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Harmonization of the UNIDROIT Principles into the Indonesian Legal System to Achieve Justice of Factoring Contracts

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Abstract
In light of globalization of economy, the need for a new trading model, either at local or international level, as a matter of fact, is also increasingly growing along with time, including the presence of an institution that deals with the issue factoring as well. Referring to the present practice of factoring, there are still some legal problems arising, which is all due to injustice in the making of factoring contract. The underlying problems are: Why can the role of equilibrium and openness principles can ensure the fair factoring contracts for all parties involved, in Indonesia? Why does the contract legal system in Indonesia remain to create legal obstacles in the practice of factoring contract in Indonesia? And, why do we need to harmonize the legal principles of UNIDROIT commercial contract into the system of contract law applicable in Indonesia, most especially in the factoring contract? This dissertation research employs what is so called normative research method departing from literature sources and some qualitative secondary data. Based on the results of analysis, it is discovered that the role of equilibrium and the principles of openness, in order to create a fair factoring contract for all parties involved in Indonesia, are of the essential elements in the making of fair contracts. This conclusion is based on the theory applied by Adam Smith and John Rawls. One of the legal constraints in the development of factoring contract in Indonesia is due to the lack of both arrangement and contents of the Indonesian Civil Code, which is not yet specifically detailing the pre-contractual activities, as a preliminary process that provides opportunities for all parties involved to do negotiation based on the principle of equilibrium and openness. Since the principle of equilibrium and openness is deemed necessary, then the harmonization of the principles of UNIDROIT into the system of contract law applicable in Indonesia is of a way out to fill in the gap of the Indonesian Civil Code – because there are some similarities between the principle of UNIDROIT and the structure of legal components, substance and culture of the Indonesian Legal System. It may be strongly advises the government and the legislative council to soon set up immediate steps to pass a law that is specifically governing the practice of factoring by harmonizing UNIDROIT Principles into the Indonesian Civil Code.
Keywords: UNIDROIT principles, fairness, justice, factoring contract

1. Introduction

Globalization represents a wider process of accelerating interaction in the forefront of politics, technology, economy and culture (Makinda 1998). The globalization of economy is meant as a process of integrating economies of various countries towards the world economic communities, which is interrelated, inter-dependent and overarching (Latief 2002).

As John Braithwaite and Peter Drahos had apparently coined, the implication of economic globalization towards the development law is obviously inevitable (Braithwaite & Drahos 2000). The globalization of law that occurs has been in a sense of substances of various regulations and contracts that has gone through the borders of various countries; an economic integrating process of various countries that needs harmonization of law in order to minimize domestic legal clashes of the countries (Breeden 1993). Countries of the world involving in the economic globalization and the free trade, either for advanced countries, developing countries or even the under-developed countries shall have to create their own legal standardization within their economic activities (Wright 1969).

The complex and fast-growing economy has resulted in countless number of business transactions, such as selling and buying transaction. In general, in a buying and selling transaction, the submitting and paying for the goods purchased, is occurring almost at the same time. This may mean that the business and the working capital can be obtained back and shall be re-used almost at the time for the business rotation.

Quite often, the payment by the buyers would only be paid off within a certain length of time depending on agreement among them, such two until four months beyond. Such a condition creates a consequence of collection rights by the sellers; this is normally called the collection period. This collection rights in the world of economy is referred to as the account receivable (Sunaryo 2008).

The period of waiting for the payment may create problems of cash-flow or delays of the cash-flow of the seller, because the seller does not have enough cash to finance the operation of the business at a certain period. A solution for the seller to overcome the problems is to seek for a financial facility with the purpose of

financing the account receivables (Pantouw 2006).

So far, there is no similarity of Legal Institution to deal with and accommodate of engaging financial facility for this account receivables, such as that some creditors are making use of cessie institution, some might use institutions of common credit contract. Apart from the two institutions, there another institution as already stipulated within the decree of the President of Republic Indonesia NO. 61 – as officially enacted on 20th December 1988 concerning the Institution of Factoring.

The concept of Factoring Institution is not exactly found within Indonesian Civil Code. The one that is presently applied in Indonesia is an adoption from factoring concept generally recognized in Common Law, in which the understanding of factoring may be found in the Decree of Finance Ministry NO. 172/KMK.06/2002 – therein stipulated that it is a business entity that purchases and/or transfers as well as arranges any account receivables upon certain claims, either within home countries or overseas. In light of the case, the factoring institution moves arounds the activities of:

1. Purchasing or transferring account receivables of a short term from a trading transaction taking place either within home country or overseas.
2. Arrangement of credit selling business as well as account receivables of the Client's companies.

The Financing Business, in Indonesia, was firstly introduced on December 20, 1988 through a Presidential Decree NO. 61/1988 concerning Financing Institutions. Ever since its inception, until the present day time, information with regard to the financing business service, most especially about Factoring, is less adequate and is hardly found. The same things with the contracts of factoring – can be said as it does not belong to the Named Contract (*begomde overeenskomsten*) as set forth within Book III of the Indonesian Civil Code (Badrulzaman 2001).

Arrangement of Factoring Contract, in Indonesia, is not yet stipulated substantially by any institution specifically appointed to it. In other countries like the USA, the United Kingdom, Japan and a neighbouring country Malaysia, such a thing has been stipulated very clearly and has been institutionalized within Financing Institution – in support of materializing development resources other than bank loans or credits (Fuady 2001). The substantial legal principle of Factoring Contract presently applied in Indonesia remains to be based on the freedom of contract. It denotes all parties are free to create contracts and arrange the contracts by themselves so long as they fulfil the following contents:

1. Complying with the terms of contracts;
2. In any case, it is not against the prevailing laws;
3. Congruent with the commonly acceptable practices; and
4. Insofar as such contracts to be executed in good and sane manner.

The facts upon the freedom of contract making in the issue of factoring require contracts to engage legal relations among parties and so they can individually make serious effort to keep rights and needs be respected by law as set forth within the contracts.

In view of the Factoring Contract, it is deemed significant to provide clarification of Factoring Terminologies to be embedded into the contract through the arrangement of clauses as dully and therein agreed upon by all parties (Pantouw 2006).

The fuzziness over the use of Factoring Terminologies may also result in the construction of law on Factoring remains unclear. Furthermore, it may also create uncertainties over the use of selling and buying construction as well as the interest rate in a context of Factoring.

As with Factoring Contract and the Rights of Regress (Factoring with Recourse), it contains of construction and terminologies of "Joint Purchase" as well as articles on the burdens of interest rate of the Factor of profit-sharing. The mix of the use of this legal construction and terminologies (Factoring and Trading) creates the interpretation over the two legal construction to become blur. This has potentially created the loss at the Factors – because the terminologies of the rate-interest burdens has created an interpretation that the relations among the parties would seemingly be like the legal construction of debit and credit. The exact relations in the Factoring should be accompanied with the terminology of discount or other terms that is equivalent with the terminology of discounts (Bachtiar 2002).

The most commonly arising problems in the activities Factoring is the collection of the account receivables to be at the expense of the Factors against Customers as a debtor (Client) that is entitled to carrying out payment. Therefore, problems relating to collecting responsibilities are of the forms of the principles of governance of the collection of the account receivables of the Customers – in the event that the account receivables cannot be collected, it would create a sequence of other problems that the legal basis needs to be sought for defining the choice of clauses on the contracts that had been made at the inception of the signing of factoring Contract, for instance concerning the absence of the clauses of the Rights of Regress (*with recourse*).

In addition, it is also important to notice the performance of the account receivables from the Factors in the relations of contract law of the Factoring Institution. With it, the legal certainty can be sought on behalf of the creditors as this might significantly minimize the possible risks of bad debts that jeopardize the Factors –

because the account receivables in context of the trading tends not to have collateral – because the activities of the Factoring business carries a risk by which the account receivables cannot be paid off later on (Wahyono & Sari 2006).

As the principles of this Factoring applies no-collateral financing and as the potential of the account receivables purchased by the Factors that cannot be collected is significantly high, then the making of the Factoring Contract shall have to ensure a fair contract, most predominantly related to the certainty of repayment of the Factor's money that has been given to the Clients can be ensured through the Customer's account receivables that is transferred to the Factor which can be paid off in due time.

The certainty of repayment is much depending on the condition and financial capacity of the Customers, and consequently anything that is related to the information possessed by the Clients, at the moment of negotiation process of the Factoring Contract, should become an important moment or in other words the openness of the Clients in providing information related to the Clients themselves and the account receivables that is sold to the Factors is of a real responsibility that has to be provided by the Clients to the Factors.

However, in general practice, such an exposure to have yet to do completely. As such can be seen from the disputes occurring between parties at the time of implementing the Factoring Contract. The following fact reveals that:

1. The Decision of the Supreme Court NO. 016/K/N/2001, on April 21, 2001 concerning Dispute Settlement between PT. Batara International Finansindo as Factor and PT. Gabus Putih Indah as Client, which have signed Factoring Contract NO. 005 of January 5, 1999, amounting to a value of IDR. 500.000.000., (Five hundred million Indonesian Rupiah), which was due on December 13, 1999. The final decision by the Supreme Court, an appeal of bankrupt upon the Client (debtor) as implored by the Factor (creditor) is officially rejected.
2. The decision of the Civil Court NO. 07/PILIT/2002/PN.NIAGA/JKT.PST dated April 8, 2002, concerning the Settlement of Dispute between PT. TIFA Finance Jakarta as Factor and Mr. Harto Sutanto as Client.

The Factor has provided a loan or Factoring Facility to the Client in Jakarta, dated February 21, 1997 No. 11 with a maximum ceiling (limit) of loan as much IDR. 2.000.000.000 (Two Billion Rupiah).

Of the two cases elaborated above, it was known that the Factor had suffered much loss of not gaining back his money; either from the Client himself or from the Client's Customers. This could only have occurred in the event that the Factor just did not have information regarding either the situation of the financial condition of the Client or the Client's customers, as well as the status of the account receivables being traded off. With such a lack of information, in context of every Factoring Offer being proposed, the Client is entitled to fulfilling all requirements and terms as proposed by the Factor (Bachtiar 2002).

All terms and requirements in the making of Factoring Contract should be adhered by the Client from the first moment the Client request his feasible business credit, and is really from the business transaction belonged the Client, in chronological order and details.

Reflecting on the above cases, the two agreed contracts, which had been agreed upon by the Factor were based on the agreement (Article 1320 of the Civil Code) between the Factor and Client as well as involving the Customer formally, were as a matter of fact still resulting in loss in the part of the Factor of not gaining back his money either from the Client of from the Client's customers.

In context of the making of a factoring contract, in Indonesia, gaining information related to the situation and the financial condition as well as the account receivables – either from the Client and the Client's customers, is remaining of the Factor's rights and has yet to be the obligation of the Factor to gain all information from the Client who with such a full awareness is entitled to providing any necessary information required. Therefore, the Client tends to behave passively and at the same time keeps on waiting for the frankness of the Factor in requiring any necessary information. The Client just does not behave proactively in providing information required by the Factor as the agent who will help develop the Client's business and as the one who may suffer the risk of loss as a result of not gaining back the account receivables he may have sold. In the event that the Factor is failed or wrong to believe in the information supplied by the client in relation to the client's financial situation as well of the Client's customers', then the potential risk of loss, may even greater and higher by which the Factor should shoulder.

Even for the Client, such a situation is not of a beneficial thing. As already elaborated beforehand, that the Client's motives in selling business account receivables to the Factor are of the need of fresh money as a preparation of working capital in order to finance the business rotation, which is being disturbed due to the invested capital in the account receivables that has yet to be paid off, besides the fresh money can be used to support the client's ability in financing his further business by being without putting any collaterals of whatsoever types as requirements.

In short, the main purpose of the Client is to get fresh money without having to put in any collateral as requirement in order to finance business operations. As a party that needs quick money from the Factor, there is a tendency that the Client is in a weak position in the process of making factoring contract. It further means that

during which time a factoring contract is made, the desire of the Factor remains dominant compared to the wish of the Client. This can be seen from the fact in context of gaining the facility of Factoring, the client shall have the good performance business and is profitable. The Client shall have to propose application by attaching all portfolios as dully required by the Factor as requirements.

In general, as it relates to the factoring contract, the dominant desire of the Factor is mainly aimed at minimizing the risk of loss, which is potentially shouldered by the Factor. The factoring business carries within it a significantly big risk, because the Factor shall have to finance an invisible thing or not yet manifested but in the form of business account receivables (Rachmat 2003).

At one point, the position between the Factor and the Client in unequal, because the Factor as a party who is requested to receive the sale of the Client's business account receivables, is in a strong position – whilst the Client as a part who requests the business account receivables that will be purchased by the Factor, is in a weak position. This brings a tendency that the Client by no means shall have to agree to follow through any requirements imposed upon by the Factor. Consequently, in the activities of factoring, the level of trust between the Factor and the Client is relatively very low. As with the strong position of the Factor, then in the factoring there are many clauses set forth in the contract that strongly reflect the desire of the Factor as this is one of the strategy of the Factor to protect his own risk from any possible loss in the business.

Herlien Budiono quoted: "In the event of the factual condition, when the position of on party in a contract is weaker than the other, it will influence the content, the scope and purpose as well as the objective of the whole contract. The inequality of such position may eventually create a misbalance of the contract. The effect of such an equal performance in the contract will create a misbalance of a contract. Ideally, by complying with the principles of Contract Law and of the equilibrium's, then will show that the Factor that defines a fairness or justice of a contract is not at all of the performance equality but rather it is the equality of all parties involved" (Budiono 2006).

In light of the elaboration above, then all parties in time of making agreement in a factoring contract are given such a freedom to conduct negotiation in order to define a joint agreement as set forth in the written contract. During the making process of a factoring contract, all parties shall have to devote great efforts to employ a wide range of openness among all parties in the form of exposure of information and the balance of the bargaining position. In the event when the bargaining position is not clearly materialized, most probably the factoring contract will not shed the sense of justice as yearned by the law. In general practice, the contract, which is merely executed on the basis of freedom of contract, as a matter of fact, has yet to create the sense of justice to all parties involved and this has always created countless of problems in its implementation.

The time has come to find out an alternative solution against the injustice in the implementation of a factoring contract, as part of legal reform in Indonesia. The reform of law contract of factoring shall have to refer to international sources, either in the form of conventions, model law, legal guide, the principle of general law, or the contract standard issued by international business organizations, such as the ICC (*International Chamber of Commerce*), FIDIC (*Federation Internationale Des Ingenieurs Counseils*), or even by the United Nations - UNCITRAL (*United Nation Conference on International Trade Law*) from which it is produced CISG (*United Nation Conventions on International Sale of Good*) as well as the UNIDROIT (*International Institute for the Unification of Private Law*) (Soenandar 2006).

Time has really come to carry out a reform of Contract Law in Indonesia, for the principles of freedom of contract presently applied by Indonesian Civil Code (*Burgerlijke Wetboek*) remains using the Code of Napoleon as a source, which is to some extent it has been out of date. In the Netherlands alone this *Burgelijke Wetboek* had been for many years ago changed into what was so called the *Niew Burgelijke Wetboek*, which has substantially been well-adjusted to the principles of the UNIDROIT (*International Institute for the Unification of Private Law*) (Soenandar 2006).

This research has referred to the principle of commercial contract law of UNIDROIT. In context of harmonization, the principles of UNIDROIT, can substantially accommodate the existing disparity in the international community, such as: Civil Law and Common Law, liberalist and socialist, the rich and poor countries. It is this commercial contract law of UNIDROIT that will be used as the underlying basis for the author to write in searching for the alternative solution as to fill the gap presently found in Indonesian Civil Code, most especially the existing gaps in the making and implementation of the factoring contract in Indonesia, which always lead to various injustice of contract among all parties involved.

Of the above elaboration, the author has conducted research over the arising problems in the process and implementation of the factoring contract, in Indonesia, by referring to the principles of UNIDROIT, as well as the urgency of the principles of equilibrium and openness, toward which all will lead to the creation of fairness/justice of contract among all parties involved entitled: "Harmonization of the UNIDROIT Principles into the Indonesian Legal System to Ensure Justice of Factoring Contracts".

2. Formulation of Problems

In view of the background as initially elaborated, the author has shed some lights on some problematic issues, namely:

1. Why can the role of equilibrium and openness principles can ensure the fair factoring contracts for all parties involved, in Indonesia?
2. Why does the contract legal system in Indonesia remains to create legal obstacles in the practice of factoring contract in Indonesia?
3. Why do we need to harmonize the legal principles of UNIDROIT commercial contract into the system of contract law applicable in Indonesia, most especially in the factoring contract?

3. Research Method

3.1 Type of Research

The type of research as to be viewed from the perspective of research, by which the author is writing, can be of the explorative one in nature, for in this research the author wishes to deepen his understanding on the issue of fairness/justice of contract of factoring in Indonesia. This research as well attempts to obtain new and fresh ideas in the assessment of the principles of commercial contract law of UNIDROIT, the principles of equilibrium and of openness – into the factoring contract, in Indonesia.

Based on the type of research, by which the author is writing, it can be the research of perspective, namely a research that is meant to obtain suggestions and feedback for the perfection of contract law of factoring in Indonesia as to be a means of harmonization to the principles of commercial contract law of UNIDROIT – by way of putting in the principles of equilibrium fairness/justice and of the openness among all parties involved. Then, the type of research to be viewed from the perspective of the research objectives, the author has divided into 3 (three), namely: The research of fact-finding, the research of problem identification and the research of problem solving. These three types of research are of continuous research, in which the fact-finding research is of the beginning step toward finding facts, then to be followed by a research toward which the problem identification is defined, and the last will be geared to the formulation of problem solving.

In this research, all stages and steps of research as obviously mentioned above shall have to conduct. As it starts from the fact-finding that the fairness/justice of contract of factoring, in Indonesia, that has yet to ensure protection, legal problems in context of the implementation of factoring contract will be discovered. Then, comes with the realities of the problems dealing with the fairness/justice of contract in the implementation of factoring contract are to be closely viewed. And, the last it will be the stage of problem solving. With these all, the author attempts to harmonize elements of contract law, which is commonly applied in Indonesia to the principles of commercial contract law of UNIDROIT on the basis of equilibrium and openness. The types of research from the perspective of research application has been divided into 3 (three) categories, namely: First, basic or pure research for the development of science. Second, a problem-focused research. And, third, an applied research.

In the research the author is conducting, to be viewed from the research application, it clearly shows that this research has been focused on the problems under-reviewed, for in any research there is always a problem that attracts any researcher with basic motivations as to answer the arising and lingering problems.

3.2 Legal Research Methodology

This research employs a method so called Normative Legal Research as it refers to the existing legal norms as they are found within the rules and regulation and court decisions.

As mentioned earlier, that the normative legal research comprises several researches. If it is related to the title of this research, then the normative form that is conducted by the author is of the principles of law, namely is a research conducted over the principle of Indonesian contract law of factoring that is related to the principles of international and commercial contract law of UNIDROIT on the basis of equilibrium and openness towards achieving a fair and just contract among all parties involved.

As it normally conducted, in general, the normative legal research, only employs document study, namely using only sources of secondary data in the form of rules and regulation as legal product, decisions of court, theories of laws, and the perspectives and ideas of prominent scholars (Soemitro 1983). This is the reason why qualitative analysis is employed (normative-qualitative analysis) – as it is based on qualitative data.

4. Results of Research and Analysis

4.1 *The role of equilibrium and openness principles can ensure the fair factoring contracts for all parties involved, in Indonesia?*

The core essence of analysis in the contractual relations is of an inevitable fact from the problems of fairness and justice. A contract, as means of similarity of aspiration of needs of one party to the other, is of a form of need-sharing that shall have to ensure fairness and justice. The analysis on the principles equilibrium and openness of

a contract shall have to be started from the aspects of fairness and justice as the basic philosophy of an activity of contracting.

With such an analysis, one can apparently see the close relation (engagement) between a fairness/justice and the contract itself. The basis of engagement among parties in the activity of factoring (between the Factor and the Client and/or with the Client's customers) is of the contractual relationship among all parties involved. The existence of a contract is a form of agreement among all parties in the activity of factoring.

An activity of factoring closely relates to the law of contracting and carries an economic value for all parties involved in the activity. Consequently, the use of essential steps and standards as proposed by experts in the two mentioned areas (the law of contract and economic values) are broadly deemed as to be a potential that may solve and evade conflict of interests in a contracting activity.

Of some scholars having widely discussed the fairness/justice within a contract, the justice theory proposed by Rawls, is deemed phenomenal and is the mostly used and debated by experts. Rawls's theory of justice has departed from the criticism over the failure of the existing theories of justice. Such a failure is substantially caused by a sense of justice, which is greatly influenced by either utilitarianism or intuitionism (Ujan 1999).

Besides John Rawls, Adam Smith, as a prominent economist, also suggested the basis of justice in economic relations among practitioners of economic activities as the most elementary aspects (Keraf 1998).

It is those two experts whom the author has used as the basis in formulating the standard of justice as to create the making of fair and just factoring contract, for it is the experts who have proposed the most essential theory of justice to law practitioners to the present day time, and that the author has considered feasible to be used a prominent reference in defining the standard of justice and fairness in a factoring contract (Keraf 1998).

Based on the two theories of justice, it is hoped that way-out can be sought by incorporating Adam Smith's theory that is emphasizing on the fairness of market economy along with Rawls's theory that is emphasizing the partiality of economy resulted by the market. The standards or the principles of fairness in contracting applied by the two as viewed theories, can be seen in the following aspects:

1. The principles of not inflicting loss in others;
2. The principles of not allowing unrelated others to intervene;
3. The principles of justice transfer or fair exchange of goods; and
4. The principles of government selective policy, which is specifically appointed to provide helps for groups who objectively are not able to use make use of optimum market opportunity by complying with the following three principles:

a. The principles of maximizing freedom;
b. The Principles of equality for all;
c. The principles of equality in Opportunity and the Elimination of Inequality in Opportunity Based on Wealth and Birth.

In light of the above matters, the author stands on the opinions that the principle of not inflicting loss to others, the principles of not allowing unrelated others to intervene, the principles of justice transfer or fair exchange of goods are leading to the principles of openness in the making of factoring contract. Whilst the principles of principles of government selective policy, which is specifically appointed to provide helps for groups who objectively are not able to use make use of optimum market opportunity are leading to an important position on the principles of equilibrium in the making of fair factoring contract. Therefore, based on the theory of Adam Smith and of John Rawls that the principle of equilibrium and openness is of the essential element in the making of fair contract.

Based on the reviewed theories, towards factoring contract is not necessarily deemed to be standardized, for the settlement of every trade account receivables as it is sold by Client to have distinctive characteristic from one to another – depending on the status of the account receivables alone (such as the due time of collection period and the size of the account receivables alone), as well as the financial situation and history of the Customers in certain the debts.

In general practice, even though a negotiation is promoted in order to achieve agreement in the making of factoring contract, there are still legal problems arising, most especially related to the implementation of the factoring contract alone, that has yet to accommodate openness and equilibrium among all parties involved and potentially results in the lack of fairness or justice.

The performance of the principle of equilibrium that is emphasizing the balanced position of all parties involved needs to be regulated from the very beginning inception in the making of factoring contract. As such is based on the ideas that in the perspective of factoring contract, there is a partiality of bargaining position among all parties involved. The Client – Factor relation is assumed as subordinate relationship, so that the client is in the weaker position in the formulation of rights and obligations, in a certain contract. It is the sub-ordinate or the weaker position, the domination of Factor and some other prevailing conditions are assumed to carry the one-

sidedness of relation among all parties involved.

Client needs to get assurance of an equal position during the time of conducting pre-contractual negotiation. Within such a process, the principle of balance, which means an ”equal-equilibrium” will take effect in providing equilibrium when the bargaining position of all parties involved become unequal. The purpose of the principle of equilibrium is the end-results that put the positions of all parties involved to be well equal in defining the rights and obligations of all parties in certain contract. And, that is why the intervention from the state authority should have been initiated in order to ensure the equal position of all parties involved in a contract. However, in context of the activity factoring contract, in Indonesia, the government has yet to do much efforts to ensuring the equal positions of either the Factor or the Client. Further, this is not yet regulated within the Indonesian Civil Code. In other words, this is remaining neglected – despite the importance of this element in the making of factoring contract. The principle of openness, as viewed herein, can be elaborated through analogy of an openness as normally carried out within the activities of stock-markets (Nasution 2007).

The principle of openness of the stock-market is aimed at disclosing all correct and accurate information as regard with the performance of the company, including the financial situation, status, ownerships and the leadership of certain company.

If it is related to the activity of factoring, in Indonesia, then the principles of openness of the stock-market is also of an important aspect, most predominantly in the making of factoring contract. Since the disclosure of information between the Factor and the Client, in the activity of factoring is by no means a must, for the biggest risk entailing from this process will be in the part of the Factor.

The providing of information in an open way is very crucial and quite useful in the making process of factoring contract; because it normally has material facts, which can be used by the Factor as a basis of consideration whether or not the Factor will buy certain account receivables as offered by the Client. The principle of openness in the making process of factoring contract – through the disclosure of full and accurate materials, is expected of fully materializing the objective of the openness itself and of saving the Factor from misleading statement by Client.

The objectives of the principle of openness, in the activity of factoring, are firstly, to increase the trust of the Factor that the account receivables' being offered by the Client is really secure and beneficial to purchase. *Secondly*, to help the Factor in deciding the price of the purchase of the account receivables as well as the price of an accurate and relevant discount in line with the expectation of the Client as to fulfil the need of the Client in financing his business. As with the activity of factoring, the purchase of the account receivables by the Factor, is not merely defined by the amount offered by the Client, but it is defined more by the objective calculations in the part of the Factor despite the amount offered by the Client. The more important thing is the information supplied by the Client related to the quality of account receivable offered by the Client. To some extent, the most crucial issue is about the information no matter who is supposed to get it the first hand. The way the information supplied is based on the assumption that the offered prices have clearly been reflected from the information being efficiently and effectively supplied and this is the benefit of the principle of openness in the part of the Factor – in defining the accuracy of purchasing power as well as the discount. Thirdly, protection for the Factor. The author is in the opinion that it is not too exaggerating that if a contract law of a country, including Indonesia, is compulsory adopting the principle of openness as basis to making a contract despite the country has an Anti-Fraud provisions as elaborated within the Criminal Code. However, the Anti-Fraud as it is elaborated within the Criminal Code has yet to be so effective in providing legal security to the Factor in activities of factoring. To some extent, our Criminal Code has neither regulated the rules of compulsory openness nor has it yet to regulate any types of frauds and dishonest acts in the giving of information.

According to the reasons expressed above, the author is in the opinion that the contract which is emerging from within the Indonesian Criminal Code is still showing a fact that is still found a problem of imbalances suffered by one of the parties involved that lead to the fact that the contract is to be neglected. That is the analogy that shows an act of violating a good wish. Such a good wish should be a necessity to done by all parties involved, for with this, the balances can be created in a contract and the implementation must be interpreted by a means of providing factual information from the party whose position is strong (the Factor) to the party whose position is weaker (the Client) as to assure there is a balance in position. This is in line with the teaching of good faith principles commonly applied in the Netherlands, either to be measured from the rationality or the compliance.

4.1a *Legal Obstacles in the Application of Factoring Contract in Indonesia*

Legal provisions in the application factoring contract in Indonesia still creates legal problems. Administratively, the provisions of factoring in Indonesia are regulated by Presidential Decree NO. 1/1988 on Financing Agency and the Decree of the Minister of Finance NO. 1251/KMK.013/1988, as amended by Decree of the Minister of Finance NO. 1256.KMK.000/1989, and is transformed back into the Minister of Finance Decree NO. 468/KMK.017/1995 on the Provisions and Procedures for Financing Institutions. However, substantially, these provisions have not yet clear boundaries about things that should be included in a factoring contract, including

the use of terminology of factoring, and the legal status of the parties to the agreement. Consequently, it is often resulting in the obscurity of the sale and purchase construction - following the interest rate burden, in the implementation of these factoring activities.

Provisions concerning factoring contract is stipulated in Book III of the Civil Code, Article 1338 Jo. 1320 of the Indonesian Civil Code. The principle of freedom of contract, as a principle, which is used as the basis among parties to prepare factoring contract.

The development of factoring business activities in Indonesia from 2003 to 2007 showed reductions in the volume of transactions to be IDR. 8.036 trillion To IDR. 2.199 trillion. This data clearly suggests that the financial institutions of factoring in Indonesia just do not evolve as it has in some developed countries. If it is seen in practice, the application of the principle of freedom of contract always raises legal issues, the rights of the various interests of the parties, which in turn gives rise to a case in court.

Although the principle of freedom of contract is a principle that is contained in the Indonesian Civil Code, but it has yet to have a working power which can accommodate the interests of the different parties, most especially related to the unbalanced position of various parties. That is what the other consequences of injustice to the parties in making the contract. A contract that is solely be based on the implementation of the principle of freedom of contract mechanisms will often result in one-sided contract by which one party has an unbalanced position compared to the other parties. The strong will dominate the weak. It happens quite always that that within an agreed contract there are clauses that are improperly burdening too much one party. To maintain the principle of equilibrium of all parties and the implementation of the principle of openness of contract, the intervention of the state is certainly needed, which should be done through the adoption of law and regulations. As in many countries, people consider the intervention of the state is quite central to restrict the principle of contracting through law and regulation with regard to the factoring activities. Such restrictions may be seen from the regulations issued by various governments to determine the terms and conditions of the insurance policy, the regulations issued by governments concerning the minimum wage, maximum working hours, and social insurance programs for workers who are required to respect the employment contract between the company and employees or labourers.

In practice, the use of the principle of freedom of contract refers to two general principles. The first general principle which determines that the law does not limit the terms that will be made by the parties, the principle does not relieve the enforceability of a contract merely because the terms of the contract to be unfair to one party. The second principle determines that in general one cannot be forced to make a contract.

In the science of law, such a moral as mentioned above is called *misbruik van omstandigheden* (The misuse or abuse of an occasion) (Panggabean 2001). The abuse of occasion could be used in category of defect in determining his/her will (*wilsgebrek*) or not being free in determining the will to give consent. This is the reason to declare of being void or cancelling a contract that is not regulated by law but is a construction that can be developed through jurisprudence. In accordance with the law of need, the construction of abuse of occasion or situation is considered as a Factor that limits or which interferes with the existence of free will to determine the agreement between the two sides.

In addition to abuse of occasion, according to Article 1321 of the Indonesian Civil Code states 3 (three) reasons for cancellation of the agreement, namely:

1. Mistake/misdirection (*dwaling*) jo. Article 1322 of the Civil Code.
2. Compulsion (*dwang*) jo. Articles 1323, 1324, 1325, 1326, and 1327 of Indonesian Civil Code.
3. Fraud (*bedrog*) jo. Article 1328 of the Indonesian Civil Code.

Should a broad line connecting all be withdrawn, it can be said that either misuse or abuse of an occasion (*misbruik van omstandigheden*), the mistake/deception (*dwaling*), Compulsion (*dwang*), or Fraud (*bedrog*) related to the implementation in good faith in a contract. In order to understand the meaning of the good faith more clearly, one should see it from the practice of the court, because of a dispute regarding the good faith in practice, has always been involving the court for its settlement.

In connection of the factoring activities (between Factor with Client or between the Customer with Factor), the basis of engagement among different parties can be recognized by the contractual relation. Therefore, a contract is an obligation among parties in conducting factoring practices.

The principle of freedom of contract in Indonesian Civil Code is the main base of the existence of factoring legal institutions. To be seen from its types, the factoring contract according to Book III of the Indonesian Civil Code, belongs to the unnamed contract (*Onbenoemde Overeenkomst*), which is a contract which is not stipulated in the Civil Code, but there exists in the community (Badrulzaman 2001).

Factoring contract such this is an obligatory contract that is valid only for certain parties as in the contract that is binding under a contract in pursuant to power as stipulated within article Section 1338, verse (1) of the Indonesian Civil Code, namely a contract that is made officially and serves as the governing law for all parties involved.

Of the elaboration above, it is known that the factoring practice is not falling apart from the law of

contract and a relationship that carries economic value for all parties. Therefore, in relation of factoring contract, the fixed standard contract is not recognized, however there is always a room for all parties to negotiate in order to reach agreement. It is the principle of freedom of contract that becomes the basis of the factoring contract. Regarding whatever has to be agreed upon, in general, the following can be concluded: Some understanding that is related to certain definitions, the administration of factoring, (cost (administration cost, discounts, provision, down-payment, the cost of contract making, postage expenses), Payment (means of payment, period of payment, and the collection over the Customer), Right of Recourse or not, notification of the transfer of the account receivables, expression and assurance/guaranty, and the mechanism of dispute settlement.

Standardization of the things that must be present in the factoring contract is absolutely necessary, because the handling of any accounts receivable sold by Client has different characteristics, depending on the status of accounts receivable itself (such as in terms of the length of the due collection period and in terms of the amount of the accounts receivable itself), as well as financial circumstances and the history of the Costumer being in debt.

As a matter of fact, though a negotiation is promoted in order to reach an agreement, yet the making of factoring contract remains resulting in many legal issues, most specifically related to the implementation of the factoring contract itself, because it is not yet accommodating the principle of transparency and the principle of balance, so an agreed contract always raises the question of sense of justice among parties involved.

Of the cases of factoring being analysed, it shows that disputes are always caused by the failure of the factor to implement the demands of the right to receive payment from the Customer in factoring contract without recourse on the one hand, and on the other hand is the Client in factoring with recourse.

The disputes over rights will occur when the Factor does not obtain the correct information about the state and the financial condition of either the Customer or Client as well as well as the quality of the account receivables being traded, fully and completely. As with the factoring contract, in Indonesia, along with its process, in each offer proposed by the Client, the Client shall bind himself/herself to comply with all requirements and related provisions imposed by the Factor (Bachtiar 2002).

The conditions in the making of factoring contract must be followed by Client starting from the very beginning when Client proposes the feasible accounts receivables and completely rights from his business transactions chronologically in great details (Pantouw 2006). Therefore, the Client tends to be passive and less aware in providing information related to the quality of the account receivables being transferred to the Factor.

In the part of the Client himself, such a situation is not an advantage. As revealed, the motivation of the Client in selling his account receivables because of the need of fresh money as a working capital to finance his business rotations, which is severely disrupted due to the tied up capital in the form of accounts receivable bills that have not been due yet. Besides fresh funds can be used by the Client to add his capabilities to finance his business venture by without submitting a guarantee (collateral) in any form as requirements.

In a factoring contract, in general, the dominant will of the Factor is strategically intended to minimize the potential risk that he/she may shoulder. This is true because the factoring business carries considerable risk with it, in which the Factor fund is financing something that is not visible or tangible, but rather in the form of accounts receivable (Rachmat 2003).

Apparently, the position of the Factor can be said as very strong while the Client as the party whose account receivables are sold to the Factor is the weak position, so that he/she normally has to comply with any conditions imposed by the Factor.

According Herlien Boediono, if in a factual condition, if the position of one of the parties to the contract is stronger than the other or not equal, then the charge will affect the content and scope of the intent and purpose of the contract. Due to inequality of achievement in the contract, it will cause an imbalance in the contract. In principle, with the bases basic principles of contract law and the principle of balance, the elements that determine the fairness of a contract are not only the achievement of equality, but the equality of the parties (Boediono 2006).

From the above description, it can be concluded that the parties, in executing factoring contract, are given a freedom to negotiate a collective agreement that is outlined in a written contract. The openness among parties in providing information and the balance of position in implementing the bargaining position is obviously required in the making process of factoring contract. In the event that the bargaining position cannot be realized, the contract does not potentially give the sense of security to all parties involved. Therefore, a contract that is made on the basis of freedom of contracting is obviously not giving justice/fairness to all parties and is potentially resulting in many legal problems.

4.1b *Harmonization of the Principles of Commercial Contract Law of UNIDROIT into the contract law commonly applied in Indonesia, most especially in Factoring Contract*

4.1b(1) **Harmonization of law system, most especially of the Factoring in Indonesia**

Harmonization, in the field of law, constitutes an important purpose in implementing legal relations. Harmonization of law to the international provisions embodies a crucial role to comply with free trade in

pursuant to WTO and APTA. Consequently, as a member of WTO, APEK and APTA, Indonesia needs pay close attention to the principle of international and commercial law as produced by UNIDROIT, along with several reasons like the following:

a. "Almost every country in the world following the UNIDROIT principles in contract law reform, such as the Netherlands. Russia, Germany, USA, and Australia. Even the people of Europe in 1997 could finalize the Principles of European Contract Law which was substantially naming use of the Principles of Law of International Commercial Contracts of UNIDROIT.
b. "The Principles of UNIDROIT have widely considered the issue of development that is often experienced by some developing countries, e.g. the provisions of clauses on the gross disparity and hardship."
c. "The principles of UNIDROIT pay attention to the protection of the weaker party in a position to make a contract, such as one of the parties must accept a contract or a standard clause, or the rights is granted to persons who are not involved in the making of the standard contract to defend themselves against a contract that is not balanced."
d. "The principle of freedom of contracting is limited by the forcing law in order to carry out the legal interest."
e. "UNIDROIT Principles are practical, because it is prepared to accommodate the interests of practices that can bridge differences in legal systems of various constraints."
f. "UNIDROIT Principles set the pre-contracting responsibilities, so that good faith must have been in effect since the time of negotiation."

Through the harmonization of freedom of contracting, the principle of international commercial contract of UNIDROIT, to the Indonesian contract law, most specifically for the factoring contract, becomes a necessity and it is difficult to avoid.

In an activity of financing the factoring, the application of the principles therein contained in the UNIDROIT Principles are important in encouraging the financing of factoring activities.

In the making of factoring contract, many of the existing provisions and clauses are mostly based on the points agreed during the negotiation period.1

In light of the need for a rule of law that can accommodate protection of all parties involved during which time of factoring contract is made, then the principles of UNIDROIT should be accepted and could be used as a rule of law to implement the activities of factoring through harmonization of law. However, it is not all of the legal concepts deriving from foreign countries can be of perfect match to the development law of Indonesia.

The ideal steps taken in the harmonization of the legal system as proposed by

L. Friedman, "A legal system should have the following elements: namely the structure of law, the substance of law and the culture of law, by which the relationships among all elements can be similarized just as to how an engine performs its duty, the legal substance is what is produced or done by the engine, then the culture of law is whoever or whatever that decides to turn on and turn off the engine and who decides how the engine is used and operated.

Various adjustment is needed when one is doing harmonization of the principles of UNIDROIT into the existing national legal system, which is covering some of following components, namely, legal structure, legal substance and legal culture. It is the step of law harmonization that the author uses to analyse the principles of UNIDROIT to the Indonesian legal system.

Another thing to note is that the harmonization of the UNIDROIT Principles into Indonesian Contract Law System is done restrictively, as far as it is needed in the activity of factoring concerning the principles associated with the principles of openness and balance.

Firstly, the adjustment of legal structure component along with its institution of the UNIDROIT principles into the National Law System. As already noted, that the principles contained in the Indonesian Civil Code still not adequately complete to meet the needs of the legal aspects of factoring activities in Indonesia, particularly in the legal aspects of the factoring contract which is the legal basis for the creation of a legal relationship between the Factor – the Client and the Customer. Based on the principles of hierarchy of law, the needed regulation may be in the form of law that is equivalent to the Indonesian Civil Codes. Consequently, it must be established through a process undertaken by the holder of the existing legislative functions in Indonesia, namely the Indonesian People's Representative Council (DPR), that in the process of the formation, this must also meet the principles contained in Law No. 10/2004 concerning the Establishments of Legislation , most especially on the people's involvement, the business players of factoring, so as to ensure that they law satisfactorily meets the needs of the people , most especially the legal culture approach.

Secondly, the UNIDROIT Principles of legal substance approach of the Indonesian Legal System. Civil Code alone is not just enough for providing certainty and legal protection for parties who wish to practice the financing activities of factoring as an option to obtain liquid funds for his business needs. Therefore, it needs some form of legislation that specifically regulates the financing activities of factoring in order to fill the

weakness of the Civil Code, and is more tailored to the practical needs of financing activities of factoring.

These weaknesses can be topped up by harmonizing the principles of UNIDROIT, most especially related to the balances and openness as stipulated within Article 1.7 on the principle of Good Faith and Fair Dealing, Article 2.1.15 on the principles of Negotiation in Bad Faith, Article 2.16 on the Principles of Duty of Confidentiality, as well Article 3.10 on the principle of Gross disparity.

Based on this, then there is a substantive conformity of Contract Containing Big Difference Principle (Gross disparity) against the substance of the Indonesian Legal System. Therefore, the acceptance of these principles do not lead to legal problems to the existing legal system in Indonesia.

Thirdly, the harmonization of the UNIDROIT Principles of cultural components in Indonesian law (legal culture). UNIDROIT Principles after being received either the substance, the structure or the agency, it should also be adjusted with the Indonesian legal culture. It is important that the UNIDROIT Principles having been received can be effectively implemented by the community, in this case by the perpetrators of factoring activities.

After the harmonization of the method as proposed by Lawrence Friedman, the next following question is what will be the guarantee that with application of the UNIDROIT Principles in the Law Contract System in Indonesian be affecting the development of factoring activities? In fact, factoring activities in Indonesia continues to decline drastically, as has been stated earlier that the value of transactions financing factoring in mid-1997, which was IDR. 10, 097 trillion rupiah. In July 2004, the factoring activity got decreased drastically to an amount of IDR. 2, 855 trillion rupiah.

To answer these questions the author will outline the developments that occurred in the United States and Japan after harmonizing the UNIDROIT Principles in the activities of factoring in their respective countries, as a comparison. In this case, the author will be describe the legal aspects on the activities of factoring and its development the United States and Japan.

Of events that occurred in the United States and Japan, there is a strong correlation or a link between the fairness of factoring contract with the increase in the volume of transactions on factoring activities. On the thing that underlies the linkages is just because there are complete rules for all parties with the very basic concerns to pay attention to a fairness of a contract as it is materialized in terms of legal protection for all parties ever since the beginning of the pre-contractual period. This becomes so important to note for the legal reform in Indonesian, most especially in the field of factoring activities, since the activity of factoring, in Indonesian, has been showing a declining transaction trend, from year to year. With this fact, a hypothesis can be withdrawn that a certainty will produce the increase of transaction volumes of factoring activities in Indonesia as long as the UNIDROIT Principles of international commercial contract are adopted or harmonized into the national legal system just like what happened in USA and Japan and this can be a legal reform of contract law that is absolutely needed in Indonesia.

Thus, harmonizing the UNIDROIT Principles constitutes an important thing in factoring activities in Indonesia. Since it is not all of the UNIDROIT Principle can be fully adopted into Indonesian law, then it is only some of the most matching ones that should be adjusted to the Indonesian Civil Code, such as some principles which heavily related to the balances and openness like the principles of Good Faith and Fair Dealing, Negotiation in Bad Faith, the Duty in Confidentiality as well as Gross Disparity. Such an act should entail in the form of binding law and regulation abided by all business operators, most especially in the field of factoring (Factor, Client and Customer).

Awareness of the parties involving in a contract, and the role of law enforcers that are very likely to be involved in the making of a contract, especially in the resolution of disputes over the issues of factoring contract, with all legal consequences based on the principle of freedom of contract UNIDROIT, particularly Advocate and the judges in their position as law enforcers of justice institution. As it is mentioned below:

1. The advocate's awareness in using the principle of freedom of contract of the Law Principles for International Commercial Contracts UNIDROIT as a guidance in the making of factoring contract.
2. The empowerment of court in seeking a contract and the necessity of the judges to make use of the International Commercial Contracts of UNIDROIT as a Source of law in determining a justice contract.

4.1b(2**) Data Analysis**

In this study, some data regarding the disputes and the settlements of the factoring activities, through the court house, are discussed and the discussion that the author has conducted on the problems and verdicts of court.

The cases of Bankruptcy Request as decided by the Central Jakarta Commercial Court through a decision NO. 11/PAILIT/1998/PN.Niaga/JKT.PST., in which PT. Profiliando Intratama Finance Bankruptcy as the Petitioner of Bankruptcy and Purnomo Onggowarsito as the Petitioned Under a Bankruptcy. The relationship between the parties is between the Factor and the Client the factoring contract. The appeal was filed by Factor on the basis that the Client does not pay the debts incurred to the Factor which is due to factoring contract.

Furthermore, regarding the request from the Factor to the Client to issue a Promissory Note as accessor/addendum of the Factoring Contract, which can be seen as the principal contract in bankruptcy cases

that have been decided by the Central Jakarta Commercial Court through a decision No. 84/PAILIT/1999/PN.NIAGA/JKT.PST., Between PT. Primarindo Finance Corporation as Petitioner and PT. Belmanda Lesatari as the Respondent. The basis of reason used by the petitioner was because the Respondent was not able to make payments on the debt that has been due over the period of the Promissory Note No. 001 527, dated August 5, 1997 with a maturity date of November 3, 1997, then the Promissory Note No. 001 641, dated 22nd September 1997 with a maturity date of December 22, 1997, and Promissory Note No. 001 905, dated December 8, 1997 with a maturity date of March 9, 1998, in which all of the Promissory Note arise due to the presence of the trading contract of account receivables (Factoring) No.5009-96-F, dated 25th September 1996, which was amended through an addendum of the factoring contract No. 2512-97-FA, dated 24th September 1997 with a maturity date of 25th September 1998

Based on the cases under-reviewed, one knows there is a perspective that a factoring activity is just the same of credit loan activities, only the implementation is done in the form of transfer of legal institutions of factoring contracts over the institutions of credit loan contract without being accompanied by the submission of any guaranty to the Factor, which is resulting in the relationship between the factor and Client as not being in good partnership but rather it is a sub-ordinate relationship between the creditor (the dominant) and debtor (the weak).

This is not really in line with the understanding and the spirit as well as the desire of factoring activities that requires that the relationship between players in the factoring activities is a the partnership one. This imbalance can be seen from the request of the Factor to the Client Factor to issue a Promissory Note as accessor of the Factoring Contract as a principal contract or a request imposed to the Client to issue the Deed of Recognition of Debt and/or (*Borghtoch*) if there is Guarantor refers to the relationship of a Client and Factor.

Of the cases mentioned above is also known that, in general, entrepreneurs interpret and carry out the activities of factoring as a borrowing institution in order to get fresh money/liquid funds with a guarantee in the form of account receivables. Based on the analysis, in fact, there has been a misconception over the understanding of factoring activity – among business players, advocates as well as their legal advisors – because the factoring activity encompasses the meaning of providing finance service in the form of trading of the account receivables by means of transferring the account receivables to the factor even though the 100% is not done as well as the inherent non-financing cost as an undetectable part from the factoring can then be neglected, which means that the factor should provide the service of the credit management, so that the Client does not have to organize the book-keeping/note-taking over the collection, for such a roles has been taken over by the Factor, in which the Factor will provide report to the Client periodically with all information relating to the bonafidity of customer who is buying the product, the position of the Client's debts including the due date times, Account Statement including the due date times, and conducting collection to the Customer.

Based on the analysis above, it is fully realized the legal awareness of the peoples with regard to factoring contract is to remain lower at the moment – that it is always resulting in various misperception, most especially at the level of the implementation by all parties involved. Not less important, as a matter of fact, efforts of law enforcement, which has been in common practice today and most especially dealing with factoring disputes, is remains to reflect various injustice or unfairness among parties involved. Such a wrong misperception has to be abolished because it will give bad impacts to the development of financing activity of factoring, in Indonesia.

Based on the observations, several causes have led to the slow progress of the financing of factoring activities in Indonesia, such as:

1. The absence of legal certainty regarding the mechanisms and guidelines for implementation of factoring in the Indonesian positive law, so that the protection of the parties in the course of factoring still has yet to get the required legal certainty;
2. The implementation of factoring activity still relies more on the principle of trust but at the same time it is clearly weakening the judicial function – that until now there is no certainty and because of that there is so often abuse of trust by the Client that led to the unsettled disputes;
3. Still there is a missing information about the existence of factoring business in society, namely that the activities of financing known as only effort of transferring the accounts receivables;
4. An excessive fear of the Client's company's secret sales;
5. An excessive worries among the Clients whole sales date be leaked to other competitors.
6. The low level of openness of Client.
7. The wish to maintain good relations with the Customer.
8. Legal Protection of the Client tends to be ignored:

a. Legal protection by the Government;

The government shall oblige factoring companies to enclose the basic format of factoring contract during the time they come to arrange the company's establishment – with purpose that the contract made may comply with the principles of the contract law and of the factoring. With this, the legal protection for all parties

can be realized.

b. Legal protection in the factoring contract;

As a matter of fact, there are many discrepancies occurring in the factoring contract, most especially related to the basic principles and the required means and end, including the imbalances of rights and obligation among different parties. What has commonly been taking place is that a certain contract made is still defending the interest and rights of the company – rather than how the company performs its obligations.

c. Legal protection in the event of a dispute;

In the settling of disputes, a deliberation involving all parties involved has always been done, because all parties normally and only prefer to maintain the good relations among them, and is to maintain the company's good reputation. In such a deliberation, the company normally applies three ways of settlement, and even the three standardized ways are aimed to benefit the company.

9. The apprehension of the Factor against the condition and ability of the Client is really high, including the quality of the account receivables being transferred by the Client. In such a condition, the Factor generally employs a significantly high standard related to the account receivables being sold – besides the relatively long list of bureaucracy that one has to go through. As for the Factor, this is all merely intended to ensure a security and certainty over the next repayment performance.

In order to overcome various problems inhibiting the development of factoring activity in Indonesia, it is necessary needed a legal rules as a guide, which will provide answers to some sorts of problems being already explained her. However, it is of necessity for the people to know, recognize and regard and even abide the prevailing rules. What it means by people here varies to the meaning of the common people or the people who are engaging as players in the activity of factoring, namely: the Factor – the Client and the Customer.

In light of the above case, the author has chosen the UNIDROIT Principles as basis to harmonize the law, as it serves a solution for the activity of factoring in Indonesia. Consequently, the development of factoring can be one of the most intriguing element in context of Indonesian economy, in Indonesia. The UNIDROIT Principles as a choice is believed as to be able of providing clues to fill the gaps and weaknesses that is remaining to be found in the activity of factoring, in Indonesia, in general. Furthermore, the harmonization of UNIDROIT Principle in to the Indonesian Legal System is meant to govern the activity of factoring so that various kinds of problems in context of the activity of factoring, either with regard to legal certainty or of the opens, as well as the balance a spects can well be answered.

4.1b(3) **Model and Procedure for Factoring Activity in Indonesia**

The results of harmonization of UNIDROIT Principles would then be included as new basis into the principle of Freedom of Contract as therein contained within the Indonesian Civil Code. These are all intended that all gaps and weaknesses therein contained in the Civil Code can be improved or furnished as necessary, most especially concerning the principle of openness and balances.

The insertion of the UNIDROIT Principle into the Indonesian Civil Codes, most especially related to the principle of openness and balances, and it shall be made perfectly by putting all elementary things into account and must ensure of not resulting in more conflict in accordance with the prevailing rules and laws.

The law or regulation that is specifically dealing with factoring activities is done by inserting new principle into the present Indonesian Civil Code, most especially related to the principles of Good Faith, Fair Dealing, Negotiation in Bad Faith, Duty of Confidentiality and the Gross disparity – as they are governed within the UNIDROIT Principle. As for Indonesia, the Law NO. 10/2004 can then be used as to start initiating the harmonization with regard to the issue being under review.

The legal substance as it may be regulated within the law of factoring, as widely described beforehand, is to be expected of improving weaknesses that are commonly found in the factoring-activity in Indonesia. As these also be aimed to ensure and provide fairness and justice where legal certainty is well accommodated.

The author is also in the opinion of believing the rules and regulation of factoring activity shall have to regulate the following matters, regarding: certain definition, players and all the parties involved, the objects of factoring, types of factoring activities, scope of activity, ways of factoring service rendered, mechanisms related to the factoring and legal settlement. So far, by common practice, there are still many contracts found and generally agreed by parties within the scope of factoring activities.

To some extent, there is no uniformity of model, mechanisms and procedures as a common guide in the area of factoring transaction, in Indonesian. The prevailing models used by practitioners of factoring are not yet considered an ideal standard and one knows this from commonly arising legal problems, for within them there has yet to provide and guaranty the emergence of fairness and justice, as well as openness and balances.

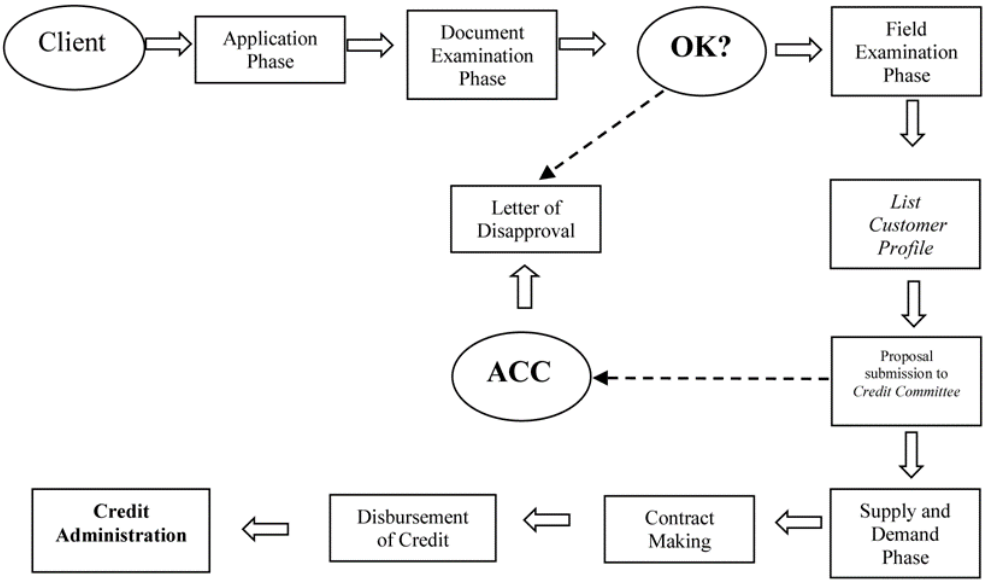

Figure – Schematic drawing for ideal mechanism and procedures of factoring transaction in Indonesia.

The above proposed schematic drawing (Figure) is expected to be well harmonized into the law of factoring commonly applied in Indonesian. Good regulation of factoring will provide much clarity and an ideal picture as a whole so as to make sure there is a tangible legal structure of factoring and not just merely a loan contract between the Factor and the Client. In the end, it is the expectation of all that with this long awaited legal reform, many lingering problems in the area of factoring activities can then be well minimized.

In addition, with better regulation in the area of factoring, there is an expectation of it to give much influence in the promotion of using the factoring financing business institutions, in Indonesia. This is all regarded important considering the trend of domestic and international trading (Export and Import) of goods and services continues to grow from time to time, either in the volume and forms, in Indonesia. And, the increased performance and quality of the said trading will eventually give significant effects to the industrial activities, which is believed in the long run improving people's lives and welfares.

In short, a better regulation of factoring also will improve legal certainty and provide proper protection to all players and practitioners of factoring. This is going to be a breakthrough or a shortcut for the Small and Medium Scale business entrepreneurs to feel the air many of whom have been encircled by the lingering problems of capital gaining for their business rotation. In other words, with such a better factoring performance, many of business operators are becoming more uncourageous to make use of the factoring business as an alternative financing and capital gaining for the business in the short term period.

5. Conclusion

Based on the explanation above it can be concluded that the role of the principle of openness and balances is meant to ensure a better implementation of factoring contract, which is fair and just for all parties involved, in Indonesia and that it is as an essential element in the making of fair contract. Such an opinion is based on the theory proposed by Adam Smith and John Rawls. Adam Smith proposed the importance of openness of fairness that should occur in an economic dealing and according to him, there are three cumulative justices being the focus of attention, such as: The principles of No-harm, Non-intervention, Fair exchange. While John Rawl advocated the importance of government's intervention to restrict market freedom so as to create balances among economic players and to provide protection to those that economically weak. The ideas proposed by the two referred experts here are just the same characteristics normatively used within factoring activities:

1. What has been the legal constraints in the development of factoring in Indonesia is the fact that the principle of freedom of contract remains to be used as basis of all parties involved in the making of contract, which is apparently not yet accommodating justice and fairness for the parties involved. This is a clear weakness of the Indonesian Civil Codes. It has yet to regulate the procedure of a pre-contract session that should be done first as to open a wide opportunity of all parties to negotiate all things based on the principle of openness/fairness. Another thing is related to the information giving with regard to the financial ability of a Client as well as the quality of the account receivables. More importantly, there is a need to have a regulation for all parties in order to ensure the emergence of equality in context of bargaining position of all parties themselves and with some

lacks of these things one may still see many unsettled disputes in the activities of factoring, and therefore many factoring contracts just cannot be implemented fairly and justly;

2. The importance of the principle of openness and balances in the area of factoring activities officially confirms the needs of harmonizing UNIDROIT Principles into Indonesian legal system as a great way-out to feel the gaps found in the Indonesian Civil Code. Based on the analysis made, so far, the UNIDROIT Principle can be harmonized into Indonesian legal system, for it is regulating the compliance of legal structure, legal substance and legal system compatible as the of the Indonesian's law system. Further, the weaknesses of the contract law being commonly available in Indonesia can actually be improved by the UNIDROIT Principles, most especially in cases that deal with the principle of openness and balances, such as the principle of the Good Faith and the Fair Dealing, the Negotiation in Bad Faith, the Duty of Confidentiality, the Gross disparity, into a certain law that specifically deals with the activity of factoring, in Indonesia.

6. Recommendation

Based on that conclusion, may recommended to the government and legislators to soon pass the law of factoring by harmonizing the UNIDROIT Principles as an additional basis to whatever already set forth or governed in the Indonesian Civil Code. This is all deemed Client necessary as to provide legal certainty, fairness and balances of positions of all parties involved in any factoring contract in Indonesia.

In view of law enforcement, most especially among advocates and lawyers, in context of their position and obligation, as law enforcers within the criminal justice system, in order to help socialize and use the UNIDROIT Principles in dealing with Clients to get factoring facilities despite the factoring law is not yet a positive law in Indonesia. The same thing, for the judges, as an element within the criminal justice system whose authority has been imposed by the state upon them in order to make any decision, in any case settlement related to the freedom of contracts, that is fair and just for all parties involved within a contract, so as to guaranty the sense of justice for all. With UNIDROIT Principles being harmonized into Indonesian contract law, all parties involved within a contract, will be able to implement a certain contract as a consequence of promises officially made upon which all parties involved have mutually agreed upon.

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