

## **THE BUSINESS SECURITY ACT: NEW LAW AND REGIME FOR CREATING SECURITY IN THAILAND**

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Thailand's Business Security Act (the "**Act**") was published in the Government Gazette on 5 November 2015, and will come into force on 2 July 2016 (240 days after publication). It makes significant changes to the regime for creating security in Thailand by, among other things, expanding the types of assets that Thai entities can use as security for their financing. This will provide Thai SMEs greater opportunities to access financing and thereby develop their businesses.

### **The existing position**

Under the Thai Civil and Commercial Code (the "**CCC**") only two types of security interest, mortgage and pledge, can be created. Mortgages can only be created for certain types of assets such as real estate, registered machinery and certain other specific movables. Pledges can be created over movable property but to be perfected the property has to be delivered to and retained by the creditor: as soon as the property is not in the possession of the creditor the pledge ceases to be effective. It is therefore not practical to create security over inventory, raw materials or stock in trade, and there are also doubts over the ability to create a pledge over a bank account. There is also no concept of a security over a fluctuating body of assets like the common law floating charge which enables a business to be sold as a going concern.

### **The business security agreement**

The Act creates a new method of creating security, the business security agreement. Security may be created over the following assets under a business security agreement:

- a business
- a right of claim (which includes a right to receive performance of obligations and any other rights, but excludes a right represented by a written instrument)
- movable property used in a business such as machinery or inventory
- immovable property used in a business
- intellectual property; and
- other assets to be prescribed by ministerial regulation.

Future assets can also be granted as security under the business security agreement.

Under a business security agreement security is created by a security provider (the "**security provider**") in favor of a security receiver (the "**security receiver**") to secure the performance of the underlying debts (the security provider's or a third

party's). The security provider can be either an individual or a legal entity (juristic person), while the security receiver must be a financial institution or any other person to be prescribed in a ministerial regulation.

In the case of a business security agreement which creates security over a business, a security enforcer (the “**security enforcer**”) must also be appointed, who will enforce the security created by the business security agreement on a default. A security enforcer must be licensed and registered with the Business Security Registration Office of the Department of Business Development and be qualified as specified in the Act, such as having knowledge and experience in law, accounting or business.

### **Formalities and registration**

A business security agreement, and any amendment to it, must be in writing and registered on-line with the Business Security Registration Office: delivery of the relevant property is not necessary. The Act requires prescribed details of the business security agreement to be included in the registration, such as the enforcement events and the debt secured. In the case of a business security agreement over a business the security receiver must file the consent of the security enforcer when registering the agreement.

The security receiver will be treated as a secured creditor under the Bankruptcy Act upon completion of the registration of the business security agreement.

The register is searchable on-line, thereby enabling a counterparty to check which assets of the individual or legal entity are subject to a business security agreement, something not available in the past due to the lack of a centralized system.

### **Enforcement**

The enforcement process depends on whether the security is over assets or a business. Court proceedings are not required for enforcement of security under the Act, unless there is a dispute over the enforcement process, and there are new rules in relation to the enforcement of security, which is faster than the enforcement of mortgages under the CCC. The steps and time limits for the enforcement are set out in the Act. The Act requires an enforcement event to be registered with the Business Security Registration Office: if an enforcement event is not so registered it may not be possible to enforce the security as a result.

#### **Enforcement over assets**

Once a registered enforcement event has occurred, the security receiver is entitled to enforce the security over the assets created by the business security agreement by way of sale by auction (which is a new enforcement method introduced by the Act): no court order is required unless there is a dispute over the enforcement process. Foreclosure is also available with no requirement for a court order but is subject to other restraints similar to those under the CCC so is unlikely to be attractive. The Act specifies certain steps for enforcement over each type of asset comprising the security: for example, in the case of security over a bank account

where the account bank is the security receiver, it is entitled to apply the balance on the account in repayment of the secured debt on the occurrence of the enforcement event. It must notify the security provider by registered mail or some other means within seven days of doing so.

### **Enforcement over a business**

This must be done by a security enforcer. As with security over assets the security enforcer is entitled to act without obtaining a court order. Further rules are specified in the Act.

### **Sanctions for security receiver**

A security receiver may be subject to a fine or imprisonment if it fails to take action required under the Act or breaches its duty of confidentiality. For example, failure to deregister the security within 14 days after foreclosure or disposal of the secured property may be subject to a fine of up to THB 100,000.

### **Consequential amendment to CCC**

Section 305 of the CCC provided that on a transfer of a debt, the benefit of security consisting of a mortgage or a pledge is automatically transferred with it. This section has been amended to add security created under a business security agreement to the types of security which are transferred automatically on the transfer of the underlying debt.

### **Implementation of the Act**

Details of implementation of the Act will be contained in ministerial regulations which have yet to be published. There are also a number of issues arising under the Act, such as whether a foreign financial institution is capable of being a security receiver and whether a security agent can be a security receiver on its own for its syndicate (or whether all syndicate members have to be). In our view, it would be desirable if the relevant authorities could work with participants in the market, such as financial institutions and legal advisers, to establish agreed interpretations and standard practices for the implementation of the Act.

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