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Analysis of Banking Cessie, Novation and Subrogation From The Perspective of Civil Law

Iin Selvina[1], Tjempaka[2].
[1]Faculty of Law, Universitas Tarumanegara, Indonesia, iinselvina@gmail.com
[2]Faculty of Law, Universitas Tarumanegara, Indonesia, not.tjempaka@gmail.com

Corresponding Author: iinselvina@gmail.com [1]

Abstract: In daily life, banks play an important role as providers of funds in society. One of the facilities utilized in banking is credit. Funds provided in credit facilities represent bank assets with very high risk. Therefore, to mitigate the risk of non-performing loans, the bank will examine the debtor before the credit facility is granted, then a credit agreement will be made. Credit agreements can be terminated through payment or novation. However, in response to legal events, banks also recognize the existence of subrogation and cessie systems to manage risks. The findings of this study elucidate that, under the Civil Code, all forms of agreements must adhere to the terms of the agreement and principles such as pacta sunt servanda, consensualism, and freedom of contract. Despite the numerous patterns and variations in banking systems and facilities, adherence to positive law is imperative to ensure legal certainty and security for all parties involved.

Keyword: Cessie, Novation, Subrogation, Civil Law.

INTRODUCTION

Banks in everyday life have a very important role as a source of providing funds in society. One of the facilities used in banking is credit. The provision of this credit facility can be used to fulfill consumption needs or as funds to help increase production in society. Banking in Indonesian positive law is regulated in article 1 number 2 of Law number 10 of 1998 concerning Banking which states that a bank is a business entity that raises funds from the public in the form of credit and or others in order to improve the lives of many people. So it can be concluded that credit is the provision of funds to improve people's lives by meeting their funding needs**.**

In this credit system, trust is essential. Credit comes from the Greek word credere which means “trust”. Trust plays a crucial role in the credit granting process. In providing credit, the bank already has confidence through a feasibility study of potential debtors. This is aspect is paramount in banking, as funds allocated for credit facilities constitute high-risk assets for the bank. These assets are referred to as high-risk assets because the assets are entrusted to debtors. Therefore, usually the bank will ensure or consider carefully in

providing credit facilities to maintain the stability and security of credit implementation. Here are some elements that must be considered by the creditor, namely:

1. Trust, where there must be confidence in the debtor ability to repay the debt within the agreed period.
2. Time, where it must be taken into account and considered regarding the provision of credit by the bank and debt repayment by the debtor, necessitating a grace period.
3. Risk, time risk must be considered, The longer the maturity of the credit cause the higher credit risk.
4. Achievement, The object of the credit agreement, whether money, goods, or services, should be taken into account. In the banking sector, providing money or bills is equivalent to offering banking service products, such as credit products.

In avoiding or reducing the risk of non-performing loans, an agreement or loan agreement will be made between the bank and the customer which requires the return or repayment of the debt and interest costs within a specified period. According to Salim H.S. a credit agreement is an agreement made by the creditor and the debtor in which the creditor provides money or credit while the debtor is obliged to pay principal and interest, as well as other costs with an agreed period of time.

The credit agreement will also be followed by a security deed that adds to the creditor's confidence that if the debtor cannot fulfill his performance in the form of money, there are still objects that will replace the material that the debtor cannot fulfill. The binding of this guarantee is accesoir in nature, which means that the guarantee will pass, erase and switch depending on the main agreement, namely debt and credit or credit agreement. That way automatically between the customers, debtors and banks, creditors, there will be a legal relationship connected through the credit agreement.

Usually, a credit agreement concludes upon the debtor's payment. However, besides payment, However, besides payment, termination of the credit agreement can also occur through the cessation of collection rights. These rights, which remain enforceable, can be transferred among creditors, debtors, or designated assets. For instance, in cases of debtor demise or legal disputes during the credit term, the bank may resort to novation, cessie, or subrogation. Variances in credit agreement settlements between banks and debtors often entail third-party involvement, shaping the legal dynamics of the credit agreement. Therefore, this paper delves into regulations ensuring legal certainty in executing novation, cessie, and subrogation in credit agreements, with a particular focus on civil law codes.

METHOD

The research method used is normative juridical research method. It is a legal research method conducted by examining library materials or secondary data. The data collection technique used in this research is literature review. The legal materials used include legal regulations such as the civil code, journals, books, and other research results related to the topics of cessie, novation, and subrogation. The approach used is a regulatory approach. The purpose of this research is to enhance readers' legal knowledge regarding cessie, novation, and subrogation. It is also hoped that this writing will be beneficial for legal practitioners or other academic parties.

RESULTS AND DISCUSSION

Civil Law is a set of rules that function to regulate legal relationships between legal subjects within society. Civil law relationships can arise as a result of:

1. Agreements between parties, such as sales and purchases, debts, and credits
2. Legal provisions that are mutually beneficial to the parties involves, for example, payments made without obligation (*onverschuldigde betaling*)
3. Legal provisions in cases where harm is caused to others.

Therefore, agreements are one of the components of civil law. Agreements are regulated in Book III of the Civil Code Indonesia. Agreements are the source from which obligations arise. According to Soebekti, an agreement is an event where there is an agreement and promise between parties to do something. Subsequently, obligations arise from such agreements. Obligations represent a relationship between the parties involved in the agreement, where there is a party making demands and another party obligated to fulfill those demands. According to Sudikno Mertokusumo, there are several principles of agreements, namely:

1. The principle of consensualism, which means that agreements must be based on the will or agreement between the parties involved.
2. The principle of pacta sunt servanda, which means that the agreement binds the parties who agree to it. The parties are obligated to fulfill the agreed-upon obligations and obtain their respective rights
3. The principle of freedom to contract.

In making an agreement, it is certainly necessary to refer to Article 1320 of the Civil Code, which explains the requirements for an agreement, namely:

1. Agreement between both parties
2. Legal capacity to enter into an agreement
3. A certain subject matter
4. A lawful or permissible cause.

According to the Civil Code, agreements are addressed in Article 1313, which states that an agreement is an act by one or more persons binding themselves to another person or persons. This means that in contract law, obligations arise the moment there is agreement or contract. From the agreement, an obligation relationship emerges, conditioning the presence of a demanding party and a party fulfilling the demand. Therefore, credit agreements are crucial for enhancing trust between creditors and debtors, as well as ensuring legal certainty and orderliness in law.

Credit agreements are obligatoire agreements, whereby this agreement creates obligations and subsequently rights and obligations for the parties involved. In the creation of rights and obligations in obligatoire agreements, delivery is required. According to Asser Rutten, in lending agreements involving interest, they fall into the category of reciprocal agreements. Reciprocal agreements are agreements that create reciprocity between the parties or, in other words, involve the exchange of performances, such as in sales agreements where the seller delivers goods while the buyer delivers money. According to Asser Rutten, although lending agreements are generally unilateral agreements, lending agreements involving interest constitute a different category. Lending agreements involving interest involve parties agreeing to provide credit and goods as collateral, while the other party has the obligation to repay the credit plus a fee to reclaim their goods. These credit agreements can be terminated through payment and also novation. However, when faced with a legal event, banks can resort to subrogation and cessie to manage risks.

NOVATION

According to the Kamus Besar Bahasa Indonesia (Indonesian Dictionary), novation is the replacement of the contracting party, debt, or obligation with a new contract. In the Civil Code, novation is referred to as debt renewal. This debt renewal implies the renewal of the debt agreement. Novation is one of the causes of extinguishment of obligations. The legal basis for novation is found in Articles 1413 to 1424 of Book III of the Civil Code.

According to Article 1413 of the Civil Code, debt renewal can be done in three ways:

1. The debtor enters into a new debt agreement for the creditor's benefit, thereby extinguishing the old agreement. This type of novation is called objective novation.

2. The debtor appoints another debtor to replace them, and then the creditor agrees and extinguishes the old agreement with the old debtor. This type of novation is called passive subjective novation.
3. The creditor appoints a new creditor to replace them due to certain circumstances, resulting in the extinguishment of the old debtor and creditor agreement. This type of novation is called active subjective novation.

The basic elements that must be fulfilled in carrying out novation are:

1. Agreement for debt renewal, which must be based on the agreement of the parties involved.
2. Made in a notarial deed. The agreement for debt renewal must be made in writing in a notarial deed.
3. Existence of the old obligation or agreement to be extinguished.

In banking, the type of novation commonly used is passive subjective novation. This type of novation is typically used when, for example, Debtor A and B enter into a credit agreement with the bank. Then, due to certain circumstances and by agreement, the debtors want to replace Debtor A with Debtor B and C. In this case, approval must be obtained from the bank to renew the credit agreement. If the creditor agrees to the debtors' proposal, the old agreement is extinguished, and a new agreement is made.

Novation can be carried out in two ways: Expromissio and Delegatio. Expromissio is stated in Article 1416 of the Civil Code, which states that the replacement of a new debtor in settling obligations through novation does not require the involvement or intervention of the old debtor. Expromissio occurs when the creditor voluntarily seeks a new debtor. Delegatio is stated in Article 1417 of the Civil Code, which states that there is a new debtor who assumes the obligations of the old debtor in fulfilling the obligations to the creditor. In Delegatio, the old debtor offers a new debtor willing to replace the old debtor in settling the debt to the creditor.

Cessie

Cessie originates from the word "cedere," which means the relinquishment and transfer of a right to another person. In the Civil Code, cessie is defined as the "transfer of receivables in the name of." The legal basis for cessie is found in Book II of the Civil Code, Articles 613 to 624.

In contract law, cessie is a legal institution that involves the replacement of a creditor, similar to the system of subrogation. Cessie is commonly used by banking institutions when certain events necessitate it or when the bank requires funds for its operational financing. Typically, the receivables to be transferred are sold at a lower price than their nominal value. Then, upon maturity, the new creditor will receive payment from the debtor.

n cessie, there are three legal subjects: the cedent, the party transferring the gift; the cessionaris, the party receiving the transfer; and the cessus, the debtor. Cessie can be carried out by fulfilling three conditions: the authority of the transferring party, a valid legal title, and the delivery corresponding to its object. According to Article 613 of the Civil Code, cessie is the transfer of receivables in the name of and non-corporeal goods to another person by making an authentic or underhand deed. This transfer does not directly affect the cessus, so the transfer only needs to be notified to the cessus in writing and acknowledged. This is to ensure that the cessus knows who their creditor is. Otherwise, the payment made by the cessus to the cedent is considered valid because the old debtor still recognizes the old creditor as their creditor.

Cessie in banking, there are usually two inseparable agreements: the obligatoire agreement and the cessie agreement. The cessie agreement is the transfer of receivables from the loan agreement between the debtor and the old creditor, so the cessie agreement cannot be executed without the underlying agreement. Therefore, the cessie agreement is accessory. Here are types of cessie prohibited or not permitted by law: those contrary to the law, public

order, prohibited in the underlying agreement, and cessie that can alter the debtor's obligations.

The commencement of payments to the new creditor in cessie is determined by the cessie date, not the date of the cessie agreement or the date of notification to the debtor. If before the cessie date, due to the cessie transfer being notified to the debtor (cessus) and payment being made by the debtor (cessus) to the new creditor (cessionaris), then the old creditor (cedent) can demand it directly from the new creditor (cessionaris). This is based on Article 1359 of the Civil Code, which states that any payment not based on obligation can be reclaimed.

SUBROGATION

Subrogation is a condition where the creditor's rights are transferred to a new creditor upon the debtor's repayment of the debt to the old creditor. Thus, in subrogation, the new creditor may represent the debtor in settling all or part of their obligations. However, this does not mean that the debtor's obligations end. The fulfillment of the performance by the new creditor obliges the debtor to repay their performance to the new creditor. This means that subrogation is not a debt discharge but rather the debt is only temporarily paid by a third party. Later, the debtor will repay their debt to this third party. In the Civil Code, subrogation is regulated in Book III, Articles 1400 to 1403.

Subrogation has two elements: having more than one creditor and the involvement of a third party making payment who then becomes the new creditor. This payment is made to the old creditor. Subrogation can occur due to two factors: contractual and legal factors. Article 1401 of the Civil Code explains subrogation arising from agreement or contract. Subrogation originating from a contract will be considered valid if there is a loan agreement between the debtor and the new creditor and the repayment made by the new creditor. This agreement must be made through an authentic deed.

The loan agreement must clearly state the amount of the loan. Additionally, it must be clearly stated that the loan amount is used to settle the debtor's debt to the old creditor. Therefore, the debtor must repay the amount of the debt. It is also stated that subrogation must be clearly stated and done at the time of repayment. This article contains two points, one stating subrogation initiated by the creditor and the other by the debtor.

Meanwhile, Article 1402 of the Civil Code explains subrogation resulting from the law. This subrogation is carried out in legal events such as:

1. A creditor representing the debtor in repaying the debt to the old creditor based on their privileged right or mortgage having a higher priority
2. A buyer of the debtor's property using the price of the immovable property to settle the debtor's debt to the old creditor.
3. A person jointly or with others who have an obligation to repay the debt or a person with an interest in representing the debtor in repaying their debt
4. Heirs who inherit with privileges and have paid off all the inherited debts

The purpose of subrogation must be clearly stated and must be made authentic to prevent unjust enrichment. This aims to avoid receiving performance twice, both from the debtor and the third party. It also prevents misunderstandings from the debtor who may think that their obligations have ended after subrogation. With subrogation, legal consequences arise where the right to claim the debt is transferred from the old creditor to the new creditor. Thus, the new creditor is entitled to demand repayment from the debtor after the subrogation agreement. If the debtor fails to fulfill their obligations or defaults, the new creditor has the right to execute the debtor's assets burdened as collateral in the agreement.

CONCLUSION

The systems of Novation, Subrogation, and Cessie are variations of mechanisms used by banks to settle credit agreements between debtors and creditors. Novation, subrogatio and cessie in the Civil Code must be based on an agreement that arises from a contract. These agreements must not deviate from the terms of the contract outlined in Article 1320. In addition to these requirements, the principles of consensus, pacta sunt servanda (agreements

must be kept), and freedom to contract also form the basis of Novation, Subrogation, and Cessie. Every legal act must be known and based on agreements, acknowledgments, and contracts between parties. Although there are differences in the systems involving third parties in these loan agreements, fundamentally all parties must be aware of the developments in the agreements, and obligations must still be carried out and fulfilled so that no one is disadvantaged in the systems of novation, subrogation, and cessie. The difference between Novation, Subrogation, and Cessie lies in that only Novation results in the extinguishment of debt. This is because there is a transfer of the old debtor or old creditor to a new debtor or new creditor. Thus, the old agreement is cancelled and replaced with a new one. Whereas in Subrogation and Cessie, there is only a transfer of the creditor where the debtor still has to fulfill their obligations to the new creditor.

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