

CHAPTER II

REVIEW OF RELATED LITERATURE

A. Previous Research

The discussion of this research also contained in some previous researchs, namely:

The first previous research was the research which was written by Nanik Rosyidah, the student of Sharia Faculty in Sunan Kalijaga State Islamic University with the title “*Perspektif Hukum Islam Terhadap Pengalihan Hutang Kepada Pihak Ketiga*” in this research, researcher took Islamic law opinion generally about law of transfer or transfer of debt, and also discussed about the difference factoring and *hawalah*, from this research could be found case which differentiating transfer of debt which in factoring company with *hawalah* was based on that contract. *Hawalah* was *aqad tabarru'*, while factoring company was profit institution which in its effort to try everything possible to got advantage.⁸ From this research, which made different with research which being done was the researcher used perspective of *Burgerlijk Wetboek* and Fatwa DSN MUI concerning *Hawalah*, while previous research used the perspective of Islamic law generally, and also in this research the researcher conduct research of transfer of receivable, wasn't transfer of debt like a previous research.

⁸ Nanik Rosyidah, *Perspektif Hukum Islam Terhadap Pengalihan Hutang Kepada Pihak Ketiga*. Skripsi (Yogyakarta: UIN Sunan Kalijaga Yogyakarta, 2010)

Then the research which was written by Siti Fatimah, the student of Sharia Faculty in Sunan Kalijaga State Islamic University with the title “*Tinjauan Hukum Islam Terhadap Praktek Hawalah Di BMT Bina Ihsanul Fikri (Bif) Gedong kuning Yogyakarta*”. In this research, researcher researched in BMT Bina Ihsanul Fikri (Bif) Gedong kuning Yogyakarta, in which, BMT Bina Ihsanul Fikri applied *Hawalah*, but in practicing, that *Hawalah* wasn't accordance with require and term of *Hawalah*, that BMT asked fee/*ujroh* in practicing of *Hawalah*.⁹ In this research, which be point of different with this research was the research location and also study or perspective aspect. The study or perspective in the previous research was general, covered all Islamic law, but in the research which was conducted by the researcher was specified in used *Burgerlijk Wetboek* and Fatwa DSN MUI concerning *Hawalah*.

Next, the research which was written by Aris Pambudi, the student of Sharia Faculty in Sunan Kalijaga State Islamic University with the title, “*Tinjauan Hukum Islam Terhadap Implementasi Akad Hiwalah*”, in this previous research, the researcher conduct the research in BMT BRS Yogyakarta, and from this research could be concluded that: conduct *hawalah* contract in BMT BRS whose ask fee wasn't permitted. This case because *Hawalah* contract was *tabarru'* contract, that was the contract which related with the transaction which wasn't objectives to got profit. If BMT BRS wanted to take fee, so the contract which was used was *hawalah bil ujrah* or

⁹ Siti Fatimah, *Tinjauan Hukum Islam Terhadap Praktek Hawalah Di Bmt Bina Ihsanul Fikri (Bif) Gedongkuning Yogyakarta*. Skripsi, (Yogyakarta:UIN Sunan Kalijaga Yogyakarta, 2008)

multi service finance.¹⁰ In this research, which be point of different with this research was the research location and also study or perspective aspect. The study or perspective in the previous research was general, covered all Islamic law, but in the research which was conducted by the researcher was specified in used *Burgerlijk Wetboek* and Fatwa DSN MUI concerning *Hawalah*.

Then the research which was written by Widya Octavia Mayasari, the student of Law Faculty in Airlangga University of Surabaya with the title, “*Hawalah Sebagai Penjamin Piutang Debitur Dalam Perspektif Hukum Perbankan Syariah*”. the objective of this thesis was how role of *hawalah* in gave guarantee to creditor for debtor who has wanprestasi to fulfill his obligation based on *akad hawalah* which has author and agreed. The legal protection given must be based on with Islamic law and valid regulation in Indonesia, as like include in article 55 act Number 21 year 2008 on Sharia banking.¹¹ Which made different with the research which will be conducted by the research was in this thesis, the researcher focused the discussion to the definition of *hawalah* based on Al-Qur’an and Hadits and its implementation in Indonesia and the comparison of *hawalah* implementation in Indonesia with institution of transfer of receivable in *Burgerlijk Wetboek*. Such as *Cessie*, *Subrogasi* and *Novasi*. While the research which the researcher conduct was regarding the practice of cashing in invoice in Brondong Nusantara fish

¹⁰ Aris Pambudi, *Tinjauan Hukum Islam Terhadap Implementasi Akad Hiwalah*, Skripsi, (Yogyakarta: UIN Sunan Kalijaga Yogyakarta, 2011)

¹¹ Widya Octavia Mayasari, *Hawalah Sebagai Penjamin Piutang Debitur Dalam Perspektif Hukum Perbankan Syariah*, Tesis, (Surabaya: Universitas Airlangga Surabaya, 2010)

auction centre under perspective of *Burgerlijk Wetboek* and Fatwa DSN MUI concerning *Hawalalah*.

The previous research which explain that this research is different with the previous research can be seen in table 2.1, that are:

Table 2.1
The Difference of The Research with The Previous Research

| No | The Researcher | Title | Type of the Research | Result | Difference |
|----|----------------|--|----------------------|--|---|
| 1. | Nanik Rosyidah | Perspektif Hukum Islam Terhadap Pengalihan Hutang Kepada Pihak Ketiga | Normative Research | In this research could be found the case which different between transfer of receivable in factoring with <i>hawalah</i> was contract principle. <i>Hawalalah</i> was <i>tabarru'</i> contract or social institution, while factoring was profit institution | In this research, which different with the research which is conducting by the researcher was the researcher used perspective of <i>Burgerlijk Wetboek</i> and Fatwa DSN MUI concerning <i>Hawalalah</i> , while the previous research used perspective of Islamic Law generally. |
| 2. | Siti Fatimah | Tinjauan Hukum Islam Terhadap Praktek Hawalah Di BMT Bina Ihsanul Fikri (Bif) Gedong kuning Yogyakarta | Field Research | In this Research, the researcher conduct the research in BMT Bina Ihsanul Fikri (Bif) Gedong kuning Yogyakarta, where that BMT was conduct <i>Hawalalah</i> contract, but in the practice wasn't accordance with pillar and requirement of <i>Hawalalah</i> , because that BMT asked fee or <i>ujroh</i> in <i>Hawalalah</i> contract. | In this research, which different with the research which is conducting by the researcher was research location and perspective aspect, where in this research, research location in BMT Bina Ihsanul Fikri (Bif) Gedong kuning Yogyakarta and the perspective aspect was used Islamic law generally, |

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|----|------------------------------|---|--------------------|--|--|
| | | | | | while in the research which is conducting by the researcher used perspective of <i>Burgerlijk Wetboek</i> and Fatwa DSN MUI concerning <i>Hawalah</i> , and also research location in Brondong Nusantara fish auction centre. |
| 3. | Aris Pambudi | Tinjauan Hukum Islam Terhadap Implementasi Akad Hiwalah | Field Research | Fee in <i>Hawalah</i> contract isn't permitted. This case because of <i>Hawalah</i> contract is <i>Tabarru'</i> contract, that is contract which doesn't have purpose to get profit. If BMT BRS want to ask fee, so must used <i>hawalah bil ujroh</i> contract or multi service finance | In this research, which different with the research which is conducting by the researcher was research location and perspective aspect, where in this research, research location in BMT BRS Yogyakarta and the perspective aspect was used Islamic law generally, while in the research which is conducting by the researcher used perspective of <i>Burgerlijk Wetboek</i> and Fatwa DSN MUI concerning <i>Hawalah</i> , and also research location in Brondong Nusantara fish auction centre. |
| 4. | Widya Octavia Mayasari, S.H. | Hawalah Sebagai Penjamin Piutang Debitur Dalam Perspektif Hukum Perbankan Syariah | Normative Research | The objective of this thesis was how role of <i>hawalah</i> in gave guarantee to creditur for debitur who has wanprestasi to fulfill his obligation based on <i>akad hawalah</i> which has author and agreed. | In this thesis, the researcher focused the discussion to the definition of <i>hawalah</i> based on Al-Qur'an and Hadits and its implementation in Indonesia and the comparison of <i>hawalah</i> implementation in |

| | | | | | |
|--|--|--|--|---|---|
| | | | | <p>The legal protection given must be based on with Islamic law and valid regulation in Indonesia, as like include in article 55 act Number 21 year 2008 on Sharia banking.</p> | <p>Indonesia with institution of transfer of receivable in civil law. Such as <i>Cessie</i>, <i>Subrogasi</i> and <i>Novasi</i>. While the research which the researcher conduct was regarding the practice of cashing in invoice in Brondong Nusantara fish auction centre under perspective of <i>Burgerlijk Wetboek</i> and Fatwa DSN MUI concerning <i>Hawalah</i>.</p> |
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B. Review Of Related Literature

1. *Hawalah*

a. Definition of *Hawalah*

According to the language, the meaning of *Hawalah* is *al-intiqal* and *al-tahwil*, the meaning is transfer.¹² According to the term, there are differences of scholars opinions:

1) According to Hanafiyah, the meaning of *Hawalah* is:

نَقْلُ الْمَطَا لَبَةِ مِنْ ذِمَّةِ الْمَدَّ يُوْنِ إِلَى ذِمَّةِ الْمُتَنَزِّمِ

*Transfer of the debt from responsibility that the owed to another which had responsibilities and obligations.*¹³

¹² Hendi Suhendi, *Fiqh Muamalah*, (Jakarta: Raja Grafindo Persada, 2002), p.99

¹³ Hendi, *Fiqh Muamalah*, p.99

2) According to Taqiyuddin, *Hawalah* is:

إِنْتَقَالُ الدَّيْنِ مِنْ ذِمَّةٍ إِلَى ذِمَّةٍ

*Transfer of the debt from burden of one person to be a burden to others.*¹⁴

3) According to Idris Ahmad , *Hawalah* is:

Some of agreement (*ijab qabul*) transfer of the debt from dependents of someone who owes to others, where the other people were also in debt to the transfer.¹⁵

4) According Ascarya, *hawalah* is:

Transfer of debt or receivable from person who has debt or receivable to other person who obligated guarantee and receipt that.¹⁶

5) According of the compilation of sharia economic law, *Hawalah* is:

Transfer of debt from *muhil al-ashil* to *muhal 'alaih*.¹⁷
That is explained in articles 362 till 372 The compilation of sharia economic law.

Thus, it can be concluded that *Hawalah* is the transfer of dependents of the debt or receivable from the owner of the debt or receivable with other debt or receivable owners. In short, *Hawalah* is the transfer of debt or receivable.

¹⁴ Hendi, *Fiqh Muamalah*, p.100-101

¹⁵ Hendi, *Fiqh Muamalah*, p.101

¹⁶ Ascarya, *Akad & Produk Bank Syariah*, (Jakarta: PT Raja Grafindo Persada, 2008), p.107

¹⁷ PPHIMM, *Kompilasi Hukum*, p.16

b. Pillars and Requirement of *Hawalah*

1) Pillars of *Hawalah*

According to Hanafiyah, the pillar of *Hawalah* is only *ijab* and *qabul* which conducted between those who doing of *Hawalah* with the receiving of *Hawalah*.¹⁸

Meanwhile according to Syafi'i, Hambali, Maliki there are six pillars of *Hawalah*.¹⁹

- a) *Muhil*, is person who transfers the debt
- b) *Muhal*, is person who is transferred his claim right
- c) *Muhal'alaih*, is person who receives of *Hawalah*, namely who receives the debt loans from *muhil*
- d) *Shighat Hawalah*, is *ijab* from *muhil* and *qabul* from *muhal*
- e) There is receivable *muhil to Muhal*
- f) There is receivable *Muhal'alaih to muhil*

But, according the compilation of sharia economic law, Pillars of *Hawalah*/transfer of debt, they are:

- 1) *Muhil*/ Borrower
- 2) *Muhal*/ Lenders
- 3) *Muhal 'alaih*/ *Hawalah Receiver*
- 4) *Muhal bihi*/ Debt; and
- 5) *Aqad*/ Contract.

¹⁸ Hendi, *Fiqh Muamalah*,

¹⁹ Hendi, *Fiqh Muamalah*, p.102

Aqad / Contract as referred to in pillar of *hawalah* is expressed by the parties in writing, orally, or cue.²⁰

2) Requirement of *Hawalah*

Requirement of *Hawalah* according to Hanafiyah is:²¹

- a) Person who transfers of debt (*muhil*) is smart person, if *Hawalah* is done by crazy person or little person, the *Hawalah* is invalid.
- b) Person who receives the *Hawalah* (*rah al-dayn*) is smart person, if *Hawalah* is done by crazy person, *Hawalah* is invalid.
- c) Person who doing *Hawalah* (*mahal'alah*) is also must be smart person and be pleased with him anyway
- d) There is debt of *muhil to muhal'alaih*.

In the compilation of sharia economic law, the pillar of the parties involved in *hawalah* is a must in accordance with article 363 to 365, i.e:

- a) In article 363 the compilation of sharia economic law,²² explained that the term of parties who conduct *Hawalah* contract must capable in law.
- b) In article 364 the compilation of sharia economic law,²³ stated that the valid term of *Hawalah* is must be known by parties, and must be permitted by who give loan.

²⁰ Article 362 The Compilation of Sharia Economic Law, *Kompilasi Hukum*, p.102

²¹ Hendi, *Fiqh Muamalah*, p.101

²² Article 363, "Para pihak yang melakukan akad *hawalah*/pemindahan utang harus memiliki kecakapan hukum."

²³ Article 364 (1) Peminjam harus memberitahukan kepada pemberi pinjaman bahwa ia akan memindahkan utangnya kepada pihak lain. (2) Persetujuan pemberi pinjaman mengenai rencana

c) In article 365 the compilation of sharia economic law,²⁴ stated that in transfer of debt isn't requirement there is debt from *muhal alaihi* to *muhal* and also in transfer of debt isn't requirement of fee/ *ujroh*.

c. Kind of *Hawalah*

Madzhab Hanafi divided *hawalah* into several parts:

- 1) In terms of object agreement, *hawalah* is divided into 2 kinds:
 - a) *Hawalah al-haqq* is The transfer of right or receivable from an owner of other receivable, it is usually done when the first party owes money on the second party, he paid his debt with its receivable on the other side. If payment of goods / objects, so that actions is named as *hawalah haqq*. Owner of receivable in this case is *muhal*, because he who transfer to others to transfer of right.²⁵ So, if which is transferred is the right to demand the debt (transfer of right) is called *Hawalah al haqq*.
 - b) *Hawalah al-dain* is transfer of debt from a debtor to another debtor. This can be done because the first debtor still has a receivable on the second debtor. *Muhal* in this *hawalah* is person who owe, because he transfer to others to pay its debts.

peminjam untuk memindahkan utang seperti yang dimaksud pada ayat (1), adalah syarat dibolehkannya akad *hawalah*/pemindahan utang. (3) Akad *hawalah*/pemindahan utang dapat dilakukan jika pihak penerima *hawalah*/pemindahan utang menyetujui keinginan peminjam pada ayat (1).

²⁴Article 365 (1)*Hawalah*/pemindahan utang tidak disyaratkan adanya utang dari penerima *hawalah*/pemindahan utang, kepada pemindah utang. (2) *Hawalah*/pemindahan utang tidak disyaratkan adanya sesuatu yang diterima oleh pemindah utang dari pihak yang menerima *hawalah*/pemindahan utang sebagai hadiah atau imbalan.

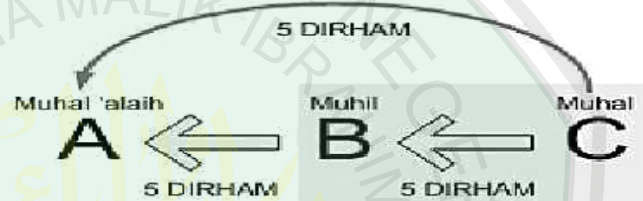
²⁵Muhammad Tahil Mansuri, *Islamic Law of Contract and Bussines and Transaction* (New Delhi: Adam Publishers and Distributors, 2006) p. 305

This *Hawalah* judged by consensus of scholars.²⁶ So, if which is transferred is the obligation to pay the debt (transfer of debt or liabilities) is called *Hawalah al-dain*.²⁷

2) In term of the kinds of contract, *hawalah* is divided into 2 kinds:

- a) *Hawalah al-Muqayyadah* is transfer as changing from debt payment of *muhil* (first party) to *muhil*/second party (conditional transfer).

Example:



A has debt to B for about 5 dirham. Meanwhile B has debt to C for about 5 dirham. Then B transfer his right to prosecute receivable which located in C to A to exchange compensation the payment of the debt B to A.

Thus *hawalah al-muqayyadah* on one side is *hawalah al-haq* because transfer the right to billing his receivable from C to A (transfer of right). While on the other hand, it can be *hawalah al-dain* because B transfer to A to be his liability C to A (transfer of debt/liabilities).²⁸

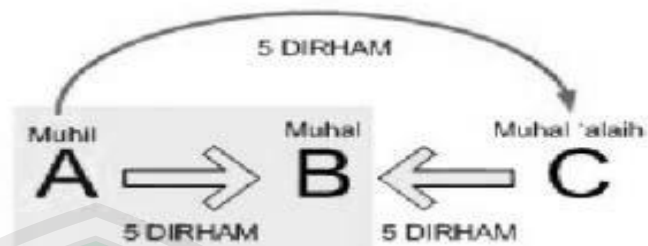
- b) *Hawalah al-Muthlaqah* is transfer of debt which not defined to exchange compensation from the debt payment of *muhil* (first party) to *muhil*/second party (absolute transfer).

²⁶ Muhammad, *Islamic Law*, p.305

²⁷ Nasrun Haroen, *Fiqh Muamalah*, (Jakarta: Gaya Media Pratama, 2000), p.222

²⁸ Nasrun, *Fiqh Muamalah*

Example :



A has debt to B for about 5 dirham. Then A transfer the debt to C until C has liability to pay the debt of A to B without mention that transfer the debt to exchange compensation from payment the debt of C to A

So, *hawalah al-muthlaqah* contains *hawalah al-dain* only because which transfer only the debt A to B into the debt C to B.²⁹

The scholar besides mazhab Hanafi does not allow this kind of *hawalah*. Some scholars argue transfer of debt in *muthlaq* include to *kafaah madhdah* (collateral), it must be based on three sides, that are, who has receivable, the debtor and person who bear the debt.³⁰

d. Termination of *Hawalah*

In *Hawalah* contract, there are some cases which can cause of *hawalah* termination, that are:³¹

²⁹ Nasrun, *Fiqh Muamalah*, p.223

³⁰ As carya, *Akad & Produk Bank Syariah* (Jakarta: PT. Raja Grafindo Persada, 2008), p. 26

³¹ Ahmad Wardi Muslich, *Fiqh Muamalah* (Jakarta: Amzah, 2010), p. 45

1) *Fasakh*.

Fasakh in terminology of *fukaha* is cessation of the contract before the goal of contract is reached. If the *hawalah* contract has *fasakh* (canceled), then *Muhal* right to sue the debt back to *muhil*.

2) *Muhal alaihi* died, wasteful or other

Muhal right (debt) difficult to can back because *Muhal alaihi* died, wasteful or other, in the circumstances of this kind in the affairs of a debt settlement back to *muhil*. Abu Hanifah, Syarih, dan Utsman give opinion that in condition of *muhal'alaihi* bankrupt or dies, then the person who debted (*muhal*) back to *muhil* for collect.³²

But according Malikiyah, Syafi'iyah, Hanabilah. If the *hawalah* contract has been perfect and right already moved and approved by *muhal*, then billing right isn't back to *muhil*, whether those rights can be met or not because of the death *muhal alaihi* or wasteful.

If the transfer of that debt occurred *gharar* (fraud) according Malikiyah, debt billing right back to *muhil*. According to Imam Maliki, if *muhil* "lay" *Muhal*, where he has *hawalah* to people who do not have anything (fakir), then *Muhal* allowed back to billing of debts to *muhil*.³³

³² Hendi, *Fiqh Muamalah*

³³ Hendi, *Fiqh Muamalah*, p.103

- 3) Giving of property by *muhal alaih* to *muhal*
- 4) The death of *muhal* or *muhal alaih* inherit of *hawalah*
- 5) *Muhal* grant that property to *muhal alaih* and he receive it.
- 6) *Muhal* give that property to *muhal alaih* and he receive it.
- 7) *Muhal* release *muhal alaih*.³⁴

e. Objectives of *Hawalah*

- 1) Allows of debt and receivable settlement quickly and simultaneously
- 2) Availability of bailouts for grants for who need.
- 3) Can be a based income / non-financial revenue source for sharia bank

The risks to be aware of the contract *hawalah* is cheating customers by giving false invoice or *wanprestasi* in broken a promise to fulfill *hawalah* obligation to the bank.³⁵

2. Concept of *Hawalah* in Burgerlijk Wetboek

In Burgerlijk Wetboek, *Hawalah* is classified into transfer of receivable part, that is in article 613 (1), that is:

“Penyerahan akan piutang-piutang atas nama dan kebendaan tak bertubuh lainnya, dilakukan dengan jalan membuat sebuah akta otentik atau akta dibawah tangan, dengan mana hak-hak atas kebendaan itu dilimpahkan kepada orang lain.”

³⁴ Ahmad Wardi, *Fiqh Muamalah*, p.45

³⁵ Muhammad Safi'i Antonio, *Bank Syariah Wacana Ulama dan Cendekiawan*, (Jakarta: alvabet 1999), p. 209

In transfer of receivable which explained in article 613 (1) there is an agreement because in the transfer of receivable involving several parties in it and transfer of receivable also require the consent of the debtor, or in other words requires agreement. It is as in *hawalah* there is agreement between *muhi' al-ashil* and *muhal 'alaih*, and in *Burgerlijk Wetboek* the Agreement provided in Article 1320 *Burgerlijk Wetboek*.

a. Cessie

1) Definition of Cessie

In agreement between *Muhal*, *muhi'*, and *muhal 'alaih* there is transfer of receivable and debt part between all parties. Regarding cashing in invoice in Brondong Nusantara fish auction centre classified into the transfer of receivable, which is described in *Burgerlijk Wetboek* in Article 613 (1) that:

“Penyerahan akan piutang-piutang atas nama dan kebendaan tak bertubuh lainnya, dilakukan dengan jalan membuat sebuah akta otentik atau akta di bawah tangan, dengan mana hak-hak atas kebendaan itu dilimpahkan kepada orang lain.”

From that case can be learned that is provided in Article 613 (1) is submission of bill on behalf and objects other disembodied,³⁶ which then is called by *Cessie*.

Cessie is a way of transfer of receivable on behalf provided in Article 613 *Burgerlijk Wetboek*. This transfer occurs on the

³⁶ *Burgerlijk Wetboek*, translated by R.Subekti and R.Tjitrosudibio, *Kitab Undang*, p.179

basis of a civil events, such as buy-sell agreement between old creditor with new potential creditor.

In *Cessie*, receivable which old is not clear, just switch to the third party as the new creditor. In *Cessie*, debtor passive forever, he only told about the replacement of creditor, so he has to pay to the new creditor.³⁷

According to Schermer, *Cessie* is submission of a receivable on behalf which is made by creditor who is still alive to others with that delivery, person who is called latter becomes a creditor of a debtor who is burdened with that receivable.³⁸ Meanwhile, according Subekti, *Cessie* is One way transfer of receivable on behalf which that receivable is sold by old creditor to person who will become the new creditor, but the legal of receivable is not clear for one moment, but in its entirety transferred to the new creditor.³⁹

2) Regulation of *Cessie*

Cessie regulated in Book II, Article 613 (1) *Burgerlijk Wetboek*, which states that the submission of receivable on behalf and other disembodied material is done by creating an authentic deed or under hand deed, which the material rights delegated to others. Furthermore, in Article 613 (2) *Burgerlijk Wetboek* states

³⁷ Suharnoko, *Doktrin Subrogasi, Novasi, dan Cessie*, (Jakarta: Kencana, 2008), p.101

³⁸ Tan Thong Kie, *Studi Notariat dan Serba-Serbi Praktek Notaris*, (Jakarta: Ichtiar Baru Van Hoeve, 2007), p.688

³⁹ Subekti, *Hukum Perjanjian*, (Jakarta: Intermasa, 1998), p. 71.

that in order to submission receivable of old creditor to a new creditor has effect of law to the debtor, then such submission have to notified to the debtor, or the debtor in writing has been approved it or admit it. Receivables on behalf is receivable which payment is made to the person whose name is written in the letter of receivable in this case is old creditor. However, the notice of the transfer of receivable on behalf to the debtor, then debtor is bound to pay to the new creditor and not to the old creditor.⁴⁰

Submission of receivable on behalf provided in Article 613 *Burgerlijk Wetboek*, is a *Yurisdische Levering* or legal act of property right transfer. This is necessary because in civil law system, buy-sell agreements, including the sale of receivable is merely *consensual obligatoir*, it means just put right and obligation of the seller and the buyer, but not to transfer ownership. Article 1458 *Burgerlijk Wetboek* states that the sale is considered to have occurred between the two parties, immediately after the seller and the buyer reach agreement on goods and prices, although that good has not been submitted and the price has not been paid. Furthermore, Article 1459 *Burgerlijk Wetboek* states that the property rights on the object which is sold is not transferred to the

⁴⁰ Suharnoko, *Doktrin Subrogasi*, p.102

buyer during the delivery has not been made in accordance with Article 612, 613, and 616 *Burgerlijk Wetboek*.⁴¹

The reason why creditor sells its receivable? This is because he needs the money, but its receivable has not maturing so that creditor can not billing now to debtor. The way out is the receivable sold to another party at a price below.⁴²

3) Substances of *Cessie*

- a) *Cessie* always occur because of agreement
- b) *Cessie* always required a deed
- c) In the role of *Cessie* creditor absolutely necessary
- d) *Cessie* can be based on a variety of civil events, such as the sale or debts;
- e) *Cessie* only apply to the debtor after the notification.⁴³

b. Agreement

1) Definition of Agreement

In *Burgerlijk Wetboek*, the definition of agreement has been set in article 1313, that is an act by which one or more people committing himself to one or more others.⁴⁴ From that definition can be mentioned, that is in an agreement involve some parties, that's means agreement is done by some person to a person or more freely and as knowing, without the threat of other parties,

⁴¹ Suharnoko, *Doktrin Subrogasi*, p.103

⁴² Suharnoko, *Doktrin Subrogasi*, p.103

⁴³ Suharnoko, *Doktrin Subrogasi*, p.102

⁴⁴ *Burgerlijk Wetboek*, translated by R.Subekti and R.Tjitrosudibio, *Kitab Undang*, p. 338

such as article 1321 *Burgerlijk Wetboek*, which states, "there isn't agree if that agree is given because of the mistake, or acquired by force or fraud." Then article 1323 *Burgerlijk Wetboek* more explained again about the sound article 1321, which States that the coercion of the person who conducted the agreement may cancel an agreement, and also if the coercion exercised by third parties can also cancel.⁴⁵

According to Prof. Subekti, an agreement is an event when someone promised to another person or between two that people promised each other to implement something. Understanding Agreement according to Prof. Van Dune means a legal relationship based on an agreement to lead to legal consequences. While Prof. RM Sudikno Mertokusumo stated that the legal act occurred because of the cooperation of two people or more. In that cooperation, the purpose of the parties may be different but the same can also co-exist.⁴⁶

2) Valid Term of Agreement

According article 1320 *Burgerlijk Wetboek*, an agreement is valid if there are four term, they are:

a) Presence of the Word Agree

According to Subekti, which is meant by the word

"agree" is rapprochement of desire between the two sides,

⁴⁵ *Burgerlijk Wetboek*, translated by R.Subekti and R.Tjitrosudibio, *Kitab Undang*, p.340

⁴⁶ Much. Nurachmad, *Buku Pintar Memahami dan Membuat Surat Perjanjian*, (Jakarta: Visimedia, 2010), p. 5

namely what the desired by the first party also desired by the other party and both of them want the same thing in reciprocity.⁴⁷ On *Burgerlijk Wetboek* is not explain about the word "agree" in detail, but in the article 1321 tells that there isn't legitimate agreed if agreed it was given because of the mistaken, or acquired by force or fraud.⁴⁸ So, in legitimate agreed must be done by freely wings without acquired by force or fraud

b) Qualification to Make Agreement

On article 1329 *Burgerlijk Wetboek* mentions that everyone is qualified to make an agreement with the provisions of the Act not specified else i.e. defined as people who are not qualified to make such a the agreement.

Next Article 1330 *Burgerlijk Wetboek* mention that people who are not qualified to make an agreement:

- (1) People who are immature
- (2) They who are under the Trusteeship and/pardon
- (3) Women/wives in terms established by the legislation and all those to whom the law has banned certain agreements made.⁴⁹

⁴⁷ Subekti, *Bunga Rampai Ilmu Hukum*, (Bandung: Alumni, 1992), p. 4.

⁴⁸ *Burgerlijk Wetboek*, translated by R.Subekti and R.Tjitrosudibio, *Kitab Undang*, p. 339

⁴⁹ *Burgerlijk Wetboek*, translated by R.Subekti and R.Tjitrosudibio, *Kitab Undang*, p. 341

c) The presence of a particular thing;

On *Burgerlijk Wetboek* article 1333, paragraph (1) States that an agreement should have a certain thing as the subject of the Treaty namely the stuff at least determined type. Then in article 1333 paragraph 2 is stated that, regarding the amount does not matter provided at a later date can be determined.

d) Existence of a cause of halal.

On article 1337 *Burgerlijk Wetboek* mentions that "one reason is forbidden, if prohibited by law, or if contrary to good morality or public order."⁵⁰ So one reason or cause is halal if not prohibited by law, it is not contrary to public order and morality, as well as the agreement has no reason not to clean will result in an agreement that annulled by law, because it does not meet the terms of the agreement.

3) The Principle of Agreement

On article 1338 (1) *Burgerlijk Wetboek*, declared all agreements are made legally valid as legislation for them who author it. So, in this article contained 3 main principles in kinds of agreement, namely: freedom of contract principle, *consensualisme* principle, and *pacta sunt servanda* principle. In addition to the

⁵⁰ *Burgerlijk Wetboek*, translated by R.Subekti and R.Tjitrosudibio, *Kitab Undang*, p. 342

principles, there are still good faith principle and personality principle.

a) Freedom of Contract Principle

Freedom of contracts giving guarantees freedom to someone to freely in some matters relating to the agreement, as expressed Ahmadi Miru, they are:⁵¹

- (1) Free to determine whether he will be doing a deal or not;
- (2) Free determine with whom he would perform the agreement;
- (3) Free to determine the content of the clause or agreement;
- (4) Free to determine the form agreement; and
- (5) Other freedoms which are not contrary to the laws and regulations

b) *Consensualisme* Principle

Consensualisme principle is principle which describe that agreement which is made by all parties binding for all parties since that consensus or agreement about everything which be main idea from that agreement. This principle relates to the time of the inception of an agreement. That consensus does not obeyed when one party uses force, fraud, or there is a mistake in the contract object.⁵²

⁵¹Ahmadi Miru, *Hukum Kontrak Perencanaan Kontrak*, (Jakarta: PT. Raja Grafindo Persada, 2007), p. 4

⁵²Syahmin, *Hukum Kontrak Internasional*, (Jakarta: Raja Gravindo, 2006), p.5

c) *Pacta sunt-servanda* Principle

This principle is related to the result of agreement and conclude in sentence." applied as law to those who author it" at the end of article 1338 (1) *Burgerlijk Wetboek*. So, the agreement made legally binding by the parties as the author of the legislation. This sentence is knotted restrictions for all parties including the "judge" to interfere with the content of the agreement which have been lawfully made by the parties in question. *Pacta Sunt Servanda* is a principle which states that all agreements made in accordance with applicable law as the law for those who make it. Therefore this principle is also called the principle of legal certainty.⁵³

d) Good Faith Principle

Principle of good faith is reflected on article 1338 (3) *Burgerlijk Wetboek*, that all agreements should be implemented with good faith. The provisions of article 1338 (3) *Burgerlijk Wetboek* also provide power on a judge to oversee the implementation of an agreement that does not conflict with the Act. This principle is divided into two type, namely subjective and objective.

The principle of subjective good faith is honesty in a person or a clean goodwill of the parties, while the principle of

⁵³ Much. Nurachmad, *Buku Pintar Memahami*, p.15

objective good faith is the implementation of the agreement must comply with applicable regulations and heed the norms of decency and morality.⁵⁴

e) Personality Principle.

Personality principle of this actually describes the parties involved in an agreement. This principle is contained in article 1315 and 1340 *Burgerlijk Wetboek*.

On article 1315 mentioned that in general no one could tie oneself on behalf of themselves or request an appointment than he has set for himself. Next Article 1340 states that the agreements apply only between parties who author it, agreement cannot carry losses or benefits to the third party, other than in respect of regulated claims Article 1317. Therefore it agreement is only binding on the parties that make it and cannot bind the other party. So this fundamental principle is called personality.

4) Kinds of Agreement

On *Burgerlijk Wetboek* Article 1314, explained that there are two forms of agreement, namely the agreement with free of charge and the agreement on burden. Agreement with free of charge is an agreement whereby one party gives an advantage to the other party, without receiving a benefit for himself. While the

⁵⁴ Much. Nurachmad, *Buku Pintar Memahami*, p.15

agreement on burden is an agreement that requires each party to make something, do something, or not to do something.⁵⁵

According Syahmin, kinds of agreement can be divided into several forms, that are:

- a) Reciprocal agreements, for example purchase agreement, lease agreement
- b) Free of Charge Agreement, agreement such as this can be demonstrated as the grant agreement
- c) Agreement on the burden, such agreement can be demonstrated as a part effort.
- d) The agreement nameable, in agreement nameable usually that gives the name of the legislation is civil law and trade goods such as day care, insurance and leasing
- e) The agreement is not nameable, agreement such as this for example the agency agreement, distributor agreement, financing agreement such as leasing, factoring, venture capital, etc.
- f) Agreement mixture (*contractus sui generis*) for example the agreement establishment of fertilizer plants and followed by the purchase agreement of fertilizer machinery and technical assistance agreement or experts.⁵⁶

⁵⁵ *Burgerlijk Wetboek*, translated by R.Subekti and R.Tjitrosudibio, *Kitab Undang*, p.338

⁵⁶ Syahmin, *Hukum Kontrak*, p.23

- g) Consensual Agreement. is agreement which born sufficient with an agreement between two parties.⁵⁷

5) Substances of Agreement

a) *Esensialia* Substance

Esensialia substance is substance which must exist in the agreement, without any substance of *Esensialia*, then there is no agreement. For example in buy-sell agreement must there is agreement on the goods and the price because without an agreement on the goods and the price in buy-sell agreement, the agreement is annulled by law because of there isn't certain things which is agreed.

b) *Naturalia* Substance

Naturalia substance is substance which has been regulated by law. Thus if it is not regulated by the parties in agreement, then the law that set. So, *Naturalia* substance is a substance which is always presumed to exist in the agreement. For example, if in agreement is not agreed about hidden defects, automatically applies the provisions of the Burgerlijk Wetboek that the seller should bear hidden defects.

⁵⁷ R. Soeroso, *Perjanjian Di Bawah Tangan: Pedoman Praktis Pembuatan dan Aplikasi Hukum*, (Jakarta: Sinar Grafika, 2010), p.18

c) *Aksidental* Substance

Aksidental substance is substance which there will be or binding on the parties if the parties assume obligations. For example in buy-sell agreement with installment agreement that the debtor negligent to pay his debt, fined two (2) percent per month of delay, and if the debtor negligent to pay for three (3) consecutive months, purchased goods may be withdrawn by the creditor without through the courts. Similarly, other clauses which often specified in an agreement, which is not an essential substance in the agreement.⁵⁸

6) Nullification of Agreement

As we all know there are two (2) requirements that determine the validity of a agreement in article 1320 *Burgerlijk Wetboek*, the requirements are:

- a) The subjective requirement, is agreement and skills
- b) The objective requirement, is a particular case and cause of halal.

If these requirements are not met then the consequence is that isn't met subjective requirements (agreement and skills), so, the agreement may be annulled by either party through the

⁵⁸ R. Soeroso, *Perjanjian Di Bawah Tangan*, p.16-17

courts, while if isn't met the objective requirement (a certain thing and a cause which halal) so, the agreement void by law.

Regarding is annulled by law or annuled by itself are when the objective requirements (a certain thing and a cause of halal) are not met. This means that the agreement as if it never existed, or from the beginning legally there was never agreement. It also means that one party cannot perform a lawsuit against the other party, because there is no legal basis. In connection with these case the judge because of his position is required to stated that there was never any agreement.⁵⁹

7) Termination of Agreement

In an agreement, the agreement will terminate if there are few things as follows:

a) Payment

Payment referred to in this section is different from the payment terms that is used in everyday conversation, as payment in terms of day-to-day must be done by handing over money while handing goods other than money is not referred to as payment, but in this section is the payment is everything the fulfillment of the obligation.

⁵⁹ R. Soeroso, *Perjanjian di Bawah Tangan*, p. 24-25

b) Cash Payment Offer followed by storage or Custody

If a creditor refuses payments made by the debtor, The debtor can make an offer of cash payments on his money, and if the creditor still refuses, the debtor can deposit money or goods in court.

c) Debt Update

Debt updates basically is a replacement object or subject of the old contract with the object or subject of a new contract

d) Encounter of Debt or Compensation

Encounter of debt or compensation occurs when the two parties owe each other between a party and other, so when that debt each is taken into account and equal in value, both parties will be free of debt.

e) Mixing of Debt

If the position of the creditor and the debtor gathered in a person, that debt clear and void. Thus, mixing of that debt also by itself eliminate the responsibility of the person in debt.

f) Exemption of Debt

With the return of the original receivables sign sheet voluntarily by the creditor, then, it is already a proof of debt exemption even to others who also owe it to bear the responsibility.

g) Destroy of Payable Goods

If a particular item which made the object of agreement destroyed, it can't be traded, or lost, delete the agreement, unless it happens by mistake the debtor or the debtor has failed to deliver in accordance with a predetermined time.

h) Annulled or Annulled by Law

Annulled or annulled by law a contract occurs if the agreement is not meet the objective requirement of the validity requirement of the contract, is "certain things" and "cause of halal."

i) Applicability of Annulled Requirement

Voidance of agreement resulting from the applicability of cancel, applies if a contract made by the parties is made with suspension requirement or annulled requirement. Because if the contract is made with suspension requirement and the requirement turned out to which be a suspension requirement is not met, the contract is annulled itself.

j) Expiration

Expiration or passing time can also lead to voidance of the contract between the parties. It is set in *Burgerlijk Wetboek* Article 1967 and so on.⁶⁰

⁶⁰ R. Soeroso, *Perjanjian di Bawah Tangan*, p.29-49

3. Concept of *Hawalah* in Fatwa DSN MUI concerning *Hawalah*

In Fatwa DSN MUI No.12/DSN-MUI/IV/2000 on *Hawalah*, there are some provisions about *Hawalah*, there are: pillars and requirements of *hawalah*, position of all parties, and dispute resolution. Then in Fatwa DSN MUI No.58/DSN-MUI/V/2007 on *Hawalah bil ujroh*, that is fatwa which is issued as continuation from fatwa DSN MUI No.12/DSN-MUI/IV/2000 on *Hawalah*, decision that *hawalah* can be done with fee or *ujroh*, but just in kind of *hawalah muthlaqah*.

a. Definition of *Hawalah*

In this fatwa, which referred to *Hawalah* is the transfer of debt from a party to another party, consisting of *hawalah muqayyadah* and *hawalah muthlaqah*. *Hawalah muqayyadah* is *hawalah* where *muhil* is person who owe at once has receivable to *Muhal 'alaih* referred to in Fatwa No.12/DSN-MUI/IV/2000 of *Hawalah*. *Hawalah muthlaqah* is *hawalah* where *muhil* is person who owe but he doesn't has receivable to *muhal 'alaih*, then *Hawalah bil ujrah* is *hawalah* with take *ujrah* or fee.⁶¹

b. Pillar of *Hawalah*

- 1) *Muhil* is person who owe at once has receivable,
- 2) *Muhal* or *muhtal* is person who has receivable to *muhil*
- 3) *Muhal 'alaih* is person who owe to *muhil* and must pay that debt to *muhtal*,

⁶¹ Fatwa DSN MUI Number 58/DSN-MUI/V/2007 on *Hawalah bil ujroh*

4) *Muhal bih* is debt of *muhil* to *muhal*

5) *Sighat (ijab-qabul)*.

Ijab and *Qabul* statement must be declared by the parties to demonstrate they will enter into a contract (*aqad*) and the contract should be written as proof that the contract actually exists.⁶² It is also in accordance with the word of God in Surah Al-Baqarah verse 282:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ

Meaning: O you who have believed, when you contract a debt for a specified term, write it down.

c. Substances of *Hawalah*

As in pillars of *hawalah* in this fatwa, it is in a contract *hawalah* there must be three parties, that are *muhil*, *muhal*, and *muhal 'alaih*

- 1) *Hawalah* is done with approval of *muhil*, *muhal/muhtal*, and *muhal 'alaih*.
- 2) The position and obligations of the parties must be stated in the contract expressly
- 3) The contract must be written as proof that the contract actually exists
- 4) If the transaction *hawalah* has been done, the parties involved are just *muhtal* and *Muhal 'alaih*, and billing rights *Muhal* move to *Muhal 'alaih*.

⁶² Fatwa DSN MUI Number 12/DSN-MUI/IV/2000 on *Hawalah*

- 5) *Hawalah bil ujah* just used in *hawalah muthlaqah*. In *hawalah muthlaqah*, *muhal 'alaih* can get *ujrah* or fee for willingness and commitment to pay the debt of *muhil*.
- 6) The amount of that fee have to be set at the time the contract is clear, firm and definite as agreed by the parties. *Hawalah* have to be done on the basis of the willingness of the parties concerned.
- 7) Position and obligations of the parties must expressly stated in the contract.
- 8) If the transaction *hawalah* has been done, the billing right *Muhal* move *Muhal 'alaih*.