



Basic of Security Interest under Thai Law (2/2)

Nuttaros Tangprasitti, Kewalin Tiyajamorn, Yasunari Sugiyama, Nobuhiko Harada,
Takuya Wada

Overview

Prior to 2016, Thai law allowed only certain types of assets to be used as collateral for financing (i.e. *real property, shares, immovable assets, and a limited number of movable assets*¹). The two primary means by which this occurred were mortgage and pledge, both of which had to adhere to the conditions prescribed in the Civil and Commercial Code (“CCC”).² This led to few opportunities for Thai small and medium sized business operators to acquire loans, as their ownership of the immovable property necessary for mortgage purposes is typically limited and pledges require the placement of movable assets in the possession of the lender, leaving the pledger unable to use such property for the sake of its business. Combined, these factors were affecting the growth of the small and medium sized business sector.

In response to the above, Thailand’s “*Business Security Act B.E. 2558 (2015)*” (“BS Act”) came into effect on 2 July 2016, mainly focusing on extension of the range of assets eligible as security for financing. Thanks to the BS Act, business operators may opt to secure loans by placing various types of valuable assets as security, whereby a transferring of title or delivering of such property to a Security Receiver is *non-obligatory*. After placing the assets as security under the BS Act, the Security Provider is entitled to possession, use, exchange, disposal, and transfer, including mortgage, of the said assets. This newsletter

¹ These few types of movable assets are defined by law and require registration with the government in order to be eligible.

² For a fuller discussion of the CCC, please see the previous newsletter (“Security Interests under Thai Law – the Basics 1/1”, May 2020).

This newsletter is the product of its authors and does not reflect the views or opinion of Nishimura & Asahi. In addition, this newsletter is not intended to create an attorney-client relationship or to be legal advice and should not be considered to be a substitute for legal advice. Individual legal and factual circumstances should be taken into consideration in consultation with professional counsel prior to taking any action related to the subject matter of this newsletter.

clarifies the scope and implementation of asset eligibility for use as collateral under the BS Act, especially with concern to *receivables, intellectual property, and businesses*.

I. Security Interests over Receivables

Receivables, in other words, rights of claim,³ are now eligible to be used to secure loans under the BS Act by means of Business Security Agreements (“BS Agreements”).⁴ A BS Agreement is an agreement whereby a *Security Provider* places his/her asset with a *Security Receiver* in order to secure a payment or other performance of obligation without delivering the asset or transferring possession of such asset to the Security Receiver. Such agreements are legitimate and enforceable only upon being made in writing and registered with the competent authority (i.e. the Department of Business Development, Ministry of Commerce).⁵

Who can be a Security Provider and Security Receiver under the BS Act?

A Security Provider may either be a natural person or a juristic person,⁶ while a Security Receiver must be a financial institution or other persons as prescribed in a Ministerial Regulation. Nowadays, there are 2 Ministerial Regulations issued under the BS Act in relation to Security Receivers, namely “the Ministerial Regulation on Categories of Security Receivers B.E. 2559 (2016) and the Ministerial Regulation on Categories of Security Receivers B.E. 2561 (2018), which together set forth ten (10) types of persons who are eligible to act as Security Receivers, as follows:

- | | |
|--|---|
| <ol style="list-style-type: none"> 1. juristic persons having special-purpose vehicles with the objective of securitization; 2. juristic persons having the objective of factoring business operations; 3. juristic persons operating the business of futures contracts under the law governing futures contracts; 4. trustees in the name of a trust under the law governing trusts for transactions in capital markets; 5. securities companies, mutual funds, or representatives of debenture holders under the law governing securities and exchange; | <ol style="list-style-type: none"> 6. asset management companies under the law governing asset management companies; 7. the Office of the Permanent Secretary for Industry, specifically in the case of SME Development Fund under Civil State Guidelines; 8. foreign banks, specifically in the case of granting loans jointly with Thai financial institutions; 9. juristic persons with specific purpose for hire-purchasing and leasing business; 10. juristic persons with specific purpose for operating a loan-granting business. |
|--|---|

Careful analysis reveals that the BS Act provides fewer opportunities for foreign entities to become a Security Receiver than it would first appear, as it only allows this benefit to foreign banks (see item 8 in the above list). Other types of

³ Receivable, or right of claim, means the right to receive payment and other rights, but shall not include rights represented by written instruments (See Section 3 of the BS Act). The rights represented by written instruments, e.g. a bill of exchange, promissory note, or check, do not fall under the scope of assets eligible to be used as security under the BS Act. However, they would be able to serve as security by means of pledge under the CCC instead.

⁴ BS Act, Section 8.
The following assets can be used as security under the BS Act:

1. Business;
2. Right of Claims;
3. Movable Properties which Security Providers use in business operations (e.g. machinery, inventory or raw materials used in production);
4. Immovable Properties which Security Providers directly use in real estate business;
5. Intellectual Properties;
6. Other assets prescribed in the Ministerial Regulation
(Note: Currently, there is a Ministerial Regulation issued under this Section prescribing that perennial plants may be used as security under the BS Act.)

⁵ *Id.* at Section 13.

⁶ *Id.* at Section 6.

foreign entities may also become a Security Receiver, provided that they establish “foreign status” in Thailand, i.e. open a branch office or subsidiary, in a manner according with the acceptable practices outlined by the Department of Business Development. However, entities with foreign status are also subject to the Foreign Business Act B.E. 2542 (1999) and required to obtain a Foreign Business License prior to commencement of operations in Thailand.

What kind of receivables are not covered by the BS Act?

Even though the BS Act does not mention limitations on the types of receivables eligible to use as security, it is reasonable to assume that the receivables that are covered by the BS Act must be in accordance with Section 303 of the CCC.⁷ This is to say, every receivable is eligible to be used as security, whether arising from agreement or damage from a wrongful act, and whether it has conditional or temporal limitations, *except for intransferable receivables*, as follows:

- receivables that by nature are unable to be transferred (i.e. compensation for nonpecuniary damage);⁸
- receivables that are prohibited from transfer by intention of the parties; and
- receivables that are not subject to judicial attachment.

To further clarify the basic nature of BS Agreements, we have extracted the key-points of the BS Act, as stated below:

◆	Present and future receivables are eligible to serve as collateral. According to the BS Act, Security Providers might opt to place an asset which he or she has rights over at present, or shall have rights over in the future, as security for a contract or legal relationship, however, any preferential rights intended to be based on such placement shall arise only when the Security Provider duly obtains such asset. ⁹
◆	Rights obtained through a BS Agreement shall still exist even when the receivables they are based upon have been transferred to a third party. As with a mortgage or pledge, if the Security Provider transfers receivables secured as collateral under a BS Agreement, the right of the Security Receiver arising from such BS Agreement established upon those receivables shall pass to the transferee. ¹⁰ The Security Receiver also has the preferential right to receive payment of the debt based on such collateral prior to ordinary creditors, despite the receivables having been transferred to a third party. ¹¹
◆	The Security Provider can be a third party to a loan agreement who is not the debtor.
◆	The Security Receiver shall be entitled to subrogate the property which Security Provider obtains from the disposition, transfer, exchange, or replacement of a receivable used as security. ¹² Nevertheless, the Security Provider and Security Receiver must register such amendment of property with the Department of Business Development, Ministry of Commerce. If the Security Provider makes such a substitution, the notice thereof must be given to the debtor as well (in the case that the Security Provider is a third party to a loan agreement who is not the debtor).

⁷ A claim may be transferred, unless its nature does not permit it. (See Section 303 of the CCC)

⁸ CCC, Section 446.

⁹ BS Act, Section 9.

¹⁰ CCC, Section 305.

¹¹ BS Act, Section 29.

¹² *Id.* at Section 31

How to enforce receivables if the Security Provider is in default.

To enforce a security, the Security Receiver shall send a written notice to the Security Provider and debtor of right, stating the cause of enforcement. Upon the date of receipt of such notification, the debtor of right is prohibited from making payment on the debt to the Security Provider. Instead, when such receivable is due for payment, the debtor of right is required by the BS Act to make the according payment to the Security Receiver.¹³

II. Security Interests over Intellectual Property

According to the BS Act, intellectual property can be used as collateral by means of a BS Agreement,¹⁴ whether such property is acquired by the Security Provider by means of registration (i.e. trademark and patent) or acquired automatically without any registration (i.e. copyright). Nevertheless, intellectual property requiring registration shall be considered as “Registered Property”, hence, in order to use it as security for a loan under the BS Act, the Security Provider and Security Receiver are required to enter into a BS Agreement and register such BS Agreement with the Department of Business Development in a manner similar to that explained in Section I (above). After registration of a BS Agreement, the registrar of the Department of Business Development will inform the relevant registrar (i.e. the registrar of the Department of Intellectual Property, Ministry of Commerce (“DIP”)) about the security made over such Registered Property.¹⁵ The DIP registrar then shall have the duty of recording the security in the relevant security record.¹⁶

How to enforce the intellectual property if the Security Provider is in default.

In order for enforcement to be carried out over a Registered Property, the Security Receiver must send a written notice to the Security Provider, stating the cause of enforcement and demanding the Security Provider deliver *the document showing right in the intellectual property*. Within fifteen days from the date of possession of such document by the Security Receiver, the Security Receiver must provide another written notice to the Security Provider (and the debtor, if they are not the same) notifying the debtor and the Security Provider of the necessity to make the debt payment within fifteen days from the date the Security Provider receives such notification and also making clear to them that if the Security Provider (and/or debtor) fails to settle the debt within the prescribed period, the Security Receiver shall be entitled to enforcement through foreclosing or disposing the security by way of sale.

In sum, two written notices must be issued (and provided) to the Security Provider and debtor, as follows:

1. a notice stating the cause of enforcement and demanding delivery of the document showing right in the intellectual property; and
2. a notice demanding payment of the debt by the Security Provider and debtor.

¹³ *Id.* at Section 39 paragraph 4.

¹⁴ BS Act, Section 8 (5).

¹⁵ *Id.* at Section 19.

¹⁶ *Id.* at Section 19 paragraph 2.

Since intellectual property is Registered Property, the Security Receiver shall also have the duty to notify such enforcement to the DIP registrar for the furtherance of the record.¹⁷

However, there are no further prescriptions in the BS Act regarding processes and methods for enforcement over intellectual property not requiring registration.

III. Security Interests over Business

Under the BS Act, businesses¹⁸ are eligible to be used as security for a loan by means of a BS Agreement, in the same manner as receivables and intellectual property. In order to create and perfect a security over a business, the same procedure applicable to receivables and intellectual property is required. Furthermore, during the creation of a BS Agreement, the Security Provider and the Security Receiver are also required to select and appoint a person called a “Security Enforcer”,¹⁹ to conduct enforcement on behalf of the Security Receiver, and to register such Security Enforcer along with the BS Agreement.

Tangentially, when a business is provided as security in a BS Agreement, such property remains eligible to be mortgaged to others under the CCC. This stands in contrast to pledges, as a Security Provider is not permitted to simultaneously pledge property provided as security for the payment of another debt; if this were to occur, such pledge would be void under the BS Act.

In the event that an asset is subject to a BS Agreement and mortgage at the same time, priority between the Security Receiver and mortgagee shall be in respective order of the date and time of registration.²⁰ In addition, by virtue of Section 35 of BS Act, the Mortgagee may opt to enforce such asset either by enforcement procedures provided in this BS Act or the mortgage enforcement procedure as prescribed in the CCC. Nevertheless, if enforcement of a security under a BS Agreement arises after a mortgage’s enforcement procedure has commenced, such mortgage enforcement procedure must be suspended and the Mortgagee shall be forced to enforce the security under Section 35 paragraph 3 of the BS Act. Once the asset is disposed, the payment of debt shall take the order of the Security Receiver and Mortgagee in accordance with the date and time of registration under Section 33 paragraph 2 of the BS Act.

The BS Act sets out the methods for enforcement of security over a business differently from securities over other types of properties (i.e. receivables and intellectual property). Upon cause for enforcement, the Security Receiver shall send a written notice to the Security Enforcer. Then, the Security Enforcer must notify both the Security Provider and the Security Receiver of the date, time, and place to conduct a fact-finding inquiry. On the fact-finding inquiry date, the Security Enforcer shall examine and decide whether there are grounds for security enforcement. If such grounds exist, the Security Enforcer shall issue its decision to enforce the security and call on the Security Provider to deliver the business, including the applicable stamp, accounting books and other documents concerning the property, inclusive of all liabilities

¹⁷ *Id.* at Section 51.

¹⁸ Business means any property provided by a Security Provider that is used thereby in their business operations and any rights relating to such business operations which the Security Provider uses, or is eligible to be used, as security and which the Security Provider may transfer to other persons in a manner that allows the Security Receiver to immediately continue such business operations. (See section 3 of the BS Act)

¹⁹ BS Act, Section 12.

²⁰ *Id.* at Section 33 paragraph 2.

and rights related to the business, to the security enforcer for selling off. The aforementioned decision of the Security Enforcer must be issued within 15 days from the first fact-finding inquiry.²¹

Summary

Nowadays, apart from mortgage and pledge, business operators may opt to secure a loan by using high-valued assets such as *receivables, the business itself, and Intellectual Property* by way of a Business Security Agreement. This flexibility helps business operators access new sources of financing. As the Business Security Act does not require Security Providers to deliver the security to Security Receivers, the Security Provider will be able to utilize such security to facilitate his/her business operations.

²¹ *Id.* at Section 68.



[Nuttaros Tangprasitti](#)

Partner, SCL Nishimura

nuttaros@siamcitylaw.com



[Kewalin Tiyaamorn](#)

Attorney-at-Law, SCL Nishimura

kewalin.t@siamcitylaw.com



[Yasunari Sugiyama](#)

Partner, Nishimura & Asahi

y_sugiyama@jurists.co.jp



[Nobuhiko Harada](#)

Partner, Nishimura & Asahi

n_harada@jurists.co.jp



[Takuya Wada](#)

Attorney-at-Law, Nishimura & Asahi

t_wada@jurists.co.jp