

Legal Certainty of the Transferring of Receivable In The Factoring Transaction in Indonesia

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Abstrak

Factoring Institution begins to be known in Indonesia in 1980s as known as “Factoring”. The term of factoring includes four legal relations, namely: the financing, purchasing, and transferring ownership of receivable legal relations. One of the factoring activities is the purchasing and transferring of receivable. The concept of sale - purchase of receivable under (Indonesian) Private Law Code with consensual and obligatory nature, namely it exist since the consensus to be achieved, although the transfer of credit does not take place yet. The transfer ownership of receivable must be performed by “levering”.

The receivable purchasing and transferring process of receivable need regulation in the factoring transaction with the norm applied in Indonesia Legal System. Therefore, “Is the transferring process of receivable in the factoring transaction comply with the concept of receivable transferring in (Indonesia) Civil Code?” to be the issue of this dissertation.

The research of this dissertation uses normative legal research. The conclusion may be drawn from this research that, the norm in Civil Code regulating factoring is very limited. It regulates under “party-autonomy” principle. The transferring of receivable particularly *Undisclosed Factoring* does not comply with even contrary to the “*Cessie*” doctrine in Article 613 Civil Code. This research recommends to the Government and House of Representative to enact Acts on the Financing Institution in which regulates the activities of factoring institution, so that the legal certainty and legal protection may be given to all parties to the factoring transaction.

Keywords: *The provision of transferring of receivable may not be omitted.*

1. Introduction

Situation of business in Indonesia recently undergo very dynamic growing and developing in various fields. This growing and developing increase competition between Companies in dominating market segment. Improving the quality of product and offering of competitiveness price are the methods to cope with this business competition. The other method making available the easy payment system uses installment method called as the payment based on credit plan.

The system of property payment based on the credit system may cause the risk where the company will has credits from the customers. Increasing credit to the customers will impact to the decreasing of company capital. To fulfill the need of venture capital, the company may obtain it by borrowing money from banking institution by making the contract of credit bank. In this contract the customer must give guaranty and its process need the time that relatively long. Therefore, there is another alternative to obtain this credit for the entrepreneurs namely through Financing Organization.

The financing institution as one of the financial institution has the important role and function in facilitating the financing of business activity. This institution is relative new Indonesia. It emerged approximately in the 1990s together with the issuance of deregulation package in the field of economic, financial and monetary as called as October Package (PAKTO 88).

President Decree Number 61 Year 1988 on the Financing Institution states that (the institution) that may run activities in the Financing Institution are Banks, Financial Institutions non-Bank and Financing Companies. The field of business may be run by the Financing Institution:

- a. *leasing*;
- b. *Ventura capital*;
- c. *factoring*;
- d. *credit card*;
- e. *consumer finance*;
- f. *Project Finance*.

Thus one of the field and type of the activity of financing institution is “Factoring”, as known as “*Factoring*” in the business world. Before 1980 factoring is unknown institution in Indonesian legal system. It is adopted from

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Factoring institution applied in the American and English based on the common law legal system. (Indonesian) Civil Code following Continental Law System does not regulates factoring specifically. However, it is applied in Indonesia based on “party-autonomy” principle as contained in Article 1338 (Indonesian) Civil Code.

Citing opinion of Prof. Wiryono Prodjodikoro, Rinus Pantouw states that:¹

“Factoring institution based on the *Common Law System*. This system applies to England followed by United States, focusing on the set of rules are not contained in the legal code but under tradition or custom followed by the court. This system is called as “*Case Law*”, since it may be known if the “case” appears in the court come from the content of this decision court.”

The meaning of factoring is: “the financing activities in the purchasing and/or transferring as well as managing of receivable or short-term accounting form a company in the domestic or abroad trade transaction”.

Munir Fuady, states that:²

“in Indonesia language the term factoring is often translated into Factoring”. Under President Decree Number 61 Year 1988 on the Financing Institution, factoring forms financing venture in the purchasing and/or transferring as well as managing of receivable or short-term of accounting form of a company as a result of domestic or abroad trade transaction.”

This means that the factoring includes a broad scope involving four legal relations, namely financing, purchasing of receivable, transferring of receivable, and managing of receivable. Each activities under the Indonesian Legal System has its characteristic itself compared each other. The financing activities term shows to the providing a number of fund to the other party related to the legal relations in borrowing, purchasing receivable lead to the sale–buy receivable relation, transferring of receivable lead to the process of delivering or transferring of ownership to the receiver, while managing of receivable is a legal relation to do certain services.

As stated above, one of factoring activity is the purchasing of commercial account. In fact, the concept and regulation on the selling and purchasing of receivable may be found in (Indonesian) Civil Code, namely in the Book III, Title 3, Part 5, regulating particularly on the selling and purchasing of receivable and the other abstract properties. Based on the concept of private law the selling and purchasing of receivable have consensual and obligatory character, namely it imposes mutual right and obligation to the parties only does not transfer the ownership of receivable sold to the buyer. This concept comply with Article 1458 (Indonesian) Civil Code stating that: “selling and purchasing are considered to be happened between the both parties once the parties to the contract consent on the goods and its price, though this goods is not delivered yet, or its price is not paid yet”.

The process of ownership transferring from the seller to buyer needs a legal act known as “delivery” (*levering*). This regulates in Article 1459 (Indonesian) Civil Code stating that: “the ownership of the sold goods does not move to the buyer if it is not delivered under Articles 612, 613 and 616 (*Indonesian Civil Code*)”.

The transferring of receivable includes in factoring, generally may be done without knowing of debtor (*Customer*) as the debtor party. However, the transferring of receivable in factoring transaction must be done under the method of receivable transferring in Article 613 (Indonesian) Civil Code.

Based on that description, factoring needs to synchronized and harmonized in practice with the provisions on the selling and purchasing of receivable and other abstract properties, as well as the procedures on transferring of receivable in (Indonesian) Civil Code.

The issue in this research is: “Is the process of transferring of receivable in factoring applied to Indonesia complies with the concept of receivable transferring in the (Indonesian) Civil Code?”

2. Methods

This research is a normative legal research. As such, it studies and analyzes rules and regulations, legal principles, and legal concepts. It uses statute, and conceptual approach. Through statutes approach, the rules and regulation on the factoring and the method of receivable transferring are identified and analyzed. Conversely, identification, evaluation, and analysis various concept various concept as the concept of sale and purchase in general, that of selling and buying of receivable, and that of transferring/delivering of receivable.

3. Result and Discussion

3.1 Delivery Receivable in factoring transaction

Factoring contract is is contract that has consensual and obligatory character altogether. As the obligatory contract, factoring contract does not transfer yet the ownership from the receivable seller (*Client*) to the receivable buyer (*Factor*). The ownership must be transferred through delivering from the Client to factor. The act of delivering in general includes delivering of receivable does not stand alone. It is always as a consequence of legal relation that to be the basis for the delivering act. The legal relation that to the basis for delivering of

¹ Rinus Pantow, *Right of Claim to the Factor on Commercial accout*, (Jakarta, Kencana Prenada Media Group, 2006), p. 12

² Munir Fuady, *The Law on Financing in Theory and Practice*, (Bandung, PT. Citra Aditya Bakti, 1995), p. 69

receivable from the Client to the Factor is the selling and purchasing of receivable between the Client and Factor.

The transferring of receivable in factoring must comply with the provisions on the delivering of receivable in (Indonesian) Civil Code. The provision regulating the way to deliver receivable may be found in Article 613 (Indonesian) Civil Code.

Article 613 (Indonesian) Civil Code lays down:

“The delivering of receivable on the name and immovable goods is performed by making an authentic or private deed by which the right to property is delivered to another person. Such delivery for debtor has no legal effect, except after that delivering to be notified to him, or to be agreed in writing and to be recognized by him. The delivery for each receivable to the porter document is conducted by delivering this deed; the delivery for each receivable for appoited document is conducted by delivering this deed the deed accompanied with endorsement”.

Based on this Article 613, can be concluded there are three ways to deliver receivable and abstract property, namely:

- (a) regulates the procedures on delivery of receivable on name and another abstract goods;
- (b) regulates the procedures on delivery of receivable on bearer;
- (c) Regulate on the procedures of delivery receivable on name.

The delivery of Cessie and another abstract goods, are regulated in Article 613 paragraphs (1) and (2), while Article 613 paragraph (3) (Indonesian) Civil Code regulates transferring receivable on bearer, namely by delivering the deed; receivable on name is performed by delivering the deed as well as endorsement.

The delivery of Cessie and other abstract goods are performed by making an authentic or private deed. The transferring of Cessie in doctrine is called as “Cessie”. Mariam Darus Badruzaman, state that: “Cessie is a contract where creditor transfer his receivable (in the name) to the other party. Cessie forms the agreement of things preceded by a “title” forming an obligatory contract”.¹

Chapter Second, Book II, regulates the methods to get ownership right. One of the method to get ownership rights is through assigning or delivery. Article 584 (Indonesian) Civil Code red as follow:

the ownership right on the goods does not obtain by another way except by ownership in nature, expired, inheritance whether the act or will, and by assigning or delivering based on the private act to transfer ownership rights, performed by a person that entitle to do freely to that goods ”

Based on the provision of Article 584 may be known that, so as to the ownership of the goods may be transferred from anyone to another, one of its way is by delivery (*levering*). Legally, legality the transferring of ownership on name on the goods through delivery (*levering*) must fulfill to main conditions, namely: (1) that delivery must be based on the existing of a private event private (*tiile or legal title (title or rechtstitel)*), and(2) that delivery must be done by the authorized person (*beschiking*) to do ownership act on the delivered goods.

Both requirements on the transferring of ownership on goods through delivery must be fulfilled. If one of both requirements of that delivery do not be fulfilled, the transferring of ownership on a goods through the delivery to be illegal.

3.2 The Delivery of Cessie

The legal basis of the Cessie is Article 613 paragraph (1) (Indonesian) Civil Code, lays down: “*Delivery of Cessie to be done by making authentic deed or non-authentic dedd, paragraph (2) lays down that: the delivery as such for the debtor has no effect, except for after the delivery be notified to him, or to be agreed in writing and recognized”.* The delivery based on the Article 613 paragraph (1) as called as “Cessie” and its delivery deed is called as *Cessie deed*.

The subject involving in the process the Cessie, consist of three parties, namely:

- a. *Cedent*; is the party who deliver the receivable;
- b. *Cessionaries*; is party who receive the delivery of receivable;
- c. *Cessus*; is debtor must pay the receivable;

There are some important factors must be paid attention in the event of Cessie (Cessie), namely:

a. *Notification (Betekening/Notification) in The Cessie*

The Cessie may be done without involve or without obtaining aid from the *Cessus*. Thus, the transferring of receivable that to be performed between *Cedent* dan *Cessionaries* parties is lawful, although without to be known by the *Cessus* party (as the owed debtor). In the event of the Cessie without involve or without to be known be the *Cessus*, *Cessus* as debtor as the owed debtor need obtain legal protection. *Cessus* must obtain certainty on who his creditor, so as to *Cessus* may perform payment of the receivable legally to the appropriate person. While the *Cessionaries* juga need to obtain legal certainty and protection, that the event of *Cessie* taken

¹ Mariam Darus Badruzaman, *The Chapter on Hipotec, Mortgage and Fudicia*, (IKAPI London 1984) p. 105-106

place. *Cessus* (as the debtor) will perform payment to the *Cessionaries* himself only and does not pay this receivable to *Cedent* (the origin creditor), or perform payment to another party.

Therefore, to give guaranty legal certainty whether for the *Cessus* party or *Cessionaries*, in the event of *Cessie* through Article 613 paragraph (2) (Indonesian) Civil Code, the law gives formulated the provision as follow: “*Such delivery for the debtor has no effect, except after the delivery to be notified to him, or in writing to be agreed and recognized*”

How are the notion and meaning of provision Article 613 paragraph (2) (Indonesian) Civil Code? Before explaining meaning contained in The Article 613 paragraph (2), need to be explained the words “*to be agreed in writing and recognized by him*” contained in That article. In (Indonesian) Civil Code written by R. Subekti, R. Tjitrosudibio containing the words “*to be agreed in writing and recognized by him*”. However if we see its original language in *Burgerlijk Wetboek (BW)*, uses phrase “*to be agreed or recognized*” (*heft aangenomen of erkend*). It must be translated as alternatively not cumulatively. Thus, the phrase “*to be agreed or recognized*” is correct.¹

Next, need to be explained the notion and meaning of sentence “*Such delivery for the debtor has no effect*”. The sentence may be construed that the event legal relation in the *Cessie* made between *Cedent* by *Cessionaries*, has no legal effect to the *Cessus* (Debtor) as the owed party, before Notification on the event of *Cessie* to be done to him, or in writing, the event of that *Cessie* has been recognized by him or agreed by the *Cessus* (Debtor).

The word “*has no effect*” in Article 613 paragraph (2) may be construed that, the event of *Cessie* made between the *Cedent* by *Cessionaries*, has no legal effect to the *Cessus*. This means that, *Cessus* has no legal relation by *Cessionaries*, *Cessus* has legal relation with *Cedent* only. For the *Cessus* his creditor remains the origin creditor namely the *Cedent*. As far as the *Cessie* do not be notified yet to the *Cessus*, or the *Cessus* do not agree or recognize yet the *Cessie* tersebut in writing, the *Cessus* legally remains to be justified to perform payment legally to the *Cedent*.

Thus, the Notification issue (*betekening/Notification*) has no relation directly to the event of *Cessie* as the legal relation between *Cedent* by *Cessionaries*. The *Cessie* Remain lawful, although without involve or without to be known by *Cessus* as the owed party. Notification (*betekening/Notification*) or agreement or recognition in writing, to be needed to bind (create) legal relation between the owed *Cessus* (Debtor) with *Cessionaries* (as the new creditor).

The interpretation Article 613 paragraph (2) as such related to Article 613 paragraph (1), where the event of *Cessie* taken place lawfully by making the *deed of Cessie (Cessie certificate)* and as a consequence the transferring of ownership of receivable on name has been transferred from the *Cedent* to the *Cessionaries*. If the event of that *Cessie* do not be notified yet formally to the *Cessus*, or the *Cessus* do not agree or recognize in writing on that *Cessie*, the *Cessus* remains may perform payment to the *Cedent* (as creditor semula). Except for if event of that *Cessie* has been notified formally to the *Cessus* (although without agreement or recognition in writing), and the *Cessus* remains perform payment to the *Cedent*, in this case may be deemed *Cessus* bad faith, so that in this case the *Cessus* need not to be protected legally.

b. Who Must Perform Notification

Related to the provision of Article 613 paragraph (2) (Indonesian) Civil Code, Notification (*betekening/Notification*) in the process of *Cessie* as explained above, has the important function. If Article 613 paragraph (2) we see succinctly, this article states the need of notification in the event of *Cessie* to the *Cessus* party only. The purpose or function of Notification in the transferring of receivable is to bind the *Cessus* so as to does not pay to the *Cedent*, but must perform pay to the *Cessionaries* and it may give legal certainty to the *Cessus* on who his lawful creditor.

Article 613 paragraph (2) (Indonesian) Civil Code only determine on the Notification in the transferring of receivable to the *Cessus*, However it does not explain on who has obligation and responsibility to perform Notification on the event of that *Cessie* to the *Cessus*? Since no explanation on who has obligation to perform Notification, in related to this issue, may be construed that Notification on the event of that *Cessie*, may be performed by the *Cedent* party, or may be performed by the *Cessionaries* party, namely Notification may be performed by one of both parties, or Notification on the event of that *Cessie* may be performed simultaneously by the *Cedent* and *Cessionaries*.

The aim of Notification on the event of this transferring of receivable is to give certainty to the *Cessus* on who his creditor, namely Notification on this *Cessie* must give trust and conviction to the *Cessus* to whom he must perform the appropriate payment lawfully. If this Notification be performed by the *Cedent* as the owner of receivable, notify that his receivable to the *Cessus* has been transferred to the *Cessionaries*, by which the *Cedent* orders to the *Cessus* agar to perform payment to the *Cessionaries* and does not pay to the *Cedent*, Notification

¹ Rahmat Setiawan, J. Satria, *Legal Explanation of Cessie*, (Jakarta, National Legal Reform Program, 2010), p. 20

performed by *Cedent* itu, may give trust and conviction (legal certainty) to the *Cessus* to perform payment to the *Cessionaries*.

How does if Notification on the event in transferring of that receivable be performed by the *Cessionaries*? Is the Notification by the *Cessionaries* may bind *Cessus* to perform payment to the *Cessionaries* ? This (if Notification be performed by *Cessionaries*) will cause problem. It should be remembered that, the aim and the purpose of Notification (*betekening/Notification*) in *Cessie* is to give legal certainty to the *Cessus* on whose his lawful creditor , so that *he* may perform the appropriate and lawful payment, and he obtain protection legally that he perform payment to the appropriate creditor.

Next, it likewise need to be noticed that the event of *Cessie* may be performed without involving dan without to be known *Cessus*, in the meaning that contract of this *Cessie* forms legal relation between the *Cedent* and the *Cessionaries*. Before performing Notification on this *Cessie*, the *Cessus* does not to be bound to the *Cessionaries* since he does not know since dia tidak-tahu menahu on the legal relation between the *Cedent* dan *Cessionaries*.

Likewise in legal relation on debt – credit by the *Cessus* (legal title (*recht title*)), the *Cessionaries* stand as the third party only, who has no involvement in legal relation between the *Cedent* and *Cessus*. Based on this explanation, may be imagined how does if the *Cessionaries* (another party does not to be known by the *Cessus*), come to the *Cessus* and notify that that receivable owned by the *Cedent* party has been transferred to him and request to the *Cessus* to perform payment to him promptly. This may raise the questions, namely: Is Notification performed by *Cessionaries* that the *Cessie* has been taken place, may give trust and conviction (legal certainty) to the *Cessus* to perform payment to the appropriate creditor? Is not the *Cessus* must be protected to perform no payment to the false creditor?

Suppose the *Cessionaries* party *Cessie* notifies, it may give trust and conviction to the truth on this *Cessie*, the *Cessus* need to request to be shown the evident that the transferring of receivable has been taken place. This evidence in form of *Cessie* Deed (*Cessie deed*). Even on behalf on the legal protection to the *Cessus*, *Cessus* may request to be shown the basic bond (*recht title*) in the obligatory contract form as the basis form that the transferring of receivable has been taken place. All of this at aiming avoid that the *Cessus* does not perform payment to the false creditor. In this relation, need to be noticed that based on the theory of causal doctrine states that if the title of the transferring of that receivable is illegal and annulled by judge, as a consequence the *Cessus* performs payment to the false party (to creditor the false creditor), is not it may cause problem and damage for the *Cessus* ?.

To prevent this problem and damage to the *Cessus* to be taken place, if Notification on the event of *Cessie* be performed by the *Cessionaries* party or the other, and to give the legal certainty and legal protection that proper the *Cessus*, the *Cessus* entitles to request to be shown *Cessie Deed* on contract (*title*) that to be basis for its delivery.

c. *The Methods of Notification of Cessie*

Equal to the issue who has obligation and responsibility to perform Notification in the event of *Cessie*, Article 613 paragraph (2), and does not explain on how the Notification on the *Cessie* must be performs. Therefore, on the issue of the methods to perform this Notification, the scholars have the differentiated understanding. Some suggest that, to be taken place the Notification in the event of *Cessie* must be performed formally, the other state that enough by the normal Notification.

If we return to the purpose of Notification in the *Cessie*, namely to give legal certainty, in the form of trust and conviction to the *Cessus* to pay to the appropriate creditor and simultaneously to give legal protection so as to the *Cessus* does not perform payment to the false creditor, it is appropriate that the Notification on the event of that *Cessie* must be performed formally .

The original text of Article 613 paragraph (2), that Notification must be performed through *betekening* (*aan hem is betekend geworden*). Notification through *betekening* at aiming that the Notification must be run formally through *exploits bailiff*.¹ Why does it run must be run through *exploit* (deed) bailiff? Since it is an authentic deed. That deed has a complete evident force (article 1870 (Indonesian) Civil Code). Through Notification formally (*betekening*), no doubt that legally the *Cessus* has been deemed formally has accepted the Notification on the *Cessie*.

The other opinions state that, the important in the the event of *Cessie*, the Notification in the event of *Cessie* has been taken place when this Notification arrived to the *Cessus*, so that need not the *exploit* of bailiff. The importance is the evidence that that Notification has been arrived to the *Cessus*. Ali Boediarto in the resume of the case contained in the Issue of *Cessie* Legal Institution Problem like discuss on the *Cessie* notified to the debtor, without attaching it by *exploit* bailiff.²

¹ Hartono Soerjopratikno, Debt - Credit, P 63; J. Satria Cessie, p. 31

² HP Pangabebean, Dissertation, *The Role of the Supreme in the Legal Development through its Decisions in the Field of Law of obligations* (1966-2000), (Yogyakarta Gajah Mada University), p. 14.

In practice the transferring of receivable particularly the Cessie today, requirement of the Notification in the event of Cessie causes many difficulties. Beside to avoid the cost as a consequence of the obligation of Notification (*betekening*), likewise may be imagined if the Notification must be given through bailiff, while the bailiff are very busy with the other tasks, so that do not easy to ask them to notify that the Cessie has been taken place to the Cessus. Therefore, the obligation on Notification (*betekening/Notification*) in the Cessie has been conceders as does not practice.

If we examine succinctly some court decision in Indonesia, may be known that the court receives Notification of Cessie taken place is adequate to be done in writing. It is possible that the way Notification to be done is not an issue in the court decision since in (Indonesia) Civil Code translated by Subekti-Tjitrosudibijo the word "*betekening*" is translated into "Notification".

d. What will be notified on the Cessie

What matters will be notified to the Cessus party in the Cessie? It is needed to be notified to the Cessus, is the event in transferring of his receivable or his Cessie, since in his Cessie is stated that, receivable owned by the *Cedent* to the Cessus, the *Cedent* has been transferred to the Cessionaries and his Cessionaries has been determined in the Cessie Deed. Thus, the basic bond (legal title (*recht-title*)) as the basis of the Cessie needs not to be notified.

3.3 The effect of the transferring of receivable

The implementation of the transferring of receivable impose legal effects, namely is the new creditor replace the old new creditor. This replacement take place since the replacement of creditor happened because the third party must perform his debt of debtor to the creditor. Therefore, the third party who has paid the debt of debtor to this creditor will change position of the creditor as new creditor. The replacement of creditor in this, in the doctrine of legal contract is called as *Assignment (Subrogation)*.

This is comply with the provision of Article 1400 (Indonesian) Civil Code stating that: "*Subrogation (assignment) or the replacement of creditor rights by a third party, who pay to that creditor, taken place whether by agreement or by the statutes*".

Based on *subrogation* (assignment (the replacement of creditor) create legal relation between the debtor and new creditor. This legal relation to be the basis for obligation to the debtor in performing payment to the new creditor and the new creditor entitles to perform request payment to the debtor.

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3.4 The transferring of receivable in Factoring Transaction

As stated before that, the object of factoring contract is commercial account in short-term created by commercial transaction whether goods or services, embodied by delivering *Cheque*, or *bilyet giro* and *Wesel* or *promise*, without sorting whether that commercial account as the Cessie (*oop naam*), receivable pointed document (*aan toender*) or receivable on order (*aan orde*). However, the procedure of delivery and transferring of commercial account in factoring transaction (*factoring*), remains must be based on the provision on the delivery of receivable in Article 613 (Indonesian) Civil Code. The transferring of receivable in the form of Cessie of name (*oopnaam*) to be done by the method of Cessie as laid down in Article 613 paragraph (1) and paragraph (2) (Indonesian) Civil Code, namely by making authentic or private deed and has effect to the debtor, that delivery must be informed to the debtor. While the transferring of receivable yang in the non Cessie form (on show and on bring) must be based on the provision Article 613 paragraph (3).

It need to be noticed that, in the practice of factoring transaction, this factoring transaction is normally made in the form of factoring by Notification (*Disclosed Factoring*) on the transferring of that receivable to *Customer* and factoring transaction without Notification (*Undisclosed Factoring*), in the meaning that on the transferring of that receivable does not to be informed all to the *Customer* party.

In the factoring transaction, *disclosed factoring* (by Notification) does not to be the case, since factoring made in the form *disclosed factoring* (by Notification), is parallel and comply with the procedures of delivery of receivable as laid down in Article 613 paragraph (1) and paragraph (2) (Indonesian) Civil Code. It is needed not to be paid attention of the transferring of receivable particularly the Cessie in factoring made in the form *Undisclosed Factoring* (without Notification) to the *Customer*. Delivery/transferring of receivable of this kind, need to be analyzed and studied whether it parallel and comply with the provision on the delivery of Cessie based on the Cessie principle in Article 613 paragraph (1) and paragraph (2) (Indonesia) Civil Code.¹

3.5 Legal certainty of the Cessie in factoring transaction

As stated before that, object of factoring (*factoring*) is the receivable in short-term as a result from the commercial transaction. Therefore, that object to berupa commercial that receivable may such as Cessie of name (*oop naam*), receivable of appointing (*aan toender*) and receivable on order (*aan order*). Especially for

¹ Rahmat Setiawan, J. Satria, Legal Explanation Cessie, Op. Cit .. p. 24

delivery/the Cessie in factoring transaction (*factoring*), must be performed under the provision of Article 613 paragraph (1) and paragraph (2). (Indonesian) Civil Code said that:

Article 613 paragraph (1): Delivery of receivable-Cessie and another abstract goods, be done by making authentic deed or non-authentic, by which that rights to the goods (absolute rights is authorized to another.

Article 613 paragraph (2): Such delivery for the debtor has no effect except after that delivery is notified to him, or to be agreed in writing or recognized by him.

Delivery of Cessie in the factoring transaction must be based and shall not deviate from provision of Article 613 paragraph (1) or paragraph (2) that (Indonesian) Civil Code. Since if the delivery of Cessie deviate from Article 613 paragraph (1), e-g the delivery of Cessie to be done without making the authentic deed or private deed, its result the delivery of that Cessie is illegal. Next, if delivery of Cessie deviate from the provision of Article 61 paragraph (2), for-example after the delivery of that Cessie does, no notification to the owned Customer party (debtor), that Cessie has no legal effect for *Customer* (debtor). That is why the procedure of Cessie of name (*oop naam*) different from the delivery of receivable on order (*aan order*), and receivable on shows (*aan toonder*)

The provision on the procedures of delivery of receivable in Article 613, whether for delivery of Cessie or another abstract goods, delivery receivable on bring (*aan order*) or delivery of receivable on show (*aan tonder*) is the goods contract kegoodsan (*Zakelijk-verbintenis*), indeed it is the provision that to force nature (*mandatory law*), in the meaning that parties must obey the provision and do not illegal.

This, confirmed by Sri Soedewi Masjchoen Sofwan:¹

"The regulation System of Goods Law is a closed system, in the meaning that, the people cannot hold the new rights goods (read make the other provision), other than those already stated in the statute. So it can only hold rights of goods (the provision) are limited name on already stated in the statute. Contrary to this is the system of obligation law, since law obligation in the open system in the meaning that anyone may enter into contract or another contract (*verbintenis*), whether regulated in the statute (namely the Code. Private, Commercial code, specifically Regulation) or does not regulated at all. Thus, what kind of contract may be made, this is known as So be held on any contract, the words said by the other party know the autonomy principle. However this autonomy has limitation items, namely as far as does not prohibit by statutes, does not Contrary to morality and public order".

3.6 The legality of transferring of receivable in factoring Without Notification (*Un-disclosed Factoring*)

As explained that, the legality of transferring of receivable made between the Factor and *Client* may be done without involve or without to be informed by the owned *Customer* (debtor). Therefore, in the practice of factoring transaction, it is normally made in two forms, namely may be in *Disclosed Factoring* (by Notification to *Customer/Debtor*) or in *Un-disclosed factoring* (without Notification to *Customer/ Debtor*).

Although both factoring transaction are lawful and may be justified legally, however need to be noticed, if that receivable sold or transferred is in Cessie (*oopnaam*) form, to made it binds the *Customer* party must make it in the form *Disclosed Factoring* (Factoring by Notification).

In the business practice of *factoring* in Indonesia, factoring contract may be made in the form of *Un-disclosed factoring* (without Notification to *Customer*). Normally in a factoring transaction, the *Client* party does not want to be known by public that, he sold to public trust and may decrease it bonafid in business world. The assumption as such may disturb the business fluency and development of the *Client* party. Therefore, the *Client* who want to transfer his receivable, tend to do it by factoring in the *Un-disclose factoring* (without Notification to the *Client* party).

This factoring transaction without Notification normally made for some motives:²

a. It is concealed to debtor deliberately

This may be happened in the case there is prohibition to transfer receivable contextually. For-example, if this contract causes the transferring of receivable prohibited. Since the debtor party does not want to takes the risk if this factoring contract is disability law, so that the debtor party will be claimed twice by the old creditor party (*Client*).

b. The Notification is not practice

Sometime the Notification indeed is not practice to be done. For-example if the debtor party is lot and his receivable are bits.

c. Avoiding or *prejudicing* from the debtor party

¹ Sri Soedewi Masjchoen Sofwan, Private Law, Law of Goods (Property Law), (Civil Law Section, Faculty of Law, University of Gajah Mada, Yogyakarta, 1974) p. 11

² Munir Fuadi, *The Law on Financing in theory and Practice*, p. 92, in Suharnoko, Endah Hartati, Doctrin Subrogation, Novation and Cessie, p. 132-133.

To certain debtor, the transferring of receivable causes him to pay his debt without seriousness. For-example there is certain factor from the of receivable party, as a consequence the debtor party unwilling to pay his debt directly to him. Or he will deem that this transferring of receivable, will cause prejudice where party transferring his receivable will be considered as decrease his benefit, or suffer from financial difficulties.

Although factoring without Notification (*un-disclosed factoring*) in the practice of may be justified, the delivery of his receivable if we study under the provision on the procedures of delivery and the transferring of receivable, particularly delivery of Cessie in Article 613 (Indonesian) Civil Code, factoring without Notification (*un-disclosed factoring*) may not bind *Customer* (debtor) because, in fact is not comply with the provision Article 613 paragraph (2) (Indonesian) Civil Code, where this Article lays down that the transferring of *Cessie* must be informed to *Customer* (debtor).

Munir Fuady states, that:¹

“Is the provision in the Article 613 may be overrode by the parties? For the writer, as the provision on another technique of transferring like the requirements before the Cadaster (PPAT) in transferring the land, in Article 613 is mandatory rule so that it may not be overrode in parties. So, if there are requirements in Article 613 (Indonesia) Civil Code are not fulfilled in factoring transaction, as the obligatory, the factoring as such is lawful, but his receivable is not transferred completely”.

If the object of factoring it is Cessie, and its factoring is performed without notification (*un-disclosed factoring*) on that transferring to the *Customer* party (debtor), the delivery of receivable does not bind the *Customer* (debtor), to perform payment to the Factor party (new creditor). If viewed from system the determined in Civil Code, factoring without Notification (*un-discoursed factoring*), its factoring contract remains lawful, the transferring of ownership on that receivable has no legal effect at all, since it is not comply with the provision of Article 613 paragraph (2), except the *Customer* party (debtor) recognize or agree the transferring of receivable in writing. Thus, the *Customer* party (debtor) has obligation to pay his debt to the Client party (as the origin creditor), refer to its bas bond, except for the basic bond causing that receivable regulate reversely.

Factoring without Notification (*un-disclosed factoring*) has no strengthen bind to the *Customer* party (debtor), to cope with the difficulty on payment of receivable in factoring transaction such as, *un-disclosed factoring* or factoring without Notification, or this *Notification*, in the practice. It is mad construction on construed factoring (*factoring*) by making a deed on agency as such, placing the Factor party (the new creditor) as the receivable buyer who receive the delivery of receivable, legally may perform claim on receivable legally and on behalf of the Client party (creditors) as the receivable seller.

4. Conclusion

Based on the above description may be concluded that: In general, the transferring of receivable receive in factoring transaction is comply with the procedures in the transferring of receivable as regulated in Article 613 Indonesian Civil Code; the transferring of receivable in factoring, in this case *Un-disclosed Factoring* (without Notification) is not comply with the procedure in the transferring of receivable in Article 613 paragraph (2) (Indonesian) Civil Code. Therefore, the transferring of receivable in factoring such as, *Un-disclosed factoring*, has no binding force to the *Customer* (debtor). As a result so that it is not giving legal certainty to parties in factoring transaction.

5. Recommendation

Based on that conclusion, may recommended to the Government and House and Representative to enact the act on Financing Institution in which regulate the factoring substance and the method of the transferring of his receivable that may give legal certainty and legal protection to all parties.

References

- Badrulzaman, Mariam Darus, *Variation of Business Law*, Alumni Bandung, 1994
_____, *Chapter on Hypothec, Mortgage, and Fiduciary* (Bandung IKAPI 1984)
Bintang, Sanusi & Dahkan, *The Principles of Economic and Business Law*, Citra Aditya Bakti, Bandung, 2000
Barton Simatupang, Richard, *Legal Aspect in Business Law*, Rineka Cipta, Jakarta, 1996
Fuady, Munir, 1994, *Economic Law in Theory and Practice*, Buku kedua, Citra Aditya Bakti, Bandung
Hartono Sunaryati, *Legal Politic toward One System of National Law*, BPHN, 1999
_____, *Legal Research in Indonesia in the End of 20th Century*, Alumni. Bandung, 1999
H.P Panggabean, Thesis, *The Role of Supreme Court and the Legal Development of Law Through its Decisions in the Bond of Law Field, 1966-2000*, (Jogyakarta, Universitas Gajah Mada),
Karseno, Arif Ramlan dan Arti Adjie, *Economic Policy and the Institutional Development in Indonesia*, UUP, AMP, Yogyakarta, 2001

¹ Munir Fuadi, *Op. Cit.*, p. 91

- Khotibul Umam, *Law of Financing Institution, Right and Obligations of the Customer as Financed by Financing Institution*, Pustaka Yustitia, Sleman, Yogyakarta, 2010.
- Lembaga Ilmu Pengetahuan Indonesia (LIPI), *Indonesia steps on the 21th Century, Economic-Political Study*, Millennium Publisher, Jakarta, 2000
- Mulya Lubis, T., dan Buxbaum, Richard M., *The Role of Law in Development Countries*, Yayasan Obor Indonesia, Jakarta
- Neni Sri Imaniyati, *Business Law, Analyze on the Economic Actor and Activity*, Graha Ilmu, Bandung, 2009.
- Rahmat Setiawan, J.Satrio, *Legal Explanation on Cession*, National Legal Reform Program, Jakarta, 2010.
- Richard Burton Simatupang, *Legal Aspect of Business Law*, PT. Rineka Cipta, Jakarta, 2007
- Rinus Pantauw, *Claim Rights on Commercial account, Factoring (Factoring)*, Prenada Media Group, Jakarta, 2006.
- Saleh, Ismail, *Hukum dan Ekonomi (Law and Economy)*, PT. Gramedia Pustaka Utama, Jakarta, 1990
- Sanusi Bintang dan Dahlan, *Principles of Economic and Business Law*, Citra Aditya Bakti, Bandung, 2000
- Sri Soedewi Masjoen Sofwan, *Private Law, Property Law (Law of Goods)* (Private Law Department, Law Faculty, University Gajah Mada, Yogyakarta, 1974
- Suharnoko, Endah Hartati, *Doctrine of Subrogation, Innovation, and Cessie, (Indonesian) Civil Code, New Netherland Civil Code, French Civil Cod and Common Law*, Copy Right Body, Law Faculty, University of Indonesia, 2006
- Sunaryo, *Financing Institution Law*, Sinar Grafika, Jakarta, 2008

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