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Filing a Lawsuit for Damages in Enforcing the Civil Aspects of Business Competition

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Abstract

In the life of society, the law has a main objective, which is to regulate the life of society and the state in all its activities. Various community activities include social, political, and cultural activities. It is hoped that the activities carried out by the community, especially in trade, will not exceed the limits of the provisions implied in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. The purpose of this study is to analyze the business competition system in Indonesia against a business actor who is disadvantaged as a result of unfair business competition practices, whether he can file a claim for rights or a lawsuit in the form of payment of compensation through civil law enforcement procedures without first reporting in writing the occurrence of the practice to Commission for the Supervision of Business Competition (*KPPU*). This type of research uses library materials as secondary data and laws and regulations as a system of norms that must be obeyed and by usingan approach philosophical. Business actors who have been harmed based on Article 1365 of the Civil Code as the basis for the right to tort or Article 1239 of the Civil Code as the basis for the right to default can file a lawsuit directly to the District Court without first reporting in writing to the Business Competition Supervisory Commission (*KPPU*). *KPPU* as an institution responsible for implementing business competition law enforcement is a complementary state institution (state auxiliary organ) regardless of government influence. In practice, *KPPU* is an institutionas if judicial because the *KPPU* has the same authority as the judiciary, one of which is the authority to issue decisions and decisions.

Keywords: Lawsuits, Compensation, Unfair Business Competition

Abstrak

Dalam kehidupan masyarakat, hukum mempunyai suatu tujuan utama adalah mengatur kehidupan bermasyarakat dan bernegara di dalam segala kegiatannya. Berbagai kegiatan masyarakat meliputi kegiatan bersosial, berpolitik, maupun budaya. Kegiatan-kegiatan yang dilakukan oleh masyarakat khususnya dalam perdagangan diharapkan tidak melewati batas-batas ketentuan yang telah disiratkan dalam Undang Undang Nomor 5 Tahun 1999 tentang Larangan Praktik Monopoli dan Persaingan Usaha tidak sehat. Tujuan penelitian ini adalah untuk menganalisis sistem persaingan usaha di Indonesia terhadap seorang pelaku usaha yang dirugikan akibat terjadinya praktik persaingan usaha tidak sehat apakah dapat mengajukan tuntutan hak atau gugatan berupa pembayaran ganti rugi melalui prosedur penegakan hukum perdata tanpa terlebih dahulu melaporkan secara tertulis terjadinya praktek tersebut kepada Komisi Pengawas Persaingan Usaha (KPPU). Jenis penelitian menggunakan bahan-bahan kepustakaan sebagai data sekunder serta peraturan perundang-undangan sebagai suatu system norma yang harus dipatuhi dan dengan menggunakan suatu pendekatan filosofis. Bagi pelaku usaha yang dirugikan dengan mendasarkan pada Pasal 1365 KUHPerdata sebagai alas hak perbuatan melawan hukum atau Pasal 1239 KUHPerdata sebagai alas hak cidera janji dapat mengajukan gugatan langsung ke Pengadilan Negeri tanpa terlebih dahulu melaporkan secara tertulis kepada Komisi Pengawas Persaingan Usaha (KPPU). KPPU sebagai institusi yang bertanggung jawab dalam pelaksanaan penegakan hukum persaingan usaha adalah lembaga negara komplementer (state auxiliary organ) terlepas dari pengaruh pemerintah. Dalam praktik, KPPU merupakan lembaga quasi judicial karena KPPU memiliki kewenangan yang serupa dengan badan peradilan, salah satunya kewenangan untuk mengeluarkan penetapan dan putusan.

Kata kunci: *Gugatan, Ganti Rugi, Persaingan Usaha Tidak Sehat*

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Introduction

The business world is a world that arguably cannot stand alone. Many aspects of various other worlds are directly or indirectly involved with the business world. This connection sometimes does not give priority to the business world, which in turn makes the business world must submit and follow the existing signs and often even prioritizes the business world so that it ignores existing rules (Yani & Widjaja, 2000).

Law is needed to regulate community life in all its aspects, be it social, political, cultural life and its role in economic development. It is in this economic activity that the law is needed, because of the limited economic resources on the one hand and the unlimited demand or need for economic resources on the other hand, in order to prevent conflicts between fellow citizens in fighting over these economic resources. It is clear that law has an important role in economic development to realize social welfare (Nugroho, 2012).

Legal products in Indonesia have the role of regulating all community activities in order to run orderly and balanced. Law Number 5 Year 1999 on Anti Monopoly and Unfair Business Competition is one of the legal products in the field of trade with the aim of encouraging the opening up of increased trade potential for business actors. This law is one of the government's efforts to maintain unfair competition that may occur for business actors.

In principle, everyone has the right to sell or buy "what" goods or services, "with whom", "how much", and "how" to produce, this is what is called a market economy. In line with that, market behavior and structure are sometimes unpredictable so that it is not uncommon for business actors to commit fraud, restrictions that cause some or several parties to suffer losses. According to Mustafa Kamal Rokan, at a macro level, there is currently a tendency for many countries to embrace a free market, where business actors can "freely" meet consumer needs by providing diverse and efficient products. Market freedom in this system not infrequently makes actors perform actions (behavior) that form a market structure (market structure) that is monopolistic or oligopolistic. The formation of a monopolistic or oligopolistic market structure is a manifestation of unfair business competition (Rokan, 2012).

In principle, every form of unfair business competition practice is prohibited, except for agreements, acts and/or activities as stipulated in Articles 50 and 51 of the Law. The prohibition is based on the premise that any form of unfair business competition practice will result in a business climate that is not conducive and not competitive. Other consequences, if they cause losses to other business actors, may lead to conflicts or even disputes among business actors.

As a result of a violation of the law, there may be no lawsuit filed or a lawsuit filed. Disputes that arise are usually civil disputes, namely demands for payment of compensation due to unfair business competition practices. The parties that can file a case of unfair business competition practices can be made by the injured party or business actor, namely the business actor. As long as the parties do not determine a separate dispute resolution mechanism through Alternative Dispute Resolution (ADR), according to the applicable civil procedural law in Indonesia, in principle, it must be resolved through litigation procedures or civil lawsuits to the District Court as the first level state judicial body that has the authority to examine and adjudicate civil cases in general. However, as stated by Fuady, it turns out that "Antimonopoly Law No. 5 of 1999 in principle does not regulate the civil lawsuit aspect of the antimonopoly act No. 5 of 1999" (Fuady, 1999).

In Article 38 paragraph (2) of Law Number 5 Year 1999, the occurrence of unfair business competition against business actors who are harmed, then business actors can report in writing by mentioning the occurrence of violations and losses incurred to *KPPU*. As an independent institution, *KPPU* has the authority to oversee the implementation of laws to prevent monopoly and unfair business competition. *KPPU* conducts examinations but does not act as a real 'law enforcement agency'. This causes *KPPU* to have no coercive power in terms of summoning the parties or in the execution. Meanwhile, the District Court, according to Article 44 paragraph (2) of Law Number 5 Year 1999, is only placed as an institution authorized to examine and hear objections from business actors who have been sentenced to administrative actions by *KPPU*.

KPPU is basically an enforcement organ of the administrative aspects of business competition law. One of the administrative actions that can be imposed by *KPPU* as stipulated in Article 47 paragraph (2) letter f of Law Number 5 Year 1999 is in the form of civil sanctions in the form of stipulation of payment of compensation. For some legal circles, there has been an interpretation that as if the legislator has also established KPPU in its position as the first level judicial body in enforcing the civil aspect of competition law (private litigation) in Indonesia.

In principle, as a consequence and interpretation of the position of the *KPPU* above, the District Court in examining and adjudicating objection cases from business actors should not place the *KPPU* as one of the parties (defendants) in a case that must be defended in court. However, since there is no clear and unequivocal regulation on this interpretation in Law Number 5 Year 1999, the result will be a debate among the legal community and different views among District Court Judges. Objection cases from business actors will not place *KPPU* as one of the parties (defendants) in a case that must be defended in court. However, since there is no clear and unequivocal regulation on this interpretation in Law

Number 5 Year 1999, it will result in debates among the legal community as well as differences in views among District Court Judges.

Research Problems

Based on the background of the above problem, this article focuses on discussing whether in the Indonesian business competition system, a business actor or other party who feels harmed because of unfair business competition practices can file a claim or lawsuit in the form of payment of compensation through civil law enforcement procedures without first reporting in writing about the existence of such business competition practices to the *KPPU*?

Research Methods

This type of research is library research. Library research is research conducted by examining primary data and secondary data. Secondary data by examining primary legal materials and secondary legal materials. The approach used in this research is philosophical. The philosophical approach in legal research is to examine the law at an ideal level. The data source used in this research is secondary data (Marzuki, 2005).

Data collection techniques are carried out through conventional and online searches. Conventional literature search is an activity of searching for library sources to data storage places. While online searching is an activity of searching for library sources in cyberspace through the internet network. This research uses qualitative data analysis because the data will be presented in a narrative-descriptive manner, not in numerical form.

Discussion

In the business world, efforts to obtain maximum profit are reasonable behavior, as long as such behavior does not lead to monopolistic practices and unfair business competition. By implementing fair business competition, it will have a positive effect on business actors in the form of motivation or stimulation to increase efficiency, productivity, innovation, and the quality of products produced so that in addition to benefiting business actors, consumers will also benefit from fair business competition. Conversely, if there is unhealthy business competition between business actors, it will have negative consequences not only for business actors but also consumers and negatively affect the national economy. Therefore, for a company it is very important to implement a business based on the principle of fair business competition (Manli, Kusmayan, Afriana, 2016).

State involvement in the field of law, including civil matters, is carried out as long as there are weak parties that need to be protected in order to avoid exploitation by strong parties (Dhaniswara, 2006). In fact, there are many terms

used for this field of law other than the term competition law, namely antimonopoly law and antitrust law. The term competition law is considered to be the most appropriate, and is in accordance with the substance of the provisions of Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, which covers the regulation of antitrust and business competition with all its related aspects (Hermansyah, 2008).

The implementation of competition law is a must for every country that adopts a modern economic system. Almost all modern economic countries in the world, although not in a specific legislative format, have implemented competition law. It is true that the formation and new currents occurred massively in many developed countries in the 1980s following the liberalization of the world economy (Nusantara, 2010).

Market control activities are closely related to the possession of a dominant position and significant market power in the relevant market. Market control will be difficult to achieve if business actors, either alone or together, do not have a strong position in the relevant market (Sugiarto, 2015). According to the Big Indonesian Dictionary, a monopoly is a situation where the procurement of certain merchandise (in local or national markets) is at least one-third controlled by one person or group, so that the price can be controlled. The factors that cause monopoly include: a) Unique resources; b) Economies of scale; c) Monopoly power obtained through government regulations; d) Patent and copyright regulations; e) Exclusive business rights (Rokan, 2012).

Unfair business competition has been regulated in Law Number 5 Year 1999 in Article 1 Point 6, which provides that business actors are prohibited from conducting business competition by using dishonest or illegal means. Theoretically, acts or actions of fraudulent or dishonest competition and illegal competition can basically be categorized as unfair competition practices, while acts or actions that are restraint of competition can basically be categorized as anticompetition.

Lampert argues that acts of unfair competition can be given a limitation of understanding as unfair competition that violates good morals (Lampert 1997). Meanwhile, another opinion expressed by siswanto; that anti-competitive actions are a category to designate the types of actions that are blocking or preventing competition. (Siswanto, 2002). Substantially, according to Juwana, it is said that Law Number 5 Year 1999 regulates 3 (three) main prohibitions, namely (a) prohibited agreements, (b) prohibited activities and (c) prohibitions relating to dominant positions. (Juwana, 2002).

Competition law actually regulates disputes between business actors, where one business actor feels disadvantaged by the actions of another business actor. Therefore, competition disputes are basically civil disputes. Actually, competition

disputes between business actors can be conducted by associations established by business actors, if the disputed issue does not have public elements. However, the settlement will encounter various obstacles if there is no willingness to implement the decision of the defeated party. This is because an association is not authorized to confiscate or impose public sanctions (Nugroho, Adi, 2012).

In principle, although substantially the regulations on the types of unfair business competition as well as various forms of prohibited actions in Law Number 5 Year 1999 have fulfilled the principles of antitrust laws that apply internationally, if this is not supported by state power with a good law enforcement system, it will certainly be meaningless. Therefore, in order to maintain that the provisions of business competition are adhered to by business actors, in general, countries enforce business competition law through approaches in various aspects of law, be it administrative law, criminal law or civil law.

To oversee the implementation of Law Number 5 Year 1999 on the Prohibition of Monopolistic Practices of Unfair Business Competition (*UULPM*), a Business Competition Supervisory Commission (*KPPU*) was established as stipulated in Article 30 paragraphs (1) and (2) of *UULPM*. Article 30 states that *KPPU* is an independent institution independent of the influence of government power and other parties and that in carrying out its duties *KPPU* is responsible to the President. *KPPU* is appointed by the President after obtaining approval from the House of Representatives (Simbolon, 2012).

At the beginning of its establishment, the Business Competition Supervisory Commission had a very difficult task in facing the chaotic business world in the midst of the multidimensional crisis situation that enveloped Indonesia at that time. At that time, the flow of conflict in the Indonesian business world was very strong. Unfair business competition practices were considered commonplace, coupled with conspiracies between business actors and power holders. To carry out its duties properly, the law provided *KPPU* with ammunition in the form of broad authority. In addition, *KPPU* is also given a limited time span in handling a case, this aims to ensure business certainty (Simbolon, 2013).

KPPU is not an actor of judicial power. Law No. 48/2009 on Judicial Power (*UUKK*) states that judicial power is exercised by a Supreme Court and the judicial bodies under it in the general court, religious court, military court, state administrative court, and by a Constitutional Court. In the context of *KPPU*, business actors who do not accept *KPPU's* decision can file an objection to the district court. This means that legal remedies taken by business actors are submitted to the general judicial environment. This is a controversy in the procedure for handling business competition cases, especially with regard to the role of the judiciary in handling objections to *KPPU* decisions (Anisah, 2005).

The implementation of law in society besides depending on public legal awareness is also very much determined by law enforcement officials, because it often happens that some legal regulations cannot be implemented properly because there are some law enforcement officers who do not implement a legal provision as it should. This is due to the implementation by law enforcement itself which is not appropriate and is a bad example that can degrade the image. In addition, good role models and the integrity and morality of law enforcement officers must absolutely be good, because they are very vulnerable and open opportunities for bribery and abuse of authority. In the modern state structure, the task of law enforcement is carried out by the judicial component and carried out by the bureaucracy, so it is often called the law enforcement bureaucracy (Sanyoto, 2018).

The economic civil aspect is one aspect of business competition law enforcement that is considered very important. This is because this approach allows a business actor who violates the provisions of the law to pay a certain amount of compensation to the parties who factually suffer losses due to the violation.

In Law No. 5/1999, the issue of law enforcement in the civil aspect is not regulated by litigation procedures. This does not mean that a business actor who feels disadvantaged due to unfair business competition practices cannot file a claim for payment of compensation using the rules of civil law as stipulated in the Civil Code (Bergerlijk Wetboek). The existence of unfair business competition practices will essentially create points of intersection between civil law and business competition law, especially with regard to the issue of liability on the basis of unlawful acts *(onrectmatige daad)* or on the basis of breach of promise (default) of business actors who have committed unfair business competition practices.

In the perspective of protecting the interests of business actors in creating a conducive and competitive business climate, the enforcement of the civil aspect of business competition law is carried out through litigation procedures using the grounds of tort or breach of promise, which theoretically can be seen as an effort to expand the enforcement of the civil aspect in the system of business competition law in Indonesia. Compensation in the form of payment of damages due to unfair business competition practices can only be pursued by reporting the occurrence of violations and losses incurred to *KPPU*.

Institutionally, *KPPU* can be categorized as a Non-Departmental Government Institution. *KPPU* in carrying out its duties can be represented as an authority in business competition law, because *KPPU* has the power to impose sanctions for violators of the rule of law. Sudikno Mertokosumo in his book Knowing the Law, states that the ruler has the power to impose sanctions on violations of legal principles (Mertokosumo, 2005).

Regarding the position of *KPPU* in competition law enforcement, *KPPU* is a supervisory institution for the implementation of *UULPM* that has the authority to examine and decide business competition cases, both cases reported to the *KPPU* secretariat and cases known through *KPPU's* own research. *KPPU* has done many things related to efforts to harmonize business competition policies. Sectors that have become the focus of *KPPU's* attention include the retail, oil and gas, and port sectors. *KPPU's* suggestions and considerations regarding the three sectors have been responded quite well by the government. In fact, *KPPU's* inputs and considerations in the oil and gas sector have been elaborated by the government in the *BPH* Migas Regulation. He also said that the role of *KPPU* is very important in enforcing business competition law so that a holistic performance is needed that can be synergistic between law enforcement, policy harmonization and advocacy efforts and socialization of business competition law (Pasaribu, 2008).

KPPU is more of an administrative institution because the authority attached to it is administrative authority, so the sanctions imposed are administrative sanctions. *KPPU* is given the status of supervisor of the implementation of *UULPM* which is independent and detached from the influence and power of the Government and other parties. *KPPU* members are appointed and dismissed by the President with the approval of the *DPR* This provision is reasonable because *KPPU* carries out some of the duties of the government, while the supreme power of the government is under the President. However, because in carrying out its duties *KPPU* may not be free from government interference, the independence of *KPPU* must be maintained by involving the *DPR* to participate in determining and controlling the appointment and dismissal of *KPPU* members (Simbolon, 2012).

In principle, *KPPU* is actually a supervisory institution for the implementation of the law and *KPPU* is not a law enforcer in the criminal field such as the police, prosecutors and judges who have forced efforts to present suspects in court. However, the understanding of the formulation of Article 36 of Law Number 5 Year 1999 concerning the authority as an investigator and investigator carried out by *KPPU* is a criminal law area, so it is often used as a reason that can be the basis for *KPPU* in seeking and finding material truth, namely whether business actors violate Law Number 5 Year 1999 or not (Mantili, Kusmayanti, Afriana, 2016).

KPPU's legal position in the state administration is a complementary state institution (state auxiliary organ), established by the president to oversee the implementation of *UULPM*, *KPPU* in carrying out its duties is independent of government influence. State auxiliary organ is a state institution established outside the constitution to assist the implementation of the duties of the main state institutions, namely the executive, legislative and judicial institutions. *KPPU*

is not a judicial institution, however, *KPPU* has the authority to implement quasi judicial including the authority possessed by judicial institutions, namely, investigation, prosecution, examining, adjudicating, and deciding business competition cases at the first level (Simbolon, 2012).

KPPU is a very appropriate institution in resolving and accelerating the handling of business competition cases by conducting investigations and examinations of the existence of monopolistic practices and or fraudulent competition. This institution in enforcing business competition law must of course consist of people who not only have a legal background, but also economics and business. This is very necessary considering that business competition is closely related to economics and business. Therefore, in the context of enforcing business competition law, if there is an objection from a business actor to a decision made by *KPPU*, including a decision on the determination of compensation payments. *KPPU* must be willing to place itself as a party in the case (defendant) to defend the decision before the judicial institution, be willing to submit the decision and case file to the District Court for assessment of the examination procedure (procedural process), and must also be willing to accept the return (remand) of the decision for re-examination if it is assessed that there is an error in the examination procedure.

KPPU issues decisions and stipulations in the enforcement of business competition law. The legal position of *KPPU* in relation to the enforcement of business competition law is reflected in the provisions of Article 35 letters a, b, c, d on the duties of *KPPU* and Article 36 letters a to l on the authority of *KPPU* which is further emphasized in Article 4 letters a, b, c of Presidential Decree No. 75/1999 has been well implemented by *KPPU*, as evidenced by the issuance of various decisions and rulings produced by *KPPU* from 2001 to 2009. The impact of the enactment of the *UULPM* is that it has changed the behavior of business actors in conducting their business, as business actors are encouraged to conduct their business in a fair manner, conducting efficiency and innovation to be able to compete in seizing the market.

The authority given by the state to *KPPU* is expected as a supervisory institution to carry out its duties and functions as well as possible, and must be able to act independently. The sociological reason for the establishment of *KPPU* is the declining image of the court in examining and adjudicating a case, as well as the accumulated court case load. Another reason is that the business world needs a quick settlement and a confidential examination process. Therefore, a special institution consisting of people who are experts in the fields of economics and law is needed, so that a quick settlement can be realized.

Law enforcement can be carried out using 2 (two) kinds of approach methods, namely: first, the normative-dogmatic approach method, which is an

approach method in law enforcement that stems from the necessities listed in the legal regulations and accepts it as a true reality, and second, the sociological approach method, which is an approach method in law enforcement that stems from the desire to know how the law actually works in society or to know the processes that actually occur in law enforcement.

Normative law enforcement in the process of imposing legal sanctions for unfair business competition practices can be carried out through various legal aspects, be it administrative law, criminal law or civil law. Civil submissions are related to the filing of claims for rights or claims for payment of compensation through litigation procedures as a result of unfair business competition practices and the position of the *KPPU* in the case of objections filed by business actors as referred to in Article 44 paragraph (2) of Law Number 5 Year 1999.

In several countries that already have competition law, such as France and Japan, the issue of enforcement of the civil aspect of competition law relating to the filing of claims for rights or lawsuits regarding the payment of compensation through litigation procedures as a result of the occurrence of unfair business competition practices has generally been expressly regulated, while in the Indonesian competition law system, such express regulation is not found at all. As can be seen from the formulation of Articles 47 through 49 of Law Number 5 Year 1999, the regulation on the enforcement of business competition law in Indonesia is apparently only carried out through administrative and criminal aspects. Meanwhile, the enforcement of the civil aspect of business competition law is not regulated at all.

Law No. 5 of 1999 does not provide direct provisions for law enforcement regulation in the civil aspect, this does not mean that a business actor who feels harmed as a result of unfair business competition practices cannot file a claim for compensation. The submission of a claim for compensation to the District Court regarding a claim for payment of compensation from an aggrieved business actor means that there is a formal legal vacuum (*rechtsvacuum*) of business competition law, so that in examining and adjudicating the case the judge is obliged to carry out legal construction or the formation of civil law rules which become the basis for the right (*rectstitel*) to file a claim for rights or a lawsuit regarding the payment of compensation (Ardhiwisastra, 2000).

From the perspective of civil law, every form of unfair business competition practice, be it in the category of unfair competition practice or anticompetition practice, can basically be constructed as an unlawful act (*onrectmatige daad*) as referred to in Article 1365 of the Civil Code (*Burgerlijk Wetboek*). Violation of a right (*inbreuk op een recht*) or an act that is contrary to the legal obligations of the perpetrator, contrary to the obligations specified in the legislation. Therefore, if

various forms of unfair business competition practices have caused losses (*schade*) to other business actors, where the losses are causally related (*adequatie*) with the fault of the business actors who have committed unfair business competition practices, then the business actors can be held liable (*toerekenings-vatbaar*) to pay compensation to other business actors who feel harmed by filing a claim or lawsuit through litigation procedures (private litigation) on the basis of tort rights. In addition to being construed as an unlawful act, if the unfair business competition is a denial of an agreement that has been made and agreed upon with other business actors, it is basically also construed as an act of default as referred to in Article 1239 of the Civil Code.

Theoretically, efforts to conduct legal construction of various forms of unfair business competition practices on the basis of civil law principles in order to open up the possibility for aggrieved business actors to file claims or lawsuits regarding the payment of compensation can essentially be viewed as a process of law discovery (*rechtsvinding*) in the context of enforcing the civil aspects of business competition. The effort to conduct legal construction as a process of legal discovery in the context of enforcing the civil aspects of business competition law is also in line with the legal principle applicable in civil procedural law, that judges are always considered to know the law (*ius curia novit*) and judges may not refuse to examine and adjudicate a case on the pretext that the law is absent or unclear.

Conlusion

The occurrence of unfair business competition practices, theoretically, an aggrieved business actor can directly file a claim or lawsuit for payment of compensation through the District Court on the basis of tort as stipulated in Article 1365 or breach of promise as stipulated in Article 1239 of the Civil Code without first having to report in writing about the violation and loss to the *KPPU* as the first-level decision-making body of business competition cases.

Sugestion

Business competition is one of the factors that need attention in running the economy. Launching from the official website of the Business Competition Supervisory Commission (*KPPU*), competition in the business world means efforts to gain profits in a market mechanism. In this case, Article 1365 or breach of promise as stipulated in Article 1239 should be maximized for its application.

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