

Legal Problems of Building Rights as Credit Guarantee in Banking Practice

IB Gede Agustya Mahaputra
Email; agustyamahaputra@gmail.com

Abstract

The purpose of this research is to find out the legal problems of bank credit guarantees that Building Rights guarantees in banking practice. Building Rights that can be used as collateral for credit are land rights that have been charged with mortgage rights. In the implementation of the mortgage right, the debtor sometimes neglects to pay attention to the validity period of the building rights certificate which will then be used as debt security. The certificate of Building Rights that has expired will erase the land rights while this often happens when the debtor's receivables have not been completed to the creditor, causing legal consequences to the creditor. The research method used is normative legal research. With descriptive analysis, the legal material that has been collected is processed to formulate the conclusions of the study. research results are analyzed in depth. The results of the study show that collateral is all property belonging to the debtor, both movable and immovable, both existing and new ones that will exist in the future to be dependent on all individual engagements. Before being used as collateral, the Building Rights must be given legal certainty so that the mortgage rights can be charged. Building Rights can be used as collateral for credit if the mortgage has been charged in accordance with Article 45 Paragraph (1) of PP No. 18 of 2021. Building Rights are used as credit guarantees. Negligence of the debtor who does not extend Building Rights which is a credit guarantee becomes a problem and causes legal consequences for the abolition of the mortgage right on Building Rights and also Building Rights will also be erased, causing legal uncertainty. As a result, the creditor does not have the legal force of the guarantee that has been issued. used in a credit agreement and if examined in the law of agreement, the agreement between the debtor and creditor is null and void because the object of the agreement has been deleted.

Keywords: Problematic, Building Rights, Credit Guarantee

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INTRODUCTION

In carrying out its function to channel funds to the public, the bank must carry out its business activities actively, including by providing credit to customers or debtors. The activity of borrowing money or better known as credit in practice is something that is not foreign to urban and rural areas. The function of credit in general is to provide capital loans to the community to facilitate the development of business activity or business that is already running, both in terms of production businesses to private businesses that are built independently aimed at improving people's lives.

The risk that can harm the creditor must be given more attention by the bank, so that in the process of providing credit, the bank's confidence in the ability and ability of the debtor to pay the debt is needed and the principles of sound bank credit are also considered. In a credit agreement, collateral is required, both movable and immovable goods, where the goods are not privately owned by the creditor because in a credit agreement it is not like a sale and purchase agreement where there is a transfer of ownership of an item, but the collateralized goods are used to pay off debts in accordance with applicable regulations, where the goods are auctioned and the proceeds from the auction are to pay off debts from the debtor, if there is any remaining from the auction proceeds it will be returned to the debtor (Supramono, 1996: 75).

Usually, the collateral most often used as collateral for credit (collateral) in credit agreements is land rights, whether they have the status of property rights, building rights or use rights because in general they have a fairly high value and will continue to increase. One of the guarantees in the credit agreement is the Building Rights Certificate (immovable property). Definition of Building Rights. according to G. Kartasapoetra is the right to build and own a building on land that is not one's own, which has a maximum period of 30 years. Building Rights are not only used on land controlled by the state but can also be used on private or individual land (Kartasapoetra, 2012: 10).

Building Rights may only be owned by Indonesian citizens and legal entities established under Indonesian law and domiciled in Indonesia. This is regulated in Article 36 number (1) of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles in conjunction with Article 19 of Government Regulation Number 40 of 1996. If an individual or legal entity holding a Building Rights does not meet the requirements as a Building Rights holder for buildings, a period of 1 (one) year is given to individuals or legal entities to be obliged to transfer the Building Rights that they control to individuals or legal entities that meet the requirements as holders of Building Rights. If it is not transferred, Building Rights will be legally removed.

Problems with the installation of mortgage rights where there are debtors who fail to pay attention to the validity period of the certificate of Building Rights which will then be used as debt guarantees which in turn will lead to good legal consequences for creditors. The expiry of the term of the Building Rights means that with the expiry of the period of the Building Rights which is being used as collateral for the Mortgage Right, the Mortgage Rights will automatically be removed and the object of the Mortgage will become state land.

METHODS

This research is normative legal research. Normative legal research refers to primary legal materials, secondary legal materials and, tertiary legal materials. The type of approach used in this research is the statutory approach and the legal concept analysis approach as well as the legal construction approach. The sources of legal materials used in this study consist of primary legal materials consisting of statutory regulations, secondary legal materials consisting of books -literature books, journals, papers and other written legal materials. Then tertiary legal materials that are supportive of primary and secondary legal materials consist of legal dictionaries and Indonesian language dictionaries.

The technique of collecting legal materials used is a literature study technique. The legal materials used in this research are legal materials obtained through library research, for example, understanding and studying more deeply the literature and laws and regulations that are correlated with both direct and indirect discussions. The legal materials that have been collected are then continued with the analysis process, namely analyzing the collected materials using several techniques, namely description, interpretation, systematization and evaluation techniques and then concluded with argumentation techniques. The description technique is a technique of analyzing legal materials by describing and connecting the problems discussed in this study, namely regarding the position of instrumental witnesses in the making of a notary deed with the theories and literature that have been collected.

DISCUSSION

Building Rights as Bank Credit Guarantee

Article 4 paragraph 1 of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles formulates that on the basis of the state's right of control over land as referred to in Article 2, it is determined that there are various types of rights to the earth's surface, which are called land which can be granted to land and owned by people either alone or jointly with other people and legal entities. Building Rights (hereinafter referred to as HGB) is the right to construct and own buildings on land that is not one's own, with a maximum period of 30 years and can be extended for another 20 years. The limitation of this HGB is to establish and own buildings on land that is not their own (Santoso, 2012: 180). HGB can be transferred and transferred to another party. HGB is regulated in Article 35 to Article 40, the HGB arrangement is specifically regulated in Government Regulation no. 40 of 1996.

Building Rights can only be owned by Indonesian citizens and legal entities established under Indonesian law and domiciled in Indonesia. In Government Regulation 40 of 1996, Building Rights can be issued on State Land, Management Rights Land, and Property Rights Land. According to G. Kartasapoetra, Building Rights are the right to construct and own buildings on land that is not their own, with a maximum period of 30 years. In addition to land controlled by the state, building rights can also be granted on someone's land (Kartasapoetra, 2012: 17). According to Article 21 of the Government Regulation. No. 40 of 1996, land that can be granted with Building Rights are State Land, Management Rights Land and Property Rights Land. Building Rights are land rights that are specifically intended to build buildings on it, cannot be used for other purposes.

In principle, those who can have building rights are Indonesian citizens and legal entities established under Indonesian law, and domiciled in Indonesia as well. This is as regulated in Article 36 paragraph (1) of the LoGA in conjunction with Article 19 of Government Regulation no. 40 of 1996 which stipulates that those who can have Building Rights are: 1) Indonesian citizens 2) Legal entities established under Indonesian law and domiciled in Indonesia. the granting of Building Rights on land with Hak Milik is born at the time the deed of granting the Building Rights is made by the Land Deed Maker Official (PPAT). The registration carried out serves to bind the Third Party. This provision is different from the granting of Opstal Rights above the eigendom of the view of the Civil Code, new Opstal Rights are born at the time of registration according to the provisions of Article 620 of the Civil Code.

Article 32 of Government Regulation Number 40 of 1996 stipulates that the holder of the Right to Build has the right to control and use the land granted with the Right to Build for a certain period of time to construct and own a building for his personal or business purposes and to transfer the right to another party and burden it. The holders of Building Rights are very limited because the Building Rights is established on land that is not their right, so it only occurs during a certain time. The maximum period is 30 years and can be extended for a maximum period of 20 years.

Obligations of the holders of Building Rights according to the provisions of Articles 30 and 31 of

Government Regulation Number 40 of 1996. Article 31 confirms the obligations of the holders of Building Rights as follows:

- a. Paying the entry fee, the amount and method of which is determined in the decision on granting the right;
- b. Use the land in accordance with its designation and the requirements stipulated in the decision and agreement for granting rights;
- c. Take good care of the land and buildings on it and preserve the environment;
- d. Return the land granted with Building Rights to the State, holders of Management Rights or Ownership Rights holders after the Building Rights are nullified; and
- e. Submit a certificate of Building Rights that has been canceled to the Head of the Land Office.

Article 31 concerning the obligations of the holder of the Right to Build, it is stated that if the land with the Right to Build due to geographical or environmental conditions or other reasons is located in such a way that it confines or closes the yard or other plot of land from public traffic or waterways, the holder of the Right to Build is obliged to provide exit or waterway or other facilities for the confined yard or plot of land. The explanation of the substance of Article 31 is that the granting of Building Rights may not result in the closure of the physical use of the land enclosed by the Building Rights land. Therefore, the holder of the Right to Build is obliged to provide the opportunity for the holder of the rights to the land that is confined to have the necessary access. It can be concluded from the meaning of the substance of the provisions of the article above is that the holder of the Right to Build may not harm other holders of land rights and its use must not interfere with other parcels of land from public crossings or waterways.

The granting of Building Rights on land with Hak Milik is born at the time the deed of granting the Building Rights is made by the Land Deed Maker Official (PPAT). Registration made is only to bind third parties. This provision is different from the granting of Opstal Rights over the eigendom of immovable property, especially land according to the Civil Code/Civil Law. In view of the Civil Code, new opstal rights are born at the time of registration according to the provisions of Article 620 BW/Civil Law Book. Permohonan perpanjangan atau pembaruan Building Rights diajukan selambat-lambatnya dua tahun sebelum jangka waktunya berakhir dan wajib dicatat dalam buku tanah pada Kantor Pertanahan. Untuk Building Rights atas tanah hak milik, jangka waktunya adalah paling lama tiga puluh tahun. Setelah jangka waktu tersebut berakhir, maka Building Rights dapat diperbarui atas kesepakatan antara pemegang Building Rights dengan pemegang hak milik. Pembaruan tersebut dimuat dalam akta yang dibuat oleh Pejabat Pembuat Akta Tanah dan wajib didaftarkan. Building Rights dapat beralih atau dialihkan kepada pihak lain dengan cara 1) Jual beli; 2) Tukar menukar; 3) Penyertaan dalam modal; 4) Hibah; 5) Pewarisan. Peralihan Building Rights wajib didaftarkan pada Kantor Pertanahan.

In addition to being transferable, Building Rights can also be removed. This is in line with the provisions of Article 37 Paragraph (1) Government Regulation no. 40 of 1996 which states that:

"If the Building Rights on State Land is nullified and is not extended or not renewed, then the former holder of the Building Rights is obliged to dismantle the building and objects on it and hand over the land to the state in a vacant state no later than 1 (one) year from the date of the cancellation. building rights".

Then added in Article 38 of Government Regulation no. 40 of 1996 states that:

"The abolition of the right to build on state land has resulted in the land becoming state land. The abolition of Building Rights on the land with the right of management resulted in the land being returned to the control of the holder of the management right. The abolition of Building Rights on the land with the right of ownership results in the land being returned to the control of the holder of the property right.

Both of these regulations emphasize that after Building Rights is abolished, the holder of Building Rights in question is no longer entitled to the building because the land has been returned to the state. If it is related to Building Rights which is guaranteed at the bank, it will be considered as non-existent because the right has been abolished.

Then in Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flat Units and Land Registration, explains more specifically regarding the period of ownership of Building Rights which is described in Article 37 Paragraph (1) Government Regulation no. 18 of 2021, namely Building Rights on state land and land management rights, are given a maximum period of 30 (thirty) years, extended for a maximum period of 20 (twenty) years, and to be renewed for a maximum period of 30 (thirty) years. Then in Article 37 Paragraph (2) Government Regulation no. 18 of 2021 explains that the Right to Build on the land with the right of ownership is given for a maximum period of 30 (thirty) years and can be renewed with a deed of granting the right to the building on the right of ownership.

The banking credit agreement uses the form of a credit agreement using a standard contract, because in practice the form of agreement has been provided by the bank as a creditor and the customer as a debtor only learns and understands it well (Kartasapoetra, 2012: 20). Legal subjects in the credit agreement are the parties who bind themselves in a legal relationship. The credit agreement includes two parties, namely the creditor is a

person or legal entity that has money, goods or services that are willing to lend to other parties (credit providers) and debtors are parties who need or borrow money, goods or services (credit applicants). Herowati, 2007: 87).

Article 4 Paragraph (1) of Law no. 4 of 1996 concerning Mortgage Rights states that Building Rights are one of the rights that can be charged as mortgages. In Article 1 paragraph (1) of the Mortgage Law (hereinafter referred to as UUHT), mortgage rights are security rights that are imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, whether or not along with other objects which are an integral part of the land for the settlement of certain debts, which give priority to the creditor over other creditors.

Building Rights which can be charged as a mortgage can be used as collateral in a credit agreement in line with Article 45 Paragraph (1) Government Regulation no. 18 of 2021 which states that "Building Rights can be used as collateral for debt with encumbrances with mortgage rights". Article 1131 of the Civil Code states that guarantees are all property belonging to the debtor, both movable and immovable, both existing and new ones that will exist in the future to be borne by all individual engagements. Before being used as collateral, the Building Rights must be given legal certainty so that the mortgage rights can be charged.

The granting of mortgage rights on Building Rights must be registered at the Land Office no later than 7 (seven) working days after the signing of the Deed of Granting Mortgage Rights. Based on the theory of legal certainty, Building Rights used as collateral in credit agreements must have legal certainty to ensure that creditors can get legal protection for the continuity of their credit repayment guarantees. The legal certainty in question is the Deed of Granting Mortgage issued by PPAT as the authorized official. Legal certainty will provide a sense of comfort and security to a creditor in line with Utrech's opinion on legal certainty which provides legal security for individuals who in this event are to maintain guarantees for the continuity of repayment of debtors' debts to debtors.

Legal Consequences for the Negligence of the Debtor Not Extending Building Rights

Building Rights is the right to construct and own a building on land that is not one's own within a certain period of time. The holder of the Right to Build does not actually own the land where a building stands, but only the building that stands on the land. A building use right holder has a Building Rights certificate as a guarantee of legal certainty for the ownership of Building Rights. The HGB certificate holder can construct and own the building and use it for personal or business purposes. In addition, the owner can also transfer the right to another party, as long as it is still within the period of use of the Building Rights.

Article 35 Paragraph (2) of the BAL stipulates that the Right to Build can be extended for a maximum period of 20 years. If Building Rights is not extended, the right is deemed to have been nullified. Article 46 Government Regulation no. 18 of 2021 stipulates that Building Rights will be annulled because:

- a. The expiry of the period as stipulated in the decision on granting, extending, or renewing the rights;
- b. The right is canceled by the Minister before the expiry of the term because:
 1. Non-fulfillment of the provisions of the obligations and/or prohibitions as referred to in Article 42 and/or Article 43;
 2. Non-fulfillment of the requirements or obligations contained in the agreement for granting Building Rights between the holder of the right of building and the holder of the right of ownership or the agreement on the use of land with the right of management;
 3. Administrative disability;
 4. Court decisions that have legal force.
- c. Changed the rights to other land rights;
- d. Released voluntarily by the right holder before the expiry of the term;
- e. Revoked by law;
- f. Designated as wastelands;
- g. Defined as destroyed land;
- h. The end of the agreement on granting rights or land use agreement for Building Rights over property rights or management rights; and/or
- i. the right holder no longer meets the requirements as the subject of the right.

Building Rights used for collateral to creditors must be charged with mortgage rights so that they can be considered as collateral. Collateral is the last bastion for credit safety and with this guarantee, creditors get certainty that the credit that has been given will be recovered at a predetermined time. In the credit agreement between creditors and debtors who use land rights with the status of Building Rights, they must attach a certificate of Building Rights legalized by PPAT. PPAT in the provisions of Article 29 of Government Regulation no. 24 of 1997 is required to conduct an inspection at the local Land Office regarding the suitability of the certificate of Building Rights which is used as collateral with the list in the land office. PPAT is also obliged to refuse the making of the Deed of Granting Mortgage if the certificate of Building Rights submitted is not a document issued by the Land Office or a fake certificate or the data contained therein is no longer in

accordance with the list at the Land Office.

The legal consequences of a credit agreement with a Building Rights guarantee that expires before the credit is paid in full make the position of the creditor as the holder of the Mortgage which was originally positioned as the preferred creditor as the holder of the material guarantee because the Deed of Granting Mortgage Rights (APHT) as a material guarantee agreement has the principle absolute/absolute, droit de suite, droit de preference, speciality and publicity, then with the abolition of the Mortgage Right turns into a concurrent creditor who has individual rights which are rights arising from general guarantees or guarantees arising from the law as stated in Article 1131 of the Civil Code. Execution of mortgage rights on certificates of Building Rights that have expired cannot be carried out, unless the Building Rights are extended before the expiry date. the Mortgage Right is removed because the object of the Mortgage is no longer there and there is no exception to the Right to Build above the Management Right. Based on this, it can be stated that the debtor is still obliged to pay his debt to the creditor until it is paid off, even though the Right to Build has expired. In order not to lose their rights, the debtor can extend Building Rights.

Credit is a loan agreement between a bank as a creditor and a customer as a debtor. In the agreement, the creditor as the creditor trusts the customer within the agreed period of time it will be returned in full (Pramono, 2006: 30). Land is a collateral for debt repayment that is most in demand by financial institutions that provide credit facilities, because land is generally easy to sell and has a value that will increase every year, has proof of rights in the form of certificates, is difficult to embezzle and can be burdened with mortgage rights that give privileges to creditors (Perangin, 1991: 67). Land as collateral for credit which is encumbered with mortgage rights is stated in Article 51 of the UUPA which states that "The mortgage rights that can be imposed on the property rights, the right to cultivate and Building Rights are in Article 25, Article 33 and Article 39 are regulated by law". The regulation established as the implementation of Article 51 of the LoGA is Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land which was enacted on April 9, 1996.

Rights that can be categorized into mortgage rights are property rights, business rights and building rights. In accordance with the provisions of Article 35 Paragraph (1) of the BAL, it is stated that "Building Rights is the right to construct and own buildings on land that is not one's own for a maximum period of 30 years". Every land right that is granted for a limited time so that the term will definitely expire like a building right. Building Rights can be used as collateral for the debt by being burdened with the right of collateral and will be erased with the expiration of the period of Building Rights in question.

In the practice of lending and borrowing between creditors and debtors, the term of Building Rights may expire, while the credit agreement is still running and the debtor is in default. The second possibility is that it occurs when the term has not yet expired and the debtor defaults because the process of paying off the debt is protracted which results in the debt not being paid off until the term of Building Rights ends. This will be detrimental to the creditor holding the mortgage right because the guarantee for the object of the mortgage has expired. Land rights that are encumbered with mortgage rights will not be erased because they are extended. The extension or renewal of Building Rights is carried out by referring to the Regulation of the State Minister of Agrarian Affairs/Head of the National Land Agency Number 9 of 1999 concerning Procedures for Granting and Canceling State Land Rights and Management Rights.

Legal protection for creditors in the context of Mortgage of course cannot be separated from legal protection for debtors as collateral owners and other related parties. The law is not only concerned with the interests of creditors. In accordance with Article 18 Paragraph (1) letter d of the UUPA, it is stated that the mortgage rights are nullified by the abolition of the land rights burdened with the mortgage rights. Then Article 40 of the UUPA states that land rights in the form of Building Rights can be canceled due to the expiration of the term of land rights. The term of the Building Rights expires, the land rights are nullified, and the abolition of the Building Rights results in the nullification of the mortgage rights that burden him. The abolition of the mortgage causes the creditor to have no legal power over the debtor's receivables.

Building Rights whose term expires is returned to the state, whereas according to the UUPA the state is not the owner of the land but controls the land. Mortgage rights that do not have a strong position and material nature can no longer meet the needs of creditors. Legal protection given to creditors as mortgage holders if there is a guarantee with the status of Building Rights that will or has matured can be done with 3 (three) aspects including (Herowati, 2007: 39):

Aspects before the binding of credit is carried out which is a preventive action from the creditor. Building Rights that can be accepted as credit guarantees are those that have a period longer than the credit period. Preventive measures that can be taken by creditors include:

- a. Determine the period of credit granted.
- b. Determine how long the credit is given based on the remaining maturity period of the building rights used as credit collateral. If the debtor refuses to shorten the credit period as a result of Building Rights which will mature, the creditor can provide 2 (two) alternatives, namely:
 - 1) Changing Building Rights into the right of ownership.

2) Extending Building Rights immediately after the credit binding is made.

Another preventive measure is that creditors ask for additional guarantees as substitute guarantees to make creditors feel safe.

1. Aspects prior to credit binding carried out by PPAT.

Preventive actions to prevent future problems, especially those that harm creditors are also the responsibility of PPAT because PPAT is a public official who is authorized to make authentic deeds regarding certain legal actions regarding land rights. This is in accordance with Article 1 Point 1 of Government Regulation Number 37 of 1998 concerning PPAT. Article 39 of Government Regulation 24 of 1997 concerning Land Registration Jo Article 97 of the Regulation of the Minister of Agrarian Affairs/Head of BPN Number 3 of 1997 states that PPAT must first conduct an inspection at the local Land Office. PPAT binds the guarantee by making the Deed of Granting Mortgage which is broadly regulated in Article 101 of the Regulation of the Minister of Agrarian Affairs/Head of BPN No. 3 of 1997.

2. Aspects after credit binding is done

The imposition of mortgage rights as outlined in the Deed of Granting Mortgage made by PPAT must be followed up with registration at the land office no later than 7 working days after signing the Deed of Granting Mortgage. Mortgage rights are born when they are registered at the Land Office after the documents are complete, which is known as the publicity principle in accordance with Article 13 of the Mortgage Law.

The form of dispute resolution between the debtor and the mortgage creditor on the certificate of Building Rights which expires before the credit is paid in full, there needs to be an amicable settlement by carrying out credit rescue, including through rescheduling, reconditioning, and restructuring or possibly through alternative dispute resolution efforts such as negotiation, conciliation, mediation or arbitration. However, if the settlement in the form of credit rescue has not been successful, the last resort taken is credit settlement through legal channels, namely by executing the goods or objects that are pledged as collateral to creditors.

The parties in the agreement should be able to settle their respective rights and obligations so that they do not default that harm others who require the other person to compensate, as well as debtors who pledge land with Building Rights status which will expire, should be able to extend Right to Use the Building. Actions that can be taken by the creditor as the holder of the Mortgage to anticipate the abolition of the guaranteed land rights are to make a Power of Attorney to impose Mortgage Rights (SKMHT) at the time of signing the Credit Agreement, i.e. before the Deed of Granting Mortgage Rights (APHT) is made on the land to be guaranteed and this has been made possible in Article 15 UUHT. Then by including promises to save the object of Mortgage. Saving the object of Mortgage here includes anticipating or rescuing the abolition of the land rights that are pledged due to the expiry of the time for the land rights that are burdened with the Mortgage due to the non-extension of the validity period of the land rights. In the Deed of Granting Mortgage (APHT) on the land, the power of the Mortgage Provider to the Mortgage Rights holder can be stated to extend the term of the land rights. The existence of legal rules regarding the implementation of the imposition of Mortgage Rights in a credit agreement aims to provide legal certainty and protection for all parties in utilizing land and objects related to land as credit guarantees. For this reason, the practice of binding credit with mortgage guarantees in banking activities should also be carried out in accordance with what has been regulated in the Mortgage Law, so that its implementation can obtain strong legal certainty guarantees.

CONCLUSION

Building Rights is the right to build and own a building on land that is not one's own. Arrangement of Building Rights as collateral in a credit agreement where Building Rights are regulated in the Basic Agrarian Law. Building Rights can be transferred and can be deleted if it does not meet the requirements for having Building Rights. Article 1131 of the Civil Code states that guarantees are all property belonging to the debtor, both movable and immovable, both existing and new ones that will exist in the future to be borne by all individual engagements. Before being used as collateral, the Building Rights must be given legal certainty so that the mortgage rights can be charged. Building Rights can be used as collateral for credit if the mortgage has been charged in accordance with Article 45 Paragraph (1) of PP No. 18 of 2021. Building Rights are used as credit guarantees.

Negligence of the debtor who does not extend the Right to Build which is the collateral for the credit will have legal consequences for the cancellation of the mortgage right on the right of building and also Building Rights will also be nullified, causing legal uncertainty regarding the collateral used in the credit agreement. In this case the debtor has no legal force on the collateral that has been used in the credit agreement and when examined in the law of the agreement, the agreement between the debtor and creditor is null and void because the object of the agreement has been deleted.

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