

The Efforts to Settle Non-performing Loans through the Execution of Mortgage Guarantees without a Court Decision

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Abstract. *The purpose of this study is to find out and analyze efforts to resolve non-performing loans through the execution of mortgage guarantees without a court decision and to find out and analyze the legal consequences of the execution of mortgage guarantees without going through a court decision. The research approach method used in this journal is a sociological juridical approach. . Collecting data using interview methods, document studies or library materials. After the researcher collected data, then the data obtained from the interviews and document studies were analyzed qualitatively. Qualitative data analysis, is a research method that produces descriptive data analysis, namely what was stated by the respondent in writing or verbally and also his real behavior, researched and studied as a whole. After the data analysis is complete, the results will be presented descriptively, namely by telling and describing what is in accordance with the problems studied. Furthermore, a conclusion is drawn which is the answer to the problems raised in this study. Efforts made by the Bank include collecting in the form of money to customers, restructuring credit, conducting mortgage auctions, direct write off method which is carried out when a receivable is believed to be uncollectible or repaid by the debtor, resulting in losses on receivables, directly debited to the accounts receivable loss account so that the reserve for receivables loss account is no longer used and as a result of the law the auction is null and void.*

Keywords: *Credit; Guarantee; Mortgage; Settlement.*

1. Introduction

Banks play an important role in advancing the economy and equitable distribution of community economic growth. One of these roles is realized through credit facilities issued by banks. Credit is a banking language which can be interpreted as debts and receivables. The definition of credit in Article 1 number 11 of the Banking Law, credit is the provision of money or an equivalent claim, based on an agreement or loan agreement between a bank and another party that requires the borrower to repay his debt after a certain period of time with interest. Credit facilities are often used by the community with the aim of helping their economic survival¹.

Banks as business entities in the financial sector, run their business by collecting funds from the public in the form of demand deposits, time deposits, certificates of deposit, savings, and or other equivalent forms. After obtaining funds in the form of deposits from the public, then by the bank, the funds are replayed or sold back to the public in the form of loans or better known as credit.²

The definition of credit in the Banking Law can be concluded as an agreement between a bank and a customer who binds themselves in a debt agreement, namely the bank as the creditor and the customer as the debtor. The basis of the debt agreement is Article 1754 of the Civil Code, which is about lending and borrowing agreements.³

The bank as a creditor requires the existence of a guarantee object whose value is equal to or more than the loan provided. Based on the opinion of legal experts, a guarantee can be interpreted as something given by a debtor to a creditor to create confidence that the debtor will fulfill obligations that can be valued in money arising from an engagement.⁴

Debt agreements with collateral are regulated in Article 1131 of the Civil Code, which reads, movable or immovable property belonging to the debtor, both existing and future, becomes collateral for the debtor's debt. Credit guarantee is the provision of confidence to the creditor on the debt that has been given to

¹ Laura Notess (WRI) , Peter Veit (WRI), Iliana Monterroso (WRI), Andiko (WRI), Emmanuel Sulle (WRI), Anne M. Larson (WRI), Anne-Sophie Gindroz (WRI), Julia Quaedvlieg (WRI) and Andrew Williams (WRI) - July 2018, The Scramble for Land Rights, Reducing Inequity between Communities and Companies, <https://wri-indonesia.org/en/publication/scramble-land-rights>

²Kasmir, (2015), *Bank dan Lembaga Keuangan Lainnya*, Raja Grafindo Persada, Jakarta, p. 25

³ Sri Ahyani, Land Registration As A Legal Construction Of Law In Order To Facing Asean Economic Communities, *International Journal of Nusantara Islam* Vol. 06 No. 02 2017: (198-207), DOI: 10.15575/ijni.v6i2.6227

⁴Hadisaputro Hartono, (1984), *Pokok-pokok Hukum Perikatan dan Hukum Jaminan*, Liberty, Yogyakarta, p.20

the debtor, which is issued from an agreement that is additional (accessoir) to the main agreement.⁵The existence of guarantees for debts is intended to protect the interests of creditors, namely to prioritize the settlement of receivables when the debtor is in default when the debtor does not fulfill its obligations in the debt agreement. Judging from the practice, the debtor's property commonly used for credit guarantees is land. The use of land as collateral for credit is based on the consideration that land has a relatively high economic value.⁶Then the land certificate is registered as collateral for mortgage rights. Registration of mortgage guarantees requires an authentic deed made before the Land Deed Making Officer (PPAT), namely the Deed of Granting Mortgage Rights (APHT).

Mortgage guarantees are regulated in Article 1 of Act No. 4 of 1996 (hereinafter referred to as UU HT). Sometimes in the middle of the debt receivables, the debtor defaults or defaults, resulting in non-performing loans. So that the bank as a creditor feels entitled to collect the repayment of its receivables from the value of the mortgage guarantee⁷.

The credit agreement is made in writing to ensure the legal certainty of the engagement as well as to protect the rights of the parties in the credit agreement. When the credit agreement fails, an auction of the execution of mortgage rights can be carried out by the creditor.⁸Based on Article 6 of the HT Law, the mortgage holder has the right to sell the object of the Mortgage on his own power through a public auction and take repayment of his receivables from the proceeds of the sale.

Mortgage certificate holders may carry out a general auction of mortgage guarantees in the following ways:

- Parate execution, is an execution that can be carried out by creditors without asking for court assistance or the process of placing collateral foreclosures. This is as regulated in Article 1155 of the Civil Code, Article 1178 of the Civil Code, Article 6 jo. Article 20 paragraph (1) letter a UU HT.

⁵Munir Fuady, (2013), *Hukum Jaminan Utang*, Erlangga, Jakarta, p.22

⁶Asuan, 2021, Legal Protection of Mortgage Execution Auctions, *Jurnal Solusi*, Vol. 19, No. 2, p. 273

⁷ Sri Hartati, The Sustainable Cropland Protection In The Perspective Of Policy Implementation In Karawang Regency, *Journal of New Government Paradigm* Volume 2, 2nd Edition, 2015, p. 73

⁸Dr. Burhan Sidabariba, S.H., M.H, (2019), *Lelang Eksekusi Hak Tanggungan*, Papas Sinar Sinanti, Depok, p. 3

- The executorial title, regulated in article 14 of the HT Law, is the execution of mortgage rights based on a mortgage guarantee certificate in which there are instructions "For Justice Based on the One Godhead". So that if the debtor defaults, it is ready to be executed, as is the case with a court decision that has permanent force. Then the execution of this executorial title is carried out through a public auction, as regulated in Article 20 paragraph (1) of the HT Law.
- Underhand Sales, based on the Elucidation of Article 20 paragraphs (1) and (2) of the HT Law, in principle, every execution must be carried out by public auction because in this way it is hoped that the highest price for the object of collateral can be obtained. However, if through a public auction it is not expected to produce the highest price, then by violating the principles as referred to in Article 20 paragraph (1) of the HT Law, the possibility of carrying out execution through underhand sales provided that it is agreed upon by the giver and the guarantee holder and by fulfilling the following conditions: others that must be met.

The regulation regarding the procedure for conducting the auction itself is contained in the Regulation of the Minister of Finance Number 27/PMK.06/2016 concerning Auction Implementation Guidelines (hereinafter referred to as PMK Auction Implementation Guidelines).

The law provides an exception from the ordinary civil lawsuit procedure in collecting receivables through the Grosse Deed institution. With the exceptions created by the law, in resolving debtors who are in default, the creditor does not need to go through a civil lawsuit against the debtor but can directly execute credit guarantees based on the Grosse Deed. The definition of Grosse Deed in Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Regulation of Notary Position (hereinafter referred to as UUJN) article 1 number 11, Grosse Deed is a copy of the deed for the recognition of debt with the Head of the Deed, "FOR FOR JUSTICE BASED ON THE ONE ALMIGHTY GOD", which has executive power.

Notification of execution of mortgage guarantees is often ignored by debtors. So that the object of the auction becomes the object of a problematic auction and cannot be emptied or confiscated. Legal uncertainty because the execution process takes longer and is detrimental to the Bank as a creditor. In addition, it will also have an impact on the continuity of the banking business and the circulation of money in the bank.

2. Research Methods

The research approach method used in this journal is a sociological juridical approach. According to Mukti Fajar, "The sociological juridical research method has an object of study on community behavior. The behavior of the community being studied is behavior that arises as a result of interacting with the existing system of norms. This research specification uses descriptive analysis, namely research that in addition to providing an overview, writing and reporting an object or an event will also draw general conclusions from the problems discussed. Sources of data come from primary data and secondary data. Data collection methods include interviews, document studies or library materials.

3. Results and Discussion

3.1. Problem loan settlement through the execution of liability guarantee without a court

Mortgage is only a bond ("accessoir") of the main agreement, namely an agreement that gives rise to a legal relationship between debt and credit. The existence, expiry and abolition of the Mortgage Rights automatically depend on the debt which is guaranteed to be paid off. The Mortgage Agreement is not a stand-alone agreement, but follows a previous agreement called the master agreement. The master agreement contained in the Mortgage Rights is a debt agreement that gives rise to guaranteed debt. Agreements that follow this master agreement in legal terminology. The Netherlands is called the "accessoir agreement" Affirmation of this "accessoir principle".⁹

The object of Mortgage according to Article 27 of Act No. 5 of 1960 is Property Rights. According to Article 20 paragraph (1) of Act No. 5 of 1960 Property Rights are hereditary, strongest and fullest rights that can be owned by people on land, keeping in mind the provisions in Article 6 of Act No. 5 of 1960 which stipulates that all rights on land has a social function. Further the strongest and fullest words are stated by AP. protection¹⁰, that the intent is to distinguish Hak Milik with Hak Guna Usaha, Hak Guna Bangunan, Hak Guna Usaha, and other rights, to show that among the rights to land owned by people, the Hak Milik is the strongest and fullest. 30 As an accesoir right, the birth of mortgage rights is based on the existence of a principal agreement, namely a debt-receivable agreement. The granting of mortgage rights is preceded by the debtor's promise

⁹ Wood, David. (1993). Forests to fields. Restoring tropical lands to agriculture. *Land use policy*. 10. 91-107. 10.1016/0264-8377(93)90001-Q, https://www.researchgate.net/publication/11109790_Forests_to_fields_Restoring_tropical_land_s_to_agriculture/citation/download

¹⁰Perindungan AP, (1993), *Komentar Atas UUPA*. Mandar Maju, Bandung, p. 124.

to provide mortgage rights to the creditor as a guarantee for repayment of the debt. The promise is stated and is an inseparable part of the debt-receivable agreement. Then the granting of mortgage rights is carried out through the making of the Deed of Granting Mortgage Rights (APHT) by the Land Deed Making Official (PPAT). In mortgages, bad debts and problems are often encountered for various reasons¹¹:

- Account behavior such as frequent overdrafts, significant balance declines, intermittent payments, frequent requests for payment delays, and changes to the payment schedule. If there is an overdraft, it is something that can be tolerated in business, but if it happens often, it is necessary to watch out for it as a possibility according to the customer's financial ability.
- Financial statement behaviors such as decreased liquidity, decreased receivables turnover, increased inventories, sharp increases in long-term debt, debts from other creditors, and unaudited financial statements. Based on the customer's financial behavior, the situation can be read which indicates that the credit obtained by the customer has symptoms of problems.
- Business behavior such as declining relationships with retailers and customers, selling prices too low, negative information from outsiders, sudden changes in management, and seeking new loans.
- Macroeconomic behavior such as government regulations, recessions, and natural disasters

In resolving and rescuing bad loans, there are several efforts that can be done, namely first, rescheduling or rescheduling, changing credit terms only regarding the payment schedule and or time period including the grace period and changes in the amount of credit installments; second, reconditioning or re-conditioning, changes in part or all of the credit terms which are not limited to changes in the payment schedule, time period, interest rate, postponement of payment of part or all of the interest and other terms; third, restructuring or rearrangement, changes in credit terms involving additional bank funds, conversion of all or part of arrears of interest into new loan principal and conversion of all or part of credit into bank participation or taking other partners to increase participation; fourth, liquidation or liquidation, the sale of goods that are used as collateral in order to pay off debts. The liquidation is carried out on credit categories that

¹¹Mahmoedin, (2004), *Kredit Bermasalah*, Pustaka Sinar Harapan, Jakarta, p. 28.

really cannot be helped to be rehabilitated or businesses that have no prospects for development¹².

Banks can conduct an assessment of each customer who will guarantee their rights with mortgage rights with the aim of maintaining the security, health, stability of the banking system, laws and regulations and provisions that apply consistently. This assessment is also known as 5C, namely:¹³

- *characters*, the nature or character of the prospective debtor, the prospective borrower must have a good reputation and the bank must research such as asking bank to bank information
- *capacity*, the bank must know the ability of prospective customers to pay credit and be related to their ability to manage the business and their ability to seek profit
- *capital*, the amount of funds/capital owned by the prospective customer
- *collaterals*, guarantees provided by prospective customers, both physical and non-physical. Collateral should exceed the amount of credit granted.
- *Conditions of economy*, looking at the current and future economic conditions according to their respective economic sectors.

Credit settlement efforts are an effort made by creditors against debtors to resolve problems with bad loans. Efforts made by the Bank include collecting money in the form of money to customers, restructuring credit, conducting mortgage auctions, direct write-off method which is carried out when a receivable is believed to be uncollectible or repaid by the debtor, resulting in direct losses on receivables debited to the accounts receivable loss account so that the allowance for receivables losses account is no longer used. If these efforts cannot be implemented, the Bank will conduct a mortgage guarantee auction.

Basically, as stated in Article 6 of Act No. 4 of 1996 concerning Mortgage on Land and Objects Related to Land, if the debtor is in breach of contract, the holder of the first Mortgage has the right to sell the object of the Mortgage on his own power through a public auction and take repayment of his receivables from the proceeds of the sale. However, keep in mind that based on Article 13 paragraph

¹² Ngadenan, Eksekusi Hak Tanggungan Sebagai Konsekuensi Jaminan Kredit Untuk Perlindungan Hukum Bagi Kepentingan Kreditur Di Mungkid, *Jurnal Law Reform*, Vol 5 No. 1 April 2010

¹³ Firdaus, Rahmat and Maya Ariyanti, 2008, *Commercial Bank Credit Management: Theory, Problems, Policies and Applications Complete with Credit Analysis*, Alfabeta, Bandung, pp. 81.

1 and paragraph 2 of the Mortgage Law, the Mortgage must be registered at the Land Office no later than 7 (seven) working days after signing the Deed of Granting Mortgage (APHT).

The Land Deed Making Official (PPAT) is obliged to send the relevant (APHT) and other required documents to the Land Office. As proof of the existence of Mortgage Rights, the Land Office issues a Mortgage Certificate (Article 14 paragraph 1 of the Mortgage Law). This Mortgage Certificate has the same executorial power as a court decision that has obtained permanent legal force (Article 14 paragraph 3 of the Mortgage Law). Meanwhile, the APHT made by PPAT is the first step in granting the mortgage.

Based on Article 10 paragraph (1) of the Mortgage Law, the granting of mortgage rights is preceded by a promise to provide mortgage rights as collateral for the repayment of certain debts, which are set forth in and are an inseparable part of the debt agreement in question or other agreements that give rise to the debt. The granting of Mortgage is carried out by making APHT by PPAT (Article 10 paragraph 2 of the Mortgage Law). So, basically if the APHT has been registered at the Land Office and has obtained a mortgage certificate, then the creditor can sell it by auction if the debtor defaults.¹⁴

Execution is a legal action taken by the court to the losing party in a case, is a follow-up procedure for the continuous examination process of the entire civil procedural law process.¹⁵ One of the facilities provided by the mortgage is the ease of execution. The execution of mortgage rights can be carried out by the rights holders themselves by conducting general auction sales without asking for an execution flat (approval) to the district court.¹⁶ Execution at Banks, namely:

- Underhand Sales In certain circumstances, if through a public auction it is not expected to produce the highest price, then upon the agreement of the giver and the holder of the Mortgage, it is possible for execution to be carried out by means of underhand selling, if in this way the highest price will be obtained that benefits all parties.
- Public Auction the implementation of a public auction based on Article 6 of the UUHT is easier than the "Execution Parate", because in this auction an order from the Head of the District Court is required to sell the object of the Tangungan Rights concerned.

¹⁴Harahap M. Yahya, (1991), *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, Gramedia, Jakarta, p. 1

¹⁵Bachar Djauli, (2001), *Eksekusi Putusan Perkara Perdata Dari Segi Hukum Dan Penegakan Hukum*, Akademik Pressindo, Jakarta, p. 6.

¹⁶Khoidin M, (2017), *Hukum Jaminan Hak-Hak Jaminan*, Laksbang Yustitia, Surabaya, p. 89.

If the debtor is in default, the mortgage certificate can be executed like a court decision. Based on the certificate which has the executorial title, the mortgage holder submits an application to the Head of the District Court to carry out the execution of the mortgage object.

3.2. Legal consequences on the execution of warranties of liability without a court's decision

The legal regulation regarding Mortgage is a legal instrument that is used when there is an agreement (agreement) to borrow money between the Borrower (Debtor) and the Lender (Bank). In practice, prospective debtors apply for loans to banks by enclosing all forms of documents, namely the identity of the borrower, loan guarantees in the form of a Deed of Ownership of Land and Buildings as well as business licensing letters if the debtor is a legal entity.

If according to the Bank the application submitted by the Debtor meets the criteria, then an agreement is reached to provide Credit Facility (Conventional Bank) or Financing (Islamic Bank) to the Debtor. As a follow-up to the loan agreement, the bank provides a number of funds (money) as a form of loan to the debtor, then the debtor provides land/building ownership documents or other objects as collateral for loan repayment. Collaterals in the form of land and buildings are usually burdened with the installation of a Mortgage Certificate issued by the National Land Agency (BPN).

From the Credit Facility agreement, the Bank provides conditions for the obligation for the Debtor to pay the loan/credit with a monthly installment/installment system with a repayment grace period of 1 (one) to 20 (twenty) years. If the Debtor pays the installments in a timely manner until the payment is made, the Bank will certainly give an assessment that the Debtor is a debtor/customer with a good predicate, so that then the Bank will be more confident in providing loans to the Debtor with a good predicate. Of all the borrowing/credit transactions, of course there are also debtors who do not make installment payments on time or are usually called Bad Credit.

Therefore, the Bank will certainly try to collect the debtor with the excuse of avoiding the risk of bad credit. The Bank's efforts to avoid bad loans are to use the rules of agreement on Mortgage Guarantees on customer ownership certificates if they are immovable assets (land and buildings) or the application of Fiduciary Guarantees if the collateral is in the form of movable objects (cars, machines and others). Regarding the provisions on the imposition of Mortgage on loan guarantees, the state has issued legal regulations in Act No. 4 of 1996 concerning Mortgage on Land and Objects Related to Land.

In practice, if there is a debtor who defaults, usually the bank will send a warning letter to the debtor to carry out his obligations in paying installments in accordance with the agreement. The warning is usually submitted at least 3 (three) times to fulfill the conditions of the debtor's default. If it has been properly warned but the Debtor does not pay its obligations, then the Bank through the legal provisions contained in Article 6 and Article 20 of Act No. RI. 4 of 1996 concerning Mortgage Rights, will conduct an auction process for Debtor Guarantees.

Banks usually submit more applications for Mortgage Guarantee Auction to Private Auction Halls. Furthermore, the Private Auction Center will forward the application to the KPKNL (State Property and Auction Service Office) which is one of the work units at the Directorate. General of State Assets, Ministry of Finance of the Republic of Indonesia. When the Private Auction Center acts as a Facilitator for the implementation of the Auction, the legal basis used is Article 14 of the Republic of Indonesia Act No. 4 of 1996 concerning Mortgage which implies that the Implementation of the Mortgage Auction has the same executorial power as a court decision that has permanent legal force (*inkracht van gewijsde*). However, if the object of the Mortgage Guarantee auction has legal resistance from the Debtor or other party,

That the authority to carry out the Execution of Emptying an object is the authority of the judiciary. Whereas in practice the Court cannot directly carry out the Emptying Execution of problematic Auction objects auctioned by the Private Auction Hall. This happened because the Court considered that there was no confiscation (*beslag*) for the auction object sold by the private auction house. Meanwhile, the legal procedure for carrying out emptying executions requires that there must be a confiscation determination by the Court, then on that basis an empty execution (*HIR/RBG*) can be carried out.

In the Mortgage Law, it provides convenience for creditors holding Mortgage Rights if the debtor defaults or defaults, based on Article 20 paragraph (1) letters a and b of the Mortgage Law, the execution of the Mortgage Guaranteed object can be reached through 3 (three) methods, namely *parate executie*, executorial title and sales under the hand.

The three executions of the Mortgage above each have differences in their implementation procedures, as referred to for *parate execution* because defaulters usually carry out their own executions through the Office of Wealth and State Auction Services (KPKNL) and the implementation is shorter, executorial title or based on a Certificate of Mortgage issued. subject to the Civil Procedure Law as regulated in Article 224 HIR/258 Rbg, in its implementation it must go through the determination of the Head of the Court so it takes a short time, while the execution of the sale under the hands of the implementation

must meet several requirements, including an agreement between the Mortgage Provider (debtor) with Mortgage holders (Creditors).

After the enactment of Act No. 4 of 1996, banks as creditors rarely conduct auctions through the Court even though there is an addendum to conduct auctions to court, but with the MARI decision No. 3210 K/Pdt.G/1984 and Book II MARI 2007 edition of the Guidelines for the Supreme Court of the Republic of Indonesia which requires fiat execution through the Court. In fact, the creditors in carrying out the auction process without going through the Court, so that it has an impact on the interest of the auction buyers, because there are often many obstacles when emptying the auction because the auction does not go through the Court. So the procedure for implementing an auction that already has an addendum (agreement) that chooses to go to court is still through the fiat execution of the head of the court where the object of the Mortgage is located.

The legal consequences, regarding the implementation of the auction on the basis of a Power of Attorney for Imposing Mortgage Rights (SKMHT) that do not meet the standard requirements, can lead to unlawful acts as regulated in Article 1365 of the Civil Code and the auction is illegal and legally flawed, and does not rule out the possibility of a decision a court that has permanent legal force (*inkraacht van gewidjse*), which states that the auction is illegal and legally flawed against the auction implementation that has committed an unlawful act can be criminally prosecuted as referred to in Article 335 of the Criminal Code.

Regarding the legal consequences for the implementation of an auction that has an executorial title containing "For the sake of Justice Based on the One Godhead", according to the applicable laws, it must be through the determination of the Head of the Court, but if the creditor continues to carry out the auction through the Wealth Service Office The State and Auction (KPKNL), means that they have committed an unlawful act as referred to in Article 1365 of the Civil Code and the auction is invalid and unlawful, furthermore in a Court Decision which has permanent legal force (*inkraacht van gewidjse*), which states that the auction is not legal and legally flawed can be criminally prosecuted as regulated in article 335 of the Criminal Code.

Meanwhile, the legal consequences for the implementation of the Auction are not in accordance with the instructions for implementing the auction, resulting in the implementation of the auction having violated the applicable legislation in Article 15 paragraph (1) of Act No. 4 of 1996 in conjunction with the provisions of Article 27 letter c, letter h and letter i of the Regulation of the Minister of Finance of the Republic of Indonesia No.106/PMK.06/2013 concerning Amendments to the Regulation of the Minister of Finance No.93/PMK.06/2010 concerning Auction Implementation Guidelines, because before the auction took place, there was already a lawsuit in court by other parties who were not

included in the debtor, so the auction had been carried out against legal actions as referred to in Article 1365 of the Civil Code,

4. Conclusion

Credit settlement efforts are an effort made by creditors against debtors to resolve problems with bad loans. Efforts made by the Bank include collecting in the form of money to customers, restructuring credit, conducting mortgage auctions, direct write off method which is carried out when a receivable is believed to be uncollectible or repaid by the debtor, resulting in losses on receivables. debited directly to the accounts receivable loss account so that the allowance for receivable losses account is no longer used. If these efforts cannot be implemented, the Bank will conduct a mortgage guarantee auction. And the legal consequences for the implementation of the Auction are not in accordance with the instructions for the implementation of the auction, resulting in the implementation of the auction having violated the applicable legislation in Article 15 paragraph (1) of Act No. 4 of 1996 in conjunction with the provisions of Article 27 letter c, letter h and letter i of the Regulation of the Minister of Finance of the Republic of Indonesia No.106/PMK.06/2013 concerning Amendments to the Regulation of the Minister of Finance No.93/PMK.06/2010 concerning Auction Implementation Guidelines, because before the auction took place, there was already a lawsuit in court by other parties who were not included in the debtor, so the auction had been carried out against legal actions as referred to in Article 1365 of the Civil Code.

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