



Tips for Foreign Secured Creditors in Thailand: Requirements for Registration of Securities and Additional Conditions

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Overview

We hope that our newsletters of April and May 2020 have given readers a basic but well-rounded understanding of the use of security, under the Civil and Commercial Code of Thailand (“CCC”) and Business Security Act B.E. 2558 (2015) (“BS Act”), to enhance the liquidity or cash flow of businesses owned by either Thai or foreign nationals (both natural and juristic persons as defined below). In this newsletter, we will focus on those that fall in the latter category and who would like to explore becoming creditors in the Thai money market.

Security Registration Requirements and Additional Conditions for Foreign Creditors

To what extent are those natural persons and juristic persons who are not citizens or entities incorporated under the laws of Thailand (“foreign nationals”) eligible to register security interests under Thai Law and what should they bear in mind when doing so?

We would like to draw your attention to security interests under the CCC, i.e. mortgages and pledges. *In their most basic form, mortgages and pledges are security interests over a property that obtain legitimacy upon registration with the competent authority, as detailed in our April 2020 newsletter.* They are not necessarily comparable, but rather, co-dependent, as *they work together to secure financing for the borrower and security for the lender.*

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The measures and regulations prescribed in the CCC do not impede foreign creditors from being party to a mortgage and/or pledge. While this means that foreign creditors are normally eligible to register a mortgage, there are issues that may restrict such eligibility, e.g. certain rules under the separate laws that govern land and foreign business.

Given the above complexities, in this newsletter we would like to focus on the case where a foreign national intends to become a creditor in Thailand by providing financing, via mortgage, for a piece of land or a condominium unit, as detailed in Sections 1 and 2 of this newsletter, as well as eligibility of foreign nationals to enter financing scenarios involving the use of a business as security, as detailed in Section 3. In addition, we will summarise the restrictions upon foreign nationals who wish to act as security receivers.

1. Land Mortgage Registration

Can foreign nationals execute the foreclosure of mortgaged land?

To reiterate, foreign nationals are eligible for land mortgage registration in Thailand. To do so, foreign creditors must follow the same procedures as Thai creditors, providing the requested documents and adhering to the appropriate legal processes indicated in our April 2020 newsletter. However, there are additional (significant) issues of which foreign nationals must also be aware. A particularly important one is in Land Code B.E. 2497 (1954) (“**Land Code**”), under which foreigners are prohibited from owning land in Thailand unless it is specifically allowed by provisions stipulated in the Land Code or another official Act.¹ For example, a foreign national may inherit² land or be granted the privilege to own land by the Board of Investment (“**BOI**”) under the Investment Promotion Act B.E. 2520 (1977), or by the Industrial Estate Authority of Thailand (“**IEAT**”). In such regard, the aforementioned restrictions under the Land Code may affect execution of mortgage enforcement in terms of foreclosure of the mortgaged land.

As explained in our April 2020 newsletter, as a mortgagee, a Thai national may opt to enforce a mortgage through foreclosure proceedings that see the ownership rights either put up for public auction or assumed by such mortgagee, as applicable under Sections 728 and 729 of the CCC. However, *a foreign mortgagee is only able to execute mortgage enforcement by way of public auction; foreclosure involving assumption of ownership of the mortgaged land would not be legally acceptable*. This is due to restrictions in the Land Code, under which foreign nationals are prohibited from owning land. Thus, a foreign creditor with a mortgage contract must bear in mind that the only option available to them would be public auction.

2. Condominium Unit Mortgage Registration

Issues to consider before enforcement of a mortgage over a condominium unit.

Although, as stated above, there are strong barriers prohibiting foreign nationals from owning land, it is apparent that such barriers do not apply to buildings and other types of construction (collectively “structures”) erected upon or connected to the land. This is to say, even though foreign nationals are restricted from owning land in Thailand, they are still capable of owning

¹ Section 86 of the Land Code.

² *Id.* at Section 93.

structures fixed on the land of another person and possess full rights to mortgage those structures. (*A point to note: for certain, mortgages over such structures shall not extend to the substrate land.*³)

However, condominium unit ownership, according to the Condominium Act B.E. 2522 (1979) (“**Condominium Act**”), is only permissible for specific types of foreign nationals⁴ investing in condominiums in which at least 51% of the total units are held by Thai nationals or Thai juristic persons.⁵ In this regard, as with the other aforementioned structures, foreign nationals are still eligible for condominium unit mortgage registration but, from an enforcement perspective, the condominium unit shall be able to be foreclosed upon only in cases where the mortgagee falls into one of the five different types of foreign nationals referenced in footnote number four (4) and the ratio of foreign owners to Thai owners does not exceed 49:51 percent of the total units contained in the condominium. Therefore, prior to foreclosure of a condominium unit, foreign creditors need to check with the competent authority, i.e. the Department of Land under the Ministry of Interior, as to ***whether the ratio of foreign owners in such condominium building exceeds 49 percent***. An official from the Department of Land will ask the foreign creditor to coordinate with the Condominium Juristic Persons to issue a certificate of condominium unit ownership (describing the ownership ratio within the condominium in question). Upon receipt of said certificate and confirmation that foreclosure of the subject unit(s) will not cause the ratio between foreign owners and Thai owners to exceed 49:51 percent, the official from the Department of Land will proceed with the request accordingly. If 49 percent of the total amount of units already belong to foreigners and the unit in question is not one of them, the foreign creditor would then automatically be prohibited from a foreclosure in which they assumed ownership of the mortgaged condominium unit. Thereafter, such foreign creditor would have no other option except public auction (similar to the case of mortgaged land).

3. Business Security Registration

Are all foreign nationals eligible to act as a security receiver?

As explained in our May 2020 newsletter, at present, business operators in Thailand may opt to secure their loan by way of business security agreement under the Business Security Act B.E. 2558 (2015) (“**BS Act**”), which requires such agreements be made in writing and registered with the competent authority, i.e. the Department of Business Development (“**DBD**”), in order to be considered valid.

In general, Thai law does not prohibit foreign national ownership of assets. However, as mentioned in our newsletters of April and May 2020, business security registration utilizing assets - such as *a business; accounts receivable; movable property used*

³ See section 720 of the CCC.

⁴ Section 19 of the Condominium Act sets forth five types of foreign persons who are eligible to ownership of units in condominiums as follows:

1. Foreign person who obtains a permanent residence visa in accordance with immigration law;
2. Foreign person who obtains a permit to enter the country in accordance with the law on investment promotion;
3. Foreign juristic person under Section 97 and 98 of the Land Code, as follows:
 - (a) a limited or public company registered under Thai law, of which more than 49% of shares are held by foreign shareholder(s)
 - (b) a limited partnership registered under Thai law, in which a foreign partner(s) invests his/her capital through shareholding greater than 49% of the total capital, or more than half of the total number of partners are foreign persons
 - (c) associations including a co-operative in which the foreign members exceed one-half of the total number of members or those which operate particularly or mainly for the benefit of foreigners
 - (d) foundations with objectives focusing particularly or mainly on the benefit of foreigners
 - (e) any juristic persons under (a) to (d) who are the majority shareholder or hold more than 49% of shares;
4. Foreign juristic person who obtains an investment promotion certificate in accordance with the law on investment promotion; and
5. Foreign person or juristic person bringing foreign currency into the country, withdrawing funds from a Thai Baht account of a person having a place of residence outside Thailand, or withdrawing funds from a foreign currency-based deposit account.

⁵ Section 19 bis of the Condominium Act

in business operations, such as machinery, inventory or raw materials used in the manufacture of goods; immovable property used in the real estate business; and intellectual property – can only be sought by the types of security receivers permitted under the BS Act⁶ (i.e. one of ten types described in our newsletter of May 2020).

Considering the wording used to describe the ten types of persons eligible to act as security receivers, certain foreign entities may qualify as such persons, except for those indicated as eligible through relation to the Office of the Permanent Secretary for Industry (specifically in the case SME Development Funds under Civil State Guidelines, since this type of “person” is actually a Thai authority).

4. Additional Conditions for Foreigner Creditors

Do foreign creditors need to comply with any additional conditions?

1. Requirements under the Foreign Business Act, B.E. 2542 (1999)

With regards to creditor position, foreign nationals⁷ who provide loans, in general, shall be required to comply with the Foreign Business Act (“FBA”), i.e. to apply for a foreign business licence (“FBL”) prior to business operations, unless the such lender is an appropriately licensed juristic person of any type listed in the Ministerial Regulations issued or to be issued under the FBA from time to time, whose activities are to be exempted from such FBL requirements, i.e. as activities of financial institutions, which in general are governed by the Bank of Thailand.

In the case of domestic loans, the FBL requirement is also bypassed if the loan is provided by a foreign status entity having a relationship of the type explained in the Ministerial Regulation prescribing business activities which are exempted from the foreign business licence requirement (No. 4) B.E. 2562 (2018).

Hence, in terms of loan activity, if a foreign entity (which is not exempted under any of the Ministerial Regulations) wishes to provide a loan to any other person within Thailand (who does not have a relationship detailed in Ministerial Regulation (No.4) mentioned above) or provide a loan to any person outside Thailand, *such foreign entity must apply for and obtain an FBL before initiating provision of such loan to other(s) under the FBA*. In this regard, much like with Thai nationals, a specific licence in relation to a loan may be required depending on the details of the business.

⁶ Ministerial Regulation imposing Other Persons to be Security Receiver, B.E. 2561 (2018)

Also see: https://www.jurists.co.jp/sites/default/files/newsletter_pdf/en/en_newsletter_20200528_finance_asia.pdf

⁷ Full definition of “Foreigner” is prescribed in Section 4 of Foreign Business Act B.E. 2542 (1999), as follows:

“(1) Natural person not of Thai nationality.
 (2) Juristic person not registered in Thailand.
 (3) Juristic person registered in Thailand having the following characteristics:
 (a) Having half or more of the juristic person’s capital shares held by persons under (1) or (2) or a juristic person having the persons under (1) or (2) investing with a value of half or more of the total capital of the juristic person.
 (b) Limited partnership or registered ordinary partnership having the person under (1) as the managing partner or manager.
 (4) Juristic person registered in Thailand having half or more of its capital shares held by the person under (1), (2) or (3) or a juristic person having the persons under (1), (2) or (3) investing with the value of half or more of its total capital .

For the purpose of the definitions, the shares of a limited company represented by share certificates that are issued to bearers shall be deemed as the shares of foreigners unless otherwise provided by ministerial regulations.”

In case of foreign entity, it is defined under Section 4 (2)–(4) of Foreign Business Act B.E. 2542 (1999) Please note further that under Sections 97 and 98 of Land Code, it is prescribed that an entity incorporated with a foreign shareholding ratio greater than 49% , such entity is regarded as foreign entity. Section 19(3) of Condominium Act B.E. 2522 (1979) also refers that entity under Sections 97 and 98 under Land Code is regarded as foreigner under Condominium Act B.E. 2522 (1979)

Thus, in general, a lender (who may also act as mortgagee, pledgee or security receiver) is required to apply for and obtain an FBL for lending before providing any loans.

Foreign creditors should also note that if **a mortgagor or pledger or security provider places their assets as security for a third party's debt (not their own debt)**, said mortgagor, pledger, or security provider also shall be subject to the FBL requirement *for business operations involving provision of security for a (third party) debt*. Hence, there is a risk that any security placed with a foreign creditor (without an FBL) could be considered void, since it would be in violation of the FBA. However, as of now there are no precedent court cases on this matter.

2. Business Objective Registration

Apart from the FBL issue stated above, to avoid potential disputes regarding the capabilities of a particular entity, foreign entities must ensure that their listed business objectives (or the objectives of a mortgagor, pledger, or security receiver who is not a borrower) cover the scope of the intended transaction (e.g. lending, mortgage or pledge, acceptance of mortgage or pledge, or security receivership or provision) in order to align with Section 66 of the Civil and Commercial Code.⁸

Considering the above provisions, the stated objectives of a company can be checked against the public record, e.g. with the DBD. In addition, apart from the CCC provision mentioned above, there are guidelines issued by the DBD, called "Rules for Registration of Offices of Limited Liability Companies and Partnerships", explaining the details of qualifying and prohibited business objectives and providing certain wording that should be included within companies' stated objectives. These principles and guidelines apply equally to both Thai and foreign entities.

Summary

A foreign creditor in the Thai money market is not prohibited under Thai law from being a mortgagee or a pledgee under the Civil and Commercial Code, or a business security receiver under the Business Security Act. However, there are some conditions of which foreign nationals need to be more aware, in comparison to Thai nationals. Specifically, for both land and condominium unit mortgage registration, a foreign national is still required to follow the provisions prescribed in other relevant laws, such as the Land Code and Condominium Act. The Land Code restricts foreign nationals from ownership of land, thus leaving foreign creditors prohibited from foreclosing on mortgaged land. However, thanks to the Condominium Act, a foreign creditor is still allowed to enforce a mortgage over a condominium unit by means of foreclosure, but only **if** the condominium building of which such unit is a part does not have a foreign ownership ratio exceeding 49 percent.

Finally, foreigners operating businesses involving the provisioning of loans (i.e., lending businesses which may include the use of mortgage, pledge, or business security) will need to apply for and obtain a foreign business licence before commencement of operations, unless it is exempted in the Ministerial regulations issued under the Foreign Business Act.

⁸ Section 66 of Civil and Commercial Code – juristic persons shall have the rights granted by, and duties of conformity with, the provisions of this Code or of other laws within the scope of its power and duties, or its object as provided by or defined in relevant laws, regulations, or constitutive acts.



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