Analysis Of TheVadility Of A *Cession* Over A Receivables Sale And Purchase Agreement That Was Subject To An Invalid Novation

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Abstract

In order to guarantee smooth capital turnover, banks would often "withdraw" their capital even if the receivables (often from credit) that they currently own are not yet payable, by selling their receivables, followed by cession. However, in practice this is often problematic. Most of the problems revolving around this practice is that the cession that follows the selling of receivables is conducted not in accordance with applicable laws regarding cession and could therefore backfire and become a problem for the bank in question. The cession of Permata Bank on Debt Assignment Deed (Cession) Number 85 dated 5 May 2017, as stated in the Central Jakarta Commercial Court Decision Number 131/Pdt.SUS-PKPU/2018/PN.Niaga.Jkt.Pst is one of such problematic cessions. On this matter, the assignment of receivables was done through Debt Assignment Deed (Cession) Number 85 dated 5 May 2017, related to a Conditional Receivables Sale and Purchase Agreement that was novated and then amended. This article uses a normative juridical research method. The research specifications used in this study are descriptive analytical. The secondary data used by the author in this study consisted of primary legal materials, secondary legal materials, and tertiary legal materials. The data analysis method used is normative qualitative. The Conditional Receivables Sale and Purchase Agreement is carried out without the transfer of ownership with cession, so that the ownership has not yet been transferred to the buyer. The Novation and Amendment To the Conditional Receivables Sale and Purchase Agreement is also invalid because it was carried out without involving the debtor. So, it can be concluded that the cession of the Conditional Receivables Sale and Purchase Agreement which was later novated and amended is null and void because the cession was made under a receivables sale and purchase agreement that was invalidly novated.

1. Introduction

The livelihood of a bank depends on the amount of credit given by the bank within a certain period. This is since the more credits a bank provides, the more revenue it earns.[1] However, in addition to the amount of credits given, banks must also keep in mind the quality of the credit. Even if all credit proposals have been analyzed with 4P, 5C, and the necessary principles, the risk of nonperforming loans will always be present. Nonperforming loans can be caused by a variety of factors, such as a mistake in procedure in providing the credit, intentional misadministration by the parties involved, and other factors such as macroeconomics.[2]

Nonperforming loan can cause huge losses for banks. The existence of *nonperforming loan* can disrupt the Banks's capital turnover, an essential part of banking. This is since a smooth capital turnover signifies the healthy operation of a bank. Therefore, for the sake of its business a bank must avoid *nonperforming loans* as best as possible so as not to disrupt its capital turnover.

For the sake of ensuring smooth capital turnover, banks often attempt to "withdraw" its capital even though the receivables (from credits) acting as the source of that capital is not yet due and payable. Banks would do this on all its credits, whether performing or nonperforming. Such "withdrawal" is done by assigning its receivables through *cession*, preceded by first selling such receivable through an agreement. By receiving the money from the sale, the bank has effectively "withdrawn" the available credit form such receivable that is yet to be due and payable. However, in practice this is often problematic. One of the main problems that arise is that the assignment of the receivables is not done in accordance with the law, which in turn backfires and becomes a bigger problem for the bank.

In 1999, a particularly problematic and spotlighted *cession* case occurred: the *Bank Bali Cession*. In the *Bank BaliCession* case, the rights to claim over debts owed to *Bank Bali* by *Bank Umum Nasional* and *Bank Dagang Nasional Indonesia* which were transferred to *PT Era Giat Prima* became problematic and, in the end, said *cession* was annulled by the Indonesian Bank Restructuring Agency on the basis of law and public interest.[3] A problematic *cession* case would then again be repeated in 2018 by *Bank Permata*.

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[1] Kasmir, 2016, *Bank dan Lembaga KeuanganLainnya, EdisiRevisi 2014,* 17th Print, Jakarta :RajagrafindoPersada, p. 104

[2]Hermansyah, 2020, *Hukum Perbankan Nasional Indonesia,* 3rd Edition, 9th Print, Jakarta :Kencana, p. 60

[3] Akhmad Budi Cahyono, "*CessieSebagaiBentukPengalihanPiutang Atas Nama*", Journal Lex Jurnalica, Vol.2 No.1, 2004, p. 14

The *Bank Permata Cession,* as within Central Jakarta Commercial Court Decision Number 131/Pdt.SUS-PKPU/2018/PN.Niaga.Jkt.Pst, is another occurrence of a problematic cession. In early-mid-2017, *PT Bank Permata Tbk.* performed a sale of its assets to *CVI CVF III Lux Master SARL*, a company originating from Luxemburg. The assets sold took the form of a portfolio containing nonperforming loans over a number of debtor companies, with the transaction value of the sale on the basis of the Conditional Receivables Sale and Purchase Agreement signed on 4 March 2017 being Rp1,124,101,372,087 (one trillion one hundred twenty four billion one hundred one million three hundred seventy two thousand and eighty one Indonesian Rupiah) before fees, commissions, costs, expenditures and tax.[4]

PT Pelita Cengkareng Paper was one of the debtors of *PT Bank Permata Tbk.* That is, the debt of *PT Pelita Cengkareng Paper* was one of the receivables of *PT Bank Permata Tbk*sold under the Conditional Receivables Sale and Purchase Agreement. Previously, *PT Pelita Cengkareng Paper* was a debtors of *PT Bank Permata Tbk.* as stipulated within Agreement of Banking Facility Provision Deed (Specific Terms) No. 93, dated 22 August 2013, made before Mira Marizal, S.H., M.Kn., which by virtue of Supervisory Assembly of Notary Area Administrative City Central Jakarta Decree (*Surat Keputusan MajelisPengawas Daerah Notaris Kota Administrasi Jakarta Pusat*) Number 030/MPD.JKT PST/CT/IV/2013, dated 24 April 2013 as the replacement of Drs.GunawanTedjo, S.H., M.H., Notary domiciled in Central Jakarta with its final addendum, Addendum to Agreement of Banking Facility Provision Deed (Specific Terms Addendum) KK/16/1195/ADD/MM dated 30 June 2016.

Over the above debt of *PT Pelita Cengkareng Paper*, *PT Bank Permata Tbk.* as the creditor entered into the Conditional Receivables Sale and Purchase Agreement with *PT Bank Permata Tbk* as the seller and *CVI CVF III Lux Master SARL* as the buyer dated 4 March 2017. Said Conditional Receivables Sale and Purchase Agreement was not followed by the delivery or *levering* with the *cession*. Not only that, regarding the Conditional Receivables Sale and Purchase Agreement between *PT Bank Permata Tbk.* and *CVI CVF III Lux Master SARL* on said 4 March 2017, neither *PT Bank Permata Tbk.* nor *CVI CVF III Lux Master SARL* performed notification to *PT Pelita Cengkareng Paper* as the debtor.

A Subjective Novation was then performed over the Conditional Receivables Sale and Purchase Agreement between *PT Bank Permata Tbk.* and *CVI CVF III Lux Master SARL* dated 4 March 2017. The Subjective Novation over the Conditional Receivables Sale and Purchase Agreement between *PT Bank Permata Tbk.* and *CVI CVF III Lux Master SARL* dated 4 March 2017 was set out in Novation and Amendment to "Conditional Receivables Sale and Purchase

[4] PT Bank Permata Tbk Letter, Number 042/BP/DIR/17, Regarding Material Fact or Information, dated 10 Maret 2017

Agreement" Agreement (Conditional Receivable Sales an Purchase Agreement) dated 28 April 2017. Based on this Subjective Novation, *PT Bank Permata Tbk.* which priorly was the party acting as the receivables seller in the Conditional Receivables Sale and Purchase Agreement dated 4 March 2017 had now become the recipient of the novation, while *CVI CVF III Lux Master SARL* while had previously been the receivables buyer has now become the grantor of the novation. Not only that, in the above novation, *PT Bank Permata Tbk.* as the recipient of the novation performed the sale of *PT Pelita Cengkareng Paper*'s debt to a new buyer, *Molucca Holding SARL.*

In relation to the Subjective Novation dated 28 April 2017, neither *PT Bank Permata Tbk., CVI CVF III Lux Master SARL*, nor *Molucca Holding SARL* performed notification to *PT Pelita Cengkareng Paper*'s as the debtor. Following the aforementioned subjective novation, *PT Bank Permata Tbk.* performed the transfer of its receivables to *Molucca Holding SARL* by drawing up Transfer of Receivables (*Cession*) Deed Number 85 dated 5 May 2017.

On page 7 of Transfer of Receivables (*Cession*) Deed Number 85 dated 5 May 2017, the transfer of receivables within said deed were based upon Conditional Receivables Sale and Purchase Agreement dated 4 March 2017 and Novation and Amendment to "Conditional Receivables Sale and Purchase Agreement" Agreement (Conditional Receivable Sales and Purchase Agreement) dated 28 April 2017. In the Transfer of Receivables (*Cession*) Deed Number 85 dated 5 May 2017, neither *PT Bank Permata Tbk.* nor *Molucca Holding SARL* reinvolved *CVI CVF III Lux Master SARL* as a party within the aforementioned *cession* deed.

Transfer of Receivables (*Cession*) Deed Number 85 dated 5 May 2017 was subsequently made the basis for *PT Bank Permata Tbk.* to transfer receivables followed by property rights attached to said receivables to *Molucca Holding SARL.* On the basis of said *cession*, *PT Bank Permata Tbk.* subsequently performed notification to *PT Pelita Cengkareng Paper* as the debtor through Letter Number No. 021/SAM-PHOENIX/V/2017 dated 5 May 2017, which was also agreed to by *PT Pelita Cengkareng Paper,* which then provided signature of its agreement.

PT Pelita Cengkareng Paper did not continue its payments of the remainder of its debts which had been transferred to *Molucca Holding SARL*. Due to this, *Molucca Holding SARL*as the *cessionaris*subsequently requested for Postponement of Debt Settlement Obligation (*PermohonanPenundaanKewajibanPembayaran/ PKPU*) towards *PT Pelita Cengkareng Paper* (Cessus). However, this request was denied by the panel of judges presiding since the condition for a PKPU applicant to be a creditor with claim rights over debts towards a PKPU respondent and for a PKPU respondent to be a debtor of a PKPU applicant were not fulfill, since it was required to reestablish proof before the not simple court that the PKPU applicant was in fact a creditor with claim rights over debts of the PKPU respondent, as set out in Central Jakarta Commercial Court Decision Number 131/Pdt.SUS-PKPU/2018/PN.Niaga.Jkt.Pst.

2. ResearchMethod

The methodology used in the writing of this article is judicial normative. The specifications used in this writing are descriptive analytical, which is a study that aims to describe and analyze existing facts in a systematic, factual and accurate way using theories that exist in positive law that relate to the issue being studied to obtain a full and holistic picture regarding the validity of *cession* over receivables sale and purchase agreements illegally novated as within Central Jakarta Commercial Court Decision Number 131/Pdt.SUS-PKPU/2018/PN.Niaga.Jkt.Pst.

To obtain the necessary data, the author performed library research in which is the stage where the author analyses secondary data, data not obtained from a direct source and instead obtained by citing other sources. The secondary data used by the author in this study consist of primary legal materials, secondary legal materials, and tertiary legal materials. The primary legal materials include the Indonesian Civil Code (ICC). Secondary legal materials encompass literature, books, internet sources, and journals written by experts relevant to this study. Meanwhile, tertiary legal materials are other materials relevant to the identified issue in this study, such as dictionary references and others.

The method of analysis used is normative qualitative. Normative here means the study is performed by studying library materials or secondary data.[5] This study is based upon legal principles dan norms. Qualitative here means the study was performed through studying legal documents and regulations that apply, literature, and academic writings that relates to the object of the study being analyzed.[6]

3. ResultsandDiscussion

3.1. Receivables Sale And Purchase Agreement

An agreement is defined within Article 1313 of the ICC as a legal action, whereby one or more party binds itself, or binds each other, towards one or more

[5]SoerjonoSoekanto dan Sri Mamudji, 2019, *Penelitian Hukum Normatif: SuatuTinjauanSingkat*, 19th Print, Depok : Raja GrafindoPersada, p. 13

[6]SoerjonoSoekanto, 2017, *PengantarPenelitian Hukum*, Jakarta: UI Press, p. 32

other party.[7] From such definition, an agreement is therefore made by at least two parties (or more), and such action gives rise to a relationship to the parties making the agreement.[8] This also means that the agreement gives rise to obligations to be fulfilled by one of the parties to the other, who conversely has the right over the fulfilment over the obligation of that party. Therefore, an agreement will always contain two parties, which is the creditor and debtor. In addition, mutual agreements are two-ways, meaning more than one relationship arises from the agreement, where the creditor who has the right over an obligation is also a debtor who must fulfill another obligation within the same agreement.[9]

An agreement shall be valid if it fulfills the conditions laid out in Article 1320 of the ICC, which states the following:

"*For an agreement to be valid, four conditions must be fulfilled:*

i. *there must be consent of the individuals who are bound thereby;*

ii. *there must be capacity to conclude an agreement;*

iii. *there must be a specific subject;*

iv. *there must be an admissible cause.*"[10]

Additionally, Article 1319 of the ICC states: "*All agreements, whether known under a specific title or not known under a specific title or name, shall be subject to the general terms enshrined within this chapter and other chapters*"[11]. Under this provision, an agreement is differentiated into two types, which are titled (or with a specific name) or untitled. Titled agreements are regulated within book III of the ICC, and titled agreements include settlement agreements, guarantee agreements, power of attorneys, lease agreements, loan agreements, deposit agreements, rent agreements, sale purchase agreements, trade agreements, and grant agreements.[12]

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[7] R. Setiawan, 1999, *Pokok-Pokok Hukum Perikatan*, 6th Print, Bandung :Penerbit Putra A bardin, p. 49

[8]KartiniMuljadi dan GunawanWidjaja, 2014, *Perikatan Yang Lahir Dari Perjanjian*, 6th Print, Jakarta : Raja GrafindoPersada, p. 7

[9]*Ibid*, p. 92-93

[10] Prof. Dr. Ahmadi Miru, S.h., M.S., dan Sakka Pati, S.H., M.H., 2014, *Hukum PerikatanPernjalasanMakna Article 1233 sampai 1456 BW*, 6th Print, Depok :RajagrafindoPersada, p. 67

[11]Indonesian Civil Code (ICC), Article 1319

[12] AzaheryInan Kamil, PandjiNdaruSonatra, and Nico Pratama, *Hukum KontrakDalamPerspektifKompartif (MenyorotPerjanjian Bernama DenganPerjanjianTidak Bernama)*, Jurnal Serambi Hukum, Vol 08 No. 02, Agustus 2014, p. 138

Sale and purchase agreements is one type of titled agreements. According to the ICC, sale and purchase is a mutual agreement where two parties: a seller under the obligation of handing over the rights over an object, and the buyer who is under the obligation to pay a price in the form of a specific amount of money in order to acquire the right to the object.[13] The *essentialia* conditions of a sale and purchase agreement is the object and the price. In accordance with the consentualism principle, a sale and purchase agreement is created upon agreement by the seller and buyer regarding the object and the price over the object being sold.[14]

A receivables sale and purchase agreement is an example of the many different types of sale and purchase agreements. A receivables sale and purchase agreement is a mutual agreement where a seller agrees to handover the rights to receivables that it previously held and the buyer agrees to pay a certain price for those receivables. The *essentialia* conditions of a receivables sale and purchase agreement is the price over the receivables and the receivables themselves.

A seller within a sale and purchase agreement has two main obligations, and that is to handover the rights over the object being sold and guarantee the benefit and any unknown defects and vices over such object.[15] The seller's obligation to handover the object means any actions deemed necessary by the law to transfer the rights over the object being sold to the buyer. As the ICC acknowledges three types of objects, which are immovable objects, movable objects, and intangible objects (or assets), there are accordingly three types of delivery over ownership that apply over each respective types of objects.[16]

For immovable objects, the delivery of the ownership is conducted through transfer of title, or *overschrijving*in Dutch. Meanwhile, delivery of ownership over movable objects involve the actual delivery or handover of the object in question. This handover is also not necessary if the object is already within the possession of the buyer. Finally, for intangible objects such as receivables, right to bill, and claims, the transfer is done through *cession*.[17] Therefore, within a receivables sale and purchase agreement, the transfer over the rights to the receivables is done through *cession*.

[13] R. Subekti 2014, *Aneka Perjanjian*, Bandung : Citra Aditya Bakti, p. 1
[14] *Ibid*, p. 2
[15] *Ibid,* p. 8
[16] *Ibid,* p. 9
[17] *Ibid,* p. 9-10

As laid out above, a sale and purchase agreement gives rise to the obligation of the seller to transfer the right to ownership over the object being sold. This means that the ICC adopts a system where a sale and purchase agreements is merely an *obligatoir*agreement. Meaning, with a sale and purchase agreement, only gives rise to the mutual rights and obligations between the seller and the buyer, where the seller has the obligation to transfer the ownership over the object being sold and is given the right to demand for payment over the object being sold in the amount agreed. On the other hand, the buyer has the obligation to repay in full the payment agreed over the object being sold and in turn has the right to demand for the transfer or handover over the ownership over the object being bought sold.[18]

However, this does not mean that the object itself is transferred. The ownership will only be of the buyer after the act of transfer or *levering*.Thus, within the ICC, *levering* is seen as the legal act of transfer of ownership over the object being sold. This is explicitly regulated under Article 1459 of the ICC which states that "the ownership of the objects sold shall not be transferred to the buyer until after delivery takes place which shall occur in accordance with the related regulations"[19]

3.2. The Transfer of Ownership of Receivables through *Cession*

It has been explained previously that for a receivables sale and purchase agreement, the transfer of ownership is done through *cession*. Cession is based on the word "*cedere*", meaning to release a right and assign such right to another party.[20]Schermer, as translated by Tan Thong Kie defines cession as follows:

> *"Cession is the assignment of a registered receivable done by a still-living creditor to another party. With such assignment, the person [receiving the assignment] registered last shall be the creditor towards the debtor bearing the obligation related to such receivable."*[21]

A definition of cession in Indonesia has also been given by Yahya Harahap, who states that:

> *"Cession is the assignment of receivables. Upon a cession, payment done by a debtor shall no longer by towards the original creditor, but rather towards a replacement creditor or cessionary that has replaced the*

[18]*Ibid,* p. 11

[19] ICC, *Op.Cit*, Article 1459

[20]Kartono, 1977, *Hak-HakJaminanKredit*, Jakarta :Pradnya Paramita, p. 42

[21] Tan Thong Kie, 2007, *StudiNotariat&SerbaSerbiPraktekNotaris*, Jakarta : PT. IchtiarBaru van Hoeve, p. 688

> *standing of the original creditor. Any payment towards the cessionary shall be seen as the same as if the debtor has done in person payment towards the original creditor."*[22]

Meanwhile, Subekti defines cession as :

> *"A method of assigning registered receivables where such receivable is sold by a creditor to another person that then becomes the new creditor, however the debt relationship is not voided in any form, but rather only assigned to the new creditor."*[23]

If referring to Article 613 paragraph 1 of the Indonesian Civil Code ("ICC") (or *ICC*), cession is:

> *"The assignment of registered debts and other intangible assets, shall be effected by using an authentic or private deed, in which the rights to such objects shall be assigned to another."*[24]

Based on the above definitions provided by scholars and regulations, one can infer that cession is a method to assign rights over a registered receivable held by a creditor.

Assignment of registered receivables through cession, in addition to being governed by applicable regulations related to contracts, is also governed by applicable laws related to assets, specifically related to the assignment of registered receivables.

Judicially, the definition of assets or objects (*zaak*) is everything that can be owned or be the object of property rights.[25] The definition of objects (*zaak*) as legal objects not only include tangible objects, namely objects that can be captured by the five senses or commonly known as goods (*goed*), but also intangible objects, namely rights to tangible objects (recht).[26]

According to the Western Civil Law system as regulated in the ICC, objects can be distinguished into immovable objects and movable objects, objects that are destroyed and objects that remain, objects that can be replaced and objects that cannot be replaced, objects that can be divided and objects that cannot be divided, as well as tradeable and non-tradeable objects.[27] The difference between movable

[22] M. Yahya Harahap, 1986, *Segi-Segi Hukum Perjanjian*, 2nd Print, Bandung : Alumni, p. 113
[23] R. Subekti, 2012, *Hukum Perjanjian*, Jakarta :Intermasa, p. 71
[24] ICC, Article 613 paragraph 1
[25] *Ibid*, Article 499
[26] RiduanSyahrani, 2006, *Seluk-Beluk dan Asas-Asas Hukum Perdata, EdisiRevisi, 3rd Edition*, Bandung : Alumni, p. 107
[27] *Ibid,* 108

objects and immovable objects has an important meaning because of the special provisions that apply to each of these classes of objects, for example:

a. Regarding the right to *bezit*, in accordance with the provisions of Article 1977 paragraph 1 of the ICC, the owner of a movable object is the person who controls the item. Thus, the *beziter* of a moving object is the *eigenaar* of the object. This provision does not apply to immovable objects. On immovable objects, *bezit* or ruling position does not apply. The person who can be considered as the owner of the object is the person who has legal proof of ownership, so that a person who only controls the object without being able to show proof of legal ownership cannot be considered as the owner of the object.
b. Regarding encumbrances (*bezwaring*), movable objects can be pledged and put under fiduciary guarantees while immovable objects can be subject to hypothec and mortgages. In accordance with the provisions in Article 1150 of the ICC, movable objects must be pledged (*pand*).[28] Apart from pledges, in accordance with the provisions in Article 1 point 1 of Law Number 42 of 1999 on Fiduciary Guarantees, movable objects can be guaranteed by using fiduciary guarantees.[29] Meanwhile, based on the provisions of Article 1162 of the ICC, a hypothec must be applied to immovable objects, especially to ships measuring 20 M Kibik.[30] As for land security, mortgage rights can be exercised as regulated further in Law Number 4 of 1996 on Mortgage Rights.
c. Regarding the transfer (*levering*), Article 612 of the Civil Code stipulates that the transfer of movable objects can be carried out with actual transfer.[31] With this actual transfer, the legal rights of ownership will also be transferred. Meanwhile, based on the provisions in Article 616 of the ICC, the transfer of immovable objects must be carried out by changing the name in the general register.[32] Thus, it is not enough for immovable objects to be handed over only by physical transfer, but judicial transfer must also be carried out, namely by registering or changing names.
d. Regarding expiration (*verjaring*), for movable objects, *bezit* is an *eigendom*, and is thus not subject to *verjaring*. Meanwhile, immovable objects are subject to *verjaring*.

[28] ICC, *Op.Cit,* Article 1150
[29]Law Number 42 of 1999 on Fiduciary Guarantee, Article 1 number 1
[30] ICC, *Op.Cit,* Article 1162
[31]*Ibid,* Article 612
[32]*Ibid*, Article 616

e. Regarding confiscation (*beslag*), movable objects can be subject to *revindicatoirbeslag*, namely confiscation for the sake of acquiring the object itself back. This is followed by *executoirbeslag*, namely confiscation to carry out court decisions. *Executoirbeslag* must be carried out first on movable objects. If it is not sufficient to pay the defendant's debt to the plaintiff, then the *executoirbeslag* can be carried out on immovable objects.[33]

The receivables themselves are movable objects that are intangible or movable because of the provisions of the law as regulated in Article 511 of the ICC, which in paragraph 3 states that "as movable objects and because of the provisions of the law, they must be considered as relationships and claims in relation to the amounts of money that can be collected or concerning movable objects."[34]

In the ICC, there are three types of receivables, namely receivables on carry, receivables on appointment, and registered receivables (or named and on behalf of). [35] In connection with the cession agreement as a form of transfer of receivables, what is transferred is registered receivables. Mariam Badrulzaman defines registered receivables as the right to collect of creditors against certain debtors based on an relationship.[36] Registered receivables in principle indicate who the creditor is, although in principle it does not have to be stated in written form or a letter stating the name of the creditor.[37] Although the name of the creditor is not mentioned, the parties are aware of each other's identity so that the request for payment can only be made against those who have bound themselves to the agreement that has been made. [38] Included as registered receivables, among others, are promissory notes, certificates of deposit, interbank claims, shares on behalf of, and others.

There are three parties involved in the assignment of registered receivables through cession, which are the original creditor who holds the registered receivables, also known as the cedent, the new creditor that will receive the assignment of registered receivables, also known as the cessionary, and the debtor who will receive notification or provide approval over the Cession

[33]RiduanSyahrani, *Op.Cit,* p. 111
[34] ICC, *Op.Cit,* Article 511 paragraph 3
[35] J. Satrio, 1999, *Cessie, Subrogasi, Novatie, Kompensatie&PencampuranHutang, 2nd Print* Bandung : Alumni, p. 3-4
[36] Mariam Badrulzaman, 1994, *Aneka Hukum Bisnis, First Print*, Bandung : Alumni, p. 66
[37] J. Satrio, *Op.Cit,* p. 4
[38]Akhmad Budi Cahyono, *Op.Cit,* p. 16

agreement made between the cedent and the cessionary. The debtor here is known as the *cessus*.

As a form of assignment of registered receivables, Cession must be done under a legal basis (for the right) or rechttitel. Such basis is the private legal relationship that serves as the basis of such assignment of receivables. A legal basis exists due to a relationship that is made to exist in order to assignment such rights to receivables, also known as an *obligatoir*relationship. The obligatoir relationship often comes in the form of a sale and purchase agreement over receivables.[39] Simply put, an assignment must take place over a clear legal relationship established between the parties.

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In order to conduct such assignment of receivables, two legal relationships are needed, which is the obligatoir relationship, and that arising from the delivery or transfer of the rights (levering). The reason for this is that Indonesia adopts a causal system in the delivery of rights to ownership, as stated by Diephuis and P Scholted.[41] In a causal system, a right to ownership only transfers upon the act of transfer or handover. The validity of such transfer depends on the validity of the *titel*that acts as the basis for the transfer, and that such transfer must be conducted by a person with the right to freedom (*beschikkingsbevoegd*) over the object being transferred. If such *title* is invalid or is later voided, then so too will the *levering,* and the transfer of ownership shall be deemed to have never taken place.[42] Therefore, the validity over the *levering* must depends on the validity of the *obligatoir*obligation acting as the basis for such transfer or *levering*.

[39]*Ibid*

[40]*Ibid*

[41] Frieda HusniHabullah, 2002, *Hukum KebendaanPerdata, Hak-Hak Yang MemberiJaminan, Jilid2,* 1st Print, Jakarta : Penerbit Ind, Hill-Co, p. 133

[42] R. Subketi, *Op.Cit*, p. 12

The causal system regarding the transfer of ownership is deduced from Article 584 of the ICC which regulates methods in acquiring rights to ownership. One of the ways is through *levering* and that such must be done "*pursuant to a transfer of [titel], originating from the individual who was entitled to dispose of the property*."[43]

For registered receivables whose assignment is done through *cession*, in addition to the need for a legal basis, the delivery or handover must be done by a person with the authority to transfer such receivable (*eigendar*). In addition to the *eigendar*over such object, the power to transfer such object can be given to another party by the *eigendar*. If the person transferring the ownership is a person without the power to do so, whether due to the fact that they are not the person with the direct power or was not given such power, then the *levering* is deemed to be voided and the transfer of ownership is deemed to have never taken place.[44]

According to Article 613 paragraph 1 of the ICC, *cession* must be done through a written agreement in the form of a deed, whether notarial or private. This is different than the *obligatoir*agreement that serves as the legal basis over the assignment of the registered receivables through *cession*. For such *obligatoir*agreement, the agreement can also be in a verbal, unwritten form.

The assignment of registered receivables therefore requires two types of agreements, which are the *obligatoir* agreement in the form of a sale and purchase agreement and a *cession* agreement as a form of delivery of the registered receivable, with the *cession* agreement serving as an *accesoir* agreement to the sale and purchase agreement. The *cession* agreement therefore cannot exist without the sale and purchase agreement. The *obligatoir* agreement (or the sale and purchase agreement) must also be made in accordance with applicable laws since the validity of the *cession* agreement depends on it.

In order to bind the debtor (*cessus*) towards the transfer of receivables done through the Cession deed, then such transfer must be notified to the debtor or must be acknowledged and approved by the debtor (*betekening*). This is addressed in Article 613 paragraph 2 of the ICC, which states that "such assignment shall have no effect to the debtor unless after such assignment is notified towards them, or is acknowledged and approved by them in writing".[45]

[43] ICC, *Op.Cit,* Article 584
[44] R. Subketi, *Op.Cit,* p. 13
[45] ICC, *Op.Cit,* Article 613 paragraph (2)

The result of the Chamber for special private matters as contained within Supreme Court Circular Letter (*Surat EdaranMahkamah Agung* or SEMA) Number 7 of 2012 on The Legal Formula as a Result of the Plenary Meeting of a Supreme Court Chamber as A Guideline in Conducting Duties for Courts asserts that creditors that receive assignment of receivables under Cession, can only be deemed as a creditor of the debtor who is the petitioned for insolvency, after such assignment is notified to that debtor or is acknowledged and approved in writing by that debtor in accordance with Article 613 paragraph (2) of the ICC.[46]

The notification referred to in Article 613 paragraph (2) of the ICC refers to the term "*betekening*" meaning an official notification through exploit of the bailiff to the debtor done in accordance with Article 390 HIR. This clearly shows that "*betekening*" cannot be equated with general notifications that could be done verbally or in writing.

Quoting Hooggerechtshof, J. Satrio states that the validity of Cession does not necessarily have to rely on a notification to the debtor. He surmises that the absence of a valid notification to a *cessus*, does not affect the assignment from the Cedent to the cessionary since the assignment technically only requires the delivery done under a Cession deed and the receipt of such delivery in writing from the cessionary.[47]

Negligence in notifying the *cessus* could potentially cause any payments done by the *cessus* to the cedent (or original creditor) to do be valid, as long as the *cessus* genuinely believes that the Cedent is still its creditor.[48]

Not all Cession is valid by law, as any of the following Cession must be deemed to be invalid:

a. Cession that is not in accordance with applicable laws such as a Cession over the right to buy;
b. Cession that significantly changes the obligation of the *cessus*;
c. dan Cession that is contrary to public order; and
d. Cession that is forbidden by the agreement under which the rights being assigned arise.

3.3. Active Subjective Novation

[46]Supreme Court Circular Letter Number 7 of 2012 on The Legal Formula as a Result of the Plenary Meeting of a Supreme Court Chamber as A Guideline in Conducting Duties for Courts

[47] HamatulQurani, October 19th, 2020, "*PerihalBeketeningDalamCessie*", available on website: https://www.hukumonline.com/stories/article/lt5f8c34c2be574/perihal-betekening-dalam-cessie, Accesed February 12th, 2022.

[48]HFA Vollmar, 1990, *Hukum Benda Menurut ICC,* 2nd Print, Bandung :Tarsito, p. 77

Novation is established through the agreement of the parties to erase or terminate their old agreement and at the same time replace it with a new agreement. In accordance with Article 1381 of the ICC, Novation is one of the ways of the termination of an agreement.[49]

Principally, novation is done to terminate an agreement. However, the legal relationship established by that agreement is maintained in a new agreement. M Yahya Harahap in his book explains that "this [novation] causes the termination of an agreement and legal relationship naturally, and at the same time through a new agreement and legal relationship that takes precedence over the previous agreement and legal relationship. In other words, Novation is a statement of the intention of the creditor and debtor, to terminate the old agreement, and at the same time replace it with a new agreement that is the continuation of the old agreement."[50]

Article 1413 of the ICC states that "there are three ways to conduct renewal of debt [or novation]:

a. If a person in debt establishes a new debt relationship for the sake of the person indebted to them, that replaces the old debt, and is therefore terminated as a result;
b. If a debtor is appointed to replace the old debtor, who is relieved of its relationship and obligation to pay by the creditor;
c. If, as a result of a new agreement, a new creditor is appointed to replace an old creditor, who is relieved from the relationship."[51]

Point a above is known as objective novation, whereas point b. and c. is known as subjective novation. In an objective novation, the renewal happens upon the object. The replacement in agreements do not change the parties, meaning that the creditor and debtor of the new agreement is identical to the previous novated agreement. For example, an agreement is terminated through an agreement to restructure debt, whereby the two agreements are essentially the same, which is that of a loan.[52] In accordance with Article 1138 of the ICC, objective novation would cause the previous agreement to be terminated and thus so too would any side agreements (if any) to that principal agreement.

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[49] ICC, *Op.Cit,* Article 1381

[50] M. Yahya Harahap, *Op.Cit,* p. 143

[51] ICC, *Op.Cit,* Article 1413

[52]Suharnoko dan EndahHartati, 2006, *DoktrinSubrogasi, Novasi, Dan Cessie, Dalam Indonesian Civil Code, NieuwNederlandsBurgelijkWetboek, Code Civil Perancis, dan Common Law, 2nd Print,* Jakarta ; KencanaPrenada Media Group, p. 58

Subjective novation is divided into two, which is passive subjective and active objective novation. In a passive subjective novation, the novation is done by changing the debtor. The previous debtor would be replaced by a new debtor through an agreement between the new debtor and the creditor, with or without the agreement of the previous debtor.[53] In an active subjective novation, novation is done to change the creditor. The previous creditor would be replaced by a new creditor. In an active subjective novation, any binding collateral from the previous agreement can still be maintained as long as the new agreement expressly states such intention.[54]

The legal consequence of a novation is not specifically stated in applicable laws. However, Article 1418 of the ICC elaborates that one of the consequences of a novation is that "the previous debtor is released from its obligations to the creditor with the appointment or delegation of a new debtor, and the creditor no longer has the right to request payment to the previous debtor notwithstanding the fact of the new debtor going into insolvency or the new debtor is revealed to not have legal capacity to conduct legal actions, unless its exceptions have been expressly agreed to.[55]

There is a similar element between a *cession* and an active subjective novation, which is that both involve the change of the creditor. Nevertheless, there is a very principal difference between the two, which is that in an active subjective novation, the old relationship between the debtor and the creditor is erased and replaced with a new relationship, through the replacement of the creditor, whereas the debtor remains the same. Meanwhile, a *cession* only involves the change of creditors, however the original relationship remains, which is the original relationship established between the original creditor and debtor.[56]

3.4. The Validity of the Conditional Sale and Purchase Agreement between PT Bank Permata Tbk and CVI CVF III Lux Master SARL

Cession of Bank Permata as addressed within Central Jakarta Commercial Court Decision No. 131/Pdt.SUS-PKPU/2018/PN.Niaga.Jkt.Pst is an example of a problematic *cession*. This is because the *cession* in question was made under a receivables sale and purchase agreement that was invalidly novated. As

[53] ICC, *Op.Cit,* Article 1416
[54] ICC, *Op.Cit,* Article 1421
[55] M. Yahya Harahap, *Op.Cit,* 147-148
[56] J. Satrio, 2012, *CessieTagihan Atas Nama,*Jakarta : Yayasan DNC, p. 35-36

elaborated within a previous section, this issue started within mid-2017, when PT Bank Permata Tbk conducted sale of its assets consisting of a portfolio of nonperforming loans of several debtors to CVI CVF III Lux Master SARL, with a total sale amount of Rp1,124,101,372,087 (one trillion one hundred twenty-four billion one hundred and one million three hundred seventy-two thousand eighty-seven Indonesian Rupiah), before fees, commission, costs and taxes, as enshrined within a Conditional Receivables Sale and Purchase Agreement signed on 4th of March 2017.

To determine whether the Conditional Receivables Sale and Purchase Agreement between PT Bank Permata Tbk and CVI CVF III Lux Master SARL dated 4 March 2017 is valid and legally binding, that agreement must fulfill the elements of a valid and binding agreement as regulated under Article 1320 of the ICC. In other words, the Conditional Receivables Sale and Purchase Agreement must be made under consent, capacity, a specific object, and an admissible cause.[57]

The element of consent is fulfilled by the Conditional Receivables Sale and Purchase Agreement, where page 7 of the Deed of *Cession* No. 85 dated 5 May 2017 states that the Conditional Receivables Sale and Purchase Agreement dated 4 March 2017 between PT Bank Permata TbkandCVI CVIII Lux Master SARL has been agreed to and that CVI CVIII Lux Master SARL purchases from PT Bank Permata Tbk, who assigns receivables (including all of the rights and obligations attached thereto) owned by it. In this case, the receivables mentioned are those payable by PT Pelita Cengkareng Paper.

The element of capacity has been fulfilled by virtue of the fact that PT Bank Permata Tbk and CVI CVIII Lux Master SARL are companies, whom are not exempted by Article 1330 of the ICC. Additionally, the other two elements of an agreement is fulfilled as the specific object are the receivables owned by PT Bank Permata Tbk as enshrined within Deed of Banking Facility Provision Agreement (Specific Terms) No. 93, dated 22 August 2013, made before Mira Marizal, S.H., M.Kn., who under the Regional Notary Supervisory Council of Central Jakarta Decree No: 030/MPD.JKT PST/CT/IV/2013, dated 24 April 2013 serves as the substitute notary for Drs. GunawanTedjo, S.H., M.H., Notary in Central Jakarta, as lastly amended by Addendum to the Banking Facility Provision Agreement (Specific Terms) KK/16/1195/ADD/MM dated 30 June2016. Such receivables are indeed intangible objects that are tradeable according to applicable laws.

[57] ICC, Article 1320

With such elements of a valid and binding agreement being fulfilled in accordance with Article 1320, the Conditional Receivables Sale and Purchase Agreement between PT Bank Permata Tbk and CVI CVF III Lux Master SARL dated 4 March 2017 is therefore valid legally binding.

However, even if the receivables sale and purchase agreement made by PT Bank Permata Tbk and CVI CVF III Lux Master SARL is formally valid and binding, the transaction nevertheless seems odd. Buyers of such a transaction scheme would look to minimize their risks and, in the event of actual default by borrowers, have a method of ensuring payment or execution of guarantee (if any) over such events. However, this case presents a foreign company, without even an Indonesian business license or branch or representative office, like CVI CVF III LUX Master SARL willingly buy nonperforming credit in massive amounts. The fact that the purchase was entirely of nonperforming credits in massive amounts, and that the company was without any legal footing to conduct any actions in Indonesia, should raise eyebrows over anyone having knowledge of the transaction. Specifically, CVI CVF III LUX Master SARL would not have any clear method or legal recourse to demand payment over the nonperforming loans towards the borrowers.

However, such transactions are often used by banks in order to clean up its their balance sheets and portfolio. By selling its problematic receivables, the bank would have fewer nonperforming loans, and therefore have a possibility of being less scrutinized by authorities such as the Financial Services Authority (*Otoritas Jasa Keuangan, or "**OJK**").*

For PT Permata Bank Tbk as the seller, there is an obligation to perform the Conditional Receivables Sale and Purchase Agreement, which means that it must transfer the ownership over the object being sold. This covers every action as legally necessary so that the ownership rights over the object are held by CVI CVF III Lux Master SARL. The transfer over intangibles is done through *cession,* which means that such action must therefore be needed.

However, related to the relevant Conditional Receivables Sale and Purchase Agreement between PT Bank Permata Tbk and CVI CVF III Lux Master SARL, PT Bank Permata failed to conduct any *cession* over such agreement, but then proceeded to novate the agreement with CVI CVF III Lux Master SARL and Molucca Holdings SARL. The Conditional Receivables Sale and Purchase Agreement dated 4 March 2017, between PT Bank Permata Tbk and CVI CVIII LUX MASTER S.a.r.L is an *obligatoir* agreement as the legal basis over the

assignment of registered receivables. However, with only the *obligatoir*agreement and without any *levering* over the registered receivables through a *cession*, there nott been a transfer of ownership. Meaning, the the rights of ownership over the registered receivables have not been transferred to the rightful owner according to the agreement (Molucca Holdings SARL), and remains in the hands of PT Bank Permata Tbk as the original creditor.

Therefore, it can be concluded that the Conditional Receivables Sale and Purchase Agreement dated 4 March 2017 between PT Bank Permata Tbk and CVI CVIII LUX MASTER S.a.r.L is valid and legally binding, however the ownership over the recivables being sold within that agreement is still of Bank Permata Tbk as there was never any *cession* done over them.

3.5. The Validity of the Active Subjective Novation over the Conditional Share and Purchase Agreement

It has been elaborated that no *cession* was done by PT Bank Permata Tbk to CVI CVF III Lux Master SARL over the object sold by the Conditional Receivables Sale and Purchase Agreement between PT Bank Permata Tbk and CVI CVF III Lux Master SARL, but a novation was done with CVI CVF III Lux Master SARL and Molucca Holdings SARL, as can be seen within the Novated and Amended Conditional Receivables Sale and Purchase Agreement dated 28 April 2017.

Originally, PT Bank Permata Tbk was the creditor who sold its receivables from its debtor PT Pelita Cengkareng Paper to CVI CVF III Lux Master SARL under the Conditional Receivables Sale and Purchase Agreement dated 4 March 2017. After the novation done under the Novated and Amended Conditional Receivables Sale and Purchase Agreement dated 28 April 2017, the legal standing of the parties are changed, and PT Bank Permata Tbk as the seller of the receivables to Molucca Holdings SARL, and the buyer or purchaser of the receivables are now Molucca Holdings SARL.

Things would have been different if, for example, it is stated within the Novated and Amended Conditional Receivables Sale and Purchase Agreement dated 28 April 2017 that CVI CVF III Lux Master SARL as the buyer of the receivables has not received the transfer of ownership because no *cession* over the Conditional Receivables Sale and Purchase Agreement dated 4 March 2017 was done, who then novates the agreement (but not *sell* the receivables) back to PT Bank Permata Tbk. PT Bank Permata Tbk, who was originally the creditor, would then be the receiver of the novation. As the receiver of the novation, PT Bank Permata Tbk then sells its receivables to Molucca Holdings SARL, so that Molucca Holdings SARL is then recognized as the buyer of the receivables.

It is known that the Conditional Receivables Sale and Purchase Agreement dated 4 March 2017 was not followed by a *cession* over the receivables, and thus the right of ownership over the receivables remain with PT Bank Permata Tbk and has not yet shifted to CVI CVF III Lux Master SARL. Therefore, CVI CVF III Lux Master SARL does not have the right to novate such agreement, as in accordance with Article 584 of the ICC, an agreement can only be novated by a party with the power to do so. A party not having the power would cause such novation to be null and void.

Novation itself is divided into three different types, which are objective novation, passive subjective novation, and active subjective novation. Within a passive subjective novation, novation is done to change the debtor. Within an active subjective novation, novation is done to change the creditor. In the case of the Novation and AmandementTo Conditional Receivables Sale and Purchase Agreement dated 28 April 2017, a change of creditors took place whereby Molucca Holdings SARL becomes the new creditor, which means that the novation that was done is of the active subjective type.

An active subjective novation involves a change of creditors. What's important here is the change to the agreement between the debtor and the creditor, and not the agreement between the original and new creditors done without the involvement or knowledge of the debtor. If, for example, CVI CVF III Lux Master SARL novated the Conditional Receivables Sale and Purchase Agreement dated 4 March 2017 to PT Bank Permata Tbk through the Novation and Amandement To Conditional Receivables Sale and Purchase Agreement dated 28 April 2017 without involving PT Pelita Cengkareng Paper (as the debtor), that would cause PT Bank Permata Tbk to be the receiver of the novation, then such novation would not be a novation agreement in accordance with the law.[58] Therefore, the novation done by the Novation and Amandement To Conditional Receivables Sale and Purchase Agreement dated 28 April 2017 is not valid and should be null and void.

Therefore, it can be safely said that the novation through the Novation and AmandementTo Conditional Receivables Sale and Purchase Agreement dated 28 April 2017 done by PT Bank Permata Tbk, CVI CVF III Lux Master SARL, and Molucca Holding SARL is invalid and therefore null and void.

[58] Central Jakarta Commercial Court Decision Number 131/Pdt.SUS-PKPU/2018/PN.Niaga.Jkt.Pst, p. 88

3.6. The Validity of the *Cession* over the Invalidly Novated Receivables Share and Purchase Agreement

After the *Novation and AmandementTo Conditional Receivables Sale and Purchase Agreement* dated 28 April 2017, PT Bank Permata Tbk and Molucca Holding s.a.r.l made and executed Deed of Assignment of Receivables (*Cession*) No. 85 dated 5 May 2017 as the legal basis of the transfer of the receivables and all attached rights thereto, without involving CVI CVIII Lux Master SARL, as a party to that deed.

According to page 7 of the Deed of Assignment of Receivables (*Cession*) No. 85 dated 5 May 2017, the assignment of receivables within the Deed is related to the Conditional Receivables Sale and Purchase Agreement dated 4 March 2017 and the *Novation and AmandementTo Conditional Receivables Sale and Purchase Agreement* dated 28 April 2017. Therefore, this signifies that the *obligatoir*agreement to the transfer of ownership through *cession* made under Deed of Assignment of Receivables (*Cession*) No. 85 dated 5 May 2017 is the Conditional Receivables Sale and Purchase Agreement dated 4 March 2017 which was then followed by the Novation and AmandementTo Conditional Receivables Sale and Purchase Agreement dated 28 April 2017.

After, PT Bank Permata, Tbk as the *Cedent*, the assignment of the receivables done through Deed of Assignment of Receivables (*Cession*) No. 85 dated 5 May 2017 was notified to the *Cessus* (debtor), through Letter No. 021/SAM-PHOENIX/V/2017 dated 5 May 2017, which was also approved by the debtor, through the signature of the debtor. This asserts that the creditor has fulfilled Article 613 paragraph 2 of the ICC in involving the Debtor (*Cessus*) over the assignment of the receivables done through the *Cession* deed.

It has also been elaborated that the novation done through Novation and AmandementTo Conditional Receivables Sale and Purchase Agreement dated 28 April 2017 is invalid and therefore null and void. Invalidity within the *obligatoir*agreement serving as the legal basis of the transfer of ownership over the receivables through a *cession*, would case the *cession* as enshrined within Deed of Assignment of Receivables (*Cession*) No. 85 dated 5 May 2017 to also be null and void, even if that deed has been subject to *bekentening*.

This is due to the causality system previously mentioned, stated by Diephuis dan P Scholted, related to the transfer of ownership.[59] In a causal system, any ownership will only transfer after the existence of *levering* or

[59] Frieda HusniHabullah, *Loc.Cit.*

delivery. The validity of the delivery or transfer is tied to the validity of the *titel*serving as the basis on which the transfer or delivery is done by the party with the power to do so (*beschikkingsbevoegd*) over the object in question. The *titel*here is the *obligatoir*agreement, such as a sale and purchase agreement. If this *titel*is invalid or is later deemed to be void, then the *levering* related to it shall too be deemed to be void, and the delivery or transfer of ownership is deemed to have never taken place.[60] Accordingly, the validity of the *levering* depends on the validity of the *obligatoir*agreement serving as the basis over the *levering*.

Thus, it can be concluded that the *cession* done under the *Conditional Receivables Sale and Purchase Agreement* dated 4 March 2017 which was then followed by the *Novation and AmandementTo Conditional Receivables Sale and Purchase Agreement* dated 28 April 2017 is null and void since the *cession* done therein was over an agreement that was invalidly novated.

4. Conclusion

Following the above analysis, several conclusions can be made. First, a sales purchase agreement over receivables is a mutual agreement that consist of two parties, namely the seller which promises to transfer receivables in its possession and the buyer who promises to pay the price consisting of an amount of money in exchange for the obtained receivables. The Conditional Receivables Sale and Purchase Agreement dated 4 March 2017 between *PT Bank Permata Tbk.* and *CVI CVIII Lux Master SARL* is valid and legally binding, although the ownership over the sold receivables agreed upon has not been transferred and still falls within the possession of *PT Bank Permata Tbk.* since the transfer of ownership was never performed with a *cession.*

Second, novation can be divided into three categories, which are objective novations, subjective passive novations and subjective active novations. In a subjective passive novation, the novation is performed to change the debtor party. In a subjective active novation, the novation occurs to change the creditor. The former creditor is replaced by a new creditor. The Novation and Amendment to "Conditional Receivables Sale and Purchase Agreement" Agreement (Conditional Receivable Sales and Purchase Agreement) dated 28 April 2017 was performed without involving the debtor, hence the novation was not a novation agreement according to the law.

Third, *cessions* are a form of assigning registered receivables which must be based upon the existence of a prior legal relationship as the basis for which the

[60] R. Subketi, *Op.Cit*, p. 12

right for a transfer of registered receivables to occur. The validity or invalidity of a *cession* agreement depends on the validity or invalidity of the legal relationship that becomes the basis for the transfer or rights or basis of rights. The *cession* made on the basis ofthe Conditional Receivables Sale and Purchase Agreement dated 4 March 2017 followed by the Novation and Amendment to "Conditional Receivables Sale and Purchase Agreement" Agreement dated 28 April 2017 is null and void since the *cession* was made on the basis of a receivables sales and purchase agreement that was invalidly novated.

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