

Thailand expands and consolidates the law of security

by

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Introduction: Thailand has had for a long time settled principles for the creation of mortgages over immovable property (including land, buildings, machinery and ships), pledges against moveable property (including shares), guarantees, and “quasi-security” namely assignments of e.g. leases, concession agreements, receivables, bank accounts and insurance policies (found particularly in project finance transactions). But problems have arisen in practice. To create a pledge, the pledged property must be physically given to the pledgee. In relation to pledging of bank accounts, the bank pass book could be handed to the pledgee, but the pledgor would be unable to operate the account if he had to hand over all monies in the account. In practice, it was not possible to create security over stock that moved into and out of the possession of a pledgor. Whilst mortgages were subject to public registration, pledges were not, so a public search could not be made to see if an asset was subject to a pledge or not.

The Commercial Security Act is intended to deal with some of the shortcomings in the existing law. It was approved in November 2015 and is due to come into effect in July 2016.

Commercial Security Agreement: The Act creates the concept of a written Commercial Security Agreement (“CSA”). Such an agreement, or any amendment to it, must be in writing and registered with the Commercial Security Registration Office (“CSRO”) (part of the Ministry of Commerce). The secured assets do not have to be handed over. The parties to such an agreement are: a security provider, who may be a natural or juristic person, and the security receiver, which must be a financial institution, or other person as approved in regulations. Where the security is created over a business, a third party, the security enforcement agent, must be appointed, with power to enforce the security. A security enforcement agent is also subject to registration with the CSRO, and must meet qualifications specified in regulations. The Act describes the registration fees payable.

After registration, the security receiver becomes a secured creditor with property rights to enforcement in a bankruptcy over unsecured creditors.

It would be possible to make a search at the CSRO to ascertain whether an asset was subject to security or not.

The Act contains provisions for termination of the CSA.

Note that unpaid interest cannot be enforced after more than five years.

What assets may be brought into security? The following assets can be made subject to security:

- a business (rather than specific assets of a business)

- a right of claim
- moveable property used in a business (including inventory)
- immovable property used in a business
- intellectual property
- other assets, as prescribed in regulations

Assets not currently owned but which may be created in the future may be brought into security.

An asset can be made the subject of security where the debt is owed by a third party.

Enforcement of a CSA: The Act sets out the steps and procedures to be followed for enforcement. In general, court procedure for enforcement is not required. But the occurrence of a security enforcement event must be registered with the CSRO, otherwise the security may not enforceable.

After an enforcement event has occurred, enforcement is by the convening of a public auction of the assets. Foreclosure is also possible, subject to the requirements of the Civil and Commercial Code. In general, a court order is not required in either case. The Act prescribes particular enforcement methods applicable to particular types of asset.

Where enforcement is to take place over a business, this must be carried out by the Security Enforcement Agent. The Act specifies the procedures to be followed.

Enforcement: The Act contains penal provisions for fines and in some cases imprisonment for breaches of duty under the Act.

Comment: The Act is not due to come into effect for a period of six months after its being passed. This should enable the necessary regulations to be drafted and issued to effect implementation. Whilst it is interesting to note the physical handing over of secured property will no longer be required, we will need to see the supporting regulations to assess whether the practical enforcement of the new Act will be as smooth as has been promised. There also appears to be overlap with the existing rights to register mortgages over land with the Land Department, mortgages over machinery with the Central Registration Office, and mortgages over ships at the equivalent agency. Where an asset is used in a business, does the security receiver have a choice regarding where security registration is effected? This is not clear.

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