

Thailand: Business Collateral Act

On 7 August 2015, the National Legislative Assembly (the "NLA") approved the Business Collateral Act (the "Act") as proposed by the National Council for Peace and Order. We summarise below the provisions of the Act which, once implemented, would address certain obstacles under the Civil and Commercial Code (the "CCC") that currently prevent the taking of security. The Act would make the taking of security in Thailand more practical and covers a broader range of assets that could be used as security.

Background to the new law

Under the CCC, only mortgages and pledges can be used as security to ensure performance under contracts. Furthermore, only certain types of assets can be mortgaged, those being immovable assets (land and buildings) and some types of registered movable property e.g. ships of five tons and over, floating houses, beasts of burden, and any other movables with regard to which the law may provide registration for that purpose e.g. machinery. As a result, other valuable property used in business cannot be mortgaged to secure performance under a contract.

As delivery of pledged property to the possession of the pledgee is a key requirement to create a pledge and once the pledged property returns to the possession of the pledgor the pledge ceases, this limits its use. This principle has been supported by Supreme Court judgments in cases where lenders lost their pledges over assets (machinery) as the lenders allowed the pledgors to use the pledged machinery for their businesses. This issue has been

recognised as an obstacle for taking security in Thailand, which obstructs the growth of lending.

Business Collateral Contract

This is a new type of contract. A person, called the security provider, grants security over property to another person, called the security receiver, as security for the performance of an obligation of the security provider or any other person, without delivering such property to the security receiver. The security provider can be an individual or entity but the security receiver must only be a financial institution or any other person as provided under ministerial regulations.

It is clear under the Act that the security provider is entitled to possess, use, exchange, dispose, transfer and mortgage the asset that is collateral under the Act and any interest from such assets will belong to the security provider; but in the case where the security provider grants its rights to deposits as collateral, the parties thereto can agree otherwise. However, the security provider cannot further pledge such asset. Any provision that is agreed otherwise will be void.

A security receiver registered under the Act will have priority over the assets in priority to unsecured creditors and would be recognised as a "secured creditor" under the Thai Bankruptcy Act.

Key issues

- A new type of contract called a business collateral contract is created under the Act
- The Act seeks to overcome obstacles under the current law e.g. requirement to deliver pledged property
- Security receiver must be a financial institution
- A broader range of assets can be used as security
- Implementing regulations are required before the Act is effective.

The Business Collateral Contract is required to be in writing and registered with a competent officer (under the Act).

Types of collateral

This includes a business, a claim, movable property used in the security provider's business (e.g. machinery, inventories, and raw materials), real property if the security provider is in the real estate business, intellectual property or any other asset as provided in the ministerial regulation. The Act further states that any asset, which the security provider will receive in the future pursuant to an agreement, can also be collateral once the security provider acquires it.

Business Collateral Registration Office

This is a new office to be established under the Act in the Department of Business Development. The duties of this office are to accept registrations and amend, cancel and revoke business collateral agreements under the Act. It will provide collateral registration information and details of the security enforcer for public search. As such, a third party can now conduct a search to check on whether any asset of a company is being used as collateral under the Act for another party. Thailand has not previously had a central system or organization for checking which assets are used as security.

Enforcement Procedure

The enforcement of security is normally subject to the requirements under the CCC (e.g. sending of demand notice) and the Civil Procedure Code of Thailand (the "CPC") (e.g. attachment, seizure, or court proceedings). However, the Act provides new rules/methods in regard to enforcement procedures, conditions for foreclosure, priority of payment etc. which differ from those in the CCC and the CPC. Moreover,

the Act sets out a specific method for enforcement of a business through the security enforcer (this is also new to the Thai legal system).

Security Enforcer

A security enforcer is required for the enforcement of a "business" where a business is used as collateral. The security enforcer must be registered with the Business Collateral Registration Office and have certain qualifications as stated in the Act; for instance, being a professional lawyer or accountant, and not being a government officer or a bankrupt person.

Insufficient proceeds to repay the secured debt

Under the Act, the law clearly states that any third party security provider must not be liable for any shortfall if proceeds from the enforcement/ foreclosure are inadequate. Any provision agreeing otherwise would be void. However, the Act would allow the security receiver to demand the difference from the principal debtor.

Amendment to the CCC

The implementation of the new Act would require that certain sections of the CCC (e.g. Section 305) be amended. As a consequence, on 11 August 2015, the NLA approved a draft Civil and Commercial Code Amendment Act (the "CCC Amendment") amending Section 305 of CCC to include business collateral under the Act, which is to be transferred automatically once the rights secured by it are transferred. Such CCC Amendment awaits the King's royal endorsement and announcement in the Royal Gazette. The CCC Amendment will become effective on the date following an

announcement in the Royal Gazette, which is expected to be just before the effective date of the Act.

Legislative procedure

Prior to the Act becoming effective, several rules and ministerial regulations will also be required for the officers implementing the new Act, for example with regard to the registration procedure and the secured assets list. The relevant rules and regulations to implement the Act are important as they will determine the practicality of taking security under the Act.

Dishonesty in complying with the Act

As the business collateral contract is based on the good faith of the parties, the Act imposes penalties on a dishonest party who, for instance, gives any false information in making a registration or destroys or conceals the secured assets. The Act imposes fines and imprisonment on persons found to be acting dishonestly.

Effective date

The Act will be proposed by the Prime Minister to the King for royal endorsement and will subsequently be announced in the Royal Gazette. The Act will be effective after 240 days from the date it is announced in the Royal Gazette.

If you require any further advice on any of the issues raised in this newsletter please contact the authors at the contact details below.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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