CHAPTER I

INTRODUCTION

A. Context of Study

In the business world, it is common if a company has a debt to another party. As long as they can pay the debt, having a debt is allowed. Companies who are able to pay its debt obligations called solvable companies. While the company who can not pay their debt called as insolvable companies. If a company is already in a condition that stopped paying or is no longer able to pay its debts, it can be sentenced for bankruptcy decision by commercial court, as long as the other requirement fulfilled. The bankruptcy decision is come from the claim of the creditor or the debtor itself. Because essentially, bankruptcy is a common seizure that the parties which declared bankrupt lose power over the goods they had.[1]

Bankruptcy is the mass executions by court decision, effective immediately, by seize on all the property of people that declared bankrupt, both existing at the time of the declaration of bankruptcy, as well as those obtained when the bankruptcy takes place, for all of the interests of creditors, which is done with the supervision of the authorities.[2]

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[1]Andy Sri Rezky Wulandari, *Buku Ajar Hukum Dagang*; Mitra Wacana Media, Makassar, 2014, p.187

[2]Bernadette Waluyo, *Hukum Kepailitan dan PKPU*; Kencana Group, Jakarta , 1999, p.1

Now Indonesia using the Law No.37 of 2004 on Bankruptcy and Suspension of Payment which replaces the Law No. 4of 1998 on the Bankruptcy. The Law No. 4 of 1998 was born as a reaction of the monetary crisis that appears in 1998. But changes in legislation is considered important because of the problems arising in the bankruptcy will be more diverse. The problem that faced by the company always growth time by time. It is the main purpose of the amendment of bankruptcy law.[3]

Meanwhile in United State, the definition of bankruptcy seems not have significant differences with Indonesian Bankruptcy Law. Bankruptcy is the legal process by which financially distressed firms, individuals, and occasionally governments resolve their debts. The bankruptcy process for firms plays a central role in economics, because competition tends to drive inefficient firms out of business, thereby raising the average efficiency level of those remaining. Consumers benefit because the remaining firms produce goods and services at lower costs and sell them at lower prices. The legal mechanism through which most firms exit the market is bankruptcy. Bankruptcy also has an important economic function for individual debtors, since it provides them with partial consumption insurance and supplements the government-provided safety net. Local governments occasionally also use bankruptcy to resolve their debts and

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[3]Anton Suyatno, *Pemanfaatan Penundaan Kewajiban Pembayaran Utang*; Kencana Predana, Media Group., Jakarta, 2012, p.15

there has been discussion of establishing a bankruptcy procedure for financially distressed countries.[4]

In United State, the history of bankruptcy law can divided into 3 historical stages: 19th century era, 1898 Bankruptcy Act and the Great Depression, and modern era of 1978. The shape of bankruptcy law and practice throughout American history is at least as much a result of political consideration and influence as economic consideration. In 1970s, the creaky construct of 1898 Act was ripe for overhaul. The urgency came from creditors who were frustrated with the rising number of personal bankruptcy filings during 1950s and 1960s. 1978 Bankruptcy Code profoundly changed the bankruptcy system and its importance in society and economy. By making bankruptcy more attractive to individuals, personal bankruptcy rose from less than 300,000 in 1980s into 1,5 million in 2002. It routinized corporate bankruptcy, turning it into a business and strategic decision rather than a last resort.[5]

In Japan, Corporate Bankruptcies in 1997 recorded 16,365 cases, over 12.5% from 1996’s figure of 14,544 and amount of debts was the highest in history, 14.21 trillion yen in Japan. After the burst of the bubble economy in 1990, the Japanese economy has been on a downward slide and many companies have been faced with financial difficulties. Hence, a

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[4]Michelle J White, *Economics of Corporate and Personal Bankruptcy Law*; The New Palgrave Dictionary of Economics, 2008, p.1

[5] Todd J Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*; Michigan Law Review, Vol. 101, Issue 6, 2003, p.2017-2021

certain prediction model to assess the financial distress of Japanese firms is required. A few empirical studies of corporate bankruptcy in Japan have been undertaken.[6]

The Bankruptcy Law in Japan was comprehensively amended in 2004, and became effective on January 1, 2005. The Bankruptcy Law provides for bankruptcy proceedings, which are applicable to both individuals and legal entities. A bankruptcy proceeding is a sell-out proceeding where a debtor gives up all assets (except for those exempt in the case of an individual debtor), the court-appointed trustee sells these assets, and the proceeds are distributed to creditors on a pro-rata basis. In 2005, there were 227,053 bankruptcy cases terminated; 216,582 of those cases involved bankruptcy proceedings of individual debtors.[7]

In order to do their business activity, some companies can sell their debt and also buy the other debt. Sell and purchase of the debt itself is very common nowadays. It also called as transfer of debt. Transfer of debt is quite useful for some companies that want to make efficiently for doing their business activity.

According to article 1 of Presidential Regulation No. 9 of 2009 about Financing Institutions, Factoring is a financing activity in the form

[6] Yoshida Shirata, *Financial Ratios as Predictors of Bankruptcy in Japan: An Empirical Research*; Associate Professor of Accounting, Tsukuba College of Technology Japan, Tokyo, 1998, p.2

[7] Junichi Matsushita, *Japan's Personal Insolvency Law*; University of Tokyo, Tokyo, 2007, p.2

of the purchase of short-term trade receivables of a company and management of its these receivables. Explanation on Article 6 (I) of Law No. 7 of 1992 about Banking, as amended by Act No. 10 of 1998 gives the meaning that factoring is an arrangement activity of debt or short-term bills of trade transactions in the country and abroad, which is done by a takeover or purchasing the debt.[8] In the process of factoring transactions, the debt which owned by a party is transferred or sold to the factoring company. Regarding the transfer of these debt, regulated in the Civil Code. However, the provisions of the transfer of the debt in the Civil Code is not clear, the provisions of the transfer of the debt must be considered in performing factoring transactions.[9]

In the business activity, the rotation of capital is an indication for success in business. Based on that, often for entrepreneurs need capital in a quick time in order to ensure the liquidity of the business, so they no longer wait for the maturity of the debt that held for later billed. The common way that usually used to obtain the fresh funds in a quick time is to sell their debt to another party who able to buy. Regarding the high and low price also depends on whether liquid such receivables as well as their accompanying collateral accounts. Problems arise when the procedure or

[8]Munir Fuady, *Hukum Tentang Pembiayaan*; Citra Aditya Bakti, Bandung, 2014, p.56
[9] Ibid, p.72

the receivables sale process does not meet the statutory requirements, so it can be detrimental to the seller's own.[10]

There are three kinds of transfer of debt, namely subrogation, novation, and cession. All three kinds of this law have strong relationships with factoring. According to Article 1400 of the Civil Code, the definition of subrogation is the transfer of right of creditor to the third party, where the third party making payments debt to the creditors. Also it determined that the subrogation can occur because of laws or because of the agreement. Meanwhile the meaning of the novation is a renewal of debt. In this case the old debt will be removed and replaced with new debt. The difference between the subrogation and novation is located on the position of debt after it was committed. In subrogation, the debt is never erased and there was never any new debt. Rather old debts that were transferred from the old to the new debtor. While in novation, the debt was renewed. So in this case, the debt from the new creditor is not transferred, but the debt agreement was renewed.[11]

The other one is Cession. Cession means that the Cessionaris make a deal to purchase the debt of Cedent. Cedent or who was selling the debt is the creditor of another debt. Than with cession, the right of creditor

[10]Akhmad Budi Cahyono, *Cessie Sebagai Bentuk Pengalihan Piutang Atas Nama;* Lex Jurnalica, 2004, p.13

[11]Munir Fuady, *Op.Cit*, p.73

of Cedent was transferred to Cessionaris. So Cessionaris can directly ask the debtor of Cedent to pay the debt to them.[12]

But sometimes the position of Cessionaris is not clear in some condition. This situation means that Cedent only sell half of their debt to the Cessionaris. And both Cedent and Cessionaris sued the debtor to the court for bankruptcy. According to this condition, the requirement of minimum creditor was fulfill. Because there are 2 creditors; Cedent and Cessionaris, it going to be weird that the fact it is very easy to make someone sued for bankruptcy. And it going to be a crack when someone had no good faith tried to sued another. But the parameters of good faith can not be consideration for judges to settle the case.

For example is the case of PT Dharma Rosadi International (DRI), a nickel mine company, against PT Bahana Selaras Alam as their partner. PT BSA claimed that they have a right to claim a debt 1.79 billion rupiahs from PT DRI. This debt comes from a contract related to nickel mine exploration agreement in Halmahera in 2011. In 3 September 2015, PT BSA transfers his claim right to PT Tridaya Sakti Mandiri (TSM). PT BSA was only transfer partially as 300 million rupiahs by partial cession.[13]

In 10 September 2015, PT BSA together with PT TSM sent a bankruptcy lawsuit for PT DRI to commercial court of Central Jakarta. In

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[12]Heru Pramono, *Pengaruh Pengalihan Piutang Terhadap Kepailitan*; Pengadilan Niaga Surabaya, 2012, p.11

[13] https://kabar24.bisnis.com/read/20151025/16/485746/dharma-rosadi-international-gagal-dipailitkan accessed on 13 October 2019, 13:28

the end the judge of Central Jakarta Commercial Court reject the request from plaintiff. The judge argued that the position of debt is not clear. Between debtor and creditors still have their own interpretation in the amount of the debt. The position of cession is also invalid because of that. In judge opinion, the lawsuit is not including as simple proof. But PT BSA insists that the debt can be simply proven.[14]

Another example is the case of MH Thamrin Hospital against PT Indra Catering Service (ICS) and Rosemary. PT ICS is the creditor of several debts by Thamrin Hospital. In other condition, PT ICS is the debtor of Rosemary. To pay the debt to Rosemary, PT ICS sell half of the debt of Thamrin Hospital to Rosemary. When PT ICS is going to collect the debt of Thamrin Hospital, they can not pay yet their debt. Because of that, PT ICS asking Rosemary together to sued Thamrin Hospital for bankruptcy in Commercial Court of Central Jakarta.[15]

However, the judge of Commercial Court of Central Jakarta is refusing the suit of PT ICS and Rosemary. The judges have opinion that the requirement of minimum creditor is not fulfill. Cession can not categorize as their own debt and Rosemary is not included as creditor for MH Thamrin Hospital. When someone was perform the transfer of debt, the right of Cedent automatically transferred to Cessionaris. The right of

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[14] Commercial Court of Central Jakarta Decision No. 10 K/Pdt.Sus-*Pailit*/2016
[15] Commercial Court of Central Jakarta Decision No. 09/pdt.sus/pkpu/2013/pn.niaga.jkt.pst

Cedent is including the right to claim the debt of debtor and also the right to sued bankruptcy to the debtor. In this condition, the position of Cessionaris is going to be not clear. And the Cessionaris are loss their right to claim the debt of debtor.[16]

B. Problem Statement

1. How is the position of Cessionaris to fulfill the requirement of minimum 2 creditors in the bankruptcy petition?
2. What are the rights and obligation of Cessionaris in the bankruptcy settlement?

C. Objective of Study

The aim of this study are:

1. To find the position of Cessionaris to fulfill the requirement of minimum creditor in the bankruptcy petition.
2. To find the right and obligation of Cessionaris in the bankruptcy settlement.

D. Originality of Research

In order to provide confirmation of the originality of this study and to avoid repetition or duplication on a theme with a focus on the same

[16] https://www.hukumonline.com/berita/baca/lt516b4fd45f4eb/dokter-gigi-minta-pkpu-rumah-sakit/ accessed on 5 June 2016, 09.30

study, search on previous studies to determine the originality of the study done by performing a search for the results of previous studies. Several studies relevant to the writing of this research were compiled successfully as a comparison to previous studies.

First, thesis written by Frenky Agustinus which titled as "Pengalihan Hak Tagih Utang Terhadap Debitur Dalam Perkara Kepailitan". This thesis explains about transfer of claim in case no. 08/Pailit/2013/PNNiaga/Mdn. Beside the case, this thesis focused on the implementation of transfer of claim for Limited Liability Company. This thesis also stated about debt and validity of cession. Although use a same subject, the point of view in cession delivery was differ with writer.

Second is "Pengalihan Piutang Secara Cessie Dan Akibatnya Terhadap Jaminan Hak Tanggungan Dan Jaminan Fiducia" that written by Puteri Nataliadari. The focus of this thesis is an implementation of cession in mortgage and fiduciary. This thesis explains about transfer of claim with cession in bank, especially in mortgage and fiduciary.

Third, a thesis written by Imam Purbo Jati entitled as "Tinjauan Yuridis Praktik Cessie Atas Sebagian Piutang Sebagai Upaya Untuk Mempailitkan Cessus (Studi Kasus PT Daya Satya Abrasives atas PT Saint Gobain Abrasives Indonesia kepada PT Multi Karya Usaha Bersama)". This research aims to determine the validity of partial cession that undertaken in order to obtain the status of bankruptcy for Cessus,

especially in the case of PT Daya Satya Abrasives and PT Multi Karya Usaha Bersama against PT Saint Gobain Abrasives.

Pengalihan Hak Tagih Utang Terhadap Debitur Dalam Perkara Kepailitan, Frenky Agustinus	Fakultas Hukum Universitas Sumatera Utara 2014	The writer focus on the position of cessionaris, while this thesis focus on the validity of cession, especially in case no. 08/Pailit/2013/PNNiaga/Mdn
Pengalihan Piutang Secara Cessie Dan Akibatnya Terhadap Jaminan Hak Tanggungan Dan Jaminan Fiducia, Puteri Nataliasari	Fakultas Hukum Program Magister Kenotariatan Universitas Indonesia, 2010	The writer focus on the cession in general, while this thesis focused on cession in mortgage and fiduciary
Tinjauan Yuridis Praktik Cessie Atas Sebagian Piutang Sebagai Upaya Untuk Mempailitkan	Fakultas Hukum Universitas Indonesia, 2013	The writer focus on the position of cessionaris in general cession, while this thesis focused on partial cession in the case of PT Daya Satya Abrasives and

Cessus (Studi Kasus PT Daya Satya Abrasives atas PT Saint Gobain Abrasives Indonesia kepada PT Multi Karya Usaha Bersama), Imam Purbo Jati		PT Multi Karya Usaha Bersama against PT Saint Gobain Abrasives

E. Operational Definition

1. Position of cessionaris

In the process of transfer of debt claim with Cession, there are three parties. Cedent is an old creditor who have claim of debt, Cessionaris is a new creditor who receive the transfer of claim. And Cessus is a debtor which in this condition only as a party who receive a notification or giving a permission for the Cession agreement which made by Cessionaris and Cedent.

According to article 613 Indonesian Civil Code, Cession is the transfer of debt claim The transfer 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 transferred to another individual. Such transfer shall have no consequences with respect to the debtor, until he has been notified thereof, or if he has accepted the transfer in writing or has acknowledged it.[17]

However the definition of cession in Article 613 Civil Code is not stated clearly. In Indonesia Cession is only known from the legal doctrines and also from jurisprudence. One of definition of Cession, which known in legal studies, is the definition which stated by Vollmar. That definition of Cession was translated by Tan Thong Kie as a one of term which commonly used for the transfer of debt.[18] In Indonesia, the definition of Cession is stated by Subekti. According to Subekti, Cession is one of method to transfer to debt claim by the old creditor to the new creditor, but the legal relation of the debt is not erased, but in overall transferred to the new creditor.[19]

2. Bankruptcy petition

Essentially, Bankruptcy is a common seizure that is conservatoire and the parties who declared bankrupt lose control of the property their owned. The settlement of the bankruptcy estate submitted to the

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[17] Munir Fuady, *Op.Cit*, p.74

[18] Puteri Nataliasari, *Pengalihan Utang Secara Cessie dan Akibatnya Terhadap Jaminan Hak Tanggungan dan Jaminan Fidusia,* Jakarta, 2010, p.13

[19] Subekti, *Hukum Perjanjian*, cet. 17, Intermasa, Jakarta, 1998, p.71

curator, who assisted in their duties by the supervisory judge who appointed the judge of the commercial court.[20]

According to article 1 of Law No. 37 of 2004 on Bankruptcy and Suspension of Payment, "Bankruptcy is a general confiscation for the property of Bankrupt Debtor that the maintenance and the settlement conducted by the curator under the supervision of the Supervisory Judge as stipulated in this Law." Creditors are people who have debt claim due to the agreement or the Act that can be charged in the court. And the debtor is a person who has debts because of agreements or laws that the payment can be charged in court.[21] According to Bernadette Waluyo in the book "Hukum Kepailitan dan PKPU", bankruptcy is determined by mass executions judge's decision to conduct a general confiscation of all property that is declared bankrupt, either existing at the time of the bankruptcy or obtained during the bankruptcy lasts.[22]

The one who file bankruptcy petition are can be debtor, creditor, or prosecutor in the case of public interest. In the case of debtor was a bank, bankruptcy petition can be filed by Bank Indonesia. And in the case of debtor was Securities Company, the one who can file bankruptcy petition is BAPEPAM. Based in the explanation, for a bank or Securities Company, neither debtor nor creditor has a right to

[20]Andy Sri Rezky Wulandari, *Op. CIt*, p.187
[21]Article 1 of Act No. 37 of 2004
[22]Bernadette Waluyo, *Op. Cit*, p.1

file a bankruptcy petition. The limitation for bank and Securities Company is important to avoid bankruptcy manipulation.[23]

3. The requirement of 2 minimum creditors

Bankruptcy has the principle that stated on the Article 1131 and 1132 Civil Code. "Any property of the debtor, both movable and immovable, either presently exist of will be exist in the future, become as collateral for any individuals agreements. Such property become joint collateral for of his creditors; the selling income of the estates is divided according to equivalence, which is in accordance to the proportionate of each credits, unless that among the there is valid reasons to be given priority for the creditors."[24]

According to article 2 of Act No. 37 of 2004 about Bankruptcy, there are some requirements of bankruptcy:

a. Debts
b. At least one of the debt was matured
c. At least one of the debt can be claimed
d. Debtor
e. At least there are 2 or more creditors[25]

[23] R Anton Suyatno, *Op. cit*, p.31
[24] Bernadette Waluyo, *Op.cit*, p.289
[25] Munir Fuady, *Op. cit*, p. 8

According to Article 6 (3) Law No. 37 Years 2004, bankruptcy petition should be granted if there is a fact or the condition that can be simply proven that the requirement of bankruptcy was fulfill.[26] In sum, debtor can be stated bankrupt if fulfill the following requirements:

1. In the condition of stop paying. It is means that the debtor is unable or do not want to pay his debts.
2. There is should be two or more creditors which one of them had a claim that can be billed.[27]

F. Research Method

1. Type of Research

This research uses a juridical normative method. Juridical normative method is done through identifying legal norms and legal views. The objective was to understand and answer the object of study by using juridical normative approach method.

2. Object of Research

The object of this research is any provisions and doctrine regarding to cession, especially for the position of cessionaris in bankruptcy

[26] Article 6 (3) of Act No. 37 of 2004
[27] Andy Sri Rezky Wulandari, *Op.Cit*, p.190

petition. The object of research also consists of several court decisions which related to the topic.

3. Legal Material

   a. Primary Legal Material: Law no. 37 year 2004 on Bankruptcy and Suspension of Debt Payment, Indonesian Civil Code, and Court decision related to the case.

   b. Secondary Legal Material: Book and article related to Bankruptcy and Cession.

4. Method of Gathering Legal Material

   The method for obtaining the materials was using library studies by collecting the literatures related to Bankruptcy and Transfer of Debt and documentation studies by analyzing the law related to Bankruptcy and Transfer of Debt.

5. Approach method

   This thesis used the statute approach by analyzing the position of Cessionaris in requirement of Bankruptcy; and the rights and obligations of Cessionaris from the point of view of legal regulation and rules.

6. Method of Legal Material Analysis

The method for analyzing materials used to the descriptive qualitative method. The obtained data way descriptively presented and analyzed in accordance to the regulations and rules that related to the Cession.

G. Structure of Writing

To give an approach of thinking on issues that will become the focus of discussion in this paper, the authors compile systematic writing consists of four (4) chapters, where each chapter relate to each other, namely:

Chapter I: Introduction

This chapter will discuss about Context of The Study, Statement of Problem, Research Objective, Literature Review, Research Method, and Structure of Writing.

Chapter II: Bankruptcy and Cession

This chapter will discuss about the definition and basic theory of Bankruptcy, cession, and the relation between bankruptcy and cession.

Chapter III: The Position of Cessionaris to Fulfill the Requirement of Minimum 2 Creditors in the Bankruptcy Petition

This chapter will discuss about the position of Cessionaris to fulfill the requirement of minimum creditor in the

bankruptcy petition, and the right and obligation of Cessionaris in the bankruptcy settlement.

Chapter IV: Conclusion and Recommendation

This chapter will consist of conclusion and recommendation in this thesis.