PCL 4(1) (2020) 33-43

JOURNAL OF PRIVATE AND COMMERCIAL LAW
https://journal.unnes.ac.id/nju/index.php/jpcl

Borrow-To-Use Agreement and its Legal Consequences in Case of Damages on the Object of Agreement

Yuli Prasetyo Adhi[1], Achmad Busro[2]

[1]*Faculty of Law, Universitas Diponegoro, Semarang, Indonesia*

Received April 8 2019, Accepted July 1 2019, Published May 30 2020

DOI 10.15294/jpcl.v4i1.24784

Abstract

The performance of a borrow-to-use agreement can only be enjoyed by one party while the other party will not obtain anything from the borrower's party. The willingness to help or to lend the other party is probably is based on an agreement, volunteerism, solidarity, or is because of the object owner's social sense. The regulation is already available in the Civil Codes. However, the question is whether the provisions in the Civil Codes regarding to borrow-to-use agreement are still relevant in the present situations and to the more complex society. The risks will rise along with the making of the agreement. Therefore, it is necessary that there is a sound mechanism to regulate and resolve problems regarding the emerging risks in the borrow-to-use agreement. The objectives of this study are to analyze provisions regarding a borrow-to-use agreement regulated by the Civil Codes and the legal consequences in the occurrence of the damage of the object of a borrow-to-use agreement in the perspective of the Civil Codes and to resolve risks occurring in the agreement. The study makes use of a normative juridical approach method by applying regulation approach. The data used are secondary data which come from the primary, secondary, tertiary materials. The object of the borrow-to-use agreement which is conducted by the society varies from movable to immovable objects. The most frequently used objects for a borrow-to-use agreement by the society are vehicles like cars, motorcycles, trucks, etc. The immovable objects which are frequently used include: houses, land, buildings, etc. In Indonesia, a borrow-to-use agreement is a common practice making use of various objects as its collaterals.

Keyword: borrow-to-use, agreement, legal consequences

INTRODUCTION

An agreement is an event in which someone promises to another person or other people to perform an action. An agreement can create a legal bond or relationship in which there are rights and obligations of the parties involved in the agreement making[1]. In other words, the parties are bound to comply with the agreement they have made. There is no fault to be found with systematizing so much as we can of the rules on promises, or on assumpsit and its descendants, or on obligations arising out of transaction[2]. In this matter, an agreement functions like a law, but the first is applied only those who have agreed. By law, an agreement can be enforced through a court. The law gives sanctions to the party who commits a breach of contract or default.

Any agreement made by the parties creates legal consequences. The legal consequences are the rights and obligations. The consequences require the parties to perform their obligations and receive

1 Lina Jamilah, Asas Kebebasan Berkontrak Dalam Perjanjian Standar Baku, Syiar Hukum Journal, Vol. XIII, No. 1, 2012, page 228.
2 Karl N. Llewellyn, What Price Contract? -an Essay in Perspective, Yale Law Journal, Vol 40, Issue 5, page 705.

* *E-mail : haridisemadi@gmail.com*
Address : Jl. Prof. Soedarto, Tembalang, Semarang City, Central Java Indonesia, 50275

p-ISSN 2599-0314 e-ISSN 2599-0306

their rights respectively. Essentially, an agreement, regardless of the object or the type of the agreement, contains wills of both parties involved to perform a promised action[3]. The agreement leads to a consequence in which either party, with their own rights and obligations, who commits a breach of contract or default can be demanded by the other party to immediately perform their obligations. The obligations are surely related with the object of what is being promised. Moreover, an agreement must have a certain object which has to be clearly defined. The object can an existing one or one which is still being planned[4]. According to Subekti, an object of an agreement can be defined as: (1) what is promised by both parties that can clearly determine their respective rights and obligations; (2) what is promised by either party does not conflict with the applicable laws, What is promised by each party cannot be opposed by law, social order and decency[5].

In the aspect of day-to-day legal activities in the field of economy, there are many legal actions which are found with respect to the agreement or contract between two or more parties. In general, they make agreements using an open system in which each party is given freedom to create an agreement either regulated by the laws or not. This condition is line with the criteria of a contract making of article (1) of paragraph 1338 of the Civil Code which asserts that any legal agreement serves as a law for those who create it. From the fore-mentioned paragraph, we can conclude that there is a principle of freedom of contract. Nevertheless, the freedom is limited by an imperative law. Therefore, the contract creators must abide by the imperative law. An agreement shall not be withdrawn unless both parties agree to do so or there are reasons which are supported by the law.

This agreement classification is based on the paragraph 1319 of the Civil Code, which mentions that there are two types of contact based on their names, they are named and unnamed contracts. Named contacts are agreements which are named, categorized as special agreements and are limited in numbers. The examples of named contracts are sale, trade, borrow-to-use, rental, donation, deposit contracts, and so on. Unnamed contracts are ones that do not have certain names and their instances are unlimited. Unnamed contracts are not yet regulated in the Civil Code. The examples are labor, agency, leasing contracts, and so on. The unnamed contracts grow due to the contract's freedom principle as regulated in the paragraph 1338 of the Civil Code.

The Civil Code has regulated various matters in our lives, including borrow-to-use agreements along with its legal consequences which are inseparable from the general provisions, rights, and obligations found in the Civil Code, especially the third book which governs engagements. The provisions, rights, and obligations of the parties involved in the borrow-to-use agreement are generally governed in the paragraph 1740 to 1753 of the Civil Code. In addition, they are also specifically governed in the agreement which is made by both parties. Generally speaking, in every agreement, both parties promise to each other to perform something, one party commits himself to make a performance while the makes a counter-performance. The agreement is called a mutual agreement.

Borrow-to-use agreement, included as a named agreement, is an agreement which has its specific characteristics compared to that of other named agreements. The performance in a borrow-to-use agreement benefits only for one party while the borrower does not benefit anything. The willingness to help or lend the other party is usually derrived from an agreement, volunteering, solidarity, and the social sense from the owner of the object. Such things are every day occurences in our society.

Only the borrower can benefit from a borrow-to-use agreement. Therefore, it is necessary to set up certain regulations accommodating the provisions of the agreement. The provisions are already available in the Civil Code. However, the question is whether the regulations related to a borrow-to-use agreement are still relevant in the scoiety that is getting more complex. There are risks arising from this agreement. Therefore, there should be a good mechanism to manage and resolve the problems around the risks caused by the agreement.

The risks in a legal agreement can be found in Chapter III of the Civil Code, paragraph 1237, which says: "Whenever there is an engagement to deliver a certain object, the object mentioned in the agreement shall be the creditor's liability". Moreover, the paragraph 1460 of the Civil Code states that a risk is the obligation to bear the loss incurred by a certain event not in the power of either party over an

3 See Ernest G. Lorenzen, Causa and Consideration in the Law of Contracts, Yale Law Journal, Vol. XXVIII, No. 7, page 646.
4 Trisandini Prasastinah Usanti, Lahirnya Hak Kebendaan, Perspektif Journal, Vol. XVII, No. 1, page 45.
5 Subekti, *Hukum Perjanjian,* (Jakarta: PT. Pembimbing Masa), page 16.

object of agreement.

Essentially, a risk is an obligation of bearing loss incurred by an event beyond the power of either party. The risk of an agreement is unilaterally borne by the creditor, while the debtor does not have to fulfil his or her performance. The risk in a mutual agreement, in which either of the parties is unable to perform due to a force majeure, the agreement is considered to be null.

Risks can occur to anyone during the agreement practice. However, risks shall not be charged to a party experiencing a force majeure. The force majeure is a condition taking place after an agreement has been made which prevents the debtor to perform. The debtor will not be disputed and he or she does not have to bear the risks for he or she cannot expect it when making the agreement.

From the above illustration rise some problems, like: (1) whether the provisions about the borrow-to-use agreement governed in the Civil Code are still relevant with the society's lives? (2) what are the legal consequences in case of damages in the object of borrow-to-use agreement from the point of view of the Civil Code? (3) how to solve the risk in the borrow-to-use agreement according to the principles of the Civil Code?

RESEARCH METHOD

The approach method applied in this research is juridical normative. Juridical means that the research emphasizes on the legal studies, while normative means that the research studies legal principles applied in the society. Thus, a juridical normative approach is an approach towards a problem study of the applicable law, in this case the one related a borrow-to-use agreement both from the aspect of the legal consequences and the risks borne by the parties.

The research specification applied in the research is descriptive analytical. It is descriptive because the research aims to give a comprehensive description depicting borrow-to-use agreements developing in the society of Indonesia.

Some approaches that will be applied in this research are those beneficial in obtaining information from various aspects concerning the problems in question. Since the research applies a juridical normative type, the approach conducted in this research is a statute approach. The statute approach is conducted to study regulations whose norms attempt to explore borrow-to-use agreements in detail.

RESULTS AND DISCUSSIONS

A borrow-to-use agreement is an agreement in which one of the parties (the creditor) benefits from the performance. The owner of the object or the one lending it does not gain any profits from the borrower during a borrow-to-use agreement. The willingness to help or to lend other party is possibly derived from an agreement, volunteering, solidarity, or a social sense of the object owner. Such things are every day occurences in Indonesian societies. The provisions regarding the a borrow-to-use agreement can be found in the Civil Code.

The Provisions Regarding the Borrow-to-use Agreements Governed in the Civil Code and their Relevance in the Lives of the Society

The provisions regarding the borrow-to-use agreements can be found in the paragraph 1753 of the Civil Code. A borrow-to-use agreement is an agreement in which the lender hands in the object to be "used" until the agreed time is due. By then, the borrower must return the object to the lender. From the characteristic point of view, a borrow-to-use agreement in real, in which the lender hands in the object an object to the borrower and it is received by the borrower. Only then is the contract effective.

A borrow-to-use agreement consists of any agreement's elements, like: (1) Essential Element; (2) Natural Element; and (3) Accidental Element. The essential element is a compulsory element in every agreement, without which the agreement is void. In a borrow-to-use agreement, there is not only an agreement between the parties, but also an object of the agreement. The natural element is one governed in the laws. Thus, when it is not stated in the agreement, it will be governed by the laws. Thus, the natural element has to be present in an agreement. In a borrow-to-use agreement, when hidden defects are not stated in the agreement, then the provisions in the Civil Code are automatically applied. The provisions

state that the object owner or the lender is fully responsible for the hidden defects especially when the defects endangered the borrower. The accidental elements are one which will later exist or bind the parties when they desire. In a borrow-to-use agreement, there must be provisions regarding the object maintenance by the borrower in order that the object's value will not diminish. The maintenance methods shall also be stated in the agreement. Therefore, this is not a very crucial matter in the agreement. However, if it is states, both parties are bound to obey it.

A borrow-to-use agreement is an example of an unilateral agreement in which only one party will benefit from the agreement, which is the borrower. The object owner will not benefit in whatsoever. When a payment is involved in the agreement, it is not a borrow-to-use agreement. Instead, it is a lease agreement.

The object of the agreement is the performance. The performance is the debtor obligation and it becomes the right of the creditor[6]. The point of the agreement is the performance itself. The object of the agreement must be defined to reach a logical and practical understanding. The Civil Code has determined that the object of the agreement shall meet the requirement, the object must be specific[7]. The paragraph 1234 of the Civil Code states that a performance consists of: handing in the object, performing an action, and not performing an action.

The object of a borrow-to-use agreement is a movable or an immovable object. In this case, the objects can be in the form of a piece of land, a building, a house, a vehicle, etc. The lender does not the obligation to lend the object. Although it is not an obligation, he or she is willing to lend his or her object to be used by the borrower. The lender's willingness to lend the object to be used by the borrower plays an important role.

Principally, a borrow-to-use agreement can be inherited in accordance with the agreed period unless it is agreed the otherwise. In the first part of the paragraph 1743 of the Civil Code, it is stated that the rights and obligations emerging from a borrow-to-use agreement can be passed on to the beneficiary of both parties is constitutional based on the laws of inheritance which governs that any rights and obligations which possess economical value (assets or liabilities) from a deceased individual shall be inherited to both parties' beneficiaries. However, when the right or the obligation is personally closely related to the deceased, the rights or the obligations cannot be passed down to the beneficiaries. Likewise, as stated in the second part of the paragraph above, the lending was carried out personally to the borrower only. Therefore, when he or she is deceased, the agreement is terminated, and the beneficiary is obliged to return the object. For example, when the deceased, during his or her life, was a university professor and he or she was given a car in a borrow-to-use agreement from the university foundation, the beneficiary shall immediately return the vehicle without waiting for a contract termination notice because the agreement is terminated automatically when the borrower is deceased[8].

Regarding with the object of a borrow-to-use agreement, we can borrow a passive asset belonging to other people to be used and empowered, for instance a piece of land or a house. There are many abandoned pieces of land and properties. The owners do not wish either to use it or to sell it. In this case, we can ask for the owners' permission to make use of the land. Meantime, in order to specify the ownership of the land, a written agreement which covers various aspects of the borrow-to-use agreement is needed. The example of the agreement object which can be found here is a house. Please feel free to modify accordingly for a different object of a borrow-to-use agreement.

The borrowing is different from that with money. For a borrow-to use case, the object is handed in to the borrower not to own it, but only to use it. The object still belongs to the person who lends it. In the case of borrowing money, the borrowed money goes directly to the borrower and he is fully entitled to use it as he wishes. The borrowed object of a borrow-to-use agreement must be returned as it is, while the loan money can be returned with that of similar amounts, unless it is agreed the otherwise. A borrow-to-use agreement is different from object deposit agreement. In principle, the deposited object shall not be used, unless it is agreed the otherwise. Meanwhile, in a borrow-to-use agreement, the purpose itself is

6 M. Yahya Harahap emphasized that regarding the performance, the creditor is entitled with the performance while the debtor is obliged to perform as agreed. See M. Yahya Harahap, *Segi-segi Hukum Perjanjian,* (Bandung: Alumni, 1982), page 9.

7 See paragraph 1320 of the Civil Code regarding the legal requirement of an agreement, which states that an agreement is legal when it has a specific object of agreement. For further explanation about object of agreement, see paragraphs 1332 and 1333 of the Civil Code.

8 See R. Subekti, *Aneka Perjanjian,* (Bandung: PT. Citra Aditya Bakti, 1995), page 120.

for the benefit of the borrower. Therefore, the borrower is free to use the borrowed object

The difference between an object deposit and a borrow-to-use agreements is that the latter is made in favor of the borrower while the first is made in favor of the party depositing the object.

The difference between a borrow-to-use and loan agreements is whether the object being borrowed diminishes after use or not. If the borrowed object diminishes because of the usage, the agreement is called loan agreement. A loan agreement is an agreement that bind the borrower and the object or money owner. In a borrow-to-use agreement, the object is not consumable. On the other hand, the object in a loan agreement is consumable.

The definition of loan agreement (paragraph 1754 of the Civil Code) is an agreement in which one party hands in the other a certain number of consumable objects, providing that the latter will return the object of the same number, amount, type, and quality.

The provisions regarding with a borrow-to-use are not only found in the Civil Code, but they are also found in the paragraph 1 number 10 of Government Regulation 27/2014 which states that: a borrow-to-use agreement is a transfer of object usage from the central government to the regional government and between regional governments in a certain period without receiving any retainer and after the period is due, the object shall be returned to the object management. Moreover, the regulation also states that the length of time is two years at most and it can be lengthened[9]. A borrow-to-use agreement is conducted on the basis of an agreement letter which at least includes (a) parties involved in the agreement; (b) the type, dimensions or number or amount of the object being borrowed and the time period; (c) the responsibilities of the borrower for operational expenses and the maintenance during the borrowing period; (d) other necessary requirements[10].

In addition, provisions of a borrow-to-use agreement can also be seen in the regulation of the Minister of Home Affairs number 17 of 2007 on the Procedures of the Implementation of Usage, Utilization, Abolition, and Transfer of State Property and the Procedures of the Implementation of Borrow-to-use Agreement of State Property. According to the regulation above, a borrow-to-use agreement of state property is the transfer of usage of state property between the central government and the regional government in a certain period of time without receiving any retainer and after the period is due the state property shall be returned to the central government[11]. The borrow-to-use agreement for state property is carried out to optimize the usage of the state property which has not been or is not used for realizing the central government implementation and supporting the realization of regional government implementation. The state property which can be borrowed are land, and/or buildings, either which are possessed by the object management or whose utilization status in on the object users and other state properties other than land or buildings[12]. The parties which can borrow to use state properties are:

a. the object management, for land and/or buildings which are possessed by the object management;
b. the object user with the permission of the object management, for 1) a piece of land and/or a building whose utilization status is on the object user; 2) other state properties other than land and/or buildings.

Those which can borrow the state properties are regional governments. The provisions on the implementation of borrow-to-use agreement according to the Minister of Home Affairs' regulation number 17 of 2007, are:

1. The state properties that can be borrowed-to-use must be items which have not been used or are not used by the object management for the implementation of their main duty and government function.
2. Land and/or buildings which can be lent by the object management include land and/or buildings possessed by the object management which have not been entirely used or are not yet for the government function purposes.

9 The meaning of parties to the provisions of this regulation is limited. That is, between the central government and regional governments or between regional governments. See Muh. Sidik N. Salam, *Aspek Hukum Perjanjian Pinjam Pakaiatas Barang Milik Pemerintah Daerah*, Legal Opinion Journal, Vol. 2, No. 6, 2014.

10 B.Y.Sondakh.,H.Sabijono.,L.Mawikere, Analysis of Local-Owned Property Management (Case Studies on Board of Financial Management and Reginal Asset at South Minahasa District), EMBA Journal, Vol. 5, No. 2, page 1179-1180.

11 Sugeng Riyono, Pemanfaatan Aset Daerah (Studi Tentang Pola Kemitraan Asset Tanah Pemerintah Provinsi Jawa Timur), DIA Journal, Vol. 11, No. 2, 2013, page 239.

12 All of the borrow-to-use objects are state assets. Veronika Mulalinda & Steven J. Tangkuman. (2014). Efektivitas Penerapan Sistem dan Prosedur Akuntansi Aset Tetap pada Dinas Pendapatan, Pengelolaan Keuangan dan Aset Daerah Kabupaten Sidoro, EMBA Journal, Vol. 2, No. 1, page 522.

3. Land and/or buildings which can be lent by the object management include a piece of land and/or buildings which are the remaining from a piece of land and/or buildings which have been used by the object management for the purpose of carrying out their main duty and functions.
4. The period of borrow-to use agreement of state property is two (2) years at most after the agreement signing and it can be extended.
5. In case of extending an agreement of borrow-to-use of state properties, the extension application shall be received by the object management at least three (3) months before the agreement's expiration date.
6. The land and/or buildings which are borrowed-to-use shall be used according to its designated function in the agreement and modifying, adding, or reducing the shape of the building is prohibited.
7. All maintenance expenses incurred during the implementation of the borrow-to-use agreement is entirely the responsibility of the borrower.
8. After the agreement is expired, the borrower shall return the borrowed state property in the conditions stated in the agreement.

The parties involved in the borrow-to-use agreement are basically are not different from that in other agreement. The parties involved in the borrow-to-use agreement are:

a. Between individuals

The parties involved in the borrow-to-use agreement, which are the lender and the borrower, are individuals. They are legal subjects acting as endorsers of rights and obligations.

b. Between an individual and a legal entity (non-government)

In an agreement, a legal entity is also a legal subject. It is a privately created legal entity based on the applicable laws which is entitled with rights and obligations like an individual. The non-government entity is acknowledged by the government. It is established privately to serve the purposes set up by the creator. The entity is acknowledged by the government in accordance with the laws.

According to the provisions in the paragraph 1653 of the Civil Code, there are three classifications of legal entities based on their existences. They are[13]: (1) A legal entity which is established by the government, like government bodies, state-owned enterprises; (2) A legal entity which is acknowledged by the government like a limited liability and cooperatives; (3) A legal entity which is allowed or, for specific purposes, has an ideal characteristic, like a foundation (education, social, religion, etc.)

The individuals involved in the borrow-to-use agreement can be an employee of a company or other legal entities. With the permission of the respective legal entities, an individual can use facilities of the office using borrow-to-use terms. The ownership of the object remains on the corporation.

c. An individual and a government office

An individual can make use of property of a government office. Usually the individual holds a managerial position in the office. Because of his position, he is entitled with some facilities like a vehicle or a house, or other objects which are can be governed in a borrow-to-use agreement.

d. A non-government corporation and a government body or vice versa

The private party (non-government corporation) with the permission of a government body is able to use government-owned objects. However, this is a rare practice since several regulations are considered too strict and limit the possibility of carrying out a borrow-to-use agreement between a government body and a non-government corporation. Nevertheless, it is still possible.

e. Between government bodies

Government bodies can carry out a borrow-to-use agreement with each other, like borrowing a piece of land belonging to a regional government to be used temporarily by another government body.

f. Between non-government corporations

Borrow-to-use agreements also develop in the community. Many private sectors are committed in the agreement. The agreement is also accompanied with a cooperation which is principally mutually beneficial.

13 See Abdulkadir Muhammad, *Hukum Perdata Indonesia,* (Bandung: Penerbit PT. Citra Aditya Bakti, 200), page 29.

The Legal Consequences in case of Damages in a Borrow-to-use Agreement on the Objects form the Point of View of the Civil Code

In every agreement implementation[14] there are always risks. The risks are related with whether the agreement can be carried out well or not. Both parties anticipate the risky situations by preparing in advance the inevitable conditions or the conditions they did not predict before. The conditions require them to immediately anticipate disputes between them deriving from the risks that occur.

The parties can make any prevention measures for conditions considered as risks by inserting any relevant item in the contract. Therefore, whenever the risky conditions take place, they know who will be responsible and what the alternative solutions are.

Risks are the obligations to bear loss incurred by a certain event beyond the power of either party. For example, the purchased item is gone in the delivery because the ship which carries it sinks, the rented item is destroyed by a fire during the rental period.

From the explanation about the risks above, it can be concluded that the risk problems is mainly due to an event beyond the power of either party involved in the agreement based on what they have agreed in the agreement. In other words, the risks which take place beyond the power of either party in the agreement according to the Civil Code is called force majeure. In the third book of the Civil Code paragraph 1237, it is stated that "in an agreement in which there is a transfer of a certain object, the object becomes the responsibility of the borrower after the contract is made". The term "responsibility" in that article is similar with "risk". Therefore, according to the agreement, when after the object is transferred, it is damaged or lost due to a situation beyond the power of either party, the loss is borne by the borrower, that is the party that receives the object. The paragraph 1460 of the Civil Code states that "if the purchased object is already definite, since then the object becomes the responsibility of the buyer, although the object has not been handed in and the seller is entitled to charge the buyer". On the contrary, the paragraph 1545 of the civil code defines the problem as follows: "If a certain item, which is agreed to be exchanged is damage beyond the power of its owner, the agreement shall become void, and the party fulfilling his or her obligation in the agreement can demand the item he or she had handed in in the agreement". However, in practice, people prefer to use article 1545 of the Civil Code as the principle in their agreement since the article regulates in detail about the implementation of the agreement. In addition, it fairly regulates the rights and the obligations of the parties involved in the agreement, so that neither party will feel harmed in the agreement and there is no imbalance between the rights and the obligations acquired by each party during the implementation of the agreement.

The force majeure is closely related with risks in fulfilling an agreement, which means that when risks of force majeure take place, the risks shall not be borne by the afflicted party. In this case, a judge will rule out the creditor lawsuit wishing the debtor to fulfil his or her obligation as stated in the agreement.

In a borrow-to-use agreement, when a force majeure takes place, the borrower is still required to bear the consequences since it is necessary to mention in a borrow-to-use agreement clearly about the force majeure in its clauses. Therefore, when a force majeure really takes place, it is clear who will be responsible for the risks.

The purpose of mentioning a force majeure clause is to protect both parties if they are prevented from fulfilling the agreement because of causes beyond their power to prevent it. The force majeure are natural disasters like flood, a volcano eruption, a hurricane storm, a tsunami, etc.[15]

When the risks taking place in the agreement are not related to force majeure, but they are cause by the negligence or deliberateness of either party, then there is a breach of contract from either of the parties involved in the agreement.

The debtor is required to perform. When he or she does not fulfil his or her obligations deliberately and not due to a force majeure condition, he or she breaches the contract. The breach of a contract is a condition in which the debtor does not fulfil his or her performance which has been agreed.

It can be called a breach of contract, a negligence, a faith breaking, or an agreement violation.

14 The function of an agreement can be distinguished into two: a juridical and an economic function. The juridical function is to give legal certainty for the parties, while the economic function is to mobilize (the ownership of) resources from a lower economic value to a higher one. Salim HS., *Pengantar Hukum Perdata Tertulis (BW),* (Jakarta: Sinar Grafika, 2006), pages 168-169.

15 See R. Soeroso, *Perjanjian dibawah Tangan,* (Jakarta: Sinar Grafika, 2010), page 27.

There are four types of a breach of contract: (1) not being able to fulfil what has been agreed; (2) fulfilling what has been agreed, but not accordingly; (3) fulfilling what has been agreed but not meeting the deadline; (4) carrying out something which is prohibited in the agreement.[16]

According to Purwahid Patrik[17], a breach of contract takes some forms. They are: (1) the debtor does not perform in whatsoever; (2) the debtor does not meet the deadline when fulfilling his or her performance; (3) the debtor's performance is not carried out accordingly.

There are two possibilities why a debtor does fulfill his or her obligations, like: (1) the debtor's error, either due to his or her negligence or deliberateness, (2) a force majeure, a condition beyond the debtor's power, hence he or she is deemed not guilty.

There are requirements for an action to be considered as an error: (1) the action carried out could have been avoided, and (2) the action is blamed to the doer, because he or she is supposed to have predicted the consequences.

Whether a consequence can be predicted or not, it must be measured objectively and subjectively. The objective measurement is when the consequence could have been predicted by a common person. The subjective measurement is when the consequence could have been predicted by the person based on his or her expertise.

Deliberateness is an action carried out intentionally and consciously. A deliberateness does not necessarily take place with an intention to harm other people. It is sufficient to say that the doer understands the consequence yet he or she keeps on carrying it out. However, a negligence is an action in which the doer understands the possibility of harmful consequences towards others.

In implementing an agreement, a person is responsible for the actions carried out by his or her dependents (paragraph 1391 of the Civil Code). In this case, it is allowed to create an agreement by making an exception for the responsibilities incurred by a deliberateness or negligence of his dependents.

In order to find out when a debtor is called to commit a breach of contract, the laws have already provided legal efforts called a statement of negligence. A statement of negligence is a notification from the creditor to the debtor to let the latter know when is the latest he is expected to fulfil his or her performance. Therefore, through the notification, the creditor can determine precisely when the debtor has breached a contract,that is when he or she is unable to fulfil his performance. Since then the debtor bears the consequences which harm the creditor due to his or her inability to fulfil his or her performance. Hence, the function of a statement of negligence is as a legal effort to determine when a breach of contract takes place.

In a borrow-to-use agreement, there are possibilities of a breach of contract, when the borrower does not maintain the object he or she borrows properly, or when he or she is negligent to maintain it which causes the damage of the object[18].

Besides, a breach of contract is committed when the borrower does not return the object to the owner when the agreement is expired, or when the borrower attempts to make a claim for the borrowed object.

Since a breach of contract due to a negligence leads to crucial consequences, it is necessary to regulate in advance what needs to be done when it occurs. There are four types of sanctions or punishments that can be applied to a breach of contract due to a negligence:

1. A compensation payment

Paying a compensation in this case includes the calculated damage or loss of the borrow-to-use object due to a negligence or a deliberateness which harm the owner of the borrowed object.

2. An agreement revocation

An agreement revocation or resolution can bring both parties involved in the agreement to their original states before the agreement is created.

3. Risk relocation

Risks are the obligations to bear loss when an event beyond the power of either party occurs afflic-

16 Subekti, *Hukum Perjanjian*, 10th Edition, (Jakarta: Penerbit PT. Inter Masa), page 45.
17 Purwahid Patrik, *Asas-asas Hukum Perjanjian,* (Semarang: FH UNDIP, 1982), page 14.
18 When the object of borrow-to-use is forest, the borrower does not have the ability to restore the forest to its original state or technically cannot be reclaimed. Then, it has entered as a default Muhamad Muhdar, Mohamad Nasir, Rosdiana. (2015). Implikasi Hukum Terhadap Praktik Pinjam Pakai Kawasan Hutan Untuk Kegiatan Pertambangan Batubara. Halrev Journal, Vol. 1, Issue 3, page 449-450.

ting the object of agreement as stated in the paragraph 1237 of the Civil Code.
4. Paying a court fee before judges

The Risk Resolutions in a Borrow-to-use Agreement According to Principles of the Civil Code.

The risk definition is always closely related with the existence of force majeure. It is important to know who will be responsible, who will bear the risks from the force majeure[19]. A force majeure is a condition in which a creditor is prevented from fulfilling his or her performance due to unexpected events or occurrences during the agreement period. The conditions shall not be blamed to the debtor since he or she does not have bad faith. Such conditions are regulated in the paragraph 1244 of the Civil Code which states that "these conditions are force majeure which are unpredictable by both parties, because if the parties have predicted the events, they are supposed to have made a negotiation".

Generally, there are three elements for a force majeure:

1) The inability to fulfil a performance because of an event that perishes or damages an item used as the object of agreement is always fixed.
2) The inability to fulfil a performance because of an event which prevents the debtor to perform can be considered fixed or temporary.
3) Events which are not known or expected both by the creditor and debtor that occur during the agreement period, so either party especially the debtor is not at fault.

The provisions in the Civil Code regarding how to resolve risk problems between the parties in a borrow-to-use agreement are limited or not specific. Other provisions focus on what is being promised in the agreement.

When a risk takes place in a borrow-to-use agreement, then the borrower bears the consequences, unless agreed otherwise in the agreement by both parties. Therefore, these conditions can trigger disputes or arguments between both parties whenever the provisions in the agreement content do not cover regulations concerning who will be responsible for the risks.

A problem that is not immediately resolved may lead to more severe disputes or arguments. When this condition happens, there must be ways to resolve the disputes. A dispute can take place every time since it can be triggered by a seemingly trivial or simple problem or by a sudden and unpredictable reason. It can also be caused by something that both parties did not expect before. The argument or dispute in the society can happen to an individual or a group of people, or it can happen to corporations either non-government or government.

In general, disputes or arguments are related with rights, statuses, lifestyles, reputations, or other aspects in the trade activities or personal conducts, among others[20] :

a. Facts which may arise from a credibility of the party, or from the data provided by a third party including explanations about the data's facts;
b. Legal problems which are generally caused by opinions or interpretations of a dispute resolution provided by related legal experts;
c. The results of technical differences between the opinions of technical experts and the party's professionalism;
d. Different understandings on the emerging matters, for example in the use of confusing words or there are differences in assumptions;
e. Different perceptions about fairness, justice concept, morality, culture, norms, and attitudes.

A dispute resolution can be done through two (2) processes, which are a resolution process through a litigation in the court and a resolution outside the court. A litigation process produces an agreement which is adversarial, and it sometimes cannot include communal interests. It also tends to create a new problem. It has a slow resolution process and requires an expensive cost. It is not responsive and can trigger hostility between the disputed parties. In contrast, a resolution outside the court can produce a win-win solution agreement. It avoids a slow, procedural, and administrative process. It solves a prob-

19 Purwahid Patrik, *Asas-asas Hukum Perdata,* (Semarang: FH UNDIP, 1982), page 26.
20 Priyatna Abdurrasyid, *Arbitrase dan Alternatif Penyelesaian Sengketa*, (Jakarta: PT. Fikahati Aneska, 2002), page 5 – 6.

lem comprehensively in togetherness and it keeps a good relationship between the disputed parties. The advantage of the non-litigation process is its confidentiality, since the result of the resolution and the decisions are not publicly published. The dispute resolution outside the court is also generally called alternative dispute resolution.

The alternative dispute resolution can be limited as a collection of procedures or mechanism serving to provide alternatives or options of procedures in settling disputes through an alternative dispute resolution to obtain a final decision and bind both parties. In general, what involves an intervention and an independent third party to help resolve a problem can facilitate the dispute resolution. The philosophy from the alternative dispute resolution is to motivate individual empowerment. It is a process which previously involves legal experts whose mastery of legal procedures, language, and rationale are needed in negotiations before the court trials begin. The individual empowerment in the dispute resolution efforts is carried out through the individual capability and to avoid from hiring legal professionals. It is also carried out through connecting the society with the policies and conscience and emotions. Sometimes, it can be said that the motivation for utilizing an alternative dispute resolution is to create resolutions by working together. It is also believed that the alternative dispute resolution achieves a better result than that of a court resolution[21]:

a. A different dispute requires a different approach and the disputed parties have to plan specific procedures for settlement using a dialog.
b. Other mediation and alternative dispute resolutions involve a more intensive and direct participation and it is believed that the alternative dispute resolution is no longer an alternative when it comes to settling a dispute.

CONCLUSIONS

The provisions regarding a borrow-to-use agreement is found in the paragraphs 1740 to 1753 of the Civil Code. According to the paragraph 1740 of the Civil Code, a borrow-to-use agreement is an agreement in which one party hands in an object to be used by the other party for free, providing that the latter shall return the object after the using it or after the agreement period which has been set expires.

The objects of a borrow-to-use agreement carried out by the society are various, starting from movable objects to the immovable ones. The most widely used object for a borrow-to-use agreement in the society is a vehicle, whether it is a car, a motorcycle, a truck and so on. The immovable objects which can be used in the agreement are a house, a piece of land, a building, etc.

In every borrow-to-use agreement, either carried out by individuals, private legal entities, or government bodies, there are regulations about the rights and obligations of the parties involved in the agreement. The provisions regarding the obligations of the borrower can be found in the paragraphs 1745 – 1746 of the Civil Code. Although a borrow-to-use agreement is created for the borrower's interest, the object owner also has obligations to do.

A borrow-to-use agreement in the Indonesia's society are mostly carried out using various items as the objects of the agreement. Therefore, the agreement is still relevant in the society. However, the characteristics of the provisions regarding with the agreement are still general and are not yet able to accommodate all items related with the societal problems which are increasingly complex.

There must force majeure provisions in every agreement, including a borrow-to-use agreement. In a borrow-to-use agreement, the borrower is the one to bear the consequences of the force majeure. Therefore, it is important to include clearly in the agreement provisions related with force majeure in one of the clauses in case of force majeure and who will bear the consequences.

If the risks taking place are not consequences which are related with force majeure, instead they are caused by negligence or deliberateness of one party, the condition can be regarded as a breach of contract by one of the parties involved in the agreement.

The debtor is required to carry out a performance. Therefore, when he or she does not perform as what is required, and it is not because of force majeure, he or she has committed a breach of contract. A breach of contract is a condition in which the debtor does fulfil his or her performance as stated in the

21 Priyatna Abdurrasyid, *Arbitration and Alternative Dispute Resolution*, (Jakarta: PT. Fikahati Aneska, 2002), page 19.

agreement.

Any agreement which is created surely contains risks. According the civil law, a risk is an obligation to bear loss due to an event beyond the power of both parties. In regards with risks, the most important question should be who will bear the consequences when there is a legal problem arising from neither of the parties. As stated previously about risks, the paragraph 1237 of the civil code can only accommodate regulations about risk management in a unilateral agreement which states that the risks will be borne by the debtor. It is also summarized in the paragraphs 1545 and 1553 of the civil code. The risk regulations are about unilateral agreements.

The risk resolution in a borrow-to-use agreement is emphasized on the content of the agreement. If the provisions on the risk resolution is absent in the agreement, then the provisions which will be applied are that found in the provisions of the Civil Code.

RECOMMENDATION

1. Before any party attempt to create an agreement, it would be beneficial to understand beforehand what is desired by both parties and what are the rights and obligations which will be borne by either party.
2. The parties involved in an agreement are advised to create a written agreement and the agreement must be witnessed and signed properly. This is to avoid future disputes by both parties.
3. It is advisable that every signed agreement contain alternative resolutions, whenever a dispute regarding with the agreement takes place. The objective doing so is to solve any dispute which rises in a well-mannered dialog in order not to harm the disputed parties.
4. Each party carries out their rights and obligations as stated in the agreement and both parties shall have good faith in carrying out the agreement.
5. It is recommended that both parties include laws which can govern and protect both of them dealing with their legal relationship in accordance with the reality in the societal lives, especially for the borrow-to-use agreements.

BIBLIOGRAPHY

Books

Abdulkadir Muhammad. (2000). *Hukum Perdata Indonesia.* Bandung: PT.Citra Aditya Bakti

Abdurrasyid Priyatna. (2002). *Arbitrase dan Alternatif Penyelesaian Sengketa*, Jakarta: PT. Fikahati Aneska

M. Yahya Harahap. (1982). *Segi-segi Perjanjian,* Bandung: Penerbit Alumni

Purwahid Patrik. (1982). Asas-asas Hukum Perikatan, Semarang: FH UNDIP

R. Soeroso. (2009). *Contoh-contoh Perjanjian yang Banyak dipergunakan Dalam Praktik,* Jakarta: Penerbit Sinar Grafika

Salim. H.S. (2006). *Pengantar Hukum Perdata Tertulis (BW).* Jakarta: Sinar Grafika

Subekti. (1970). *Hukum Perjanjian.* Jakarta: PT. Pembimbing Masa

Subekti. (1995). *Aneka Perjanjian.* Bandung: PT. Citra Aditya Bakti

Journal

B.Y.Sondakh., H.Sabijono., L.Mawikere, Analysis of Local-Owned Property Management (Case Studies on Board of Financial Management and Reginal Asset at South Minahasa District), EMBA Journal, Vol. 5, No. 2, pp 1171-1181.

Ernest G. Lorenzen, Causa and Consideration in the Law of Contracts, Yale Law Journal, Vol. XXVIII, No. 7, pp 621-646.

Karl N. Llewellyn, What Price Contract? -an Essay in Perspective, Yale Law Journal, Vol 40, Issue 5, pp 704-751.

Lina Jamilah, Asas Kebebasan Berkontrak Dalam Perjanjian Standar Baku, Syiar Hukum Journal, Vol. XIII, No. 1, 2012, pp 227-243.

Muh. Sidik N. Salam. (2014). Aspek Hukum Perjanjian Pinjam Pakaiatas Barang Milik Pemerintah Daerah. Legal Opinion Journal, Vol. 2, No. 6, pp 1-16

Muhamad Muhdar, Mohamad Nasir, Rosdiana. (2015). Implikasi Hukum Terhadap Praktik Pinjam Pakai Kawasan Hutan Untuk Kegiatan Pertambangan Batubara. Halrev Journal, Vol. 1, Issue 3, pp 430-451.

Sugeng Riyono. (2013). Pemanfaatan Aset Daerah (Studi Tentang Pola Kemitraan Asset Tanah Pemerintah Provinsi Jawa Timur), DIA Journal, Vol. 11, No. 2.

Trisadini Prasastinah Usanti. (2012). Lahirnya Hak Kebendaan. Perspektif Journal, Vol. XVII, No. 1, pp 44-53.

Veronika Mulalinda & Steven J. Tangkuman. (2014). Efektivitas Penerapan Sistem dan Prosedur Akuntansi Aset Tetap pada Dinas Pendapatan, Pengelolaan Keuangan dan Aset Daerah Kabupaten Sidoro, EMBA Journal, Vol. 2, No. 1, page 521-531.