

# THE LEGAL ASPECT OF CREDIT WITHOUT COLLATERAL IN INDONESIA

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## **Abstract**

*Using a legal normative approach, it can be stated that Act no. 10 of 1998 (amending Act No. 7 of 1992 re. Banking), in the event Bank considers loans or other financial schemes application, they are under the obligation, in accordance with Art. 8 of Act no. 10 of 1998, conduct a thorough analysis of the debtor's good faith, financial ability and willingness, and on that basis determine the risk of non-payment. In short, implement due care principles. The elucidation of Art. 8 elaborated on the bank's duties: to decide wisely with due care in order to minimize the risk of default, that is by evaluating debtor's character, capital in his/her possession, collateral offered, and economical/financial condition. In legal practice, however, it is possible for Banks to offer loans without collateral. In such case, only two articles of the Indonesian Civil Code (arts. 1131 and 1132) would be applicable to offer protection against possible default. This paper discusses the above legal discrepancy in light of the role and function of collateral as protection against non-payment.*

## **Keywords:**

*Credit, Collateral, Bank, Banking Law*

## **Abstrak**

Dengan menggunakan pendekatan yuridis normatif, dapat ditegaskan bahwa Undang-Undang No.10 Tahun 1998 (amandemen dari Undang-Undang No.7 Tahun 1992 tentang Perbankan) wajib dalam hal pemberian kredit atau pembiayaan, Bank wajib menerapkan prinsip kehati-hatian. Bank dalam hal ini wajib, berdasarkan analisis mendalam atas itikad baik, kemampuan dan kesanggupan finansial calon debitur, menghitung risiko pengembalian hutang (pasal 8). Penjelasan Pasal 8 menguraikan lebih jauh kewajiban bank (kreditur) untuk bertindak hati-hati, cermat dan seksama dalam rangka mengurangi atau meniadakan risiko gagal bayar. Bank untuk itu wajib menilai watak, modal, kemampuan, jaminan, dan kondisi ekonomi calon debitur. Namun dalam praktik Bank diperkenankan menawarkan dan memberikan kredit tanpa agunan, padahal perlindungan hukum yang tersedia hanyalah dua Pasal (1131 dan 1132 KUHPerdara) yang mengatur jaminan pada umumnya. Tulisan ini akan menelaah inkonsistensi kebijakan di atas terhadap peran dan fungsi agunan dalam pemberian hutang oleh bank.

## **Kata Kunci:**

Kredit, Jaminan, Bank, Hukum Perbankan

## **Introduction**

The economy strength of a country is determined by some pillars. One of the pillars is banking. Article 4 of Act No.10 of 1998 which is amended by the Act No. 7 of 1992 regarding Banking (hereinafter mentioned as "Act No.10 of 1998")

states that the objective of Indonesia Banking is to support the national development in order to improve the balance, economic growth, national stability for the people's welfare improvement. To reach such ideal purpose, bank has functions to obtain the fund from the people as creditors in form of savings and to distribute some part of the fund to the people who need it to improve their welfare in form of credits. Those are the main functions of a bank which are stipulated in Article 3 of Act No.10 of 1998. In running its' business, bank must apply the prudential banking principle, including but not limited in distributing fund in form of credit.<sup>1</sup>

The prudential banking principle in credit is regulated in the Article 8 of the Act No.10 of 1998. It states that bank must have faith based on thorough analysis or a good faith and debtors' capacity to return the loan or the financing as written in the agreement. In the explanation of the article, it elaborates that a bank must analyze thoroughly some criteria, which are character, capital, capacity, collateral, and condition of economy to obtain the "trust" upon debtors. All of the criteria must be reviewed by the bank in order to give any credit approval.<sup>2</sup> The main security in a credit is actually "trust", yet there is another consideration for the bank in approving a credit application which is an additional security in material form, which is well known as "collateral".

Nowadays, in Indonesia, there is term "a credit without collateral" that is offered by some banks. A credit without collateral is a credit without additional guarantee which is handed over from debtor to the bank in order to obtain a credit and financing facility based on Sharia Principle.<sup>3</sup>Therefore a credit without collateral is also well known as unsecured loans. Even though, the amount of credit or the plafond is not much, there are risks in giving a credit without collateral, considering the function of collateral is to be sold when the debtor is in a default condition. When there is no particular security appointed in a credit

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<sup>1</sup> Sentosa Sembiring, Hukum Perbankan edisi Revisi, Mandar Maju, Bandung, 2012, p 2.

<sup>2</sup> Id., p. 197.

<sup>3</sup> Definisi agunan terdapat pada <https://www.ojk.go.id/id/ojk-pedia/Default.aspx>, yang diakses tanggal 30 April 2018, pukul 11.45

agreement, then the bank will only be protected by the general guarantee as regulated in Article 1131 and 1132 Civil Code.

Based on the aforementioned basis, some questions in legal field arise. The first question is does the law permit unsecured loans? Considering Collateral is one factor that determines whether the credit will be approved or not? The next question is how about the legal protection of such credit, especially for the bank as the lender in an unsecured loan agreement?

## **Results and Discussion**

### **Credit Without Collateral According To Laws In Indonesia**

Credit is a word that is originally come from Roman language, *credere*. It means "trust".<sup>4</sup> According to the Act No.10 of 1998, Credit is the amount of money or a billing which can be equalized with the money, pursuant to the lending approval or mutual agreement between the bank and the counterparty that obliges the borrower to pay the loan after a term including interests in such loan.<sup>5</sup>We can see in the definition that one of the unsure of a credit is the obligation of the debtors to return the money to the bank according to term which is agreed by the parties in the credit agreement.<sup>6</sup> Hence, a credit is given not for free, but it's a debt which must be paid off.<sup>7</sup>

In order to obtain the trust toward the debtor candidates, the bank uses instruments to analyze the said candidate. These instruments are known as the fives of credit which are:<sup>8</sup>

#### 1. Character

Bank must know the personality of the debtor candidate, whether he/she is a good or a bad person, an honest person or a liar. The personality will affect the

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<sup>4</sup> Sutarno, *Aspek-Aspek Hukum Perkreditan pada Bank*, CV Alfabeta, Bandung, 2005, p. 92

<sup>5</sup> Act No.10 of 1998, The Amendment of Act No.7 of 1992 regarding Banking, State Gazette of the Republic Indonesia of 1998 Number 182, Article 1 point 11.

<sup>6</sup> M. Bahsan, *Hukum Jaminan dan Jaminan Kredit Perbankan Indonesia*, PT Raja Grafindo Persada, Jakarta, 2007, p. 77.

<sup>7</sup> Id.

<sup>8</sup> Sutarno, *Supra* no. 4., p. 93-94.

willingness to pay off the loan to the bank. Therefore, the bank must do an investigation to collect the information regarding the debtor candidate.

## 2. Capital

Bank must require a down payment from a debtor candidate. In giving credit or financing, Bank must not provide full amount of money as the good's price. The debtor candidate must pay some amount of money to have the credit object.

## 3. Capacity

Bank must check whether the debtor candidate is capable to pay the loan in the term which stipulated in the agreement. The measurement is the income or the salary of the debtor candidate. The debtor candidate income can be the strong basis for the bank to be certain of the capability of the said candidate to return the money to the bank.

## 4. Collateral

Collateral is wealth owned by the debtor candidate, which can be required as the security or guarantee in the event that the debtor cannot pay the loan. The bank can execute the collateral in order to get the payment which such payment is the bank's rights.

## 5. Condition of economy

Bank also must pay attention to the country's condition when bank will approve a credit application. When a country goes through an economic turmoil, it will be difficult for the debtors to pay the loan because it will affect the incomes of some debtors.

One of the instruments which must be analyzed is collateral. Collateral is needed to secure the payment of credit. Collateral will cover the loss suffered by the bank in the event the debtors are default, insolvent, or bankrupt.<sup>9</sup> Hence, the collateral becomes an important aspect in credit analysis. The question is how about a credit without collateral? Regarding collateral, Article 1 point in Act No.10 of 1998, defines it as the additional guarantee which is handed over by the debtors

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<sup>9</sup> Rachmadi Usman, *Hukum Jaminan Keperdataan*, PT SinarGrafika, Jakarta, 2009, p. x

to the bank in credit facility approval or financing facility according to Sharia Principle. Moreover, the explanation of Article 8 clause (1) stated:

“...To obtain such faith, before giving the credit, bank is obliged to go through a thorough review upon the character, capacity, capital, collateral, and business prospect of the Debtor. Considering, that collateral as one unsure of credit distribution, hence to the extent that other unsure has given the faith of the debtor’s ability to return the debt, collateral can only be material, project, or collecting right which is funded by the given credit. A land of which the ownership based on laws, and other which are at the same kind can also be used as collateral. Bank is not obliged to require collateral that is not related with the funded object, which commonly called as additional collateral...”<sup>10</sup>

According the abovementioned explanation, the collateral is compulsory. It can be concluded by doing grammatical interpretation from the words “...hence to the extent that other unsure has given the faith of the debtor’s ability to return the debt, collateral can only be material, project, or collecting right which is funded by the approved credit”. A bank must require collateral, but to the extent that the other C’s have been fulfilled, the bank is not necessary to require additional collateral. Therefore, the collateral which is not compulsory is the additional collateral. Yet, Sutarno has a different opinion. He concludes that The Act No.10 of 1998 does not oblige collateral as a condition from bank to approve a credit. He compares such act to the previous act which is Act No.14 of 1967 regarding Banking. The previous act stipulates that collateral whether material or immaterial is compulsory to be provided by one who intends to get a loan from a bank.<sup>11</sup> It is clearly stated in Article 24 of the Act:

- (1) “General Bank shall not give any credit without collateral to anybody.
- (2) On fixed asset or natural resources, assets, securities or other mortgages confiscation, which is bound to the bank as collateral for fulfilling the obligations to the bank, the bank may buy such fixed asset or natural resources, assets, securities or other mortgages wholly or partly, to be transformed into money as fast as possible.”

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<sup>10</sup> Sentosa Sembiring, *Supra* no.1., p. 196-197.

<sup>11</sup> Sutarno., *Supra* no.4., p. 140.

Sutarno also concludes that the collateral is not compulsory because the government encourages banking to supply credits, particularly for small business that has capital limitation, yet he also states that banking generally requires collateral in practice.<sup>12</sup>

Bank Indonesia which is the central bank of Indonesia, on February 28, 1991 made a decree regarding security on a credit approval. It defines security or collateral as a bank's faith upon a debtor's capability to pay the loan as written in the agreement (Bank Indonesia Board of Directors Decree No.23/69/Kep/Dir, February 28, 1991 Regarding Guarantee). The decree defines a security or guarantee in an abstract form, a faith. The definition seems vague. Furthermore, in Article 1 sub b & c in the same decree, it defines collateral (*agunan*) as the material security, negotiable paper, risks guarantee provided by the debtors to cover the bank loss, in the event that the debtors are not able to pay the loan. The writer concludes that there are confusions regarding the terms security or guarantee (*Jaminan*) and Collateral (*Agunan*) in Indonesia. Sometimes, people mixed both terms. Therefore, it must be regulated clearly regarding the difference between the guarantee and the collateral.

Is collateral is an abstract form or a material form? It should be in material form, or at least can be valued and executed in order to get the money back. In the seminar held by Badan Pembinaan Hukum Nasional in 1977, collateral is defined as: "to guarantee/secure obligations fulfillment which can be measured by money which arises from a law binding. Hence, the security law is strongly related with the law related to material or goods.<sup>13</sup> A quite similar statement is promulgated by Hartono Hadisuprpto. He defines security or collateral as something which is given to the creditor to assure the debtor will fulfill the obligations, it can be measured by the amount of money which initiated from a legal bound. Therefore, it can be summarized that collateral must be able to be measured by the amount of money.

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<sup>12</sup> Id.

<sup>13</sup> H. Salim, *Perkembangan Hukum Jaminan*, PT Raja Grafindo Persada, Jakarta, 2004, p. 22.

According to the private law in Indonesia, which is now still accommodated by the Civil Code, there are general and particular guarantee. General guarantee concept is clearly stated in Article 1131 of the Code. It promulgates: "All movable and immovable assets of the debtor, either present or future, shall be regarded as securities for the debtor's personal agreements."<sup>14</sup> Moreover, in the Article 1132 stipulated: "The assets shall serve as the joint securities for his creditors; the proceeds thereof shall be divided among the creditor in proportion to their debts unless there is a legal order of priority among the creditors."<sup>15</sup> Such guarantee is called guarantee which is sourced from the law.<sup>16</sup> Therefore, we can conclude that even in a credit without collateral, there is a guarantee which is given by Article 1131 and 1132 of Civil Code. Yet, another question follows, is such security is sufficient to mitigate the risks in a credit approval?

General guarantee as abovementioned does not give full security to the creditors. General guarantee can merely be executed after the parties whose rights are violated stand before the court for claiming their rights. Such creditors are categorized as the concurrent creditors whose rights are the same with others creditors who are not given the priority by the laws.<sup>17</sup> The consequence of such status is they get the lowest rank in the debts payment in the event of defaults performed by the creditors.

Taking into account the general guarantee has not accommodated the creditors' rights, hence particular or specific guarantee is formed to fulfill the needs of society.<sup>18</sup> Particular or specific guarantee is guarantee which is stipulated specifically in the agreement between the debtor and creditor. The particular guarantee can be in form of goods or personal guarantee.<sup>19</sup>

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<sup>14</sup> Subekti and R. Tjitrosedibio, *Kitab Undang-Undang Hukum Perdata*, PT Pradnya Paramita, Jakarta, 1992, hlm 243.

<sup>15</sup> Id.

<sup>16</sup> Sri Soedewi Masjchoen Sofwan, *Hukum Jaminan di Indonesia Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan*, Liberty Offset, Yogyakarta, 2003, hlm 44-46.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

Goods guarantee or material security is a guarantee which is related to a certain object. The collateral follows the object wherever it is moved, and it can be defended to all the people who do not have rights to such collateral.<sup>20</sup> Based on the nature, the collateral can be divided into the material and immaterial goods.<sup>21</sup> The examples of the collateral above mentioned are:<sup>22</sup>

1. Pawn

Pawn is still regulated by Article 1150-1160 Indonesia Civil Code. The object is movable goods, whether tangible or intangible. The examples of tangible objects are television, radio, while the examples of the intangible objects are account receivables, shares.

2. Land Mortgage

Land Mortgage is called *Hak Tanggungan* in Indonesia. It is regulated in Act No.4 of 1996. The objects of the mortgage are title or rights upon lands as stipulated in the Act.

3. Fiduciary Guarantee

Fiduciary guarantee is regulated in Act No.42 of 1999. The objects of fiduciary are movable goods, whether tangible or intangible, and the objects which cannot be bound by the land mortgage. The difference between pawn and fiduciary guarantee is in which party the goods are kept.

4. Chattel Mortgage

Chattel mortgage in Indonesia is applied to vessel with the minimal measurement 20 m<sup>3</sup>. We can find the vessel collateral provisions in Article 60–64 Act No. 17, 2008, Regarding Voyage

5. Warehouse receipt

Warehouse receipt is the newest kind of collateral which is regulated in Act No.9 of 2006 and has been changed by Act No.9 of 2011. According to Commerce Minister Regulation Number 37/M-DAG/PER/11/2011, the objects of *warehouse receipt* are movable objects which can be kept for a certain

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<sup>20</sup> Munir Fuady, *Hukum Jaminan*, Erlangga, Jakarta, 2013, p. 10

<sup>21</sup> Cindiana Sari and Ninik Darmini, *Supra* no 3, p. 226.

<sup>22</sup> Munir Fuady, *Supra* no 20, p. 10.

period and can be traded commonly. These objects are kept in a registered storage.

The collateral aforementioned gives the strongest position to the creditors. The creditors are categorized as the preferent creditors who have the highest rank in the fulfillment of payment obligation. In order to get such position, the creditors should go follow a collateral binding procedure which is regulated by the law. For example, the land mortgage creditor must pay a visit to an official who is authorized by the state to make an authorized collateral act. The procedure does not stop there. The creditor must also register such act to Badan Pertanahan Nasional (BPN), the institution who has the authority to take care of land bureaucracy in Indonesia. BPN will implement a registration process after receiving such act to come up with a mortgage certificate.<sup>23</sup> The certificate has the executorial power who gives the authority to the creditors to fulfill their rights. It contains the words who give the power to execute creditors' right "*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*".<sup>24</sup> The other example is in fiduciary guarantee. There is the same title on the fiduciary certificate which authorizes the holder to execute the collateral based on their free will.<sup>25</sup>

Personal Guarantee is guarantee who has a correlation solely to the subject who gives the collateral, not to a certain object. So, it is related to a person. The creditor can only defend the collateral to a certain person. 3 (three) categories of the guarantee is personal guarantee, corporate guarantee, and bank guarantee.<sup>26</sup> The right which arises from personal guarantee is a personal right, which is weaker than the material right which contains in material security or collateral. Personal rights do not differ debts according to which debts are firstly

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<sup>23</sup> Law Number 4 of 1996, Land Mortgage, State Gazette of the Republic Indonesia of 1996 Number 42.

<sup>24</sup> Herowati Poesoko, *Titel Eksekutorial Hak Tanggungan dan Pengosongan Obyek Lelang Parate Executie*, Perkembangan Hukum Perdata Book, Laksbang Grafika, Yogyakarta, 2013, p. 171.

<sup>25</sup> Ari Prihardiyanto and Taufiq El Rahman, *Problematika Yuridis Pelaksanaan Titel Eksekutorial Dalam Sertifikat Fidusia Berdasarkan Undang-Undang No. 42 Tahun 1999 Tentang Jaminan Fidusia*, Volume 2, Nomor 2, Jurnal Hukum Perdata, 193, November 2013.

<sup>26</sup> Munir Fuady, *Supra* no 20, p. 11.

took place. The personal right treats all the creditors equally as in general collateral.

The law gives a personal right to the personal guarantee creditors, while it gives a material right to the material collateral creditors. The strongest position is owned by the material security creditors. One of the laws which regulate the strong position of the material security creditors is the Act No.37 of 2004 regarding insolvency and Debt Payment Obligation Postponement, in the Article 55, it stipulated: "...every creditor who is a holder of pawn, fiduciary guarantee, land mortgage, chattel mortgage, and any other material collateral, can execute their rights as if insolvency does not happen." Such provision proves the power of the material collateral creditors.

Regarding collateral in banking, Munir Fuady stated that the main collateral in banking is actually the "trust" that the debtors will pay the loan back. This "trust as the main guarantee or security" principle is prevailed by law, and it is clearly shown in Act No.10 of 1998.<sup>27</sup> Meanwhile, the contractual collaterals are merely considered as the additional collateral, which is in addition to the main collateral which is the guarantee of the objects or assets that are funded by the credit.<sup>28</sup> Based on Munir's statements, there are 2 main guarantees, the "trust" on the debtors and the objects that are funded by the credit.

In law, sometimes there is a distance between the written norms and the society reality. Collateral in goods form certainly will be preferable, considering the strong security offered. On the other hand, in practice, there are small medium enterprises that need credits from the bank to support their business, and they have difficulties to provide material collateral. According to Krisna Wijaya, toleration to the collateral definition can still be done. Collateral should not be interpreted strictly merely as fixed asset.<sup>29</sup> Toleration is given to support people who urgently need lending from bank in order to grow or develop their business, for example as previous mentioned, small and medium enterprises. The additional

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<sup>27</sup> Id., p. 9.

<sup>28</sup> Id.

<sup>29</sup> Sentosa Sembiring, Supra no. 1, p. 202.

knowledge in analysis credit technique which becomes the strength of credit analysts, make their skill and intuition sharper. The effect is they start to eliminate the collateral importance little by little when they review a credit application. Regardless the skill and knowledge improvement, as the institution who gains trust to manage people's fund, bank should maintain the prudential principle in giving credit, no matter what the business form.<sup>30</sup>

One of the apparatus to maintain the prudential banking principle in a bank is collateral. How is ideal collateral? It should meet standards as follow:<sup>31</sup>

- a. It would not cause difficulties to the debtors in performing their business, hence they can return the money borrowed;
- b. It can be identified easily;
- c. It can be executed at any time;
- d. It has a stable value or not easy to be fluctuated;
- e. It can be easily executed so the creditors can receive the payment of debts;
- f. It can be easily known by other parties to prevent second collateral put on the same object unless with the collateral holder's prior notice or approval;
- g. It is not expensive to be made and executed.

Besides, collateral must be secured. It means the collateral should be bound legally and formally, pursuant to the prevailing laws and regulations. As writer has elaborated previously, the secured collateral gives the highest position to the creditors. It means, in case there is default committed by the debtors, bank has a perfect and complete evidence to perform a legal action.<sup>32</sup>

In banking practice, there are some considerations behind the bank unwillingness to bind collateral through lawful procedure.<sup>33</sup> Some of them are the credit term, the credit amount, and the credit type or the credit form. For example, sometimes bank does not require secured collateral when the credit term is short.<sup>34</sup>The legal consequence of inexistence of such collateral binding is there is

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<sup>30</sup> Id., p. 203.

<sup>31</sup> Rachmadi Usman, Supra no 9, p. xi.

<sup>32</sup> Id.

<sup>33</sup> M. Bahsan., Supra no 6, p. 135.

<sup>34</sup> Id.

nopreferent position for the creditors.<sup>35</sup>It means they are concurrent creditors whose positions are the same to one another.

Munir Fuady considers that collateral is not the main factor in credit. It is only an additional factor. It will be a mistake to put material collateral as the main factor to determine whether a debtor candidate can be trusted or not to pay the loan, the doubt upon debtors cannot be replaced by material collateral. This collateral is not insurance, although it can make the creditor's sleep more comfortable at night.<sup>36</sup>Yet, Sutan Remy Sjahdeini disagrees with the term of collateral or guarantee which interpreted as the faith or trust upon debtors to pay off the loan as agreed. The common interpretation of credit which is attached to the society as "credit collateral" is the last alternative and the source of the unpaid loan payment from the debtors has changed into the new collateral interpretation "the faith or trust upon debtors to pay off the loan as agreed". Hence it does not comply with the common interpretation as people were accustomed to understand.<sup>37</sup>

According to Gunarto Suhardi, Article 8 in Act of 1998 is a provision which arouse from the ambiguous attitude because of the force from the businessmen who urgently need loans and also the force from the politicians who have good alliances with the said businessmen.<sup>38</sup> The result is unclear and vague provision, which gives uncertain, even useless guidance because it will cause questions as follows:

- a. How can we measure a faith or trust? It will give a bank an opportunity to have bad faith to use the fund and sacrifice the customers.
- b. If the faith gained by implementing an international standard in credit analysis, the consequence is there will be no approved credit.
- c. Should such faith be obtained when there is a concrete guarantee which commonly mentioned as "collateral".

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<sup>35</sup> Sri Soedewi Masjchoen Sofwan, *Supra* no 16, p. 76.

<sup>36</sup> Munir Fuady, *Supra* no 10, p. 4.

<sup>37</sup> Hessel Nogi S. Tangkilisan, *Mengelola Kredit Berbasis Good Corporate Governance*, Balairung and Co, Yogyakarta, 2003, p. 78.

<sup>38</sup> Gunarto Sunardi, *Usaha Perbankan Dalam Perspektif Hukum*, Kanisius, Yogyakarta, 2003, p. 88-89

- d. Such provision does not forbid bank to require collateral, which cause problem for Bank Indonesia to serve the protests from the businessmen who are also politicians aforementioned.

Based on the laws and doctrines, it can be concluded that a guarantee can be defined as an abstract form or concrete form. If we use the definition of a guarantee in Article 8 of Act No.10 of 1998, then the guarantee is a trust upon the debtor candidates, therefore as long as the bank is certain that the debtor can return the money, it means the guarantee unsure is met. A guarantee in “trust” form is an essential part of a credit, there is no credit without trust. Hence there is no credit without guarantee, for every creditor is protected by Article 1131 and 1132 Civil Code. Yet if we apply a guarantee in a concrete term, concrete means there are material or personal guarantee, the credit without “concrete” collateral can be existed. As explained above, there are some businesses which are given toleration not to hand over concrete collateral to the bank.<sup>39</sup> Then the amount of credit, the type of credit can also determine whether the bank will require concrete collateral from the debtors.<sup>40</sup>

### **The Legal Protection for A Bank In A Credit Without Collateral**

How about the legal protection for bank that approved a credit without collateral? A credit card is an example a credit without collateral. When debtor candidates apply for a credit card, bank does not require particular collateral to the said candidates. Therefore, as long as the other Cs is matched with the bank’s requirements, the credit will be approved. The question is how about the unpaid credit if there is no collateral?

The creditors will be covered by Article 1131 and 1132 Indonesia Civil Code. The main idea of the Article 1131 is all assets whether already exist or not, belonged to debtors, are securities or collateral for their legal bindings or agreements. Furthermore in Article 1132 regulates the rule of dividing the debtors’ general assets which is based on the amount of debts of each creditor or

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<sup>39</sup> Sentosa Sembiring, Supra no 1, p. 202.

<sup>40</sup> M. Bahsan, Supra no 6, p 135.

proportionality principle. But to get the payment, the bank must join other creditors before the court. The problems are to stand before the court, bank should follow a legal procedure and pay administration fees and lawyers' fees (if any). In addition to that, sometimes the assets of the debtors are not sufficient to pay all creditors at the same time, and the creditors under Article 1131 and 1132 are at the lowest position compared to the preferent creditors whose rights are guaranteed by the law, for example land mortgage, pawn, fiduciary transfer of ownership, and warehouse receipt creditors, not to mention privilege creditors such as administration fees which are required by the court, employees' wages, funeral fees. These privilege rights are stipulated in Article 1134 clause (1), 1139, and 1149 Indonesia Civil Code. Bank is not fully protected by the general guarantee in Article 1131 and 1132. This kind of loan is categorized as unsecured loan.<sup>41</sup>

Moch. Isnaeni gave a perspective that relying on general guarantee in Article 1131 Civil Code is risky, therefore it is needed for a specific guarantee, then there has to be exception which such exception is put on an agreement that has material guarantee as the object, or well known as collateral agreement. <sup>42</sup>Moreover in his book "Pengantar Hukum Jaminan Kebendaan", he mentioned Ross Cranston's opinion that "Security strictly defined, is an interest in property which secures the performance of an obligation, in our case payment. This in addition to being able to proceed on the personal undertaking to repay, the bank has rights against the property."<sup>43</sup>

According to the aforementioned, it can be concluded that Bank must require material security from the debtors, the trust and faith upon debtors are not adequate. The material collateral is movable or fixed assets which can be valued and they also have clear documentations or immaterial collateral.<sup>44</sup> Besides, the material collateral is needed to prove creditors have the lawful

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<sup>41</sup> Sutarno, Supra no 4, p. 142.

<sup>42</sup> Moch. Isnaeni, Pengantar Hukum Jaminan Kebendaan, PT Revka Petra Media, Surabaya, 2016, p. 92.

<sup>43</sup> Id., p. 94.

<sup>44</sup> Sutarno, Supra no 4, p. 141.

rights.<sup>45</sup> Furthermore, material collateral must be secured. It means the collateral should be bound legally and formally, pursuant to the prevailing laws and regulations to give the highest position in the creditors' rank when it comes to unpaid credits.<sup>46</sup> In the practice, even the collateral is bound formally and legally, it does not mean they can receive a full payment of credit easily. One of the problems of the collateral object execution which is actually pursuant to the act authorized copy or even courts' decisions, yet cannot be done in reality.<sup>47</sup>

To protect its position, Bank at least must require collateral which is related to the object or project or collecting right which is funded by the bank as mentioned in the explanation of Article 8 clause (1):

“...To obtain such faith, before giving the credit, bank is obliged to go through a thorough review upon the character, capacity, capital, collateral, and business prospect of the Debtor. Considering, that collateral as one unsure of credit distribution, hence to the extent that other conditions have given the faith of the debtor's ability to return the debt, collateral can only be material, project, or collecting right which is funded by the given credit. A land of which the ownership based on laws, and other which are at the same kind can also be used as collateral. Bank is not obliged to require collateral that is not related with the funded object, which commonly called as additional collateral...”<sup>48</sup>

When the bank is unsure of the debtor's capacity in fulfilling the obligation, bank can ask for a guarantee in form of saving account or deposit which belongs to the debtors, exists in such bank, and has the same nominal with the credit plafond so in the event of debtor's default, the bank has a right to debit the saving account or deposit to pay the loan. This mechanism can be one of the solutions to avoid non-performing loan.<sup>49</sup> The collateral which is applied is additional collateral as stipulated in Article 8 of Act No.10 of 1998.

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<sup>45</sup> Sentosa Sembiring. supra no.1, page 208.

<sup>46</sup> Id.

<sup>47</sup> J. Satrio, Hukum Jaminan, Hukum Jaminan Hak-Hak Jaminan Pribadi, PT Citra Aditya Bakti, Bandung, 2003, p. 3.

<sup>48</sup> Sentosa Sembiring, supra no 1, p. 196-197.

<sup>49</sup> <https://www.ojk.go.id/id/ojk-pedia/Default.aspx> diakses pada tanggal 2 Mei 2018, pukul 13.00

How about the collateral problem for the small and medium enterprises? Nowadays there are micro enterprises too. Is giving toleration for such enterprises regarding collateral become the solution? To face such obstacles, in 2008, Indonesia Government made Regulation No.41 of 2008 regarding *Perusahaan Umum Jaminan Kredit Indonesia* Dated 19 Mei 2008. The objective of the Credit Guarantee Public Corporation is to execute and support the government policy and program in economy field and nation building, by doing the credit security activities for the micro, small, and middle enterprises, and *koperasi*. Moreover the Article 8 of such Regulation stipulates that one of the corporation activities is to apply the credit security whether cash or credit which is distributed by bank or corporation toward micro, small, and medium enterprises, and *koperasi*.<sup>50</sup> Post Governments Regulation No.41 of 2008, the problems regarding collateral for the business as mentioned above should be solved.<sup>51</sup>

A credit guarantee corporation can be a solution to mitigate the risks from unpaid credit. Now, it is only applied for some type of business. Yet, the government should think thoroughly to establish the same kind of corporation for other type of credit, for example credit card. If we read the explanation Article 8 of Act No.8 of 1998, the collateral for in a credit card is the right to collect the payment or collecting right. If there is a default in credit card payment, the bank usually implements a collecting procedure, sometimes it is included a debt collector. Regarding the credit or any other credit without collateral, government should think to establish a corporation to guarantee a credit without collateral the same as saving guarantee body (*Lembaga Penjamin Simpanan*) to mitigate the risks arise from such credit.

Executing collateral shall be the last resort in obtaining the loan payment, because the first procedure to deal with a debtor who has financial problems in paying the loan back is to go through a restructuring phase first. The definition of credit restructuring can be found in Article 1 point 25 of Bank Indonesia

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<sup>50</sup> Koperasi is a business entity with the Indonesia's communal spirit "Kekeluargaan" spirit and it is a people's economic movement.

<sup>51</sup> Id., p. 205.

Regulation No.7/2/2005, “the credit restructuring is a correction effort which is executed by the bank in a credit activity to a debtor who has difficulties to fulfill the obligation, which is implemented in some ways, as follows: a. credit interest rate decrease; b. credit term grace period; c. interest rate installment decrease; d. credit primary installment decrease; e. credit facility increase; and/or credit conversion into temporary capital participation.”<sup>52</sup>The credit restructuring is applied by one of the State Bank, which is Bank Rakyat Indonesia, in solving a breach of contract by the debtor, yet this kind of procedure is implemented by considering the business condition and payment capacity of the debtor.<sup>53</sup>The last effort which is done by the bank when the debtor does not have the ability to pay the loan is to execute the collateral in an auction or selling the collateral without auction.<sup>54</sup>

## **Conclusions**

Based on the afore mentioned elaboration, there are 2 (two) conclusions:

1. Is there any credit without collateral? Having gathered the law basis and doctrines regarding guarantees, there are some definitions of guarantee, abstract and concrete. The abstract guarantee means the “trust” or “faith” upon debtors from the bank, such “trust” or “faith” obtained after the bank reviews the 5 C of the Debtors. But, there is a concrete guarantee , which is defined as collateral that has money values, for example fixed or movable assets. The Act No.10 of 1998 does not explicitly stipulated regarding the material collateral. Hence, law experts have different opinions regarding the collateral importance degree in the credit approval procedure. If we use the interpretation of abstract guarantee, then all credits shall have guarantee because when Bank approves debtors’ credit, it means the bank trust them, and the trust is the guarantee based on the abstract interpretation. Yet, if we use the concrete interpretation, then there is a credit without collateral because not every

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<sup>52</sup> Sentosa Sembiring, Supra no 1, p. 231-232

<sup>53</sup> Agus Sadikin dan Ahmad Yani, Efektivitas Pemberian Kredit Tanpa Agunan Pada Bank Umum, Volume 7 Nomor 2, Jurnal Living Law 176, Oktober 2015.

<sup>54</sup> Id.

credit approved based on the material collateral, for example in credit card approval. Bank does not require material collateral when it approves a credit card application, but still Bank has collecting rights in the event of debtors' default.

2. How about the legal protection in a credit without collateral? If we discuss the collateral through the Indonesia Private Law, then there is no credit without material collateral due to Article 1131 and 1132 Indonesia Civil Code. All the movable or fixed assets belonged to the debtors which already exist or have not existed, are the securities for the creditors. Those articles cover all the agreements made by the parties according to Indonesian Law, including but not limited to banks' debtors. The problem is Article 1131 and 1132 Indonesia Civil Code does not give full protection to the creditors. The creditors are at the lowest rank in receiving the obligation fulfillment from the creditors. To improve their status, the creditors can bind the collateral object through a lawful procedure. After going through such lawful procedure, the creditors will be placed as the creditors who have the preference rights. Therefore, if bank wants to secure its' position, the choice is to be a preferent creditor. Bank has to secure its' legal position considering the fund distributed as credits is not belonged to the bank, but the society, so the fund must come back to the people who entrust such fund to the bank. In practice, the collateral can be a significant problem for the micro, small, and medium enterprises. The bank sometimes tolerates such enterprises not to provide material credit in approving their application, which cause a high risk for a bank. Realizing such obstacle, Indonesia Government made an institution to guarantee credits which are given to the enterprises. Therefore, collateral problems for such enterprises can be handled wisely, not by bending the rule, but by creating a solution pursuant to the laws and regulations.

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