

ISSN 1913-9047 (Print)
ISSN 1913-9055 (Online)

Journal of Politics and Law

Vol. 11, No. 3 September 2018



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

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Received: September 18, 2019

Accepted: October 21, 2019

Online Published: November 28, 2019

doi:10.5539/jpl.v12n4p38

URL: <https://doi.org/10.5539/jpl.v12n4p38>

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.

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

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 *accessoire* 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 receivables 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 receivable. The ownership still shifted to the last creditor. Therefore it is better to follow the causal theory in the undertaking of diverted receivable, 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.