

Legal Protection for *Assignee* over Repeated Cession Based on Indonesia Legal System

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Abstract

Humans require fundings in fulfilling their needs in life, such as primary, secondary, and tertiary necessities. Funds are used for some purposes such as venture development, working capital, investment, etc. In accordance to the function of bank which is to gather and distribute fundings to the society, banks may distribute such fundings in the form of loan. The granting of loan from banks as creditors is written in a loan agreement document. In fact, there will always be risk of non performing loan, which lead to the process of Cession, to shift the creditor's right to claim debt payment, from Bank (as Assignor) to a new creditor (as Assignee). Repeated process in assigning right to claim receivables may cause loss to the Assignee, and the right of the Assignee has to be protected by the law.

The method used in this study is the juridical normative method on a descriptive analytical nature. The study also uses statue approach and conceptual approach. The aims of this research is to have further review and analysis, about how Indonesian legal system regulates the settlement of credit, related with cession / assignment, which has been done more than once.

The conclusion that can be drawn is: Cession is a legal action which causes a main legal consequences, that is shifted right to claim payment of debt, from first creditor to the new creditor. Debtor still have obligation to pay the debt, but now to the new creditor. In fact, cession is done because the first creditor consider several conditions in the debtor, that makes the debt potentially unpaid. The new creditor has to consider and understand the risks before signing cession agreement. Repeated cession has no clear regulation in Indonesia, but it's commonly done by bankers and credit practitioners. This research suggests: government should issue regulation regarding the implementation of repeated cession, in order to protect the rights of the last Assignee. For bankers and credit practitioners, repeated cession should not be considered as recommended way to solve non-performing loans.

Keywords: repeated cession, legal protection, assignee

1. Introduction

1.1 Backgrounds

Humans do various activities in fulfilling their needs in life. In the current economical age, all human activities need financial supports. Modern society recognize the bank as the financial institution capable of providing funds in the form of loan to those who need them. Through the lending and funding activity and various other services, the bank serves the need of funding and improve the mechanism of payment system for all economical sector. (Hermansyah, 2006)

One of the ways to distribute of fund from the bank to the society is in the form of loan. To guarantee the fulfillment of loan payment, the bank will demand collaterals, either moving or non-moving objects. Therefore the loan agreement contains collateral binded by the rights of liability deed. In reality though, the distribution of loan doesn't always go well and the possibility of non performing loan (NPL) is commonly seen. There is a way to solve NPL before moving to the auction stage, which is the diversion of receivables / cession / cessie.

In Blacks Law Dictionary 9th Edition (2010), Cession is defined as The act of relinquishing property rights; The relinquishing or transfer of land from one state to another, esp. when a state defeated in war gives up the land, as part of the price of peace; The land so relinquished or transferred.

The term *cessie* isn't written explicitly in the Indonesian Civil Code; however Article 613 (1) of the Indonesian Civil Code states that: "the submission of receivables over titles and other intangible items is done by making an authentic deed or underhanded deed with which the rights of such items is given upon other party".

Herlien Boediono (2018) states that: "In order for the right of item to shift, these three requirement must be satisfied:

- 1) Authority of the submitting party.
- 2) Legitimate basis of right/title (*rechtstitle*).
- 3) Submission according to the type of item (*levering*)."

This paper will used "cession" as terminology to describe *cessie* /receiveable diversion.

Formality is required for the legitimacy of cession is written only on one article, in Article 613 Indonesian Civil Code. Herlien Boediono (2010), stated that according to the regulation, the submission of the right to demand regarding receivables over title or other intangible item must be done by using authentic deeds or underhanded deeds, with which, the rights over said item is given to other (*Assignee*) by the *Assignor*"

Distribution of fund in form of loan, is a high risk activity. The main risk is Non Performing Loan, and it will bring negative effect to Bank's financial condition. In such case, one of the alternatives is: the bank may divert the receivables by selling it to a third party. The receiving third party may be other bank or an individual person (non-bank). The diverting of receivables is done by making agreement, which deed is made by a notary public. Since the signing of the agreement / deed, all rights and obligation of the bank is shifted to the third party, including the collateral object.

In fact, the diversion of receivables/ cession may be done more than once. The second, third or even fourth diversion are done because of the same reason: possibility of non performing loan. The collateral object placed by the debtor is in the form of a non-moving object such as land and/or building with a Right of Ownership Certificate. In Indonesia, the regulation regarding the protection for assignee, in the case of repeated diversion of receivables / *cession* is still unclear.

Based on the problem mentioned above, this paper will discuss: LEGAL PROTECTION FOR *ASSIGNEE* OVER REPEATED *CESSION* BASED ON *INDONESIA* LEGAL SYSTEM .

1.2 Problems

Bank distributes loan to its debtors. This activity has some risk. One of the risks is Non Performing Loan, which may affect financial condition of the bank. To settle this problem, an alternative way that may be done is to make cession agreement. In fact, the process of receivables diversion can be done more than once.

The last / final creditor right has to be protected by the law. This paper will discuss: How regulation in Indonesia gives legal protection to the final creditor (last Assignee), in cession agreement that is done repeatedly?

2. Research Method

This research used the following type of research, nature, approach, type of data, and method of analysis:

- 1) Research Type: This research use the juridical normative research method. Soekanto (1986), define the juridical normative is a research to find out about the positive law regarding a certain matter, penomenon, or problem.
- 2) Nature of Research: This Research is done in a descriptive analytical manner. Descriptive analytical is a research that describes the phenomenon that is being studied and then analyze it based on facts in the form of secondary data obtain from primary, secondary, and tertiary law material.(Soekanto, 1986)
- 3) Research Approach: The research used the statue approach and conceptual approach. The statue approach is an approach done by reviewing all statutory regulation connected to the legal issue in question. Conceptual approach is an approach that shifted from views and doctrines developed in the study of law.
- 4) Type of Data: Secondary data which consists of a) primary legal material in the form of legislation, specifically the Indonesian Civil Code (*Burgelijk Wetboek*) and Law No. 4 of 1996 regarding the Encumbrance Right over Land and Land Related Object b) Secondary legal material in the form of all non- legal documentary publications regarding the law, including literatures and journals of law.
- 5) Data collecting will be done by literature study, and interviews.
- 6) Data Analysis will be done by using deductive logical pattern. Setyosari (2010), stated that "Deductive thinking is a thinking process based on general statements towards specific matters using certain logic." If it is

related to law research, deductive thinking pattern is a conclusion by linking general premises (legislations, doctrines, principals, and fundamentals) to specified premises (real cases or facts). Analysis is done qualitatively.

3. Discussion

Sakirang (2011), gives definition about Cession (*Cessie*) as a legal action of diverting receivables belonging to someone that holds mortgage right to another party, which is the submission of receivables over titles done by issuing an authentic deed or underhanded deed, the a notice is made regarding the submission to debtors of the receivables.

The Bank perform receivables diverting / *cessie* to the third parties, by selling the receivables. In a cession, the party diverting the receivables is called *Cedent* (Assignor), while the party earning the receivables is called *Cessionaris* (Assignee), and the debtor of the diverted claim is called *Cessus* (debtor).

The shifting or diversion of receivables is based on an obligatory agreement. The obligatory agreement becomes the basis of shifting based on “buy and sell agreement”. In the shifting of the right to claim, the object that shifted is the right to claim, from the Assignor to the Assignee.

Rahardjo (2000), discuss: “The law has purposes of achieving justice, assurance, benefit, and protection so that eventually the law will protect the society. The definition of legal protection is a protection given to a legal subject in the form of legal instruments which is either preventive or repressive in nature, and is either written or verbal. In other words, legal protection as a description of the function of law, is a concept where the law can provide justice, order, assurance, benefit, and peace.”

If the involved parties are bound by a contract, surely legal protection must be given to all parties. In this section, how legal protection is given to the last creditor over repeated *cessie* will be discussed.

Within a loan agreement, what must be assured is that the debtor can settle his/her debt in the approved period. The diversion of receivables is done by a creditor to a new creditor. This diversion is not simply an action to shift the right to claim, but also to shift the risk carried by the previous creditor to the new one. If a debtor has a problem in settling his/her debt, the risk will be the responsibility of the new creditor.

The regulation regarding the handover of receivables is implicitly mention in Article 613 Indonesian Civil Code that cites the necessity of making authentic deed or underhanded deed, then making a notification regarding the plan of Cession to the Debtor for approval and acknowledgement, and handing over the letters of receivables or other intangible goods along with endorsement to the new creditor. Thus, the handover of receivables on titles must be made in the form of written agreement, whether it is authentic or underhanded. This is different from the obligatory agreement that become the basis or for cession. In general, loan agreement (between persons) as the basis agreement does not require a written form and thus can be done verbally just like other agreements in general, but loan agreement between bank and debtor has to be made in a written form.

Although cession is legit by the making of a deed that causes the shifting of the right to claim, Article 613 (2) Indonesian Civil Code states in order to bind the debtor, the handover must be notified to the debtor or acknowledged or approved by the debtor (*betekening*). Failure in notifying the debtor will lead to the claim done by the debtor to the old debtor remain intact, as long as the debtor honestly consider the old creditor is still the creditor.

While the levering is regulated in Article 584 Indonesian Civil Code, where the levering or shifting of right of ownership require an event based on private law perspective. The events or actions may be based on agreement of buy and sell, grant, trade, rent, etc. A receivable levering must have a cause in order to avoid possible uncertainty. A problem maybe not clearly visible if a cession is only done once. A repeated cession may cause uncertainty, if the basis action or event is not real which cause the levering to be null and void.

As result of interview session with Tedy Chandra (2019), the cession agreement commonly done between Assignor and Assignee without involving the debtor, because the debtor is considered not to know about the selling price of the receivable that is agreed by creditor as the seller and the third party as a buyer. The content of cession agreement is the data of the old creditor and the new creditor, the collateral, the amount of receivable claimable by the Assignee as the new creditor, which amount of debt can be paid by the debtor to the creditor is agreed in the credit agreement. As long as a cession is lawfully done according to Article 613 Indonesian Civil Code, and the agreement is made according to the requirements of a valid agreement, the cession can still be carried out.

This research focused on discussing receivables levering from the Bank as the first creditor to the third party and receivables levering from the third party to the next party, and the repeat of said event. The bank as the first

creditor grants loans to the debtor in which the loan agreement is a primary agreement and if the collateral is in the form of land, the additional agreement is about the mortgage.

Loan agreement that has been made by bank as creditor and the client as a debtor, is a written agreement and has been arranged by the bank as loan provider. It can be classified as take it or leave it contract or standardized contract. This kind of agreement gives two choices for the debtor, whether the debtor will approve, or disapprove which leave the debtor unbound by the agreement. If the agreement states that the creditor may divert the receivables to a third party, the levering of receivables may be done by notifying the debtor about the levering of receivables, but without the consent of the debtor.

Receivables diversion is the final stage to solve non performing loan before the auctioning stage. The bank as a creditor sell the receivable to a third party. The selling price of the receivables is much lower, such as only 70% (seventy percent) of the receivable's original value. Thus the buyers may be more interested to purchase the receivable instead of getting the collateral through auction. Moreover, repeated selling of said object will make the selling price even lower.(Teddy Chandra, 2019). The bank as the creditor suffers loss by selling the receivable, however, this action is taken by the bank to preserve the performance quality and longlivity of the bank. If non performing loan persisted, the bank's capital will decrease in terms of capital rotation.

After the receivable diverted to the third party, the next creditor may also divert the receivable to another individual third party, by making a receivable buy and sell agreement and cession agreement before notary. After the second diversion, the third creditor may also divert the receivable to another third party. At this point there has been three consecutive receivable diversion. Repeated diversion of receivables through buying and selling the receivable happen due to difficulties in auctioning the collateral object. (Teddy Chandra, 2019).

Article 613 (2) Indonesian Civil Code, requires notification to the debtor. In order to bind the *cessus* or debtor, the diversion must be notified to the debtor or acknowledged or approved by the debtor (*betekening*). The debtor needs to know to whom the payment must be given and whether the Assignee (last creditor), indeed has the right to claim. The regulation that states that the diversion of receivables must be notified to the debtor, is a regulation to protect the Assignee's interest. The debtor must pay his due to the new creditor. The new creditor possibly has to face the risk that the debtor doesn't fulfil the agreement based on good faith., or somehow the presence of the debtor is unknown (debtor run away from his obligation).

This paragraph will explain, how the regulation in Indonesian Civil Code implemented practically in receiveable diversion process: Initiative for debt transferring, usually comes from the first creditor (Assignor), in this case, the first creditor is a Bank. Bank will contact the notary public, submit required documents that shows information about the amount of debt transferred, and also information about the Assignee. Notary public will arrange the contract, in which, there are clauses, state that both parties are agree to divert the right to claim . Both parties are agree about the price and the price has been paid by the Assignee. In the contract will be stated that Assignee now has the right for asking payment from debtor. Based on Indonesian regulation, notification to the debtor is required. The notification must clearly notify that the debtor have to pay to the new creditor. Notification procedure or mechanism, are based on what has been agreed upon the contract. Padmasari (2018), state that in the implementation of this notification, Article 613 Indonesian Civil Code does not regulate the deadline, when the notification must be done. That article also doesn't regulate who must done the notification process, whether the initial creditor, new creditor or the notary.

Public notary is responsible to make sure that the making of a contract are done based on applicable regulation. Based on Law Number 2 Year 2014, concerning Amendment of Law Number 30 Year 2004 concerning Notary, Article 16 (1) m, notary has obligations to read deeds in front of the parties, with at least two witnesses, and the deed has to be signed immediately by the parties, witnesses, and notary so the deed has legal force as authentic deed. Based on Article 16 (9), if the requirement not be fulfilled, the deeds only has legal force as privately made deed

After the deed has been signed, both parties are bond to the contract. The amount of claim has been paid of by the Assignee, so that the Assignee now has the right for asking payment from the debtor. Cession is used to shift the right to claim payment, form Assignor to Assignee, with all the legal consequences, also to shift the property right such as mortgage as regulated in Article 16 Law Number 4 Year 1996 on Encumbrance Right over Land and Land Related Object.

Cession causes shifting of legal relationship, first between bank as creditor and the debtors, now shifted as new legal relationship between new creditor and former debtor. Cession causing legal consequences to the debtor as long as the agreement is notified to the debtor and agreed by the debtor, so the debtor will pay to the new creditor. In case the debtor is not capable to pay, new creditor may sue and has right to execute property right that has

been placed as collateral.

Cession which is regulated in Article 613 Indonesian Civil Code, must be distinguished from personal warranty assignment. In Indonesian regulation, personal warranty assignment (*borgtocht*), is regulated in article 1820 Indonesian Civil Code. In personal warranty, a guarantor will guarantee a debtor, for debt payment. In case a debtor can't pay the debt, a guarantor will take the obligation to pay. In this agreement, there is no alteration of creditor, there is no shifting of right to claim debtor's payment. In personal warranty, the obligation to pay is shifted from a debtor to a guarantor.

In the case where the Assignee is the bank, a new loan agreement between the Assignee and the debtor can be made. If a new loan agreement is made, the change in the content of said agreement is about increased interest rate. Based on that new agreement, the debtor has obligation to pay the debt to the Assignee.

Based on explanation above, repeated cession is legitimate if the obligatory agreement and the cession agreement are made according to Article 1320 Indonesian Civil Code, and based on Article 1338 Indonesian Civil Code, the agreement that has been made by the parties is binding as law.

Based on research done by Yangin (2016), The assurance over the cession agreement is earned by the making of deed in front of a Notary Public. Indonesian civil code follows "first assignment principle" to the Assignee, and "first notification principle" to the debtors.

The making of the deed is done in the presence of a Notary Public, with clauses made to protect the interest of the Assignee. Examples of those clauses are as mentioned by Bachtiar (2008), as follows:

- “1. The Collection of Bills will still be done by the Assignor, but since the day of handover as meant above, the bills are no longer solely owned but are given wholly to the Assignee.
2. What has been diverted with this deed along with all that has connection to the bills will shift to the Assignee and all profits or losses gained or suffered from the mentioned day will still belong to him or be borne by the Assignor.
3. The Assignor assures that what has been assigned with this deed is truthfully belonged to him. Assignee is free of any affair or dispute, any confiscation, it is not mortgaged or be charged in any way, and regarding all things connected to the bills in the present and the future, the Assignee will not be charged from other parties that claims to have right over what is diverted with this deed, and thus the Assignee is released by the Assignor from all charges by other parties regarding the aforementioned matters.”

From theoretical perspective, how the Indonesian legal system supposed to provides legal protection to the Assignee in the case of repeated cession, can be discussed by comparing Causal and Abstract Theory. Both theories discuss about validity of cession.

Causal Theory stated that repeated cession will be valid and legitimate if it's done based on a real legal action that become a basis of cession (for example: if the "sell and purchase agreement" is valid, the cession will be also valid. However the repeated cession becomes questionable if the handover is done without valid legal action as the basis or done by the party without authority to hand over the item. (Setiawan and Satryo, 2010). Based on this theory, cession is an *accesoire* or additional legal action. The main legal action or obligatory legal action is the "sell and purchase agreement".

The Abstract Theory explains that basis legal action and act of diverting receiveables are two different things. If a repeated diversion is done with illegitimate basis legal action, the diversion still considered to be legitimate. Focus of abstract theory is at the will of the parties to divert the receiveable. The ownership still shifted to the last creditor. Therefore it is better to follow the causal theory in the undertaking of diverted receiveable, which requires legitimate basis legal action, so there will be evidence for debtor and assurance to all parties.

4. Conclusion and Suggestion

Based on the discussion previously elaborated, the following conclusion has been attained:

- 1) Cession is a legal action which causes a main legal consequences, that is shifted right to claim payment of debt, from first creditor to the new creditor.
- 2) Debtor still have obligation to pay the debt, but now to the new creditor. In fact, cession is done because the first creditor consider several conditions in the debtor, that makes the debt potentially unpaid. The new creditor has to consider and understand the risks before signing cession agreement.

- 3) The undertaking of repeated cession potentially harm the interest of the Assignee, if there's debtors with bad faith.
- 4) In order to provide legal protection to the Assignee, the implementation of cession must be notified to the debtor to prevent misdirection of debt payment.
- 5) Deed is made in the presence of a notary public, the clauses are arranged to protect the interest of the Assignee.

Recommendations or suggestions from this research:

- 1) Government should issue clear regulation concerning repeated cession, whether is it allowed or prohibited.
- 2) For banking practitioner, not to perform repeated cession in order to prevent losses to the related parties.

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