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Mediation Based on the Value of *Pacta Sunt Servanda* as a Regulation of the Interests of Creditors and Bank Debtors in *Cessie*

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Abstract

Receivables are the right to collect debts, a means of fulfilling civil obligations, a continuation of the credit agreement contract that must be held. The principle of Pacta Sunt Servanda as the foundation of giving direction, purpose, and fundamental value and ethical judgement to debts with property collateral with a time limit determined by the parties. However, the need for money when the receivables are not yet due encourages the receivables to be transferred into cessie, doctrinally the holder of the eigendom right has the power to eigenaar freely and to act freely on the property with full sovereignty, even so, the problem arises with the submission following the formal rules of cessie raises legal consequences, if without being notified, or in writing has been acknowledged and approved. This article questions whether the submission of receivables in the form of a unilateral legal action through cessie reflects the value of pacta sunt servanda which provides equality and justice for the parties? By applying a normative juridical research method based on a statutory approach, a legal conceptual approach, and a case approach, it strengthens the results prescriptively analytically, related to cessie which is worth justice being a hope for the business world, preventing potential legal uncertainty, avoiding potential disputes over the implementation of the transfer of receivables, preventing economic losses, by internalising the value of legal certainty and justice. The value of pacta sunt servanda in this case relates to the equal position between the creditor and the debtor, this aspect also emphasises the guarantee of human rights for the parties to the agreement, as well as legal certainty and predictability in the process of fulfilling the provisions of the rights and obligations of the agreement agreed by the parties.

Keywords: ***Engagement, Receivables, Cessie, Consent, Mediation***

INTRODUCTION

Empirical banking practices place banks as intermediary institutions that channel funds to the public, both private individuals and legal entities that need capital loans. The bank as a lender of public funds is in the position of a creditor while the community receiving funds acts as a debtor. Each of their positions is in a position of supply and demand.

If there is a misunderstanding, related to the wishes of each related party, then the agreement is made and stated in the Deed of Credit Agreement. The agreement between the debtor and creditor contains clauses that are binding, which is an emanation of the values of the principle of *Pacta Sunt Servanda*. The agreement in this case, which is made legally, applies as law to the parties who make it (Muljadi & Widjaja, 2014).

In this context, the legal principle must be obeyed because it contains ethical demands that must be fulfilled, the agreement gives birth to achievements as rights and obligations that must be fulfilled, in this context, according to Article 1338 paragraph (3) of the Civil Code, an agreement must be carried out in good faith.

In a credit agreement, when the creditor provides a loan and a credit contract is executed, it is an implementation of the performance, at that time the Right of Receivables is also born as a debt collection right to the Debtor (Miru, 2014). In this position, the creditor is the holder of the right as an object that can be enjoyed fully and freely because there is an interest in funds on the creditor's side or because of a certain position of liquidity of the Bank, the Bank can sell its receivables, because the receivables have not matured as uncollectible receivables.

Cessie as a way of transferring debt on behalf of the concept was born from the doctrine that adheres to Article 570 of the Civil Code as *Eigendom* or Property Rights with the privilege of *Eigendom* rights to be able to enjoy freely and have the right to eigenaar the receivables. *Cessie* in its implementation is regulated in Article 613 paragraph (2) of the Civil Code concerning the legal consequences of the implementation of *cessie*, namely that there is no effect on the debtor but after it has been notified or in writing has been approved or acknowledged.

Reflecting on these issues, this article offers different thoughts compared to previous studies, including first, Juniar (2021) research which focuses only on the context of the relationship between *cessionaris*/creditor and *cessus*/debtor in terms of mortgage rights in debt transfer agreements and the legal consequences of default. Second, the research of Suryamizon et.al. (2020) which justifies the implementation of *cessie* in the operational framework of bank institutions and certainty standards in the implementation of *cessie*. Finally, Saputro et.al. (2022) elaborate on the existence of *cessie* which emphasises the transfer of debt that deviates from existing or ongoing agreements.

Based on the theory of legal certainty that is reinforced by the theory of justice, it encourages fair and certain relationships or contracts, especially the placement of *cessie* in credit agreements, given the characteristics of property rights that are still related to other obligations in the event that the debtor fulfils all the achievements of the credit agreement. In this case, in line with the conditions faced in the credit agreement, this article also highlights the value aspects contained in the principle of pacta sunt servanda which are relevant to be used as a basis for placing cessie in a credit agreement that guarantees justice, legal certainty, human rights, balance of parties, and predictability that can be implemented and agreed by both parties. Referring to the comparison and context of the background issues, this article is limited to the context of the study of the nature or value of whether the transfer of receivables as a form of unilateral legal action through *cessie* reflects the value of *pacta sunt servanda* which provides equality and justice for the parties?

RESEARCH METHODS

This article is based on normative juridical research methods (Hutchinson & Duncan, 2012), supported by the statutory approach, legal conceptual approach, and legal fact approach (Sudiarawan, et.al. 2020). With the discovery of sources of legal material as a study material both primary, secondary and tertiary legal materials. In this article which is prescriptive analytical in nature, found through literature studies then the source of legal material is analysed and reviewed with interpretation techniques and legal systematization techniques (Hutchinson, 2015).

RESULT AND DISCUSSION

In the era of economic globalisation, the growth of the world's technological and economic systems is growing very rapidly and modern, in a very tight competition, the law is growing far behind (Saputra & Emoywodo, 2022), the demand for the realisation of order in the economic activities of the business community (Rosser, 2013), is the availability of legal institutions that can secure business activities in an effort to achieve the intended economic and legal goals (Hermanto & Aryani, 2021). To be able to pursue and fulfil these demands, research in the field of law must be intensively carried out (Subawa, et.al. 2023).

In the business world, an agreement is an act by which the parties bind themselves with one or more people (Woo & Hong, 2010). The promises that are agreed upon, through their agreement, are framed by law. Credit agreements based on debt and credit agreements must begin with a credit agreement contract. The security of the realisation of the performance of a legal agreement is the main and essential demand for the parties.

The agreement can be realised if it begins with an understanding between the Creditor and Debtor about the clauses related to the credit plan rolled out by the bank, which is followed by the realisation of a credit contract either made authentically or under hand, which will give birth to a form of engagement between the parties, which is framed by a bank credit agreement. The legal basis of a bank credit agreement is a debt and credit agreement. The bank acts as a liaison between the interests of people who have funds and people who need funds, acting as an intermediary institution.

The credit agreement is the main agreement (principle) which is real in nature. The real meaning is that the occurrence of a credit agreement is determined by the delivery of money by the bank to the debtor customer (Hermansah, 2005). As a principal agreement, this agreement will generally be followed by a material security agreement as an accompanying agreement that plays an important role in securing the credit that has been channeled. The existence of a security agreement is very dependent on the existence of the main agreement, without the existence of the main agreement as an obligatory agreement, there will never be a follow-up agreement as known as an assesoir agreement. This principal agreement becomes central in determining the existence of the assesoir agreement that follows it (Sugianto et.al., 2023).

Agreements made legally fulfil the provisions as stipulated in Article 1320 Paragraph (1) of the Civil Code (hereinafter referred to as the Civil Code), regarding agreement as one of the conditions for the validity of an agreement (Sugiastuti & Purnamasari, 2020). Such an agreement will give birth to an obligation for the parties, as a reflection of the reflection of the values of the Pacta Sun Servanda principle, in accordance with the provisions stipulated in Article 1338 of the Civil Code. As stated by Charles YC Chew with Promissory Theory, an agreement is a promissory agreement between two or more parties that can create, modify, or eliminate legal relationships (YC Chew, 2008).

In principle, agreements made legally by the parties will give birth to new obligations, modify or abolish old ones and "apply as law to those who make them" (Al Fikry, et.al., 2021). The Credit Agreement is actually identical to a loan agreement and is controlled by the provisions of Chapter XIII of Book III of the Civil Code (Hamzah, et.al., 2023). Another opinion states: "in whatever form the granting of credit is in essence a borrowing and lending agreement as regulated by Article 1754 to Article 1769 of the Civil Code" (Batubara, et.al., 2023).

Based on this lending agreement, the party who has received the loan becomes the owner of what was borrowed and then imposes an obligation on the borrower, namely, the loan must be returned of the same type to the lending party followed by all other obligations as an achievement that follows according to their agreement. The agreement contains a set of rights and obligations that must be carried out or fulfilled by the parties, which is called an Achievement (Slamet, et.al., 2023).

The term bank credit agreement can be found in the Cabinet Presidium Instruction Number 15/EKA/10/1966 jo Circular Letter of Bank Indonesia Unit 1 Number: 2/539/UPK/Pemb. 1966 concerning Guidelines for Policy in the Field of Credit, instructed that, "providing credit in any form, banks are required to use a credit contract" (Hapsari & Kurniawan, 2020). For the Bank, the obligation to use this credit contract after the event of money transfer becomes a preventive security, namely a security to prevent congestion in the return of credit that has been channeled to the business world and to the community (Amalia & Putra, 2022).

Similarly, in a bank credit agreement, whose legal basis is derived from a loan and borrowing agreement, because the bank has provided a credit loan as an achievement, then based on the credit agreement, a position will be born where the bank as a lender has the right as the owner of credit receivable rights, the right here has a material nature where the owner of the right becomes the owner of the object or the holder of the eigendom right with full authority and is free to take any action on his property, including mengeigenaar credit receivable rights.

The obligation born from a credit agreement gives birth to rights and obligations in the form of performance as stipulated in Article 1234 of the Civil Code, which is the right of one party and the obligation of the other party involved in the contract, the achievements that must be carried out are generally three things that can take the form of: giving something, for example in the form of goods or delivery of money in exchange for achievements or counter achievements in the form of doing something and not doing something that occurs in the future. Failure to fulfil the performance is called default as stipulated in Article 1238 of the Civil Code: "where the debtor's condition is declared negligent by warrant or by similar deed or based on the strength of the obligation itself, namely this obligation causes the debtor to be considered negligent with the passage of time specified".

Agreements that are made legally and contain values that exist in legal principles, one of which is pacta sun servanda to guide direction or direction which is as a binding continuing regulation about giving something, what can be done and what cannot be done by the contracting parties. "Legal principles function as a foundation that provides direction, purpose, and fundamental judgement, containing values and ethical demands" (Hernoko, 2010). If the agreement has been accepted, agreed and then signed by the parties, the agreement here as an obligatory agreement is formally binding even though the performance and delivery (levering) of the object has not been carried out. Changes to the contents of the credit agreement, which is the standard guideline for regulating the rights and obligations of the parties, in order to fulfil the value of equality and binding must be with the consent of the parties, a unilateral shift can make one party's position even worse.

The implementation of cessie as a transfer of creditor receivables without approval and recognition, the debtor is only given a passive role, is a unilateral change of engagement that creates legal uncertainty from disobedience to the principle of pacta sun servanda.

While, legal certainty contains two meanings, namely first, the existence of general rules that make individuals know what actions can or cannot be done (Gribnau, 2013), and second, in the form of legal security for individuals from the arbitrariness of laws and regulations made by the government (Tsuvina, 2019). Injustice can make the debtor's position worse and result in losses. The loss experienced by the debtor is due to the change of the subject of the engagement, namely the Creditor, so that it experiences a loss of banking services if the cessionary is from non-banking, the debtor who fulfils the promised performance during the credit period will experience the loss of changing the quality of the creditor as the debtor's choice, other losses from the possibility of games and fraud when changing creditors, which in practice occurs outside the agreement and will of the debtor, there is a transfer of ownership of the debtor's collateral.

Rawls writes that it is unjust to sacrifice the rights of one or a few people in favour of greater economic benefits for society as a whole (Rawls, 1958). He argues that this is contrary to justice, which requires the principle of equal freedom for all (Waldman & Ojelabi, 2014). Social decisions that have consequences for all members of society should be made on the basis of rights rather than on the basis of benefits (Martin, 2015).

Stefanbau Theory can be used to study the norm of conflict, in an effort to seek legal certainty formal laws (Formell Gesets) that are applied in concrete life to regulate order in society must apply, sourced and based on a norm that exists above it, which is sourced again to the

highest norm called basic norm (basicnorm) whose form is not concrete (abstract), which has previously been formed in advance by Indonesian society (Hermanto, 2023).

Hans Kelsen argues "a legal norm is always sourced and based on the norms above it, but downward legal norms are also the source and become the basis for norms that are lower than him and in terms of the arrangement / hierarchy of the norm system, the highest norm is the basic norm to be the place of dependence of the norms below" (Kelsen, 2005). The norms of Article 570 of the Civil Code, as a privilege to creditors born from the law, do not have the philosophical values contained in the 1945 Constitution of the Republic of Indonesia, namely Article 27 paragraph (3) and Article 28D Paragraph (1), concerning recognition of human rights (Astariyani, et.al., 2023).

After the transfer of credit money to the debtor, the debtor's obligation to submit the right to collect receivables as a form of return achievement to the creditor is born (Mirwati & Nurdin, 2023). When the credit contract is signed, it contains a clause of debt acknowledgement by the debtor or can be made separately in a deed of debt acknowledgement agreement separate from the credit agreement. With an agreement containing a debt acknowledgement clause, the creditor's rights as the owner of the receivables are born. With privilage / special rights to creditors: "the right to enjoy the use of a property freely, and to act freely on that property with full sovereignty, as long as it is not in violation of the law or general regulations determined by a power entitled to determine it and does not interfere with the rights of others, all of which does not reduce the possibility of revoking that right in the public interest based on the provisions of the law and with the payment of compensation.". The right of receivables as an eigendom right in western civil law is meaningful as a creditor's right to objects, if the legal conditions for transfer such as title recht and legal authority are fulfilled, it will give birth to the legal right to carry out various kinds of actions to sell or alienate the debt, such as conducting *Cessie*.

Creditors can use various reasons and certain arguments including: financial liquidity difficulties, violations of maximum lending limits, cash needs for more feasible expansion or other reasons (Christiawan, 2021). "Creditors need money but creditors cannot collect receivables that are not yet due so creditors cannot collect them now from debtors. The solution is to transfer the receivable rights under its control, known as cessie" (Suharnoko, 2012). Cessie is a legal method of transferring receivable rights on behalf of which occurs on the basis of the authority to transfer and a civil event, sourced from doctrine or opinions of legal experts (Vellinda, 2022). *Cessie* "is a legal method of transferring receivables on behalf of" is regulated in accordance with the provisions of Article 613 paragraph (1) of the Civil Code: "The transfer of receivables on behalf of and other intangible property is carried out by making an authentic deed or under hand, by which the property rights are delegated to another person". Furthermore, the arrangement is in accordance with the provisions of Article 613 (2) of the Civil Code: "Such assignment for the debtor shall have no effect, except after the assignment is notified to him, or in writing acknowledged and agreed upon". "The transfer or assignment of receivables from the cedent to the cessionary remains intact in the sense that the receivables to the cessionary will not change the old engagement. So that in principle all the promises that existed in the old agreement that originally characterised the bill remain intact and transfer to the cessionaris, the position cannot become worse" (Satrio, 1999).

The existence of an obligation born from an obligatoir agreement that contains the value of the principle of pacta sun servanda, becomes a regulator regulating and limiting the authority of the owner of the receivables, freely taking action to transfer receivables unilaterally, with collateral by cessie. If the performance is carried out in full by the debtor, the transfer of receivables by way of Cessi*e* without the debtor's consent violates the principle of *pacta sun servanda*, where the parties based on this principle are bound by the agreement made equivalent to the law, there is also the principle of balance and the principle of good faith in the contract.

Cessie gives passive rights to the debtor for the implementation of the transfer of receivable rights by the creditor, is an injustice in the position and balance of the contract which is very detrimental to the debtor's legal position, because the agreement is still ongoing with the fulfilment of various achievements by the debtor, but the credit contract relationship between the debtor and the creditor is terminated by the creditor without the debtor's consent. Law must contain value, law without justice is bad. If it continues without justice the law is flawed, leave the law as Rawls said. A unilateral shift from the initial legal agreement will cause changes to the subject of the agreement and will certainly cause harm to the contracting party.

Based on Fitzgerald's opinion, legal protection has the aim of integrating and coordinating various interests in society by limiting these various interests can only be done by limiting the interests of others (Fitzgerald, 1970). The essence of Fitzgerald's theory of legal protection is that the law aims to integrate and coordinate various interests in society because in a traffic of interests, protection of certain interests can only be done by limiting various interests on the other side (Fon & Parisi, 2006). This opinion is then in line with M. Isnaeni's thinking that basically, civil legal protection can basically be packaged by the parties themselves when making an agreement, where at the time of packaging the contract clauses, both parties want their interests to be accommodated on the basis of an agreement.

Likewise, all types of risks are sought to be warded off through filing through these clauses, the parties will obtain balanced legal protection by their mutual agreement (Isnaeni, 2016). Thus, the context of cessie on credit agreements which is the key to the problem of such actions creates legal uncertainty over the implemented credit agreement contract which is an agreement that does not adopt the philosophical values contained in Article 27 paragraph (3) and Article 28D Paragraph (1) of the Indonesian Constitution regarding equal treatment before the law for each individual. In this context, cessie in credit agreements can be carried out but by considering mediation-based alternative dispute resolution patterns, which contain aspects for the sake of justice in equal legal standing and value-laden legal certainty in the implementation of Cessie, in the future, clauses are offered regarding the transfer of receivables on behalf of the parties that have been agreed upon and acknowledged, It can even be possible from the beginning through the word "agreement" both parties poured legal certainty in the deed of credit agreement containing clauses related to the implementation of cessie for the sake of legal certainty and justice or balance of the parties in the contract. Meanwhile, notification is given to the debtor to ensure the existence of the Cessionaris.

CONCLUSION

Cessie as a way to transfer receivables on behalf of, carried out on the full initiative of the creditor after the credit contract is executed. *Cessie* originates from the Doctrine as stipulated in Article 570 of the Civil Code, receivables for creditors are eigendom rights that provide privelege for the creditor as a fully free property right, transferable (eigenaar) without the need to involve the debtor. In Article 613 Paragraph (2) of the Civil Code, the implementation of *cessie*, which does not need to be approved and recognised by the debtor, implies that the quality and subject of the creditor has changed, even though the receivable in the name as a legal obligation born from a credit agreement is framed by the principle of *pacta sun servanda*, the principle that emphasises the attachment of the parties in the fulfilment of the agreement which contains promises that must be fulfilled, made legally, and binds the parties as binding as the law. The creditor and debtor are bound by the clauses of the agreement, the initial bond as the main agreement is not erased, it remains as before and must not make the debtor's position disadvantaged. For the sake of justice in equal legal standing and value-laden legal certainty in

the implementation of *Cessie*, in the future, clauses are offered regarding the transfer of receivables on behalf of those who have agreed and acknowledged the parties, as outlined in the credit agreement. Meanwhile, notification is given to the debtor to ensure the existence of the *Cessionaris*.

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