaining capital goods in the middle of the leasing implementation process regarding avoiding risk is the binding of a lessee to the possibility of loss or damage to the leassed object, because the anticipation of the situation has switched to insurance, in the case of rent payments or other payments that become the lessee's obligation in the agreement.

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 object of leasing. For this reason, it is necessary to make legal protection efforts for the interests of lessors to avoid the risk of loss or loss of leasing objects. The construction of legal protection for the Lessor at this time is not ideal, therefore the author is interested in examining the "Ideal Construction of Legal Protection for *the Lessor* in the Object of Leasing If the *Lessee Defaults*".

Problem Statement

1. What is the form of legal protection against the lessor for default committed by the lessee in the current leasing financing agreement?
2. Why is construction in legal remedies made by the lessor for default made by the lessee in the current leasing financing agreement less than ideal?
3. What is the ideal construction of legal protection for the *lessor* in the leasing object if the *lessee* defaults?

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Theoretical Framework

The Grand Theory or the main theory that forms the basis of the analysis knife in this study is the Theory of Treaty Law. In the Law of Treaties contains a number of legal principles, namely:

a. The Principle of Consensualime

The principle of consensualism can be summed up in article 1338 paragraph 1 BW which states that, "all agreements made validly line that by the author apply as law to those who make them."

b. Binding force principle

This principle of binding force is the principle that states that the agreement is only binding on the Parties binding to the agreement and is only binding inward.

c. The principle of good faith (*geode trouw*)

The principle of good faith is contained in Article 1338 paragraph (3) of the Civil Code which reads: "The agreement must be executed in good faith." The principle of good faith in the subjective sense as one's honesty is what lies with a person at the time of the legal act.

d. The principle of legal certainty

The principle of legal certainty or also called the principle of pacta sunt servanda is a principle related to the consequences of the agreement.

e. The Principle of Freedom of Contract

The principle of freedom of contract is a principle that occupies a central position in contract law, although this principle is not written into legal rules but has a very strong influence on the contractual relationship of the parties. [5]

Then, *Middle* Theory in this study uses the Hierarchy Theory of Legislation. Hans Kelsen in the "General Theori of Law and State" translation of the general theory of law and [6] state elaborated by Jimly Assihiddiqie[7] under the title Hans Kelsen's theory of law among others that Legal analysis, which reveals the dynamic character of the system of norms and the functions of basic norms, also reveals a further peculiarity of law: law governs its own formation because one legal norm determines the way to create another legal norm, and also to some degree, determine the content of the other norms. Because, one legal norm is valid because it is made in a way determined by another legal norm, and this other legal norm is the basis for the validity of the first legal norm.

According to Hans Kelsen, norms are tiered in layers in a hierarchical order. In this sense, the legal norms below apply and originate, and are based on higher norms, and higher norms also originate and are based on higher norms and so on until they stop at a highest norm called the Basic Norm (*Grundnorm*) and still according to Hans Kelsen is included in a dynamic norm system. Therefore, law is always formed and abolished by its authorities who are authorized to form it, based on higher norms, so that lower norms (*Inferior*) can be formed based on higher norms (*superior*), in the end the law becomes tiered and multi-layered forming a hierarchy.[8]

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Then, *Applied Theory* in this study uses Legal Protection Theory and Legal Certainty theory. Legal protection is a protection given to legal subjects in the form of legal instruments both preventive and repressive, both written and unwritten. In other words, legal protection as an illustration of the function of law, namely the concept where law can provide justice, order, certainty, expediency and peace. Legal protection is an effort to protect a person's interests by allocating a human right power to him to act in the framework of his interests.[9]While certainty is an inseparable feature of the law, especially for written legal norms. Laws without certainty value will lose meaning because they can no longer be used as a code of conduct for everyone. Certainty itself is referred to as one of the goals of the law. The order of society is closely related to certainty in law, because order is at the core of certainty itself. According to Sudikno Mertokusumo, [10] legal certainty is a guarantee that the law is carried out, that those entitled according to the law can obtain their rights and that decisions can be implemented.

RESEARCH METHODOLOGY

This research is included in the type of doctrinal research, where the approach method used is normative juridical. The normative juridical approach is to understand the problem using the approach of legal regulations or applicable laws and regulations.[11] The normative legal research method is also called positive law science referred to here is a law that applies at a certain time and place, namely a written rule and norm that is officially formed and promulgated by the ruler, in addition to written laws that regulate the behavior of community members.[12]

In this study, a statutory approach and a comparative approach were used.[13] Legal research conducted by examining library materials or secondary data.[14] Statute approach: an approach taken by examining laws and regulations related to the focus of research.

Then the conceptual *approach is* an approach that departs from the views and doctrines that develop in legal science. A concept is a mental integration of two or more units isolated according to characteristics and united by a distinctive definition.[15] The concept approach is used with regard to the concepts in Withdrawal of Fiduciary Guarantee Objects as well as Continuous Action against Debtor Default.

RESEARCH RESULTS

Form of Legal Protection against the Lessor for Default Committed by the Lessee in the Current Leasing Financing Agreement

The relationship between the *Lessor and the Lessee* is a reciprocal relationship, involving the implementation of obligations and the transfer of a right or demand for obligations from the enjoyment of using financing facilities, for that between *the Lessor* and *the* Lessee *a financial* lease agreement / leasing contract or a financing agreement. For *the Lessor*, the benefits to be achieved in the financial lease agreement with the Buyer/*Lessee, solely depend on the creation of legal certainty for an agreement, about a series of payments* by the Lessee for the use of the assets that are the object of the lease*, including the Lessee's recognition of the control of the object by the* Lessee whose ownership remains held by *Lessor,* thus giving birth to the legal

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DOI: 10.5281/zenodo.10205622

right for the *Lessor*, in the event of default by the *Lessee* to sell or confiscate the lease object.[16]

The occurrence of default caused by 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 risk of business made by the *Lessee* by ignoring the contents of the agreed agreement. The leasing agreement made between the Lessor and the Lessee is called a lease agreement and the agreement contains several things, including:[17]

1. Name and address of the Buyer/Lessee
2. Desired type of capital goods
3. The quantity or value of the goods leasing
4. Payment Terms
5. Terms of ownership or other conditions
6. Fees charged
7. Sanctions if the Buyer/Lessee breaks its promise (default)

In the leasing agreement, there are voting rights, namely *Operating Leasee* and *Financial Lease. Operating Leasee* is a leasing in which there is no option to buy leasing objects or objects to the Lessee but simply rent and at the end of the contract period the Lessee *can extend the lease or not and the leasing object at the end of the contract period returns to* the Lessor, *as the owner and* the Lessee *is only* the *lessee*. While *Financial Leasee* is an option to buy or lease back the leasing object to *the Lessee to remain, only* the Lessee wants to buy or continue to lease. This is regulated in the Decree of the Minister of Finance Number 1169 / KMK.01 / 1991 concerning Leasing Activities in Article 1 letter a, stating that:

> "A financing activity in the form of providing capital goods either by lease with option rights, financial lease or lease without option rights (operating lease) to be used by the Lessee for a certain period of time based on periodic financing".[18]

Often the relationship between the Lessor and the Lessee is *only harmonious at the beginning of the agreement, then the relationship* between the Lessor and the Lessee is colored by various problems and the main and most frequent is the delay in fulfilling obligations from the *Lessee* to the Lessor.[19] Non-performance of the obligations of the *Lessee* / Buyer as agreed, is an act of default which in the leasing company is a business risk, even not infrequently the Lessor loses the leasing object. This action is very detrimental to the finance company. In a lease agreement, default may occur if:[20]

1. *The lessee* fails to pay the amount of installments stipulated in the agreement
2. *The lessee* does not carry out the obligation to pay fees and other costs or late fees within the specified grace period;
3. *The lessee* has done something prohibited in the agreement, such as transferring rights to another person, re-leasing, mortgaging the object of the agreement.

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The Financial Services Authority allows financing institutions to use third-party services in debt collection and there is no express prohibition on the use of third-party services. If at the time of execution of the leasing object, the Lessee / Debtor resists or is unwilling to hand over the object or the object is unilaterally transferred to another party, the finance company can report the Lessee and take court action.[21] If a dispute arises, there are two ways that can be used to resolve the dispute, namely the parties agree that the dispute will be resolved through deliberation, and if deliberation is not reached, then the parties agree to resolve the dispute in the District Court.

The execution of guarantees against leasing objects is regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. (Republic of Indonesia, 1999) In the Law, it is stipulated that creditors who have received fiduciary submission under the Ministry of Law and Human Rights and have obtained a fiduciary certificate, then the execution can be carried out immediately without going through the court because the fiduciary guarantee certificate has the same executory power as the court decision as described in Article 15 paragraph (2) of the Fiduciary Guarantee Law. As stated by Soerjono, the executory power of the fiduciary guarantee certificate gives the fiduciary the right to be able to execute his fiduciary guarantee provided that the debtor or fiduciary defaults. (Dewi, Saptanti, &; Purwadi, 2017) However, it turns out that the meaning arising in Article 15 paragraph (2) allegedly makes the fiduciary aggrieved so that on March 24, 2019, a petition for judicial review of Law Number 42 of 1999 was submitted to the Constitutional Court, until finally on January 6, 2020 the Constitutional Court ruled on the application. In the decision of the Constitutional Court Number 18 / PUUXVII / 2019, if there is a question what if the execution of fiduciary guarantees that have agreed on a clear default, but the debtor still objects to voluntarily surrendering the fiduciary object, it can be seen in the opinion of the Constitutional Court "The Fiduciary Guarantee Agreement must meet the principles of legal certainty and a sense of justice, in the form of a balance of legal rights between the fiduciary grantor (Debtor) and the recipient fiduciary (Creditor).[22] This principle is one of the main reasons for respect for agreement. The principle of balance is not realized from the equality of the number of rights and obligations for the parties, but rather the division of the portion of rights and obligations in an agreement and the implementation of the principle is manifested in the form of the formulation of a clause regarding "voluntary surrender of objects that are the object of Fiduciary Guarantee" from the Debtor to the Creditor as a result of a default event.[23]

By formulating the clauses "default" and "voluntary surrender of the Thing that is the object of Fiduciary Guarantee" based on "agreement" / not based solely on "obligations of one of the parties mentioned in the Fiduciary Law" this has placed the parties in the preparation of the fiduciary guarantee agreement in a balanced position, so that the agreement that occurs in those circumstances must be legally respected, as a binding rule for the parties under Article 1338 of the Civil Code. So that the Debtor's objection to voluntarily surrender the object of fiduciary guarantee at the time of the "default" is no longer relevant to consider, considering that from the beginning the agreement has fulfilled the principles of legal certainty and a sense of justice, in the form of a balance of legal rights between the fiduciary (debtor) and the fiduciary recipient (creditor).

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An agreement or contract as a forum that brings together the interests of one party with another party actually requires a fair and appropriate form of exchange of interests that must be carried out in good faith, this is an important point that explains the close correlation between Article 1338 paragraph (3) of the Civil Code and Article 1339 of the Civil Code. The article is the basis for the application of the Principle of Good Faith to all agreements made under Indonesian law, and limits the understanding of the Principle of Freedom of Contract and the Principle of Consensualism. In short, the principle of freedom of contract cannot be interpreted only on the benefit of one party (especially the benefit of the party who has defaulted on the promise of the delivery of the object in accordance with the principle of good faith), but must reasonably guarantee the fulfillment of the interests of the other party in the performance of the agreement in accordance with the principle of good faith.

That way, the implementation of direct execution of the leasing object by the finance company to attract the object of fiduciary guarantee, against the agreement as described above can still be carried out as long as the execution is carried out based on Article 29, Article 30 and Article 31 of Law Number 42 of 1999 concerning Fiduciary Guarantee and is subject to other related laws and regulations, including but not limited to Financial Services Authority Regulation No. 35 / POJK.05 / 2018 concerning Financing Company Business Operations.[24]

Construction in legal remedies made by the lessor for default made by the lessee in the leasing financing agreement

Leasing agreements can be divided into 2 (two) types*, namely financial lease (leasing with option rights) and* operating lease (leasing *without option rights),* based on this it will cause several possibilities related to the legal position of the leasing object concerned in the event of default by the [25] lessee*, namely:*

1. If the leasing agreement is terminated

In *financial lease*: The leasing agreement is a development of a conventional lease agreement, then the juridical owner of the leased object is the party who rents the object which in this case is the lessor. [26]So that the juridical owner of the leasing object concerned remains the lessor.

On *operating lease: In* operating lease'; The lessee does not have the option to purchase the lease/capital object. (Article 1 letter e Decree / / Minister of Finance of the Republic of Indonesia Number: 1251 / KMK.013 / 1988 concerning Provisions and Procedures for the Implementation of Financing Institutions). Thus, the juridical owner of the leasing object remains the *lessor.*

2. If the leasing agreement remains in place

On *financial lease*: In the event that the leasing agreement still exists and at the end of the lease the lessee exercises his option right to purchase the capital goods concerned, then the ownership rights of the leasing object will pass from *the lessor* to the *lessee.* However, if the *lessee* actually chooses to extend the *lease*, the juridical owner of the leasing object concerned is still the *lessor.* At

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Operating lease: the owner of the leasing object concerned remains the lessor, *while the* lessee *is only the party who controls or uses the leasing asset / goods and the risk regarding capital goods in this operating* lease *is borne by the* lessor.[27]

In leasing after and disbursed and given by *the lessor, since then* the position of the lessor becomes crucial, so in practice various guarantees are also needed that make the position of the *lessor* truly guaranteed. These guarantees include: Main Guarantee, this guarantee in leasing transactions is the confidence of the *lessor* that the *lessee* will and is able to pay back the installments as appropriate. Then the Principal Guarantee, this guarantee is in the form of capital goods purchased from the leasing transaction itself. Then Additional Guarantees, can be in the form of both material guarantees, mortgages (if it is for leasing of fixed objects), and individual guarantees.

As with the agreement in general, in the leasing agreement if the lessee (*debtor) defaults, the lessor as a creditor can sue the lessee: fulfillment of performance only, fulfillment of performance accompanied by compensation (Article 1267 of the Civil Code), sue and ask for compensation (only possible losses due to delay (HR November 1, 1918)), cancellation of the agreement, cancellation accompanied by compensation.*[28] In addition, *the lessor* also has the right to settle all installments and costs that have not been paid off by the lessee and has the right to *take back the leasing object that is in the lessee's control* [29] without having to return the excess price[30]. To avoid difficulties in terms of taking back the leasing object concerned, the leasing agreement can include a clause that can facilitate the lessor in the implementation of its rights to the leasing object.[31]

The lessee*'s responsibility* 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 leasing agreements are the types of *financial lease* and *operating lease*. In the type *of financial lease, the regulation regarding responsibility for the object of the lease 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 responsibility for the object of the lease agreement is entirely borne by the* lessor*,* including any risks arising from the use of the object.[32]

In the event of a default by the lessee that causes losses to the lessor, Civil Code vide Article 1239 specifies that in one party defaulting, the other party can claim compensation in the form of costs, losses and interest.[33] In addition, the obligations arising to the lessee for the default can be in the form of:

1. Indemnify.
2. Objects that are made the object of the engagement from the time they are not fulfilled obligations are the responsibility of the *lessee.*
3. If the engagement arises from a reciprocal agreement, the l*essor* party may request cancellation (termination) of the agreement.[34]

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In addition, leasing agreements in their implementation in addition to binding the parties to the agreement are also binding on heirs who acquire rights and third parties, as stipulated in Articles 1315-1318 and Article 1340 of the Civil Code. So that if the lessee dies, the *leasing* agreement will remain valid and all obligations *of the lessee* including its obligations arising from the default must be borne by his heirs.[35]

Ideal Construction of Legal Protection for the *Lessor* in the Object of Leasing If the *Lessee* Defaults

Legal protection of lessors in leasing agreements is not specifically regulated in a law governing leasing. Therefore, based on article 1319 of the Civil Code that the legal protection of *lessors* in leasing agreements refers to book II of the Civil Code. Article 1319 reads: "All covenants, whether they have a specific name or are not known by one particular name, are subject to the general rules contained in this and previous chapters". This provision implies that agreements, both those with names in the Civil Code and those unknown by a certain name (unnamed) are subject to Book III of the Civil Code.[36]

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

> "The debtor is negligent, if he by warrant or a deed of the kind has been declared negligent, or by his own engagement, if this provides, that the debtor shall be deemed negligent by the lapse of the time specified".

However, in accordance with article 1238 of the Civil Code, the obligation to give a negligent statement or warning can be waived by specifying in the agreement, that a default committed by the *lessee* is sufficiently evidenced by the lapse of the time of payment of rent installments, or from the time of the execution of acts prohibited by the agreement, without the need for a written statement or reprimand from the party *lessor*. And also please note that article 1238 of the Civil Code is regulating (regelent recht) and is not obligatoir (coercive).

As explained above, that as a result of a default on the part of the lessee, the *lessor* has the right to take back the lease object that is within the lessee's power. If the retrieval of these items is not hampered by the *lessee*, then nothing will arise. However, problems will arise when the *lessee* without rights prevents or hinders the return of the lessor's property .

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 approval / 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 *leased* That, with or without the help of the police. The retrieval of the lease object is called the termination or cancellation of the unilateral leasing agreement by the lessor.

As it is known that the leasing agreement cannot be decided unilaterally, but in the event of default charged to the lessee, it gives rise to the right for the lessor to terminate the leasing agreement concerned. And according to article 1266 of the Civil Code, it is determined that

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even if a void condition has been included in a reciprocal agreement, and one of the parties does not fulfill its obligations, but the termination of a unilateral mutual agreement must be carried out by a judge's decision. However, because the provisions of article 1266 of the Civil Code are only regulating, it can be set aside by the parties. Therefore, in a leasing agreement, a clause should be included that overrides the enactment of article 1266 of the Civil Code.

In this connection it is necessary to make it clear again that in practice the inclusion of such a clause will not necessarily be effective, because the judge may hear the case and reject the exception under the clause. However, the inclusion of the clause would be useful as well, since it would at least have a psychological effect on the *lessee* to accept an out-of-court settlement. As it is known that in a leasing agreement, it is actually not justified to terminate the agreement unilaterally, but because the default event charged to *the lessee gives* rise to the right for *the lessor* to terminate the leasing agreement concerned. [37]

CONCLUSION

The results showed that;

1. The *relationship between the Lessor and the Lessee is a reciprocal relationship, involving the implementation of obligations and the transfer of a right or demand for obligations from the enjoyment of using the financing facility, for that between* the Lessor *and* the Lessee *a* financial *lease* agreement / leasing contract or a financing agreement is made
2. The types of financing that are usually used in the practice of leasing agreements are the types of *financial lease* and *operating lease*. In the type *of financial lease, the regulation regarding responsibility for the object of the lease 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 responsibility for the object of the lease agreement is entirely borne by the* lessor , including any risks arising from the use of the object.
3. In the event of default on the part of the lessee, *the lessor* has the right to take back the lease object that is in power. The event of default charged to the lessee gives rise to the right for the *lessor* to terminate the leasing agreement concerned. And according to article 1266 of the Civil Code, it is determined that even if a void condition has been included in a reciprocal agreement, and one of the parties does not fulfill its obligations, but the termination of a unilateral mutual agreement must be carried out by a judge's decision.

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DOI: 10.5281/zenodo.10205622

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