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Legal Protection for Parties in Transferring Receivables from Factoring Transactions (Factoring)

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Abstract
An agreement can be born not enough just by the will; the will is not stated according to the theory of statements (verklaring theory). Furthermore, according to the theory of trust (vertrouwens theory), it is argued that the stated will becomes an agreement that can produce an agreement. We attempted to identify the existence of an agreement factoring and transfer of receivables in the practice of factoring transactions that have provided legal protection to the parties in the perspective of consumer protection and the principle of freedom of contract. Here, we conducted a legal analysis on certain legal phenomena in Indonesia related to factoring transaction. The scope of this study was limited to factoring activities of a financing nature, particularly related to the purchase and transfer of receivables in factoring transactions in Indonesia (domestic factoring). Philosophical issues related to factoring transactions, where factoring is an institution adopted from the British legal system and the American legal system (common law), influenced by the understanding and principles of materialism, individualism and liberalism, while the Indonesian legal system is based on Pancasila, based on the principles of God, kinship, togetherness and mutual cooperation, balance, and responsible freedom. In our analysis, we found that the process of making the agreement is prepared and determined unilaterally by the factor by providing a very minimal portion for the client to negotiate. Thus, the factoring agreement does not fulfill the principle of balance and the principle of freedom of contract.
Keywords: Contract; Agreement; Legal Protection; Freedom of Contract Principle, Law in Business.

Introduction

Recently, the development of the business world in Indonesia has progressed very fast and dynamic in various fields. These developments and progress have an impact on the increasing level of competition between business actors in seizing market share. Several ways to overcome business competition are by increasing

the quality of the products produced and by offering competitive prices for goods.[1] [2] Another way to do this is to provide the convenience of the payment system to consumers, namely by means of installments commonly known as credit payments.

This kind of credit payment system can pose a risk, where the company will have bills (receivables) to customers. The more the company's invoices (receivables) to customers (customers), it will impact on reducing the company's capital. To meet the need for business capital, companies can obtain it by borrowing money from banking institutions by entering into bank credit agreements. Moreover, credit at the bank is always accompanied by the submission of guarantees (collateral). In addition, bank credit requires a relatively long process. Therefore, another alternative for business people is to obtain funds from a financing institution.[3] [4]

Financial institutions have a very strategic function and role in facilitating the financing of business activities. The existence of financing institutions was only known in Indonesia around the 1960s era, along with the issuance of a package of deregulation policies in the economic, finance and monetary sectors known as the October 1988 Package (PAKTO 88).

Some of the business fields and types of activities of the financing institution are specified in the Decree of the Minister of Finance, one of which is the 'Ankjak Receivable' activity; in the business world it is more popularly known as 'Factoring'. Factoring institutions were previously unknown in the legal system in Indonesia. Factoring is adopted from the factoring institution which originates from the British and American legal systems which are based on the common law legal system. The Civil Law Code, which adheres to the Continental European legal system (civil law), does not specifically regulate the substance of factoring activities. The legal

[1] Hyungu Kang, 'An Application of "Building Blocks of Competitive Advantage" Approach to the U.S. Cereal Market Leaders' (2018) 25 International Journal of Management Studies.[1].

[2] Khalid Suidan Al-Badi, 'The Impact of Marketing Mix on the Competitive Advantage of the SME Sector in the Al Buraimi Governorate in Oman' (2018) 8 SAGE Open.[1].

[3] Dwi Tatak Subagiyo, 'Characteristics of Financial Technology as Financing Alternative Capitalization of Medium Small-Medium Enterprises (MSME)' (2021) 15 FIAT JUSTITIA: Jurnal Ilmu Hukum.[133].

[4] Anneleen Michiels and others, 'Leasing as an Alternative Form of Financing within Family Businesses: The Important Advisory Role of the Accountant' (2021) 13 Sustainability.[1].

basis for the application of factoring activities in Indonesia is based on the principle of 'freedom of contract' as contained in Article 1338 of the Civil Code.

Rilnus Pantouw, citing the opinion of Prof. Wiryono Prodjodikoro, stated that the factoring institution is an institution rather than the common law system. This system was applied in what was later followed by the United States of America, namely focusing on a set of regulations that were not contained in the Books of Law, but actually according to tradition or custom followed by the courts. This system is also called 'Cage Law', because, basically, with the existence of a certain case before the court, the 'case' can only be known how the sound of certain legal articles and these legal articles are taken from the contents of the court's decision. Then, the responsibility of the buyer of receivables (Factor), in fact the practice of factoring transactions so far, is transferred to the seller of receivables (Client) based on the 'agreement' of the parties.

Furthermore, the provisions of Article 1540 of the Civil Code regulates the sale and purchase of receivables , which reads: 'If before the delivery of a receivable that has been sold, the person who owes pays the debt to the seller of the receivable, then that is sufficient to release the debtor'. The provisions of Article 1540 are the only articles that provide protection to the debtor (customer).

Based on the understanding of Article 1540, if a receivable has been sold by the seller of the receivables (Client) to the buyer of the receivables (Factor) before the receivable is handed over by the seller of receivables (Client) to the buyer of the receivables (Factor), then the person who owes the debt is the debtor. The customer pays the receivable to the seller of the receivables (Client) as the original creditor, then the payment made to the seller of the receivables (Client) will release the obligation to pay the debtor (Customer) to the buyer of the receivables (Factor).

Factoring activities actually have a broad scope, covering four legal relationships at once, namely Financing, Purchase of Receivables, Transfer of Receivables and Management of Receivables. Each of these activities has characteristics and areas of distribution that are different from one another. Financing activities have the meaning of providing a number of funds to other parties in the context of borrowing and borrowing legal relationships; receivable purchase activities lead to receivable

relationships, accounts receivable transfer is focused on the process of transferring or transferring ownership from the party who submits it to the party receiving the delivery, while the management of receivables has more responsibility.

One of the substances of Factoring activities is the Purchase of Accounts Receivable. Concepts and arrangements regarding the sale and purchase of receivables actually already exist in the Civil Code, namely in Book III, title 3, section 5, which specifically regulates the sale and purchase of receivables and other intangible rights. The sale and purchase of receivables based on the concept of civil law is a consensual agreement and is also obligatory, meaning it is a new agreement that places rights and obligations on a reciprocal basis, to both parties and there has been no transfer of ownership of the receivables sold to the buyer. This concept is in accordance with the provisions of Article 1458 of the Civil Code: 'The sale and purchase are deemed to have taken place between the two parties, immediately after the parties have reached an agreement on the goods and the price, even though the goods have not been delivered, nor has the price been paid'.

An agreement can be born not enough just by the will; the will is not stated according to the theory of statements (*verklaring* theory). Furthermore, according to the theory of trust (*vertrouwens* theory), it is argued that the stated will becomes an agreement that can produce an agreement. A will of the parties, apart from having to be stated, is so that it can give a trust or confidence to the parties. Based on Article 1321 of the Civil Code, voluntary will is a will that does not have elements of coercion, oversight and fraud. Article 1321 of the Civil Code Law, states that: 'There is no valid agreement if the agreement was given, because of an oversight, or obtained by coercion or fraud'.

The factoring agreement is transferred into by the parties based on the 'freedom of contract' principle. Factoring agreements are usually made in written form,[5] [6] where the clauses regarding the content or substance of the agreement

[5] Ivanka Spasić, Milorad Bejatović and Marijana Dukić-Mijatović, 'Factoring - Instrument Of Financing In Business Practice –Some Important Legal Aspects' (2012) 25 Economic Research-Ekonomska Istraživanja.[157].

[6] Tamara Milenkovic-Kerkovic and Ksenija Dencic-Mihajlov, 'Factoring in the Changing Environment: Legal and Financial Aspects' (2012) Procedia Social and Behavioral Science.

have been prepared standardly in standard form by the Factor party. The clauses regarding the substance or content of the factoring agreement, in the practice of factoring transactions, have been formulated and made unilaterally by the Factor without involving the client. The Client is only a passive party with no choices or alternatives. If the Client signs the agreement that has been prepared, it means that he has agreed to the contents and all the terms that have been determined and included in the agreement.

If it is observed from the process of reaching an agreement on the factoring agreement above, there is an opportunity given to the Client to submit and convey what he wants. The client does not have the power to express his will and freedom in determining the contents of the agreement. Thus, the factoring agreement has not fulfilled the elements as required in 1320 in conjunction with 1338 of the Civil Code.

The scope of this study was limited to factoring activities of a financing nature, particularly related to the purchase and transfer of receivables in factoring transactions in Indonesia (domestic factoring). Philosophical issues related to factoring transactions, where factoring is an institution adopted from the British legal system and the American legal system (common law), influenced by the understanding and principles of materialism, individualism and liberalism, while the Indonesian legal system is based on Pancasila, based on the principles of God, kinship, togetherness and mutual cooperation, balance, and responsible freedom.

Theoretical issues related to factoring are differences in the legal concept of factoring, which summarizes receivable financing activities; purchase of receivables, transfer of receivables and even the management of receivables into one definition of factoring. According to the Civil Code system, each of these activities has different meanings and legal consequences. Just as juridical issues also have a norm vacuum. This means that there are no provisions that specifically regulate the substance of factoring activities in the Indonesian legal system, both in the Civil Code and in the Commercial Code. Another problem in the sociological context is that the agreement may not provide legal protection for the interested parties.

In this study, we attempted to identify the existence of a factoring agreement and transfer of receivables in the practice of factoring transactions that have provided legal protection to the parties in the perspective of consumer protection and the principle of freedom of contract.

Principles of Factoring

Factoring is the transfer of receivables. Financial services of a receivable transfer company sells or transfers rights to its trade receivables to a factoring company, which then acts as the most important principle not as an intermediary company that seeks to sell for another company on behalf of the entrepreneur. Another definition based on the Decree of the Minister of Finance is financing in the form of purchases and transfers of management of short-term receivables from domestic or foreign trade transactions. In the provisions of the Decree of the Minister of Finance, factoring activities are carried out in the form of:

a. Purchase and transfer
b. Management of factoring in this definition contains the most important activities that need to be known in Indonesia, namely: factoring related to financing formed in the purchase or transfer of receivables and non-financing factoring to accounts receivable or bills to the form of management.
c. Domestic trade transactions and trade between countries in the form of transactions such as exports/imports can be carried out by factoring transactions.
d. The object of financing in factoring is in the form of receivables or can be done with short-term bills on foreign and domestic trade transactions that exist in the company.
e. Factoring in financing can be used only in companies, but not for individuals or individually.

In principle, providing credit to suppliers is a form of factoring activity.[7] It is also about how to use the purchase of receivables or bills that are on the customer. In this way, what will happen is that in giving credit it is intended by the supplier to the buyer, but the only difference is that, before that, the factoring agreement has been signed.

[7] Chunying Tian and others, 'Why and How Does a Supplier Choose Factoring Finance?' (2020) 2020 Mathematical Problems in Engineering.[1].

Factoring is widely used by factoring and trading companies that earn big profits, because many have great benefits.[8] Factoring activities involve a lot of profits that will be obtained for each of the existing parties, both for the factoring company itself, for clients, and customers.[9] The benefits of factoring include for clients, such as obtaining financing services which can be useful as an increase in sales, namely through this service the client can do financing by way of credit (financing) in sales. Actually, this way credit is quite difficult to do if the client has capital difficulties. However, in services used such as factoring, clients will be able to sell them in a way, like credit. With this credit method, increasing the attractiveness of sales for buyers will use limited and modest funds.

In addition, other benefits include smooth working capital. In this case, the client is the party that allows the factoring service to change its unexpired receivables to cash funds with an efficient and fairly easy step method, so that it is fast. Such a cash fund will be available and can be used by the client to fund the client's operating activities, examples being purchasing raw materials, to pay employees, and so on.

With uncollectible receivables in risk reduction, in the form of without recourse, the existence of such a payment will allow some of the risk of uncollectible receivables from the factoring agency. It would be very profitable to use a risk transfer like this. It must be smooth and there will be business certainty for the client.

Legal Protection of the Parties Based on the Civil Code and Law Number 8 of 1999 concerning Consumer Protection

As previously stated, factoring is a type of agreement that is newly recognized in Indonesia. Factoring is an agreement that originates and is adopted from the

[8] Surendar Vaddepalli, 'Factoring: An Alternate Payment Method in International Trade' (2014) 1 International Journal of Business Quantitative Economics and Applied Management Research.[49].

[9] Ramona Ciolac and others, 'Agritourism-A Sustainable Development Factor for Improving the "Health" of Rural Settlements. Case Study Apuseni Mountains Area' (2019) 11 Sustainability.[1].

common law legal system,[10] which is not accommodated and there are no special arrangements in the Civil Code (Bw) which is originating from the civil law system or the European continental legal system.

The legal basis governing the substance of the factoring agreement, relating to the rights and obligations of the parties, is not specifically regulated in the Civil Code. There are several provisions of articles in the Civil Code which regulate the sale and purchase of receivables and other intangible assets, namely Articles 1533 to 1540. There are five provisions of articles that specifically regulate the sale and purchase of receivables, namely starting from Article 1533 to Article 1536 and the provisions of Article 1540 of the Civil Code, while the provisions of Articles 1537 to 1539 regulate the buying and selling of inheritance. The very limited provisions of the article regulate the sale and purchase of these receivables, and certainly cannot accommodate the entire substance of factoring transactions, which are neither simple nor complex. Thus, in the practice of factoring transactions so far, the regulation regarding the substance of factoring is based more on the principle of the freedom of the parties to make an agreement (the principle of freedom of contract) based on the meaning of Article 1338 of the Civil Code, which reads in full:

> "All agreements made legally apply as law for those who make them. An agreement cannot be withdrawn other than by agreement of both parties or for reasons other than the law stated for it. An agreement must be executed in good faith".

Every agreement, including the factoring agreement, requires legal certainty regarding the rights and obligations of the parties. In addition to the need for legal certainty in an agreement, it is also necessary to have provisions that can provide protection. The two articles above are actually norms that limit the liability of the seller of receivables (Client), setting the limitation on the liability of the seller of the receivables, as well as providing protection to the seller of the receivables (Client). Based on the two articles above, it can be interpreted that basically since the sale

[10] Aniek Tyaswati Wiji Lestari, 'Legal Protection and Certainty in Financing Activities by Company Factoring Receivables (Factoring) As Efforts to Achieve Economic Development in Indonesia' (2015) 8 International Journal of Business, Economics and Law.[30].

and purchase agreement of the receivables was reached and the delivery of the receivables from the seller of the receivables (Client) to the creditor (Factor), all the risk of loss due to non-payment of the receivables has been transferred to the buyer of the receivables (Factor). and become the responsibility of the buyer of receivables (Factor). Unless otherwise agreed by the parties.

The provisions of Article 1535 and Article 1536 of the Civil Code are not mandatory norms or provisions that cannot be deviated by the parties, but are regulatory provisions. The meaning of the provisions that are regulating is that the parties can enter into another agreement from what has been determined in the article. Pitlo stated:

> "Regulatory provisions or regulations have subsidiary power. In a sense, these provisions are applied in situations where the parties are not dealing with provisions that cannot be deviated so that they are only dealing with regulations that are regulating. It is different, if they are faced with coercive regulations which are said to have "primary working power", because the parties inevitably have to apply the provisions. With regard to regulatory requirements, the legislators pay particular attention to the wishes that are considered most suitable for the parties to the agreement".

The regulation regarding the sale and purchase of receivables in the Civil Code is very minimal. There are only five provisions of articles that regulate the issue of buying and selling receivables, namely Articles 1533, 1534, 1535, 1536 and Article 1540. Of the five articles, if examined carefully, only two articles tend to provide protection to the parties, the buyer of receivables (Factor), namely the provisions of Articles 1533 and 1534.

The provisions of Article 1533 explain that, in the sale and purchase of receivables, the law has provided a guarantee that all ties of a receivable, such as guarantees, privileges and mortgages, also pass to the receivables buyer (Factor). The sale of a receivable implies that the buyer will 'get everything' which is included in the sales section. These include 'guarantees' and 'primary rights/rights of precedence' as well as mortgages attached to the receivables purchased. The provisions of Article 1533 above contain the same principles as the provisions of Article 1482 of the Civil Code, which states: 'delivery of an item, including everything

that is part of the item'. Likewise, with the sale and purchase of receivables, not only the receivables are obtained by the buyer, but also all rights attached to the receivables are automatically transferred to the buyer such as *borgtocht*, main rights (*voorrecht*) and mortgages.

Article 1534 of the Civil Code explains that, in the sale and purchase of receivables, the law provides protection to the buyer of receivables (Factor), where the seller of the receivables (Client) must ensure that the receivables sold are indeed those that actually exist. when it is submitted, it is not a fictitious receivable, nor is it an uncollectible receivable, even though the sale and purchase of the receivable is without the responsibility of the seller of the receivable. Meanwhile, the next two provisions, namely Article 1535 and Article 1536, tend to provide protection to the seller of accounts receivable (Client).

In the sale and purchase of receivables, the seller of receivables must ensure that the form of the receivables being sold actually exists at the time it is submitted. However, based on the two provisions of the article above, it can be seen that the limitations of the seller's responsibilities and obligations are that the seller does not guarantee the possibility of 'defects' contained in the receivables sold. Likewise, the seller is not required to guarantee the possibility of the debtor's 'ability' to make payments; unless the seller expressly guarantees to the buyer the debtor's ability to make payments. If the debtor's 'ability' has been expressly guaranteed by the seller, and then the debtor turns out to be unable to make payments to the buyer of the receivables, then the payment obligation shifts to the seller of the receivables. Therefore, it is necessary to get attention in buying and selling receivables, that if the seller of the receivables guarantees the ability of the debtor to make payments, what is guaranteed by the seller is the ability of the debtor in 'the debtor's current state'" eg, when the sale and purchase of receivables occurs. Not the situation of the debtor in the future, unless the seller of receivables guarantees expressly that the condition of the debtor will be in the future. This means that the seller is fully willing to take responsibility for 'all payments' which should be the obligation of the debtor.

The provisions of Articles 1535 and 1536 of the Civil Code can actually be categorized as factoring transactions that are without resource factoring, namely the type of factoring transaction without any guarantee or responsibility from the seller of the receivables (Client), so that in factoring without resource factoring, the entire risk of loss caused by non-payment of the receivables sold is entirely borne by the buyer of the receivables (Factor).

The process of transferring property rights from the seller to the buyer requires a legal action known as 'leveraging'. The regulation regarding the transfer of property rights in buying and selling, is stipulated in Article 1459 of the Civil Code, which reads 'ownership rights to the objects sold, do not pass to the buyer as long as the delivery has not been carried out according to Articles 612, 613 and 616 of the Civil Code'.

The transfer of a receivable is included in factoring, in general it can be done without the knowledge of the debtor (Customer) or some of the debtors. However, the submission of receivables in factoring transactions, of course, must be carried out based on the method of submission of receivables in Article 613 of the Civil Code.

Based on the description above, it can be believed that in every agreement in the form of a standard contract, the exoneration conditions that have been standardized by one party are always included in the agreement form. The characteristics of a standard agreement which contains exoneration conditions, which intend to eliminate or limit the obligations of one of the parties, are as follows:

a. The contents are determined unilaterally by the creditor whose position is relatively stronger than the debtor;
b. The debtor does not participate in determining the contents of the agreement;
c. Driven by the needs of the debtor, he is forced to accept the agreement;
d. The form is written;
e. Prepared in advance in bulk or individually.

In Law No. 8 of 1999 concerning Consumer Protection, there is no provision that provides a reply to the understanding or definition of the exoneration clause, Law no. 8 of 1999, in the General Provisions of Article 1, number (10) determines the meaning of standard clauses as follows: '*Standard clauses are any rules or*

conditions that have been prepared and determined in advance unilaterally by business actors as outlined in a document and/or agreement that is binding and must be fulfilled by consumers.'

Law Number 8 of 1999 concerning Consumer Protection is a provision that generally regulates the relationship between consumers and business actors, where one of the objectives of the enactment of the law is to realize a balance of protection of the interests of consumers and business actors so as to create a healthy economy. General Provisions Article 1, number (1) of Law number 8 of 1999 concerning Consumer Protection explains '*Consumer Protection is all efforts that guarantee legal certainty to provide protection to consumers*'.

Badrulzaman stated that the standard agreement was translated from a term known in Dutch, namely 'Standard Contract' or 'Standart voorwarden'. Abroad there is no uniformity regarding the terms used for standard agreements. German literature uses the terms '*Allgemeine Geshafts Bedigun'*, '*Standart Vertrag'*, '*Standart Conditionen'*. British law calls this a 'Standard Contract'.

Sjahdeni formulated a standard agreement as an agreement in which almost all of the clauses have been standardized by the wearer and the other party basically does not have the opportunity to negotiate or ask for changes. Furthermore, Hondius stated that the standard conditions in the agreement are the written concept requirements contained in several agreements that are still to be made, the amount of which is not certain without first negotiating the contents. The standard conditions mentioned are generally also stated as standard agreements. In principle, the contents of the standardized agreement are fixed and no further negotiations can be held.

We know that Law Number 8 of 1999 concerning Consumer Protection does not regulate factoring activities, but if we pay attention to the provisions contained in the consumer protection law, in addition to aiming to guarantee legal certainty and provide protection to consumers against for goods produced by producers, it is implied that there are provisions of articles that regulate buying and selling relations or trade, both goods and services between business actors (sellers of goods/services) and consumers.

To fulfill the basic principles and several principles as stipulated in Article 2 of Law No. 8 of 1999, and in order to place equality (equal position) between consumers and business actors based on the principle of freedom of contract, there is a prohibition on including standard clauses which contain exoneration conditions. The prohibition against including the standard clause is stipulated in Article 18 of Law Number 8 of 1999:

In relation to the purchase price of receivables, in the factoring agreement a clause is formulated with the sentence the 'Client hereby agrees to sell to the Factor and the Factor hereby agrees to buy from the Client', the receivable is the cumulative number of offers received by Factor, without reducing the Factor's right to reduce the amount at any time without the consent of the Client. The clause related to the purchase price also shows the dominance of the position of the Factor compared to the Client, where the Factor has the right to reduce the number of receivables offered at any time without the consent of the Client.

In relation to the provisions regarding the Client's obligations in the factoring agreement, a clause is formulated with the following sentences:

a. Client guarantees to the Factor that the transferred receivables really belong to the Client arising from legitimate buying and selling transactions, free from all disputes, never, not currently, and will not be bound as collateral to other parties in any form whatsoever. Based on the clause that determines the Client's obligations in the factoring agreement, it appears that there is a dominance of the Factor over the Client. Through this clause, the Factor party wishes that the receivables purchased from the Client are receivables that are free from disputes and are not being used as collateral or dependents in any form.
b. Client must bill the Customer and be fully responsible for paying the Factor on the date determined by the Client and the Factor.
c. Late repayment (including Discounted Rate) by the Client to the Factor will be subject to a late penalty of 5% per month.
d. If it turns out that later things happen that are contrary to what is stated in Article 6 paragraph 1 of this agreement, then the Client is immediately obligated to bear the losses suffered by the Factor.

In regard to the substance and conditions contained in the factoring agreement, if examined further, it will appear that there are exoneration conditions that limit the liability of the Factor. The limitation of the Factor's responsibilities can be seen from the lack of obligations and responsibilities of the Factor, while, on the other

hand, more responsibilities and obligations are borne by the Client. And the clauses of the factoring agreement show that the intention and efforts of the Factor are to 'protect' themselves and their interests from various risks of loss that may occur.

The formulation of agreement clauses that include exoneration requirements in the factoring agreement referred to in the practice of multiple receivable transactions can be exemplified as follows:

a. Related to the process of offering and receiving receivables; in the factoring agreement a clause is formulated with the sentence 'Factor has the right to accept or reject the receivables offered by the Client based on the Factor's own considerations, the approval of the refusal will be notified in writing to the Client within seven days of the offer being received'. From the clause regarding the offer and acceptance of receivables in the factoring agreement, it can be seen that the Factor party has a more dominant position than the Client side, where the Factor party can reject or accept the receivables offered by the Client based on the consideration and approval of the Client.
b. In connection with the transfer of receivables; In the factoring agreement a clause has been formulated with the sentence 'The transfer of receivables does not affect or free the Client from obligations to the Customer', as contained in the sale and purchase transaction between the Client and the Customer, and therefore the Factor is released and is not obliged to complete or carry out the terms/conditions contained in the sale and purchase transaction.

Based on the clause in the factoring agreement, it appears that the Factor party transfers the obligation to collect the receivables to the Client and at the same time requires the Client to make payment of the receivables to the Client, where the obligation to make payments on the receivables that have been sold and transferred is actually the Customer's obligation.

Furthermore, based on the formulation of the sentence in the clause above, it appears that the Factor party places the obligation and burden of responsibility on the Client to pay a fine for any late payment, including payment of discount rate. In addition, based on clause d in point 4, it appears that the Factor has placed an

obligation on the Client to bear all losses suffered by the Factor arising from the factoring transaction.

Based on the clauses regarding the obligations of the Client mentioned above, it can be seen that the imbalance between the rights and obligations imposed on the Client is compared to the rights and obligations of the Factor party. In relation to collection or settlement, in the factoring agreement, the following clause is formulated:

a. Factor is the only holder of full rights to receive and or collect in any way any receivables purchased by Factor from the Client.
b. In the event that the Customer for any reason is unable to pay off a debt to the Client but must pay it back (including the Discounted Rate) to the Factor.
c. Based on the clause regarding the collection and settlement of receivables, it appears that the position and power of the Factor party is very broad. Where it is determined that the Factor is the only holder of the right to receive payments and the only one who has the right to collect the receivables purchased by the Factor from the Client.
d. Based on the billing and settlement clauses of the receivables, it can be interpreted that the Factor party, in addition to being able to collect bills from the Client, can also perform direct billing to the Customer. The clause regarding the collection and settlement of the receivables is a bit excessive and seems contradictory to the previous clause regarding the Client's obligations, where it is determined that the Factor requires the Client to make collections to the Customer and is fully responsible for paying the Factor.

In relation to taxes and fees, in the factoring agreement a clause is formulated: The client is obliged to pay:

a. All taxes, fees, wages, expenses and other lawful expenses, including stamp duties and fees for attorneys or legal consultants appointed by the Factor, from or in connection with the creation, performance and registration of this agreement or any fees, charges, warranties and other documents required by the Factor.
b. All fees and other costs incurred in connection with the collection and execution of payments that must be paid by the Client. Based on the clause regarding the tax burden and costs arising from the factoring transaction, the position between the Factor and the Client appears to be unbalanced; the position of the Factor very dominant compared to the position of the Client. This is clearly seen from the imposition of taxes and fees arising from factoring transactions,

all of which are charged to the Client, including the costs of lawyers or legal consultants unilaterally appointed by the Factor, and other costs, including fees and charges and billing fee.

c. In terms of dispute resolution, if a dispute arises as a result of this agreement, both parties agree to resolve it by deliberation and consensus. However, if there is no settlement at the Registrar's office of the Central Jakarta District Court, without prejudice it is the Factor's right to file a claim at another District Court in the territory of the Republic of Indonesia.

Based on the sentence in the clause, it appears that the Factor party intends to emphasize that, with the sale and purchase of receivables and the transfer of receivables carried out by the Client and the Factor, the Client must continue to carry out what is his obligation in the relationship of buying and selling goods with the Customer, and at the same time the Factor emphasizes that the Factor is freed from all obligations arising from the buying and selling relationship between the Client and the Customer, where this (substance) or the conditions listed in the factoring agreement have been determined unilaterally by the Factor, without involving the Client.

Moving on from the thoughts above, the understanding of the working power of the principle of balance which emphasizes the balance of the position of the parties, namely between the Client and the Factor in the factoring agreement is very important. This is based on the idea that, in the factoring agreement, there is an imbalance in the bargaining position between the Client and the Factor. The Client party is in a weak position in the process of reaching an agreement in making the agreement, while the Factor party is in a strong and more dominant position in determining the contents and conditions specified in the agreement. Based on this fact, it can be said that there is an imbalance in the bargaining position in the legal relationship between the parties in the factoring agreement.

The principle of balance in an agreement has a very important meaning and significance. Harnoko[11] suggests that the interpretations of the meaning and working

[11] Agus Yudha Harnoko, *Azaz Proporsionalitas Dalam Kontrak Bisnis: Perkembangan Hukum Perdata Di Indonesia* (Laksbang Grafika 2013).

power of the principle of balance are:

a. More toward the balance of the positions of the parties. That is, in the contractual relationship the position of the parties is given a balance charge;
b. The equal distribution of rights and obligations in a contractual relationship as if without regard to the process that takes place in determining the final outcome of the distribution;
c. Balance as if merely the result of a process;
d. State intervention is a coercive and binding instrument in order to realize the balance of the positions of the parties;
e. Basically, the balance of the positions of the parties can be achieved on the same conditions (*ceteris paribus*).

Furthermore, the prohibition on the inclusion of standard clauses in the agreement is stipulated in Article 18 paragraph (2), that 'Business actors are prohibited to include standard clauses whose location or shape is difficult to see or cannot be read clearly, or whose expressions are difficult to understand'.

Then, the legal consequences of the inclusion of standard clauses in an agreement that do not meet the provisions are specified in Article 16 paragraph (3), which states that 'Every standard clause that has been stipulated by business actors in documents or agreements that meet the provisions as referred to in paragraphs (1) and (2) is declared null and void by law'. The last provision that regulates the prohibition of the inclusion of standard clauses in the agreement is Article 18 paragraph (4), which states that 'Business actors are required to adjust standard clauses that are contrary to this law'. As stated earlier, in the practice of factoring transactions, the factoring agreement is usually made by the parties in writing, either in the form of a notarial deed or a private deed. If referring to the characteristics of the standard agreement as described above, the factoring agreement is included in the type of standard contract where the substance and conditions contained in the factoring agreement have been formulated and prepared by the Factor party without involving the Client.

Furthermore, the law provides understanding: Goods are any object, both tangible and intangible, whether movable or immovable, consumable or non-expendable, which can be traded, used, used, or utilized by consumers. Furthermore, what is meant by service in this law is any service in the form of work

or achievement provided for the community to be utilized by consumers, whereas what is meant by Business Actors based on General Provisions, Article 1, number (3), is every individual or business entity, whether in the form of a legal entity or not a legal entity, that is established and domiciled or carries out activities within the jurisdiction of the Republic of Indonesia, either individually or jointly through agreements to carry out business activities in various economic fields. Furthermore, in the explanation of General Provisions, Article 1 point (3), it is emphasized that business actors included in this definition are companies, corporations, cooperatives. BUMN, importers, traders, distributors, and others.

If one considers the definition of a business actor who is a person or a business entity, both legal and non-legal entities, through an agreement to carry out business activities in various economic fields, factoring transaction activities are included in the scope of activities regulated by law.. Although Law no. 8 of 1999 concerning Consumer Protection is not a statutory regulation that specifically regulates factoring transaction activities, if you pay attention to the basic principles contained in Article 2 of the law, is determined that 'Consumer protection is based on benefits, fairness, balance, security and consumer safety, and legal certainty'. Given that, until now, there is no legislation regarding factoring that specifically regulates and provides legal certainty and provides legal protection to parties in factoring activities/transactions (factoring), then there are some basic principles or principles in the law. These can be used as the basis and norms in order to provide legal protection to the parties in factoring transactions, especially protection to the Client.

Legal Protection of the Parties Based on the Principle of Freedom of Contract

One of the conditions for a valid agreement in Article 1320 of the Civil Code Law is that there must be an agreement from the parties making the agreement, the principle of consensualism (agreement) has a very important meaning in the agreement, because with the agreement of the parties, an agreement arises from the moment the agreement occurs. Since the agreement was reached, from that moment

on there was a binding agreement for the parties, in accordance with the provisions of Article 1338 of the Civil Code, which reads that all agreements made legally apply as law for those who make them.

By having reached a consensus (agreement) of the parties in an agreement and caused legal consequences that bind both parties, it can be said that the parties have obtained legal certainty guarantees regarding what their rights and obligations are. The parties must carry out their respective rights and obligations in accordance with the agreement with the principle of honesty or good faith. There are those who give the understanding that consensus or agreement is an equality or conformity of will between the parties who entered into an agreement, but there are opinions that say that consensus or agreement can actually also be born from different wills, it's just that the different wills meet in a momentum deal.

Basically, the agreement starts from the difference or unequal will (interest) between the parties. Agreement relationships generally begin with a bargaining process about what each party wants (Jenn and others, 2016). After going through the bargaining process, after an agreement has been reached, an agreement will be born and an agreement that has been legally made will bind the parties.

In consensus or agreement, it means that there is a will or willingness of the parties to bind themselves together. Based on an agreement, or in other terms licensing (*toestemming*), the parties enter into an agreement on the main things of the agreement entered into by the parties. What is desired by one party is also desired by the other party, they want the same reciprocally.

The principle of freedom of contract, sometimes called *contract vrijheld* or *partij autonomie*, is one of the principles in contract law. The principle of freedom of contract is the most basic principle in contract law, in addition to other principles which, as a whole, are the foundation and main pillar of contract law.[12] Although the principle of freedom of contract is the most basic principle in the agreement, the principle of freedom of contract does not stand alone. The working power of

[12] Melese Wondmagegnehu Belete, 'The "Principle of Autonomy" in Contract under the Civil Code of Ethiopian: Is It an Absolute Principle?' (2019) 10 Beijing Law Review.[795].

the principle of freedom of contract is always related to other agreement principles, such as the principle of consensualism, the principle of legal certainty and the principle of justice.

The principle of freedom of contract implies that everyone is free to bind himself with whoever he wants. Based on the principle of freedom, the parties can make agreements according to their own free will. In addition, the parties are also free to determine the scope of the substance or content as well as the requirements of an agreement that they want, provided that the agreement they make must not conflict with the applicable laws and regulations, does not violate public order and does not violate decency.[13]

The same thing was stated by Satrio that, based on the principle of freedom of contract, people in principle can make agreements with any content whatsoever, as long as they do not conflict with the law, decency and public order.[14] What is meant by law is a law that is coercive. In line with the law to the parties, so that the parties feel safe and comfortable in enjoying what they are entitled to, and can carry out their obligations properly. The parties must receive protection from the dangers or risks that may occur related to the agreement they made.

Legal protection is born from a legal provision and all legal regulations provided by the community to regulate behavioral relations between community members and between individuals and the government to represent the interests of the community. Grammatically, 'protection' means to get oneself under something so as not to be seen. Meanwhile, the meaning of protection is all efforts to protect certain subjects, and can also be interpreted as a place of refuge, while protection is also the process, method, or act of protecting. The protection provided by law is also related to the existence of rights and obligations, in this case that are owned by humans as legal subjects in their interactions with fellow humans and their environment. As legal subjects, humans

[13] Lutz-Christian Wolff, 'The Relationship between Contract Law and Property Law' (2020) 49 Common Law World Review.[31].

[14] Tami Rusli, 'Asas Kebebasan Berkontrak Sebagai Dasar Perkembangan Perjanjian Di Indonesia' (2015) 10 Pranata Hukum.[24-36].

have the right and obligation to take legal action.

Given the importance of the provisions that can provide legal protection to the parties in the factoring agreement, to find out the form of legal protection provided to the parties in the factoring transaction, it can be viewed from several legal perspectives, such as the terms of the agreement. With a factoring agreement made in the form of a standard contract by including an exoneration clause of this kind, it can be said that it does not meet the requirements and elements required by Article 1320 to 1338 of the Civil Code, then the agreement can be null and void by law or can be cancelled.

Therefore, the question arises: 'Does the agreement made in standard form (contract standard), which includes the requirements for exoneration, fulfill the principle of freedom of contract so that it can be said to have given birth to an agreement?' Theoretically, there are several opinions regarding this matter, namely: First; the opinion that the standard contract does not fulfill the principle of freedom of contract. This opinion was conveyed by Sluijter by saying that this standard agreement is not an agreement, because the position of the entrepreneur (creditor) in the agreement is like that of a private legislator (*legio particuliare wetgever*). The conditions determined by the entrepreneur (creditor) in the agreement are law. In line with Sluijter's opinion, Pitlo said it was a dwang contract. Although theoretically juridical, this standard agreement does not meet the provisions of the law and has been rejected by some legal experts. However, in reality, the needs of society are running in the opposite direction to the wishes of the law.

In addition to a review based on the principle of freedom of contract, the existence of factoring agreements in the practice of factoring transactions needs to be reviewed based on the principle of consensualism, with the question: Have the factoring agreements that occurred in the practice of factoring transactions so far complied with the principle of consensualism? This question is very important and fundamental, because if the principle of consensualism is not fulfilled in an agreement, the next question is whether an agreement can have binding power for the parties, so that it can provide legal certainty for the parties.

Not different from the principle of freedom of contract, the principle of consensualism is a general principle of contract law that applies universally in several legal systems. The principle of consensualism teaches that, to give birth to an agreement, it must be based on the consensus (agreement) of both parties. With this principle, civil law - especially treaty law - is essentially an additional law (*aanvullenrecht*), in the sense that the person in the agreement made by him can make provisions that deviate from the provisions of the law regarding the agreement - except for some which are compelled. Additional law will add to the void in the agreement.

The principle of freedom of contract is a general principle of contract law that applies universally,[15] [16] [17] not only in countries that adhere to the civil law system such as Indonesia, but also applies to countries that adhere to the common law system, and applies also to the treaty law system of other countries. The principle of freedom of contract is the existence of the widest possible freedom by law given to the public to enter into agreements on anything, as long as it does not conflict with the laws and regulations, propriety and public order (Articles 1338 to 1337 of the Civil Code). Freedom of contract is an essential principle, both for individuals in developing themselves both in personal life and social life.

Although freedom of contract is a generally accepted principle in the contract law system in many countries, the concept and meaning of the principle of freedom of contract certainly cannot be equated (uniform) between one legal system and another. In Indonesia, 'freedom' is not defined as freedom that has no limits. In relation to the context of freedom of contract, the Decree of the People's Consultative Assembly Number II/MPR/1978 states that:

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[15] Henry Deeb Gabriel, 'The Use of the UNIDROIT Principles as Neutral Law in Arbitration' (2013) 23 Journal of Arbitration Studies.[39].

[16] Michael J Dennis, 'Modernizing and Harmonizing International Contract Law: The CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward' (2014) 19 Rev. dr. Unif. [114].

[17] Martijn W Hesselink, 'Democratic Contract Law' (2015) 11 European Review of Contract Law.[81].

> "Humans are recognized and treated as creatures of God Almighty, with equal degrees, rights and basic obligations, without discriminating against ethnicity, ancestry, religion and belief, gender, social position, skin color and so on, human beings, tolerance of '*tepa selira'*, and an attitude that is not arbitrary toward others".

This Pancasila State philosophy displays the teaching that there must be harmony and balance between the use of human rights and basic obligations. In other words, freedom contains 'responsibility'. In national contract law, the principle of responsible freedom of contract, which is able to maintain balance, needs to be maintained as a capital for 'personality development' to achieve prosperity and happiness in physical and spiritual life that are in harmony and balance with the interests of the community. From the description above, it can be concluded that the principle of freedom of contract does not have unlimited meaning, but is limited by the responsibilities of the parties, so that freedom of contract as a principle is given the following characteristics the principle of freedom of contract is responsible.

Referring to the view on the principle of freedom of contract, the contract law in the Indonesian context must be based on the principle of freedom of contract, which is not only limited by law, morality and public order, but the meaning of freedom of contract must be accompanied by the responsibility of the parties to the agreement they made. If we examine the factoring agreements that occur in the practice of factoring transactions (factoring), it can be seen that, theoretically and legally, factoring agreements do not fulfill the principle of responsible freedom of contract. It is said that it does not fulfill the principle of freedom of responsible contracting, because of the factoring agreement that occurs in the practice of factoring transaction.

In addition to being made in a standard form (standard contract), materially the conditions contained in the factoring agreement can be categorized as conditions that include an exoneration clause, where, through the exoneration clause contained in the agreement, the Factor party has the opportunity to make provisions that limit or free him from certain obligations and responsibilities, while, on the other hand, obligations and responsibilities are more burdened with being 'transferred' to other parties.

In the process of reaching an agreement at the time of making the factoring agreement, it can be seen that there is an imbalance in the bargaining position between the Client and the parties; the Client does not have the opportunity to freely express his will in determining the content (substance) and terms of the agreement. The factoring agreement made in the form of a standard contract by including an exoneration clause can actually be said to be unable to meet the requirements and elements required by Articles 1320 to 1338 of the Civil Code. The legal consequences of an agreement that does not meet the terms of the agreement specified in Article 1320 of the Civil Code are that the agreement can be null and void by law or can be canceled.

A standard agreement can be said to not fulfill the principle of freedom of contract, because it is not an agreement, because the position of the creditor in the agreement is like that of a private legislator (*legio particuliare wetgever*), where the conditions determined by the creditor in the agreement are law. However, in reality the needs of the community in this case run in the opposite direction to the wishes of the law, so that things that should not meet the theoretical juridical provisions are considered normal as long as there is an agreement from both parties.

Conclusion

Factoring agreements in the practice of factoring transactions (factoring) that have been in effect so far have not been able to provide legal protection to the parties, especially to the Client. In the practice of factoring transactions, which are made in the form of a standard agreement containing exoneration terms, the position of the parties becomes unbalanced. The process of making the agreement is prepared and determined unilaterally by the Factor by providing a very minimal portion for the Client to negotiate. Of the factoring agreements in Indonesia, the position of the parties is not in an equal and balanced condition, even the position of the Factor party is in a very dominant position compared to the position of the Client. Therefore, the factoring agreement does not fulfill the principle of balance and the principle of freedom of contract.

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