



Thailand: Taking and Enforcing Security Interests

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This article is intended to provide an overview on the taking and enforcement of security interests under Thai law only.

The first section of this article provides a general overview of the types of security available to creditors under Thai law. Further sections discuss the perfection and enforcement procedures for various types of asset, various legal issues that may complicate the taking and enforcement of security interests and certain restrictions on the ability of secured creditors to enforce their security during bankruptcy and rehabilitation proceedings.

FORMS OF SECURITY AND QUASI-SECURITY

The two main forms of security recognised under Thai law are pledges and mortgages. An assignment is not a form of security recognised by Thai law but is simply a method of transferring rights in an underlying obligation from one party to another (either on an absolute or conditional basis). In addition to pledges and mortgages, a business collateral agreement is another type of security under Thai law that allows the security provider (e.g. borrowers) to use their assets as collateral to secure their performance (e.g. loans) without delivering such assets to the security receiver (e.g. banks).

1. Pledges

Pledges may be taken over moveable property such as machinery, shares in the pledgor's company, accounts (see below) and instruments of investment (negotiable certificates of deposit, debentures or promissory notes).

In order to create a pledge, the pledged asset must be delivered to the pledgee or a third-party security keeper, as agreed between the pledgor and the pledgee. The obvious problem with pledges is the restrictions on freedom of movement of goods in and out of a business through the necessity to satisfy the possession requirement in favour of the pledgee or third-party security keeper. This tension can give rise to compromise arrangements which may not satisfy the requirement for possession that an effective pledge requires (see below).

2. Mortgages

Mortgages are generally taken over immovable property (such as land and buildings) and certain types of machinery. The Machinery Registration Act lists specific kinds of movable property which may be registered. Only movable property which may be registered under this legislation may be mortgaged.

It is also possible to take a mortgage of a lease of industrial land pursuant to the Lease of Immovable Property for Commercial and Industry Act. A lessee can mortgage a lease of industrial land if the original lease right is longer than 30 years but not more than 50 years, provided that the landlord consents to the mortgage. The lease and the mortgage must be registered at the relevant land office. Broadly, the position is similar to that of mortgage of land and buildings.

3. Assignment

Strictly speaking, assignments would not be considered as security under Thai law, but merely a quasi-security arrangement (in the case of conditional assignment as explained below) commonly used in Thai market practice. Assignments are generally taken over agreements representing monetary rights such as performance bonds, insurance, leases, construction, supply contracts, concession agreements, account receivables, etc. The two forms of assignment which are generally used in connection with financings under Thai law are:

- (a) an absolute assignment, which involves an actual transfer of rights in the assigned property and not just the creation of a security interest; and
- (b) a conditional assignment which becomes effective following the service of notice on the underlying obligor, usually following the occurrence of a specified trigger event (i.e. the occurrence of an event of default under the relevant financing documents).

As a borrower is usually unwilling to enter into an absolute assignment of its rights and cede control of the contract to the lenders prior to an event of default, it is not unusual for the parties to enter into conditional assignments in favor of the creditors.

4. Business Collateral

A business collateral agreement is an agreement whereby a security provider (either natural person or juristic person) grants security over property to a 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 receiver must be a financial institution or other person as prescribed under the Ministerial Regulations (e.g. foreign banks, specifically in the case of granting loans jointly with Thai financial institutions). A broad range of assets including a business, a right of claim, movable property used by the security provider in business operations (e.g. machinery, inventory), immovable property in case the security provider directly operates an immovable property business, intellectual property rights or standing timber, can be used as the collateral under the business collateral agreement. Except as agreed otherwise by the parties to the contract, the security provider would be entitled to possess, use, exchange, dispose, transfer and mortgage the property provided as collateral including using it as security, production, merging into other properties in the case of possession to be wasted and fruits of the property provided as collateral.

The business collateral agreement shall be made in writing and registered with the Business Security Registration Office of the Department of Business Development. The security receiver registered under the Business Collateral Act will have the preferential right to receive repayment of a debt from the collateral before ordinary creditors. Thus, a business collateral is another type of security under Thailand in addition to pledge and mortgage.

The Business Collateral Act sets up two enforcement methods including (i) the enforcement of property given as collateral and (ii) the enforcement of business given as collateral. For the property enforcement, the procedure would be collateral disposal or collateral foreclosure. On the other hand, in the case of business enforcement registered as collateral, the enforcement process must be done by a security enforcer who is licensed and registered with the Business Security Registration Office of the Department of Business Development. The enforcement procedures under the Business Collateral Act are generally faster than the procedures under Civil and Commercial Code since it is done out of the Court.

LAND AND BUILDINGS

1. Perfection procedure

A land mortgage must be in writing and registered with the relevant land office. A land mortgage may include present and future buildings and structures on the land.

Mortgage registration consists of signing an official form of mortgage agreement (in the Thai language) at the land office where the land is located. It is common to attach a supplemental mortgage agreement to the official form which contains the main terms and conditions relating to the mortgage and this is usually signed before the official mortgage agreement. The land office will usually accept a supplemental mortgage executed in English with a Thai version certified as a true translation being

attached. However, this is a discretionary matter.

A mortgage agreement may be registered as security for any type of specific obligation such as a loan agreement, debenture or guarantee (i.e. to secure the guarantor's right of recourse against the borrower) etc. If the mortgage is security for a loan or overdraft, the lenders must submit to the land office a copy of the loan agreement or a statement certifying that stamp duty payable with respect to the loan has been duly paid.

2. Registration fee and mortgage amount

The official form must specify the amount of the secured liabilities in Thai Baht. Where the secured liabilities are denominated in a foreign currency, the amount must be converted into the Thai Baht equivalent. The mortgage will be enforceable for the amount registered; therefore, lenders must specify a figure which they are confident will cover the maximum total expenses including principal, interest, and any other costs and expenses. A registered amount totalling double the principal amount would not be unusual. Land officials do not consider it an issue if the mortgage amount significantly exceeds the appraised value of the mortgaged land.

The registration fee for a mortgage of land is 1% of the amount of the secured liability up to a maximum of Baht 200,000 for each mortgage amount.

In the case of syndicated loans where the secured liabilities are several, the mortgage agreement may stipulate either (i) several amounts (i.e. by separating the amount of secured liability of each lender) or (ii) a single amount representing the total amount of secured liabilities of all lenders (i.e. the amount of each lender's secured liability will only be set out in the syndicated loan agreement and not in the official form):

- (a) *Joint amount:* In the case of syndicated loans where the secured liabilities are joint, the mortgage will stipulate one total amount for all lenders and the mortgage registration fee is usually payable at the maximum rate. The downside of mortgaging land to secure joint liabilities is that every transaction relating to the mortgaged land requires the consent of all lenders. For instance, if one of the lenders subsequently wishes to transfer its right to a third party, the original mortgage must be released and re-registered. Therefore, this would require the consent and cooperation of all lenders. The registration fee is usually payable at the maximum rate of Baht 200,000.
- (b) *Several amounts:* Where the secured liabilities are several, each lender is free to transfer its portion of the secured liability and re-registration of the new creditor may be completed without the consent of the other lenders. Thai law provides that once a claim is transferred, the benefit of the relevant security interest passes to the new creditor by operation of law. However, it is recommended that the new creditor registers its name as a secured creditor on the land mortgage in order that the mortgage may be enforced against third parties.

The downside of stipulating several amounts is that the mortgage registration fee will be calculated on the basis of the mortgage amount for each mortgagee. The registration fee for registering the name of a new lender is 1% of the amount of secured liability being transferred. The maximum fee is, however, Baht 200,000. To re-register the name of the new creditor, only the new and selling creditor must sign the official registration form.

3. Security Agent

With respect to syndicated loans, all secured lenders must be parties to the official mortgage and the supplemental mortgage. It is not possible to appoint a security agent to accept a land mortgage on

behalf of all syndicated lenders even if the security agent is one of the lenders. The reason is that a security interest is an accessory obligation which can only be created in favour of the lender of the principal obligation. In Supreme Court case no. 817/2521, the court held that as the mortgagee did not lend money secured by the mortgage to the mortgagor, the mortgagor had no liability towards the mortgagee under the mortgage agreement. Accordingly, a security agent may accept security only over its portion of the secured liabilities.

In practice, the supplemental mortgage will be executed by the authorised signatory of each lender, but the official mortgage will be executed by an attorney acting on behalf of the lenders. For convenience, all lenders may appoint the same attorney to execute the official mortgage on their behalf.

4. No letter of clarification from the MOF needed

In the past, land officials would not permit mortgages to be registered in favour of non-banks, non-finance companies in Thailand or any type of offshore entity, as there was a concern that these entities may be engaging in credit foncier business without a licence. Therefore, these entities were required to first obtain a letter from the Ministry of Finance (the “MOF”) confirming that they were not engaged in credit foncier business.

Due to an amendment to the definition of credit foncier business under the Financial Institution Business Act, this letter is no longer required to be presented to the land office. Credit foncier business is now defined as the acceptance of deposits or procurement of funds from the public and using such funds for lending against a mortgage as part of one's core business. The MOF has issued a letter to land officers clarifying that such a letter is no longer required.

5. Enforcement procedures

There are three methods for enforcing a mortgage: (1) by commencing legal action in court for a judgment ordering the mortgaged property to be seized and sold by public auction (Section 728 of the Code), (2) by claiming foreclosure (i.e. take title over the mortgaged property) (Section 729 of the Code) or (3) selling by public auction without having to file a proceeding in court (Section 729/1). With respect to the cases (1) and (2), it is necessary to obtain a judgment debt before enforcing the mortgage.

Before enforcing a mortgage by commencing legal action in court for a judgment ordering the mortgaged property to be seized and sold by public auction, the mortgagee must first provide the debtor with written notice demanding that the debtor performs its obligation within a reasonable period of time not less than sixty days as from the day that the debtor receives such notice and notifying the debtor that if the debtor fails to comply with the notice, the mortgagee may seek to enforce the mortgage. If an action is brought to court without due notification having been served on the debtor, the court may dismiss the case. In the case where the mortgagor mortgaging property as security for the performance of an obligation by another person, the mortgagee shall deliver such notice to the mortgagor within fifteen days as from the date that the notice is delivered to the debtor. If the mortgagee does not proceed within such fifteen-day period, the mortgagor shall be discharged from liability in interest and compensation unpaid by the debtor including charge accessory to such obligation incurring as from the date that such fifteen-day period expires.

The process for foreclosure is similar to the process for enforcement by auction sale, but there are certain conditions required to be satisfied as follows:

- (i) the debtor has failed to pay interest for 5 years;
- (ii) the mortgagee has been able to satisfy the court that the value of the mortgaged property is lesser than the amount of the debt due; and

- (iii) there are no other registered mortgages or preferential rights existing over the mortgaged property.

As to the case of selling by public auction without having to file a proceeding in court (Section 729/1 of the Code), at any time after the obligation is due, if there are no other mortgages or preferential rights registered on the same property, the mortgagor is entitled to notify the mortgagee in writing for the mortgagee to sell the mortgaged property by public auction without resorting to the court on the condition that the mortgagee shall sell the mortgaged property by public auction within one year as from the receipt of such notice. It shall be deemed that the notice of the mortgagor is a consent notice for the public auction. If the mortgagee fails to sell the mortgaged property by public auction within the prescribed period of time, the mortgagor shall be discharged from liability in interest and compensation unpaid by the debtor, including charge accessory to such obligation incurring after the day that such period expires.

In the event of a sale by public auction (with or without a proceeding in court), the mortgagor is entitled to any surplus that remains after the net proceeds of the auction is distributed to the mortgagee(s). If, however, the net proceeds are less than the amount due to the mortgagee, the borrower is not liable for the difference unless stated otherwise in the mortgage agreement. As such, in practice, lenders would normally require that the borrower agrees to waive such statutory default rule and be liable for the difference.

If the lender is a majority foreign owned company, there may be foreign ownership restrictions on the foreclosure of land.

6. Ranking

When the same property is mortgaged to several mortgagees, they rank according to the respective dates and time of registration, with the earlier mortgagee being granted priority. A second ranking mortgagee cannot enforce his right to the detriment of the first ranking mortgagee.

A mortgagee has the right to enforce payment of the secured liability from the mortgaged property in priority to unsecured creditors. However, where a mortgage conflicts with a special preferential right which has been properly registered, the special preferential right takes priority. There are two types of special preferential rights which may take priority over a mortgage, namely: preferential rights on account of preservation of property and work done upon the property. In practice, these preferential rights seldom arise.

Preferential rights on account of preservation of property (e.g. obligations owed to third parties for maintaining or protecting a property from destruction by fire) must be registered immediately after the act of preservation is completed in order to take priority over a mortgage.

Preferential rights on account of work carried out on immovable property is comparable to a mechanic's lien under common law. These obligations will only take preference to the extent that the work increases the value of the immovable and the preferential creditor must register an estimate of the cost involved before commencing work.

As preservation of property or work carried out upon the property is an expense incurred for the benefit of all creditors, these rights take priority over a mortgage regardless of whether they were registered before or after the mortgage.

1. Perfection procedures

Before a mortgage over machinery can be created, title to the machinery must be registered at the Central Machinery Registration of the Ministry of Industry. There is a mandatory posting of five days notice before title registration can be completed.

The mortgage registration consists of signing an official form of mortgage agreement at the Central Machinery Registration Office of the Ministry of Industry. Registration can be completed within one day if all the supporting documents are complete. The registration fee is 0.1% of the secured liability up to a maximum of Baht 120,000 for each mortgage agreement.

2. Enforcement procedures and ranking

The position regarding priority and enforcement procedures for mortgage of plant and machinery are substantially similar to that of a mortgage of land and buildings.

MACHINERY AND OTHER MOVABLES

1. Perfection procedure

A pledge is the only form of security which can be created over machinery which cannot be mortgaged. The principal requirement for creating a pledge is that the pledged property must be delivered to the pledgee or a third party as agreed between the pledgor and the pledgee. There are no registration, governmental consent or filings required to perfect a pledge.

Methods used to overcome this requirement include, where possible, storing pledged goods in warehouses owned or managed by entities which agree to act as custodians of the pledged goods for the benefit of the lenders. Less formal methods include the segregation of areas of businesses or factories of the pledgor/borrower with administrative arrangements in place for the signing in and out of the factory of goods under nominal third-party supervision. Employees in the factory may agree to act as third-party holders of the pledged property.

There has been a long-standing debate as to whether the above type of arrangement may cause the pledge to be extinguished under Section 769(2) of the Civil and Commercial Code (the “Code”) which provides that a pledge is extinguished if the pledgee allows the pledged property to return into the possession of the pledgor.

In Supreme Court case no. 5603/2544, the court held that a pledge of machinery is extinguished if the pledgee allows the pledgor to continue to use the pledged machinery. The court held that by allowing the pledgor to make use of the pledged machinery, the pledgee was deemed to have returned the pledged property to the possession of the pledgor. Therefore, the pledge was extinguished under Section 769.

To try to mitigate this risk, most pledge agreements would state that allowing the pledgor to make use of the pledged property will not be deemed to constitute the pledgee returning the pledged property to the pledgor's possession. The court held in Supreme Court case no. 5603/2544 that this type of provision is unenforceable as the real intention of the parties is to let the pledgor use the pledged property and that this constitutes a return of the possession of the asset to the pledgor.

Following this court decision, the law is now clear that if the pledged property continues to be used by the pledgor, the courts will not recognise that pledge. It is unclear from the case law to what extent an asset will be considered to be available to be used by a pledgor without a pledgee losing possession

and this type of security is therefore problematic. It is also unclear to what extent a court would accept concepts such as deemed possession being provided to a pledgee through delivery to a particular place and what control arrangements would be sufficient to provide possession to a pledgee where assets are being used as part of a pledgor's business (or that of a pledgor's agent), or where an asset is embedded in a structure or replaced. Due to the limited types of security available under Thai law, lenders do, however, continue to request that pledges of movable assets be provided despite the problematic nature and uncertainty of this type of security. Nevertheless, the Business Collateral Act has been enacted to address this issue as the assets given as the collateral can still be used and possessed by the service provider (i.e. borrowers) for its business operations.

2. Enforcement procedures

Pledges are enforced by first requesting in writing that the debtor perform the obligation which it has failed to perform within a reasonable time. If the debtor fails to comply with the notice from the pledgee, the pledgee may sell the pledged property by public auction. The pledgor must be given notice of the time and place of the auction. If notice to the pledgor is not possible, the pledgee has the right to sell the pledged property one month from the time the obligation became due by a public auction.

Once the proceeds have been applied towards payment of the secured liabilities, the remainder must be returned to the pledgor. If the proceeds are insufficient, the pledgor remains liable for the difference.

3. Ranking

As the pledgee is entitled to retain the pledged property until repayment is made in full, no other security can be created over the property. However, the pledged property may be subject to a preferential right attached to that property on account of other debts.

Where a pledge conflicts with a special preferential right, the pledgee ranks the same as the creditor with special preferential right on account of hire of immovable, lodging in a hotel and carriage (but a pledgee ranks ahead of other types of special preferential rights (Sections 282 and 278 of the Code)). Where a pledge conflicts with an ordinary preferential right, the pledgee usually ranks ahead of creditors with ordinary preferential rights. However, an ordinary preferential right on account of expenses for the benefit of all creditors ranks ahead of the pledge (Section 277 of the Code).

SHARES AND SECURITIES

1. Perfection procedure

Shares in registered form may be pledged by delivering the share certificates to the pledgee and recording the pledge in the company's share register. If this is not completed, the pledge may not be enforceable against the company and third parties. The same procedure applies to corporate debentures in registered form.

A negotiable instrument such as a bill of exchange or promissory note may be pledged by the holder recording the pledge on the instrument and delivering the instrument to the pledgee. The pledgor must state the pledgee's name and that the pledge is given as security for the pledge. The phrase "value as security", "value in pledge", "I hereby pledge this promissory note as security for obligations owing to the pledgee" or similar wording would effectively create a pledge. In addition, notice of the pledge must be given to the issuer in writing otherwise the pledge will be unenforceable against the issuer and third parties.

2. Foreign Lenders Taking Security over Listed Shares

In the past, in order to accept a pledge of listed shares in scripless form, the pledgee had to be a member of the Thailand Securities Depository Company Limited (“**TSD**”) which usually acts as the registrar for listed shares and had to have a pledge account in its name. Prior to amendments to the Securities and Exchange Act (the “**SEC Act**”) and the TSD Regulations in 2008, only onshore financial institutions and branches of foreign banks in Thailand were permitted to be TSD members. Therefore, offshore financial institutions had to first convert the scripless shares into certificated form to create a pledge over those shares.

However, this is no longer required because the TSD has issued a new regulation to permit non-members to accept pledges of scripless shares.

3. Enforcement of pledges

3.1 Unlisted shares

A pledge of unlisted shares may be enforced without the need for court action by following these basic steps:

- A written notice must be given to the pledgor requiring the pledgor to perform the defaulted obligations within a reasonable time frame (15 days would normally be considered reasonable).
- The notice must state that, if the pledgor does not comply within the specified period, the pledgee will enforce the pledge by selling the shares by public auction.
- At the end of the specified period, a written notice must be given to the pledgor stating the time and place of the auction. There is no requirement to conduct the auction through a professional auctioneer, but it is not uncommon for this to be done especially where the pledgee wishes to bid for the shares.
- The auction is publicly advertised. This is normally done by newspaper advertisements. There is no fixed minimum period for the notice/advertisement, but we would expect this period to be at least 7 days. The advertisement must specify the conditions of sale. A realistic estimate of the shortest time required to complete a sale of shares on enforcement would be 4 weeks from the date the first enforcement notice is given, assuming the sale is made at the first auction. Lenders are allowed to credit bid in such an auction (i.e. if this is provided in the auction particulars).

It is not unusual for pledgors to attempt to frustrate or delay the auction process by seeking injunctions (for example, based on the procedure for establishing the auction, the auctioneers qualifications and the auction price (etc.)).

3.2 Listed shares

To enforce a pledge of listed shares, the pledgee must first notify the pledgor, requiring the pledgor to perform the obligations within a reasonable time frame. A pledge of listed shares, whether certificated or scripless, may be enforced through the sale of the shares on the Stock Exchange of Thailand (the “**SET**”). As this will determine a market price, the shares need not be sold by public auction. After the broker who holds the shares on the TSD on behalf of the pledgor completes the sale (which must be made in accordance with the SET regulation on enforcement of pledged shares), the broker must record the sale on the SET through the electronic media system in the system provided by TSD. TSD shall notify such sale to the registrar for further action. Moreover, the following documents shall be kept for the TSD’s inspection upon demand:

- a notice of forced sale;

- a certificate of the sale of securities used as collateral in the stock exchange, which is certified by the member of the SET which sold such securities, in accordance with the form specified by TSD; and
- other evidence as required by TSD.

4. Tender offer requirements (Listed shares)

If as a result of enforcing the pledge, the pledgee acquires a number of shares that reach the tender offer trigger point, the pledgee must make a tender offer. The mandatory offer requirements are triggered if a person acquires voting rights in a target company as follows:

- acquiring twenty-five (25) percent or more of the total voting rights in the target company;
- acquiring fifty (50) percent or more of the total voting rights in the target company; or
- acquiring seventy-five (75) percent or more of the total voting rights in the target company.

If the shares are issued by a public company, the pledgee or third party may also be required to report the acquisition of the shares to the office of the Securities and Exchange Commission subject to the applicable 5% reporting requirement under the SEC Act.

5. Ranking

The position on ranking is similar to that of pledges of machinery and movables.

BANK ACCOUNTS

1. Pledge of bank accounts

As mentioned above, an essential element of the creation of a pledge under Thai law is delivery of the pledged asset. Where the pledged property is merely a bundle of rights relating to a property, it would not be possible to deliver the pledged property unless these rights are represented by an instrument.

There are several Supreme Court cases in which the court held that a right represented by an instrument which may be pledged must be an instrument created in accordance with the law and which is transferable. Such an instrument does not include documents made only for evidentiary purposes. The courts have ruled that a bank statement or receipt evidencing a bank deposit are not instruments which may be pledged in order to pledge rights to a bank account.

Cash deposit (i.e. bills and coins) cannot be effectively pledged under Thai law because ownership of cash collateral would be transferred to the bank when the cash is deposited. The bank merely has a contractual obligation to return the same amount of cash to the depositor. Accordingly, the pledgor would not be the owner of the cash and have no assets to deliver to the pledgee to perfect the pledge.

2. Set-off rights

Although it is not possible to effectively pledge a bank account, the account bank may set off the pledgor's obligations against the bank's obligation to return to the pledgor a sum equivalent to the deposited amount. This set-off right is only available to a pledgee acting as the account bank.

Notwithstanding the bank's right of set-off, money in the account would still be vulnerable to an

attachment order if the pledgor becomes insolvent. As such, the lender/account bank must exercise its right of set-off against money in the pledgor's account before the court issues a receivership or attachment order.

3. Taking a pledge and conditional assignment

Lender is account bank: If the lending bank and the borrower's account bank are the same entity, it is best to take security over a bank account by entering into an account pledge and a conditional assignment of accounts between the lending bank and the account holder. An absolute assignment is unlikely to work together with a pledge because once the assignor has assigned its right to receive the deposits, it no longer has a right over which a pledge can be created. Additionally, it is necessary to enter into a conditional assignment because there is a risk that an outright assignment may cause the rights and liabilities of the bank to be discharged pursuant to Section 353 of the Code. This section provides that where the rights and liabilities in an obligation become vested in the same person, the obligation is extinguished.

Lender is not account bank: If the lending bank and the borrower's account bank are not the same, the preferred approach is to take security over a bank account by entering into a conditional or absolute assignment of accounts between the lending bank and the account holder.

Although a contractual assignment is not a recognised form of security interest under Thai law, it is nevertheless recommended for taking "security" over a bank account for the following reason. Once cash is deposited with an account bank, the holder of the account has an unsecured debt claim against the account bank (including in the event of the account bank's insolvency). Under a conditional assignment, the account holder is essentially assigning its contractual claim against the account bank to the lending bank and, once a trigger notice is served and the assignment becomes absolute (and notice to this effect is provided to the account bank), the lending bank should have a claim for the cash in the account at the point at which the conditional assignment becomes unconditional.

It may also be preferable to provide for a bank taking security to be a joint signatory on certain accounts and, where rights to amounts under a contract are absolutely assigned, for these amounts to be paid to an account in the name of the assignee (to avoid arguments that the assignment is not, in fact, absolute).

Notwithstanding the legal uncertainty on pledges of accounts, these are still often taken by lenders in Thai transactions.

CONTRACTUAL RIGHTS AND FUTURE ASSETS/RIGHTS

1. Mortgage and pledge of future assets

For future assets, the range of security available under Thai law is relatively limited compared to other jurisdictions. One way of overcoming this shortcoming is for the borrower to agree to mortgage or pledge future assets. This is achieved by the mortgagor/pledgor entering into a master pledge/mortgage agreement covering future mortgages/pledges, under which the mortgagor/pledgor agrees to mortgage/pledge and deliver future property (where applicable) to the lenders as and when the property comes into existence. The perfection of a future mortgage/pledge will require the cooperation of the pledgor as the pledged property must be delivered into the possession of the lenders or their agents and the mortgage must be registered at the land office.

At the time of entering into that agreement, the borrower could grant an irrevocable power of attorney in favour of the lenders or their agent so that the lenders or their agent could execute the relevant mortgage and complete the mortgage registration on behalf of the borrower as soon as the asset comes into existence. However, there are a number of difficulties with this approach.

- Entering into the agreement will not create a security interest over the assets at the time they are acquired. Rather the agreement to create the security will constitute a contract between the borrower and the lenders (breach of which may give rise to a damages claim) but will not create security or be enforceable against third parties that have a preferential right to an asset.
- An irrevocable power of attorney authorising the lenders to complete mortgage registration on the borrower's behalf may still be revoked by the borrower.
- A mortgage/pledge that takes place during the three-month suspect period under the preferential transaction rules (i.e. Section 115 of the Bankruptcy Act) may be set aside on the grounds of preference. In the Supreme Court case no. 2333/2537, the court held that a mortgage of land completed during the three-month suspect period is a preferential transaction even though the power of attorney to effect registration was issued before the suspect period.

In the light of above, the Business Collateral Act has been enacted to address this issue concerning future assets. That is, the security provider may use a property which he or she has the right over at present or shall acquire in the future under any agreement or legal relationship as collateral but the preferential right over an object of right which is a collateral under a contract shall arise only when the security provider obtains such property. The details of the assets provided as collateral under the business collateral agreement should be clearly specified under the business collateral agreement.

2. Absolute assignments of contractual rights

An assignment of claims is not valid unless made in writing and cannot be raised against the underlying obligor or any third party unless the underlying obligor has been duly notified or has consented to the assignment. Such notice or consent must also be made in writing. There are no registrations, governmental consents or filings required to perfect an assignment of claims.

If notice of the assignment is given to, rather than consent obtained from, the underlying obligor, the underlying obligor may raise any defences that it has against the borrower against payment of the assigned claim to the lender. Additionally, if only notice of the assignment is given and the underlying obligor has a claim against the borrower which had not become due as at the date of the notice of assignment, the underlying obligor may be able to set off that claim against the claim assigned to the lender when the underlying obligor's claim becomes unconditional.

The Code does not specify a time period in which consent must be obtained or notice given. It is usual practice to attempt to obtain the consent of an underlying obligor to an assignment, particularly where the rights assigned are under a license, or approval or concession issued by a governmental body and this is necessary if the ability of an assignor to assign is subject to consent or prohibited. Notice of an assignment is normally given at the time that the assignment is entered into. If notice is not given until the time of enforcement there is the risk of an assignment being set aside, for example, as a preference under Section 115 of the Bankruptcy Act.

If the assignor continues to accept payments directly from the underlying debtor, there is a risk that the court will consider that the parties did not intend to absolutely assign a claim and therefore that the assignment is not valid.

3. Conditional assignment of contractual rights

As mentioned above, a conditional assignment only becomes effective on the service of notice following the occurrence of a specified trigger event or events (e.g. an event of default). One disadvantage of conditional assignments is the possibility of the assignment being set aside by a court

on the application of an official receiver as a preferential transaction under Section 115 of the Bankruptcy Act if the “trigger notice” is served within three months of the filing of a bankruptcy petition against the assignor. A further disadvantage is that the assignor may assign rights under the conditional assignment to a third party prior to the service of a trigger notice on the underlying obligor. These risks may be mitigated to an extent by serving an initial notice of conditional assignment on the underlying obligor on the date of execution of the conditional assignment.

4. Assignment of future rights

If a contract creates an obligation (whether conditional or not), any claim in relation to that obligation may be assigned. For example, upon executing a construction agreement, the contractor has an obligation to carry out the construction work and the employer has an obligation to pay the contractor if that work is completed. Therefore, the contractor has a conditional contractual claim which may be immediately assigned upon execution of the agreement. The fact that the claim is conditional upon completion of the project or that the amount of the claim will be determined in the future does not affect the assignability of the claim. This type of claim is not a true future right.

However, claims under a master sales agreement, a revolving bank account or a credit card facility are considered true future rights. This is because the purchaser/credit card holder has the right, but not the obligation, to order goods/use the credit card. Under a master sales agreement/credit card facility, a claim does not arise until the purchaser makes an order or the credit card holder uses the card. On the execution date, there are no obligations, hence, no claims that may be assigned.

This means that despite having entered into a master assignment to assign a true future right, the assignor must enter into another written assignment after the right to receive a payment arises. The assignor must also give notice of the assignment or obtain consent to the assignment from the debtor (i.e. the contractual party) in order for the assignment to be raised against the debtor or third party.

OUTWARD REMITTANCE OF ENFORCEMENT PROCEEDS

Due to the relaxation in the exchange control regulations in 2019, outward remittances are allowed freely except for the specific list of foreign exchange transactions (negative list) which requires prior approval from the Bank of Thailand (“BOT”) such as a settlement of FX/THB transactions with financial institutions abroad. In addition, documentation will no longer need to be provided to the banks when conducting outward transfers of less than USD 200,000 (i.e. the purpose of remittance shall be notified). In this respect, even though the outward remittance of proceeds from the enforcement of a security interest is not listed under the negative list, the actual nature of each outward remittance of proceeds from enforcement of security must be considered on a case-by-case basis.

Pledges: Outward remittance of proceeds from enforcement of a share pledge must be considered on a case-by-case basis:

- A share pledge under which the loan proceeds are brought into Thailand does not require BOT approval if the person remitting the money offshore is the Thai borrower. This is because the BOT views this type of transaction as being the same as the repayment of an offshore loan. If the proceeds are to be remitted by a person other than the Thai borrower (which would normally be the case if security is enforced), specific BOT approval is required for the foreign exchange transaction and remittance offshore. To address this, the authorization from the Thai borrower can be assigned to such person for the outward remittance without the prior BOT approval.
- A share pledge in which the shares belong to a non-Thai person does not require BOT approval regardless of whether the loan proceeds are brought into Thailand. This is because the BOT views this type of transaction as being the same as the repatriation of an investment in shares.
- A share pledge where the loan proceeds are not brought into Thailand and the shares belong to a Thai

person requires prior BOT approval.

Mortgages: As mortgages must be enforced through the courts, we have been informed by the BOT that outward remittance of proceeds from the enforcement of a mortgage does not require BOT approval if the loan proceeds were remitted into Thailand.

ENFORCEMENT DURING BANKRUPTCY PROCEEDINGS

The enforceability of security documents will be limited by bankruptcy laws and laws affecting creditor's rights. Under the Bankruptcy Act, either bankruptcy or rehabilitation proceedings may be commenced against an insolvent borrower, in the latter case, only if there are reasonable grounds and prospects for rehabilitating the debtor's business.

During bankruptcy proceedings, a secured creditor may:

- (a) enforce its security separately without filing a proof of claim in the bankruptcy proceedings; or
- (b) file a proof of claim in the bankruptcy proceedings if:
 - (i) it agrees to surrender the secured assets for the benefit of all creditors, in which case the creditor may file a claim for the full amount of the debt;
 - (ii) has enforced its security outside the bankruptcy proceedings in which case the creditor can then file a proof of claim for any deficiency;
 - (iii) has instructed the official receiver to sell the secured assets by auction, in which case the creditor can then file a proof of claim for any deficiency; or
 - (iv) has appraised the value of the secured assets, in which case the creditor can then file a proof of claim for any deficiency.

If a rehabilitation petition is made, a general stay on actions will automatically come into effect following the issue of a court order accepting the petition. The general stay on actions prohibits secured creditors from enforcing their security without the approval of the court. A creditor whose rights are affected by the stay on actions may apply to the court for an order to amend the limitation on its rights if that limitation is either (a) unnecessary for the rehabilitation; or (b) the creditor is a secured creditor whose rights are insufficiently protected.

This is intended merely to provide a regulatory overview. It is not intended to be comprehensive, nor to provide legal advice. Should you have any specific or general questions on this or on other areas of law, please do not hesitate to contact any of the authors.

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