

Cessie, Subrogation and Novation in Commercial Court Practices

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Abstract

In the development of bank credit, the provision of credit to the public has followed a new pattern, in which the provision of credit takes the form of an application by way of payment or transfer of rights (cessie), replacement of creditor rights (subrogation) or renewal of debt (novation) for research and writing. created and compiled using normative juridical research methods relating to subrogation, cessie and novation in bank credit. The results of this study are that the transfer or transfer of rights (cessie), replacement of creditors due to payment (subrogation) or renewal of debt (novation), are legal actions that are often carried out by banks related to credit extended to the public which are variations and patterns in credit distribution. In this case, credit facilities as the main activity of banking institutions have had the same construction since long ago, but currently the development is leading to various patterns combining technological developments with market segments and accompanying regulations.

Keywords: *Cessie, Subrogation, Novation.*

A. INTRODUCTION

The transfer of debt collection rights or cessies usually occurs because creditors need money (Boae et al., 2020; Vitebro, 2020). So he sells his receivables to a third party who will receive payment from the debtor when the receivable is due, transfer of debt collection rights or also known as cessie is a transfer or transfer of collection rights (Candradiningrat et al., 2021; Devie et al., 2019; Shaturaev, 2021). Cessie has a dualistic nature, meaning that cessie can be viewed from two different angles, namely from the point of view of object law and from the point of view of contract law. Cessie is regulated in Article 613 of the Civil Code which is part of the Second Book of the Civil Code which regulates material matters which explains that "handover of receivables on behalf of and other goods that are not bodily, is done by way of making an authentic deed or under the hand that bestows the rights the right to the goods to another person.

This surrender has no consequences for the debtor before the surrender is notified to him or approved in writing or acknowledged by him (Balciunas, 2019). Submission of debentures upon appointment is carried out by giving them; the submission of debt securities on orders is carried out by providing them together with

the endorsement of the letter "and from the point of view of engagement law, a cessie can be categorized as an institution and a legal means for changing creditors (Kisman & Krisandi, 2019; Yanto et al., 2019; Fabiola & Cahyono, 2022).

In the process of Suspension of Debt Payment Obligations (hereinafter abbreviated as PKPU), if you do not want to be trapped and cannot enter the room of creditors, both preferential and concurrent in voting for the peace proposal, then those who will buy receivables must ensure that the sale and purchase of receivables that will be carried out has evidence lawful so that the receivables remain valuable (Mohammadi et al., 2020; Liang et al., 2018). One of them is using a cessie, this is usually done in countries that adhere to the civil law legal system. In contrast to countries that adhere to the common law legal system which is more flexible in the sale and purchase of receivables, the majority of civil law countries still apply cessie to this day, including Indonesia (Agustina, 2021; Tulus & Nerang, 2020; Disemadi & Shaleh, 2020).

Article 613 of the Civil Code paragraph (1) stipulates that the transfer of receivables on behalf of must be carried out by making an authentic deed or private deed called a cessie deed, in which the rights to that condition are transferred to a third party as the transferee. In paragraph (2) it is added, that the handover does not have legal consequences for the debtor except after being notified to him or in writing it has been approved and acknowledged.

Furthermore, paragraph (2) of Article 613 of the Civil Code requires that the delivery of these receivables is officially notified (*beteekend*) to the debtor or approved/acknowledged by the debtor. This was confirmed by the results of the Special Civil Chamber Meeting as outlined in the Supreme Court Circular Letter No. 7 of 2012 concerning the Legal Formulation of the Results of the Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation of Duties for the Court. In the circular letter it is stated that the creditor who accepts submission of invoices based on cessie, can only be said to be the creditor of the debtor who is being filed for bankruptcy, after the submission is notified to the debtor or in writing approved and acknowledged by the debtor as stipulated in Article 613 (2) of the Civil Code.

How important is the cessie in buying and selling receivables in Indonesia, because when creditors know that the receivables that have been purchased are worthless because they fail to be billed to debtors in Indonesia.

B. METHOD

This type of research is normative juridical legal research supported by empirical data, namely research that refers to legal norms contained in statutory regulations and court decisions. The main source of research is the use of secondary legal materials, coupled with primary legal materials. The results of the study are presented in full, detailed, clear and systematic as scientific work.

The specification of the research in this writing is descriptive-analytic in nature, i.e. research data, both in the form of document study data describing applicable laws

and regulations associated with legal theories and in concreto law enforcement practices concerning problems as well as field research in the form of results observations were analyzed qualitatively (Gonzales, 2021).

This research was carried out by means of literature study, namely reviewing written information and data regarding law originating from various sources and widely published and required in normative legal research. Document analysis by analyzing the transfer of debt collection rights (cessie), associated with laws and regulations governing the Civil Code and bankruptcy law. Information and written data from this library can be in the form of books, theses, dissertations, journals, articles, seminar results, comments related to research titles, the internet and others. From this research, secondary data will be obtained.

C. RESULT AND DISCUSSION

Transfer of rights over debt (cession), namely the transfer of receivables carried out with an authentic deed or private deed. The transfer of rights to debt with fiduciary guarantees is transferred by the old Fiduciary Recipient to the new Fiduciary Recipient (new creditor). Based on Law Number 42 of 1999 concerning Fiduciary, Article 19 paragraph (1) states that: "The transfer of rights to receivables guaranteed by fiduciary results in the transfer by law of all rights and obligations of the fiduciary recipient to new creditors".

From the contents of the aforementioned article, it can be seen that all rights and the obligations of creditors (fiduciary recipients) have long been transferred to creditors n(fiduciary recipient) and subsequent transfer of rights over said receivables notified to the debtor (fiduciary giver).

The provisions of the article above, if the delivery is not fulfilled, then it is considered that the delivery did not occur or is deemed not to exist, and the debtor is not obliged to fulfill the bill from the new creditor. So in this case Cessie only emphasizes the aspect of transferring receivables. In other words, the transfer of rights to the debtor's debt is only emphasized on the transfer of debt payments and the transfer of rights to fiduciary-bound collateral objects to new fiduciary recipients (new creditors) (Utomo & Permadi, 2022; Djaja, 2022).

According to Mariam Daruz Badruzaman expressed his opinion regarding Cessie, namely: "Cessie is an agreement in which the creditor transfers his receivables (on behalf of) to another party. Cessie is a material agreement preceded by a "title" which is an obligatory agreement. Based on the views put forward above, it is clear that a cessie is a way of transferring and/or handing over rights to a receivable in a name.

Cessie is a way of transferring and or handing over receivables on behalf of as referred to in Article 613 of the Civil Code (KUHPperdata). Subrogation as a result of payments other than in debt agreements is also often found in insurance agreements. In subrogation, there is a replacement of the creditor's rights by a third party who pays the debtor's debt. This third party replaces the position of the old creditor, as the new creditor to the debtor.

The term third party in the sense of subrogation mentioned in article 1400 of the Civil Code has a different meaning from the term third party in insurance company subrogation stipulated in article 284 of the Criminal Code. What is meant by a third party in Article 1400 of the Civil Code is a person who replaces the entitled party in an agreement, whereas in the case of insurance, what is referred to as a third party is the party causing the loss and therefore is obliged to pay to the person replacing the entitled party.

The aim is to provide convenience for the creditor, who is domiciled as the insured in the insurance agreement, to obtain debt repayment through coverage if the insured debt collateral is lost or damaged at any time resulting in default on the debtor. Thus the payment made by the insurance company to the insured, for damage or loss of the object of insurance in the form of debt collateral, becomes a debt repayment for the insured (creditor) which should be the debtor's obligation to pay it (Supriyanto, 2018; Suprihanto & Patitingi, 2021).

Judging from the subrogation provisions in article 1400 of the Civil Code, it is appropriate for a third party who pays the debtor's debt to replace the old creditor as a new creditor for the debtor, including the creditor's rights as the holder of collateral rights. The main subrogation is the replacement of creditors. While the agreement and its contents have not changed. Regarding the scheme or process of subrogation, there are several opinions. For example, the opinion that by making a payment, the agreement between the old creditors will be erased and then revived for the benefit of a third party as a new creditor.

Subrogation based on an agreement is also known as contractual subrogation, as stated in article 1401 of the Indonesian Civil Code. The point is that the entire subrogation process is an agreement between the creditor and a third party. So it cannot be done unilaterally. Subrogation based on an agreement, as article 1401 determines how subrogation occurs, there are only two possibilities which are limitative. This means that there is no other subrogation based on an agreement other than what has been regulated in that article. 13 These two possibilities are as explained in article 1401 paragraphs (1) and (2).

Generally, payments in a juridical sense result in an absolute or relative situation. This absolute situation can be achieved if both parties have paid (fulfilled) their respective obligations. As in buying and selling, when a buyer has paid the value of the goods purchased, then the seller has also delivered the goods, then the sale and purchase agreement has been completed (Fitrian & Achmad, 2022; Welling, 2020). Meanwhile, payments in subrogation are payments that produce relative circumstances, meaning that a third party pays the creditor and this third party replaces the creditor's rights, so he becomes the new creditor. Thus the debt agreement still exists, the debtor still has to pay the debt according to what he borrowed, it's just that the subject of the creditor has changed.

There are at least three elements of subrogation as contained in article 1400 of the Civil Code:

1. **Transfer of Creditor Rights to Third Parties Replacement or transfer of creditor rights to third parties is the result of subrogation.** The creditor's rights here are the rights owned by the creditor against the debtor. Meanwhile, third parties are parties who are neither creditors nor debtors. The third party obtains the subrogation because it pays the debtor's debt. In this condition, it does not mean that every payment made by a third party on the debtor's debt can be categorized as a subrogation event. Because in principle, payments made by third parties do not give rise to subrogations or even new bills. It's just that in certain conditions the law determines otherwise.
2. **Payments by Third Parties** Third parties only get subrogation rights if payments are made to creditors for receivables that are legal and can be subrogated. If it turns out that the debtor has no debt to the creditor, in the event that the payment has been made. Then there is no subrogation, and third parties cannot charge the debtor for the money that has been paid to the creditor.
3. **Occurrence Through Agreements and Laws** This last element is as stated in articles 1402 and 1403 of the Civil Code. This element will be explained later in the sub-chapter regarding the distribution of subrogations.

The most obvious consequence of subrogation law is the transfer of claim rights and position to a third party. So that after subrogation is carried out, the debtor must pay his debt to a third party. The transition of position includes all rights and demands. Borrowing money is a principal agreement that is usually followed by various other agreements, such as mortgages, fiduciaries, mortgages and mortgages as accessoir agreements. The nature of an accessoir agreement is to follow the principal agreement. So that with subrogation, the creditor's rights as mortgage, fiduciary, mortgage and mortgage rights also transfer to third parties as new creditors.

However, it is also necessary to pay attention to the validity of the main agreement, namely the loan agreement or credit agreement. Because the imposition of guarantees such as pledges, fiduciaries, mortgages and mortgages is an agreement that is accessoir in nature, meaning that the validity of the accessoir agreement depends on the validity of the main agreement. In addition, it should be noted that the rights and demands are only limited to what the old creditors have. Third parties are not allowed to add things beyond what is already there.

As a process, the establishment of the Commercial Court is a symbol of the revolving process of restructuring judicial institutions in keeping pace with the social and economic developments taking place in society. In general, the Commercial Court should be expected to play a role as the spearhead of Judicial power in responding to the increasingly complex needs of society (Cranston et al., 2018; Auer & Bohme, 2020).

Talking about the competence of the Commercial Court means talking about the absolute authority and relative authority it has. Absolute authority is related to the scope of examining authority that belongs to the judiciary. While relative authority is related to the division of powers to try between similar courts, it depends on the place of residence of the defendant. It is not impossible that the two powers of the

Commercial Court are often intertwined with the District Court. The basis of the application is an essential element for resolving this matter, to distinguish the basis of the dispute which forms the basis of a lawsuit filed at the District Court. A debt receivable that has matured and one of which can be collected is an absolute prerequisite for resolving disputes in the Commercial Court, whether it is related to the scope of the company, banking, or the capital market. Then the simple problem of proof becomes a solution element. If it does not meet these elements, the authority to adjudicate falls to the General (State) Court (Komijani, 2018; Prananingtyas & Disemadi, 2020).

The current existence of the Commercial Court is examining Bankruptcy/PKPU cases and the field of Intellectual Property Rights. Various issues related to the scope of this matter, including the legal basis, administration, the existence of human resources, namely Judges, whether they are Commercial Judges or Ad Hoc Judges, supervision of the Commercial Court, which includes the implementation of procedural law and the quality of the resulting decisions, as well as dissenting opinion, facilities and infrastructure related to the readiness of the Commercial Court in other areas outside Jakarta and the ability of the Commercial Court to resolve other cases outside of Bankruptcy/PKPU, namely cases in the field of Intellectual Property Rights.

D. CONCLUSION

In Book III of the Civil Code, there are several concepts of settlement of debts other than subrogation, namely cession and novation. According to the author, the differences between these three concepts need to be explained, because in the next chapter this insight is needed to support the author's analysis process. Tan Thong Kie in his book explains that a cession is the submission of a receivable on behalf of a creditor to another person, with that submission the last-mentioned person becomes a creditor for a debtor who is burdened with said receivable. Meanwhile, Novation is a renewal of debt based on an agreement. The parties (debtors and creditors) by eliminating the old agreement and at the same time the agreement is replaced by a new agreement.

The definition above shows that there is a difference between subrogation and cession and novation. However, in terms of division, subrogation has similarities with both cession and novation. Likewise, contractual subrogation with a cession has something in common, namely that there is a transfer of credit rights from the creditor to a third party by way of payment.

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