



Cross-Border Financing Report **2015**

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Lead contributors:

James Chesterman
Sam Hamilton
Jane Summers

LATHAM & WATKINS LLP

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Thailand

Passawan Navanithikul and Nattaporn Pengkul of Weerawong Chinnavat & Peangpanor

Section 1 – Bank licences

1.1 What licences or approvals do lenders need to have if lending to a borrower in this jurisdiction if a) the lender is a bank or b) the lender is not a bank?

If the lender is a financial institution, it has to obtain a licence under the Financial Institution Business Act.

If the lender is not a financial institution but is doing business involving acquiring and lending capital, which falls within the scope of regulated businesses, then prior permission from the Ministry of Finance is required.

1.2 Are any exemptions available and/or are any techniques typically used to structure around such requirements?

No exemptions are provided. However, if the lender does not engage in the lending business (for example, the parent company on-lends to its subsidiary), the lending licence is not required.

Section 2 – Security interests

2.1 Can security be taken over the following asset classes and what documentation or formalities are required to create, perfect and maintain such security?

- a) shares
- b) bank accounts
- c) receivables
- d) contractual rights
- e) insurance policies
- f) real property
- g) plant and machinery
- h) intellectual property
- i) debt securities
- j) future/after acquired property
- k) floating charges over all assets

Shares and debt securities

Yes, both in certificate form (by way of pledge) and scripless form (by way of the use of securities as collateral under the Securities and Exchange Act).

A pledge requires a delivery of the written instruments representing the pledged assets to the pledgee. Delivery of a notice of pledge to the relevant issuing company and the registration of the pledge in the registration book is also required. Additional actions may be required depending on the types of securities, such as endorsement of a pledge of a promissory note.

The use of securities as collateral involves special procedures administered through the Thailand Securities Depository Co, and a specific securities deposit account.

Bank accounts, receivables, and contractual rights

Yes, by way of a contractual assignment which needs to be made in writing and a written notice of assignment must be given to the debtor; or, consent in writing must be obtained from the debtor.

Insurance policies

Yes. In the Thai market, the parties usually require that the lender is named as the (sole) beneficiary on the relevant insurance policy. Additionally, an assignment agreement may be given.

Real property

Yes, by way of a mortgage over land, and/or buildings on that land. Mortgages must be made in writing and registered with the competent land office in Thailand.

Plants and machinery

Yes, by way of a mortgage over machinery that has been registered with the Department of Industry. The formalities for this mortgage are the same as for the real property mortgage.

Non-registered machinery may be granted as security by way of a pledge. However, a creation of a pledge whereby the pledgor still has the right to use the machinery for day-to-day business would have to address the legal issues involving the lack of possession of the pledged machinery by the pledgee.

Intellectual property

At present, there is no effective security over intellectual property available.

Future/after acquired property and floating charges over all assets

Thai law does not contain the concept of a floating charge which may be created over future or all assets of the security provider.

Under the draft Business Security Act (BSA), security can be taken over intellectual property, future or after-acquired property, and all assets of a security provider through a business security agreement. The BSA is not in force at the time of writing this article.

2.2 Highlight any issues with securing obligations that may arise in the future.

The scope of secured future obligations under a mortgage needs to be carefully specified in a contract, as Thai law requires that minimum prescribed details of future obligations be clearly specified. Incomplete details may result in certain future obligations not being covered under that mortgage agreement.

2.3 Can a universal security agreement be used to grant security over all assets in this jurisdiction?

No.

2.4 Can security be granted for the benefit of different classes of creditors under the same security agreement and if so, are there any issues that creditors should be aware of in adopting this approach?

Thai law does not provide for comprehensive classes of creditors, except in the case of a mortgage granted with different rankings.

Therefore, to achieve the benefit of different classes of creditors under the same security agreement, a contractual arrangement among all relevant creditors is necessary (such as an intercreditor agreement).

2.5 Can security trustee or security agent structures be used in this jurisdiction to secure obligations that are owed to fluctuating creditor classes?

Thai law does not contain the concept of a security trustee or a specific provision for a security agent as in other jurisdictions. Only the principal and agent concept is recognised under Thai law.

In practice, an agent can be appointed to enter into a security agreement and hold the security interest on behalf of the creditors. The agent in the transaction will generally be called a security agent.

2.6 Briefly outline any issues to consider when transferring loans and accompanying security interests between lenders.

A written notice to or written consent from the debtor is recommended so the assignment or novation is enforceable against the debtor.

Mortgages, pledges or guarantees given in respect of loans will be transferred by operation of law on the assignment of the rights of the loans, for a novation, however, the consent for which is required from the third-party security provider.

In the case of a mortgage it is generally recommended that the change of mortgagee be registered with the authority following the assignment or transfer.

2.7 Can security be granted by third parties? Are there any rights of contribution, subrogation or similar that might arise as a result of granting/enforcing third party security that ought to be/can be waived?

Yes. A security provider would generally have the right of subrogation, but in practice, this subrogation right is usually waived or subject to the rights of the lender.

2.8 Briefly outline the registration requirements, if any, applicable to security interests created in this jurisdiction, including considerations such as the timing, expense and the consequences of non-registration.

Only mortgages of assets are required to be registered with the relevant authorities as part of the perfection of the security interest. A mortgage registration fee is payable. Non-registration of a mortgage will result in that mortgage being void and unenforceable.

A pledge of shares and certain instruments also need to be registered in the register book so that they can be enforced against a third party and the issuing company.

2.9 Briefly outline any regulatory or similar consents that are required to create security (other than board/shareholder approvals).

If a mortgage or pledge is given by a third party security provider who is a foreign majority-owned company a licence under the Foreign Business Act (FBA) is required.

Section 3 – Guarantees

3.1 Briefly explain the downstream, upstream and cross-stream guarantees available, with reference to any particular restrictions or limitations.

Thai law does not distinguish between the different types of guarantees. Any company can grant a guarantee as long as giving a guarantee is permitted under its company objectives.

3.2 What regulatory or other consents are required to grant downstream, upstream and cross-stream guarantees (other than board/shareholder approvals)?

No regulatory approval is required for giving a guarantee, unless it is a foreign majority-owned Thai company whereby a foreign business licence is required.

A listed company should consider any corporate governance rules of the Thai stock exchange regulators.

3.3 Briefly outline any enforceability concerns associated with the granting of downstream, upstream and cross-stream guarantees that lenders should be aware of (eg any exchange controls or similar obstacles).

The Civil and Commercial Code (CCC) sets some statutory limitations on guarantees, which may affect the enforceability of the guarantee (especially the provisions contemplated under the recent amendments to the CCC on guarantee provisions, which came into force under the two Acts on Amendments to the CCC in February and July 2015 (Amendment to the CCC Acts)). For example: (i) the guarantor cannot agree to be jointly liable as a co-debtor with the primary debtor, except if a guarantor is a juristic person and expressly consents to the joint liability. This exemption was implemented in July 2015 after the first Amendment to the CCC Act with such joint-liable prohibition came into force in February 2015, which raised market concerns on the issue; (ii) the lender must comply with required procedures in enforcing a guarantee (such as the service of a default notice to the guarantor within a prescribed time). Failure to do so would affect the right of the lender in enforcing the guarantee or in claiming accrued default interest from the guarantor; (iii) certain agreements that are in conflict with the CCC regarding a guarantee would be unenforceable, such as an agreement that the guarantee is still in full force and effect although the guaranteed obligation is invalid, an agreement that the guarantor should not terminate a guarantee for whatsoever reason in respect of a guarantee for a series of transactions with no time limitation.

The guarantor is subject to a foreign exchange control regulation which requires the Bank of Thailand's approval for its outward remittance of foreign currency to fulfill its guarantee obligations, in the absence of a Thai court judgment.

Section 4 – Enforcement

4.1 Do the local courts generally recognise and enforce foreign-law governed contracts?

Usually yes, as long as the choice of the law of such foreign country is proved to the satisfaction of the Thai court and is not considered contrary to public order or the good morals of the people of Thailand.

4.2 Will the local courts generally recognise and enforce a foreign judgment that is given against a domestic company in foreign courts (particularly the New York or English courts) without re-examining the merits of the decision?

No. Any judgment obtained in a foreign court would not be directly enforced by a Thai court and the creditor would have to start new proceedings in Thailand. Such foreign judgment may (at the discretion of the Thai court) be admitted as evidence in new proceedings in a Thai court.

4.3 Will the local courts recognise and enforce an arbitral award given against the company without re-examining the merits of the decision?

A final foreign arbitral award could be enforced through Thai courts, provided that such award was issued in a jurisdiction that is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and subject to the requirements and provisions of the Thai Arbitration Act.

4.4 When enforcing security, what factors significantly impact the time such enforcement takes and the value of the proceeds received from such enforcement? For example, are there any statutory requirements such as (a) holding a public auction; (b) court involvement; or (c) obtaining regulatory consents?

The main factor is the nature of the enforcement process under Thai law, which involves a public auction for the enforcement of the pledge, and court proceedings and sale by public auction for the enforcement of a mortgage.

Before enforcement, certain procedures are required (for example, reasonable demand notice to the debtor).

According to the draft BSA, the enforcement procedures are, in principle, less time-consuming. This is because they do not require court involvement and foreclosure of the secured asset or transfer of the secured asset by the lender is permissible.

4.5 Are there any restrictions that apply specifically to foreign lenders when taking enforcement action?

This depends on the type of asset. For example, if the security is mortgaged land, the foreign lender should be aware of the restriction under the Land Code, which prohibits a foreign entity from owning any land in Thailand.

If the security is a pledge of shares in a Thai company, it must be ascertained whether the business of the Thai company is subject to the FBA, or any specific law regulating that business whereby a foreign entity cannot hold shares in such Thai company in excess of the prescribed limitation.

Section 5 – Bankruptcy and insolvency proceedings

5.1 Briefly, outline the main bankruptcy/insolvency processes in this jurisdiction, including any control or influence that creditors can exert on the process, the timeframes usually involved and any mandatory filing requirements.

The available insolvency procedures in Thailand are bankruptcy and business reorganisation.

Bankruptcy may be initiated by the liquidator if the assets of the dissolved company are insufficient to cover all its debts, or a creditor files a bankruptcy charge against a debtor.

After the Bankruptcy Court grants the receivership order, all rights and powers relating to the management of the debtor's assets and business will be passed to the receiver.

It generally takes around one year before the Bankruptcy Court renders the bankruptcy order, and approximately another year for the receiver to collect the assets of the bankrupted debtor for distribution among the creditors. The time period for completion of distribution of debt recovery to the eligible creditors depends on the process of realisation of the bankrupted debtor's assets by public auction.

To be entitled to receive debt repayment, creditors must file an application for the repayment of debt with the receiver within the prescribed time limit.

A secured creditor has two options for recovery of debts. The first option is to enforce the secured assets that the debtor grants to it prior to the order of receivership of such debtor's asset, without filing a claim for a debt repayment if it allows the receiver to inspect such asset. The second option is to file a debt repayment claim for a full amount of the debt if it agrees to surrender that secured asset for the benefit of all creditors, or for only the balance of the debt remaining unpaid if it has enforced the secured asset or agreed to have the secured asset enforced under the bankruptcy law.

Business reorganisation, which is available for the debtor who is a juristic person, can be initiated by a creditor or the government agency authorised to supervise the business of the debtor (involuntary case) or by the debtor itself (voluntary case).

The creditors will be divided into classes of creditors (depending on the security they hold and the debts owing to such creditors). The terms of debt repayment will be governed by the reorganisation plan where creditors in different creditor classes can be subject to different recovery of debt repayments.

The creditors are entitled to direct or approve matters in the reorganisation proceeding through a resolution under the creditors' meeting.

A business reorganisation proceeding takes around one year from the petition until the Bankruptcy Court approves the plan if there is no objection from creditors. The implementation of the plan itself should take around five years from the date the Bankruptcy Court approves such plan but no longer than seven years.

5.2 Are there any preference, fraudulent conveyance, clawback, hardening periods or similar issues or preferential creditor rights that lenders should be aware of?

A fraudulent act can be nullified by the court, provided that the beneficiary of such act is aware of the fact that made it prejudicial, unless that fraudulent act is done within one year before the application for adjudication of bankruptcy or business reorganisation petition and thereafter, or is a gratuitous act, or where the debtor receives less than a reasonable amount of compensation for that transaction.

Undue preference given to any creditor during the three months prior to an application for the adjudication of bankruptcy or a business reorganisation petition (and thereafter) can be nullified by the Bankruptcy Court. If the beneficiary creditor is an insider of the debtor, the hardening period would be extended to one year.

5.3 Do bankruptcy/insolvency processes provide for any kind of stay/moratorium on enforcement of lender claims? If so, does the stay/moratorium apply to the enforcement of security interests?

Yes, in business reorganisation proceedings. An automatic stay comes into effect upon the court's acceptance of the business reorganisation petition and thereafter during reorganisation proceedings that prevent certain activities (such as the creditor pursuing existing law suits, filing of civil claims or action against the debtor, or the creditor enforcing security).

Section 6 – Your jurisdiction

6.1 In no more than 200 words, outline any cross-border financing trends specific to your jurisdiction.

Normally, the Thai entity is one of the subsidiaries of an offshore parent company that is required to provide security to support financing obtained by the offshore parent. Subject to the restrictions and the form of security available under Thai law, the most common securities required from the Thai subsidiary (Thai sub) would be: a share pledge over shares in the Thai sub by the holding company; a guarantee from the Thai sub; a mortgage of real property of the Thai sub; and the assignment of receivables or bank accounts of the Thai sub.

However, for Thailand, assignment of receivables or bank accounts is less likely to be part of the security package due to the fact that the Thai sub would not want to inform its customers or account bank that their receivables or account is subject to security.

Often, the Thai sub is foreign-majority owned and so the requirement of a foreign business licence for giving a guarantee, mortgage or pledge is usually taken into account for the timeline and security package required from the Thai sub.


Passawan Navanithikul

Partner, Weerawong Chinnavat & Peangpanor

Bangkok, Thailand

T: + 66 2 264 8000

F: + 66 2 657 2222

E: passawan.n@weerawongcp.com

W: www.weerawongcp.com

About the author

Passawan Navanithikul is a partner at Weerawong Chinnavat & Peangpanor. She represents Thai and international banks, corporations and other clients in banking and finance matters throughout the Asia Pacific region. Her practice includes domestic and cross-border acquisition finance, investment facilities, asset-based lending facilities and regulatory matters.

Examples of her work include: financing in the landmark Thai Bev \$11.7 billion acquisition of Fraser & Neave; facilities for the development, construction, and operation of energy and infrastructure projects; financing and refinancing of major hotels, resorts, residential and commercial properties; and representation of major Thai banks in loans for the high profile procurement of digital TV licences in Thailand.

Navanithikul has been named a leading lawyer in Thailand in banking and finance by IFLR1000 and Asialaw.


Nattaporn Pengkul

Senior associate, Weerawong Chinnavat & Peangpanor

Bangkok, Thailand

T: + 66 2 264 8000

F: + 66 2 657 2222

E: nattaporn.p@weerawongcp.com

W: www.weerawongcp.com

About the author

Nattaporn Pengkul is a senior associate in the banking and finance practice group at Weerawong Chinnavat & Peangpanor. She assists Thai and international banks, corporations and other clients in domestic and cross-border matters. Her practice includes structuring, negotiating and documenting transactions that involve bank lending, project and acquisition financing, as well as a broad range of regulatory matters.

Pengkul has expertise in many industry sectors, including: airlines; highways; rail and shipping; banking and financial services; oil, gas, power and renewable energy; hotels, resorts, commercial and residential real estate; consumer goods and services; and, technology and communications.

Pengkul obtained an LLM at the University of Cambridge and an LLB at Chulalongkorn University.