



SECURITY



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This chapter outlines the types of security that are commonly granted in typical financing transactions, certain key features as well as how to perfect and enforce security interests in Thailand.

Under Thai law, common forms of available security interests range from mortgages, pledges, guarantees under the Thai Civil and Commercial Code (the “**CCC**”), to security interests created under specific laws such as the Business Security Act, B.E. 2558 (2015) (the “**Business Security Act**” or the “**BSA**”), which come into force on 4 July 2016. There are other contractual arrangements between a security provider and a security receiver by way of assignment under the CCC.

Persons Eligible to Take Security

Under the CCC, there is neither a specific requirement setting qualifications of a Thai or foreign lender who is eligible to take security interests by way of a pledge, mortgage, guarantee, or assignment, nor a prohibition on any specific entity to engage in said activities subject to a corporate status having the objectives thereof. However, under the BSA, only certain types of juristic persons are eligible and qualified as security receivers. Eligible security receivers must also apply for registration with the Thai Ministry of Commerce (the “**MOC**”).

Persons Eligible to Grant Security

Generally, there is no outright prohibition under the CCC for Thai and foreign individuals and corporations to grant security over their assets in Thailand. Under the BSA, a security provider can be either a natural or juristic person. Granting security may be subject to other restrictions under specific regulations. Prior to individuals or entities creating encumbrances over their assets, a review on a case-by-case basis will be conducted to determine whether licenses, approvals or notifications to relevant

government authorities are required. For example, under the Foreign Business Operations Act, B.E. 2542 (1999) (the “**FBOA**”), the provision of a guarantee or collateral such as a pledge, or mortgage to secure indebtedness of the debtor is considered an “other service” business activity under List 3 of the FBOA which is restricted for a foreigner as defined therein (which includes a foreign majority-owned Thai company), unless permitted.

Guarantee

Key features of a guarantee are as follows:

Nature of a Guarantee

A guarantee is a contract whereby the guarantor binds themselves to a creditor to satisfy an obligation if the debtor fails to perform that obligation. A contract of guarantee is not enforceable unless there is written evidence signed by the guarantor. There is no requirement for registration of a guaranty agreement. It is subject to a nominal stamp duty under the Revenue Code. After the default of the debtor and following the procedures as set out in the CCC, as described below, the creditor can demand performance from the guarantor. Failure to pay indebtedness by the guarantor is a ground for further litigation of a civil court case for a claim to be made against the debtor and the guarantor, within statutory limitation periods. A guarantee is merely an ancillary agreement to an underlying obligation. To create guarantee, the underlying obligation must be valid. If the underlying obligation of the debtor is extinguished, the guarantor is discharged.

Right of Recourse

A guarantor who has performed the obligation under a guarantee has a right of recourse against the debtor and the guarantor is subrogated to the rights of the creditor against the debtor. In practice, such guarantor's right is often required to be

deferred until all the indebtedness of the creditor has been paid or discharged in full.

Prohibitions and Limitations on Joint Guarantee

Agreement on a joint guarantee as a primary obligor by an individual (natural person) is invalid. However, if a corporation serving as a guarantor agrees to have the same responsibility as a primary debtor as a joint obligor, such agreement is enforceable.

Guarantee for Future Obligations and Conditional Obligations

A guarantee can secure future obligations and conditional obligations. In doing so: (i) the purpose of the secured obligation; (ii) nature of the obligation; (iii) maximum amount of the guarantee; and (iv) period of incurrence of secured obligation must be clearly stated in the guarantee agreement; otherwise the guarantee will be void. As “future obligations” are not explicitly defined under the CCC, in practice, guarantee agreements usually specify all four elements to ensure validity of the obligation. However, the period of incurrence of a secured obligation does not need to be identified if guaranteeing a series of transactions.

Default by the Debtor

The creditor must notify the guarantor in writing within 60 days if the debtor is in default, and the creditor cannot demand performance of the obligation from the guarantor until such notification reaches the guarantor. If the creditor neglects to provide notification within this period, the creditor will be prevented from claiming against the guarantor interest, damages, and other incidental costs incurred following the expiration of the 60-day period.

Debt Reduction

If the creditor and debtor reach an agreement that results in a reduction in the secured obligation (including interest, damages, and other incidental costs), the creditor must provide a written notification to the guarantor within 60 days from the date of

such agreement. If the debtor and/or the guarantor performs the obligation, which was reduced, in full, the guarantor will be discharged from the obligation. The guarantor can make such payment even if the due date of the reduced debts has passed, but in any case, payment may not be later than 60 days from such due date. However, in the case that the creditor delivers a notification to the guarantor after the due date of the obligation, the guarantor can still perform the obligation within 60 days from the date of that notification.

Agreement on an Extension of Time

After the debtor is in default, the lender’s precautionary approach toward the debtor should be considered since certain actions would affect the enforceability of guarantee. If a guarantee has been given for an obligation that is to be performed at a specific time and the creditor grants the debtor an extension of time, the guarantor is discharged unless the guarantor has agreed to such extension of time. Agreement by the guarantor to allow an extension of time in advance cannot be enforced unless the guarantor is a financial institution or engages in a business of providing guarantee for compensation.

Mortgage

Key features of mortgage are as follows:

Nature of a Mortgage, Establishment, and Registration

A mortgage is an agreement whereby the mortgagor agrees to create an encumbrance over property in favor of a mortgagee as security for the performance of an obligation, without delivering or granting the right of possession of the mortgaged property to the mortgagee. Mortgages can be established over most immovable property, for instance, land and buildings and constructions thereon. Under the CCC, certain movable properties can also be mortgaged if they have been registered under applicable laws, including vessels weighing five tons or greater, floating houses, beasts of burden, or any other movable properties that the law

may provide registration for that purpose (e.g., machinery under the Machinery Registration Act, B.E. 2514 (1971) (the "**Machinery Registration Act**"). Note that aircraft is currently not permitted to be mortgaged under Thai laws.

A mortgage agreement must be made in writing in Thai, clearly indicating the mortgaged amount in Baht and using the form prescribed by the competent authority. A mortgage agreement must be registered with the competent official. As Thai law does not recognize the concept of a trustee, the mortgage agreement must be entered into between the mortgagor and the lenders or secured parties, as mortgagee, not by a security trustee. Although the principle of agency is well established under Thai law, it is not common and is potentially controversial to have a security agent registered as a mortgagee on behalf of the lenders or secured parties.

Enforcement of a Mortgage

Enforcement of a mortgage can be done either by way of: (i) public auction through legal procedures with a court's order; (ii) foreclosure; or (iii) a public auction after receiving notification from the mortgagor. If there is an agreement in advance to allow the mortgagee to dispose mortgaged property in a manner contrary to the foregoing, for example, a private execution agreement, such agreement is invalid.

To enforce a mortgage, the mortgagee must provide the debtor of the secured obligation a notice demanding performance of the debtor within a reasonable time but no less than 60 days. If the debtor fails to comply with such notice, the mortgagee may enter an action in court for a judgment ordering the mortgaged property to be seized and sold by public auction. In a case that a mortgagor is a third party, the mortgagee must also send notification in writing to that third-party mortgagor within 15 days of providing notice to the debtor. If notification is not provided within 15 days, the third-party mortgagor is discharged from interest, damages and other incidental costs that occur after that 15-day period has expired.

Foreclosure of the mortgaged property by the mortgagee can be used as an alternative method for mortgage enforcement, in the event that there is no other mortgage or preferential right registered over the mortgaged property, the mortgagee is entitled to claim foreclosure of the mortgage in court instead of a public auction if: (i) the debtor has failed to pay interest for five years; and (ii) the mortgagee has satisfied the court that the value of the property is less than the amount due. Foreclosure procedures are not common in practice due to the difficulties of fulfilling these requirements.

In addition to the above, another enforcement procedure can also be conducted out of the normal court's procedures. If the secured obligation is due and there are no other mortgage or preferential rights registered over the mortgaged property, the mortgagor can provide written notification to the mortgagee to conduct a public auction of the mortgaged immovable property out-of-court. The notification is deemed as the mortgagor's consent to sale by public auction. The mortgagee must sell the mortgaged property by public auction within one year from the date such notice is received. If a sale is not conducted during that period, the mortgagor is released from interest, damages, and other incidental costs that occur after that period has expired.

Liability to Pay Insufficiencies

If the estimated value of the property, in the case of foreclosure is, or the net proceeds are, in the case of an auction, less than the amount due (the "**Shortfall**"), the debtor is not liable for the Shortfall. This provision can be agreed to otherwise so that the debtor remains responsible for the Shortfall.

In the case of a third-party mortgagor, this provision cannot be agreed to otherwise, since Thai law prohibits third-party mortgagors from: (i) being continually responsible for the remaining balance of a secured obligation when the mortgage is enforced; (ii) being held liable for more than the value of the mortgaged property; or (iii) being bound, at the same time, as a guarantor of the obligation (whether under a mortgage

agreement or a separate agreement). An agreement contrary to the above is invalid. The foregoing restrictions do not apply if the debtor is a juristic person and a separate guarantee is entered into by a party holding the power of management, or a party holding controlling power of such juristic person and serving as a third-party mortgagor for the debtor's obligation.

Pledge

Key features of a pledge are as follows:

Nature of a Pledge and Creation of a Pledge

A pledge is a contract whereby a pledgor delivers to the pledgee a pledged property as security for the performance of an obligation. In addition to typical movable property, securities representing value such as shares, promissory notes, and cheques can also be pledged. When pledging a security, in addition to physical delivery of the pledged property to the pledgee for perfection of a pledge, there are other minimum elements for a share pledge.

In a case of a pledge of shares, the minimum elements based on customary practice and requirements under the CCC include: (i) a share pledge agreement in writing between pledgor and pledgee; (ii) delivery of named share certificate (with endorsements); (iii) notice of the share pledge by pledgor to the company; (iv) registration in the shareholder registry book; and (v) an acknowledgment of the share pledge by the company. For other securities, the endorsements on the bearing instrument may be required. Apart from those requirements specified in the CCC, there is also a requirement and formality as set forth by the Security Exchange of Thailand for a pledge of shares in a publicly listed company, in which the registrar is the Thailand Securities Depository (TSD).

Extinguishment of Pledge

A pledge is automatically extinguished when the secured obligation is extinguished other than by prescription, or when the pledgee

returns the pledged property to the pledgor. For that reason, the pledgor cannot use the pledged property during the term of pledge and the pledgee or storage administrator assigned by the pledgee must keep the collateral on behalf of the pledgee.

Creation of pledge over movable properties has been controversial in practice since the debtor needs to have possession and control over raw materials, spare parts, unregistered machinery, etc., required for the normal course of business operations. After enactment of the BSA in July 2016, a creditor and a borrower tend to opt for the registration of business security agreements under the BSA to take security over such properties, since there is no requirement for physical delivery of the collateral under the BSA to the security receiver (note the requirements under the BSA below). In the case of registered machinery under the Machinery Registration Act, the parties have the option to either: (i) register a machinery mortgage as referred to in the above item (2); or (ii) enter into a business security agreement under the BSA.

Since there is a prohibition under the BSA that the right represented by an instrument cannot be collateral under the BSA, the form of pledge of shares or other available commercial instruments in the market remain commonly used as security documents under a typical financing.

Enforcement of a Pledge

While a pledge differs from a mortgage in that a pledge can be enforced by the pledgee without court procedures, it is prohibited to agree in advance to sell the pledged property through other proceedings other than by a public auction. To enforce a pledge, the pledgee must notify the debtor in writing to request performance of the obligation within a reasonable time, which must be specified in the notice. The pledgee must notify the pledgor in writing of the time and place of the auction of the pledged property, and that the auction of the pledged property will take place if the debtor does not perform their obligation within a reasonable period. If notification is impractical, the pledgee may

sell the pledged property by the public auction one month after the obligation becomes due. In addition, if the pledged property is a bill, as an exception, such bill can be collected on its maturity date without a prior notification.

Business Security Act (BSA)

It should be noted from the outset that Ministerial Regulations, the sub-regulations, and the Court's interpretation regarding enforcement under the BSA is still subject to further monitoring.

As described above, a mortgage and pledge in Thailand are commonly used for establishing collateral. However, a mortgage only covers immovable property or registered machines. Further, the legal requirement for the pledged property to be delivered into the possession of the pledgee can lead to difficulties for a borrower and/or pledgor if the pledge includes movable properties such as raw materials and inventories. The total quantity of those assets may vary from time to time and should be in the possession of the business operator to be used in the ordinary course of business. To increase the ability of a business operator to gain easier access to a credit line, the BSA was enacted and has been in full force since 4 July 2016. In connection with the BSA, the Department of Business Development under the Ministry of Commerce (the "DBD") launched an online registration system available for the registration of business security agreements.

Key features of a business security agreement are as follows:

Establishing Collateral Based on the BSA

Security Provider and Security Receiver

Under the BSA, it is possible for a security provider and a security receiver to enter a business security agreement and establish

collateral for certain assets without the physical delivery of such assets to the security receiver. While there is no limitation on the eligibility of the security provider, which can be either individual or corporation, the security receiver must be a financial institution as defined in the BSA or any other person as prescribed under relevant Ministerial Regulations.¹ In summary, the following persons are eligible under the BSA and the Ministerial Regulations to be a security receiver:

- (i) a financial institution under the Financial Institutions Business Act, B.E. 2551 (2008) (including commercial banks that are subsidiaries of foreign commercial banks and branches of foreign commercial banks licensed to carry on commercial banking businesses in Thailand);
- (ii) a company engaged in a life insurance business with the required permits and licenses based on the Life Insurance Act, B.E. 2535 (1992);
- (iii) a company engaged in a non-life insurance business with the required permits and licenses based on the Loss Insurance Act, B.E. 2535 (1992);
- (iv) a bank or financial institution established based on special laws;
- (v) special purpose vehicles with the objective of securitization;
- (vi) trustees in the name of a trust for transactions in capital markets;
- (vii) securities companies and mutual funds;
- (viii) futures trading businesses;
- (ix) asset management companies;
- (x) factoring businesses;
- (xi) the Office of the Permanent Secretary of the Ministry of Industry with respect to the SME Development Fund;
- (xii) foreign commercial banks where they provide facilities in syndication with financial institutions under 1) above;
- (xiii) juristic persons having a business objective of hire-purchasing and leasing; and
- (xiv) juristic persons having a business

¹ As of 5 September 2022, there are two Ministerial Regulations Prescribing Other Persons as Security Receivers issued after 2008, comprised of: (i) the Ministerial Regulation Prescribing Other Persons as Security Receivers, B.E. 2559 (2016) published in the Government Gazette on 9 December 2016; and (ii) the Ministerial Regulation Prescribing Other Persons as Security Receivers (No. 2), B.E. 2561 (2018) published in the Government Gazette on 23 February 2018.

objective of lending.

There are eligible security receivers under all the above categories that have registered and received usernames and passwords from the DBD. A list of security receivers can be found on the official website of the DBD. Notifications and announcements are issued by the DBD to prescribe requirements and procedures to apply for a username and password and verification of the applicant through DBD registration system.

Under the above categories, an eligible person who can be a security receiver is a foreign commercial bank that provides facilities in syndication with a financial institution.² A foreign commercial bank that intends to be a security receiver must serve written notice of its intention to be a security receiver under the BSA to the DBD attaching its constitutional documents showing that it is a commercial bank under the relevant laws in the jurisdiction of its registration /incorporation. In practice, a foreign commercial bank usually grants the authority to register with the DBD via a power of attorney to a Thai person.

Collateral under the BSA

Assets that can be registered as collateral based on the BSA are as follows:

- (i) business;³
- (ii) claims;⁴
- (iii) movable property used by the security provider in business operations, such as machinery, inventory, or raw materials;
- (iv) immovable property, in a case the security provider directly operates an immovable property business;
- (v) intellectual property; and

(vi) any other asset as provided in the ministerial regulations, i.e., perennial plants.

Note that the security provider can place property/rights it currently possesses, or which are to be acquired in the future, under any agreement as collateral.

Minimum Elements of Business Security Agreements

A business security agreement must be prepared in writing and must contain particulars such as the names and addresses of the parties, the secured obligation, the details of the assets designated as collateral, the maximum amount of money secured, and the grounds for business security enforcement. Such particulars must be registered via an online system with the Secured Transactions Registry Division.⁵

In addition, it is necessary for the contracting parties to a business security agreement, in the case that the collateral under the agreement is a “business”, to appoint a security enforcer⁶ as another party in the contract who has a duty to enforce the security interest upon an event of enforcement in accordance with the relevant provisions of the BSA and the Ministerial Regulations governing enforcement actions (out of the court proceedings).

Subject to the terms of the agreement, this permits the security provider to possess, use, dispose of, etc., and receive benefits arising from the secured asset until the collateral is enforced. The security provider can use the secured asset in an ordinary course of its business activities.

² According to the Ministerial Regulation Prescribing Other Persons as Security Receivers (No. 2), B.E. 2561 (2018).

³ Refers to assets used by the security provider in its business operations and other rights related to its business operations, provided that such assets and rights given as security may be transferred to a transferee in a way that the transferee can continue its ordinary business operations immediately.

⁴ Refers to rights to receive payment and other rights that do not include rights represented by instruments.

⁵ Registration is an establishment requirement for business security under the BSA. In any case, the DBD states in their publicly published materials and guidance for registration that, absence of registration is not a cause of invalidation of the agreement, but the parties will not enjoy any right under the BSA until the business security agreement has been registered. The difference is in cases of mortgages; the registration is a “form” of contract which must be done, otherwise the mortgage agreement will be invalid.

⁶ Refers to the party that conducts management and operation of the business instead of the security provider upon the enforcement of collateral over business until the business is sold.

Enforcement of Business Security

The methods for enforcement of business security differs depending on the types of collateral as classified above and usually starts from an event of default or event of enforcement as prescribed in the agreement. Under the BSA, there are two main enforcement mechanisms comprised of: (i) foreclosure of the collateral by the security receiver; or (ii) disposal of the collateral by way of a disclosed and open auction. There are three types of the collateral in which the BSA sets out specific enforcement proceedings, comprised of: (i) claims (other than the “business” type); (ii) rights over bank accounts; and (iii) businesses.

In summary, the procedures are:

- (i) In general, if the secured asset is an asset other than a business, non-judicial enforcement procedures can apply through either public auction or foreclosure of the secured asset by the security receiver. However, for the security receiver to conduct enforcement through foreclosure of the secured asset, the following criteria must be met: (i) the principal of the debt on the due date must exceed the value of the secured asset; (ii) the debtor has outstanding interest payments for at least five years; and (iii) there is no other registered security receiver or preferential rights holders. This is contradictory to the foreclosure procedures for a mortgage where the mortgagee must prove in court that the value of the mortgaged property is below the secured debt amount. In the enforcement procedures for business security, proof in court is not required as out-of-court enforcement is recognized. Like a mortgage, a third-party security provider collateral for the obligations of a debtor is not responsible for the Shortfall.

While the recognition of non-judicial security enforcement is one of the key characteristics of the BSA, to conduct a private auction or foreclosure, the security provider must give consent to the transfer of possession of the secured asset to the security receiver (excluding

the case of security enforcement of a deposit claim). If the security provider refuses to give such consent, a court order for a public auction or foreclosure may be granted.

- (ii) Regarding enforcement over the collateral that is a deposit claim under an account opened with a financial institution, there is a specific method of enforcement. If the security receiver is a financial institution holding those deposits, or if the security receiver has established all of the deposits as collateral, the enforcement procedures can be done right away through direct settlement for those deposits and are followed by delivering a subsequent notice (without obtaining consent) to the security provider to notify the same within seven days.

As for another types of collateral (which are not deposits in a bank account), the security receiver will notify the security provider of an event of enforcement and notify the same to the debtor of such rights that on the due date the debtor must perform payments to the security receiver. Failure to make that payment is grounds for further litigation against the debtor of such rights for enforcement in court.

- (iii) If the collateral is a “business”, the security enforcer has a duty under the BSA and in accordance with Ministerial Regulations that prescribe the method and procedures to decide whether an enforcement event has occurred, proceed with further action of distribution until the sale of the business. The security enforcer is obliged to manage the business until it is disposed of. When the business is disposed of, the sale proceeds will be allocated to the security receiver and, in some cases, to other creditors.

In the same manner as the case where the collateral is not a business, if the proceeds derived from the sale of the business cannot cover the total amount of outstanding debt, the creditor is still entitled to claim for such difference from

the debtor within a prescribed period.

Assignments

It is common practice for a borrower to agree in advance to conditionally assign its rights under project-related contracts, rights to receive proceeds under insurance policies, rights of deposit in bank accounts, etc., for the purpose of providing collateral to secure loan obligations in favor of a lender. Under Thai law, assignment of rights does not produce the right of exclusion in bankruptcy proceedings. Please note that the assignment of right is not valid unless it is made in writing, and such assignment can be set up against the debtor or third persons if written notice thereof has been given to the debtor, or if the debtor has consented in writing to the assignment. If there are uncertainties in practice, it is preferable to work closely with legal counsel regarding documentation.

Examples of the security interests under this category are as follows:

Assignment / Novation of EPC Contract

Under a typical project financing for the construction or the installation, operation, and/or maintenance of large-scale projects (e.g., power generation, infrastructure, public utility projects, and so forth), one of the major project agreements is the EPC contract between the borrower and the EPC contractor. The obligation of the borrower under the contract is to pay the contract price while the obligation of the contractor is to procure services within the scope set forth thereunder. For the lender to have control over the project agreement, a typical form of security interest, i.e., an assignment of the EPC contract, is applicable. Like an assignment of a project agreement, the rights over any monetary claims and other rights, including the right of suspension or termination, will be absolutely assigned to the lender once the assignment agreement is executed. Meanwhile, the other rights, mainly the right to become a party to the agreement in place of the borrower or right to “substitution”, are conditionally assigned if and when an event of default (the “EOD”)

occurs. Once an EOD has occurred, the lender has the right to request a novation so that they will become a party to the agreement for continuing the operation and management of the agreement in place of the borrower.

Assignment of Insurance

Insurance proceeds are another source of funds the borrower may derive from claims to be made against an insurance company under an insurance policy procured under a project. The lender usually sets out a requirement of insurance programs approved by the lender’s insurance advisor, and the policies are subject to the creation of security interests in favor of the lender. A typical form of security document is an assignment of an insurance policy, to which the rights over any monetary claim will be absolutely assigned to the lender, and the right of substitution or novation is usually to be conditionally assigned to the lender. Also, the lender will be named as a beneficiary under the relevant policies. A similar practice is applicable to the arrangement of reinsurance.

Assignment of Accounts

Prior to the enactment of the BSA, lenders normally requested borrowers to enter into a conditional assignment of bank accounts to conditionally assign rights, interests, or claims relating to a bank account agreement entered into and/or deposit accounts opened with themselves and/or other banks.

After the BSA was enacted, financial institutions have shifted from a typical assignment of accounts to a business security agreement over accounts. In addition to gaining control over the designated accounts of the borrower, the lender as the security receiver under the BSA will also enjoy preferential rights over the account once the agreement is registered.

If a security interest is to be created over a bank account as collateral under a business security agreement, to which the account bank is not a lender, a consent letter is required to be provided by the account bank. The BSA provides easier methods for enforcement after an enforcement event

occurs. The security receiver will be entitled to deduct deposits from the bank account of the security provider to set off against outstanding debts.

Upon the enactment of the BSA, rights and claims under project agreements, an insurance policy or a bank account can be placed as security in the business security

agreement, allowing the creditor to enjoy a preferential right. Note that it is not required by law that the security documents created over rights and claims under project agreements, an insurance policy or a bank account be in the form of a business security agreement. A financial institution may also opt to enter an assignment to assign or conditionally assign these rights and claims.