

New Thai Business Security Law

With the enactment of the Thai Business Security Act, borrowers and lenders can enter into a “business security agreement” whereby security can be granted over non-possessory security assets and the “business” as a whole in order to secure debt and financing transactions.

Introduction

The Business Security Act B.E. 2558 (A.D. 2015) (the “**Business Security Act**”) was published in the Government Gazette on 5 November 2015 and becomes fully effective on 2 July 2016 (except for certain provisions with respect to the application for the security enforcer licence which were effective on 6 November 2015).

The Business Security Act represents a significant improvement to the security which is available for debt or financing transactions in Thailand. In particular, in relation to the range of assets that may be granted as security to both local and international banks and financial institutions listed in and qualified under the Business Security Act (as further described below). Despite permitted types of security under the Thai Civil and Commercial Code, there are certain limitations on the creation of security over movable properties i.e. the legal requirement to deliver possession of the asset to the pledgee in order to create a pledge, making it less practical to create security over moveable assets.

For numerous businesses, movable property such as inventory and raw material are considered valuable assets of the business, and the delivery of these assets to a security taker would paralyse the operation of business. The delivery requirement limits the ability of business operators to seek, and also the ability of lenders to provide, necessary funding.

With the enactment of the Business Security Act, borrowers and lenders can enter into a “business security agreement” whereby security can be granted over non-possessory security assets and the “business” as a whole to secure debt and financing transactions. This provides the opportunity for borrowers to raise additional funding as they can offer other types of assets as security to lenders.

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Set out below is a discussion of the key issues of the Business Security Act and how they will affect Thai security and financing market going forward.

Security regime before the Business Security Act

Mortgage and Pledge

Only immovable properties (land and building) and certain moveable properties e.g. vessels, machinery and registered animals can be given as security by way of mortgage. A mortgage entitles borrowers to possess and use such secured assets for its business operation without the delivery of the same to the lenders. Security over moveable assets can be created by way of a pledge through delivery of possession of such moveable assets to the lenders. In practice, rights under the contracts, receivables and deposits may be contractually granted as quasi-security by way of conditional assignment or conditional novation.

Under the Thai Bankruptcy Act, only mortgage, pledge, right of retention and other preferential rights similar to a pledge are recognised as security under Thai law. As such, conditional assignment over bank accounts and receivables and conditional transfer of rights (and obligations) under contracts as novation are not recognised as security under Thai law. Lenders with these rights will not be regarded as secured creditors for the purpose of the Thai Bankruptcy Act.

New security regime under the Business Security Act

Types of security that may be taken

- > **Business:** assets used by the security provider in its business operation and other rights related to its business operation granted to secure its debt performance, provided that such assets and rights given as security may be transferred to a transferee in such a way that the transferee could continue its ordinary business operations immediately
- > **Claim:** rights to receive payment and other rights which do not include rights represented by instruments
- > Moveable property used in the security provider's business operation: **including but not limited to machinery, inventory and raw materials used for production of goods**
- > **Immovable property only in the case where the security provider directly operates real estate business**
- > **Intellectual property which includes:** both registered and non registered copyright and other intellectual property including but not limited to patents and trademarks
- > **Other assets:** as prescribed in ministerial regulations

Parties and related persons

Security Provider

A security provider may be an individual or legal entity.

Security Taker

Security takers must be any of the following:

- > Financial Institutions as defined in the Thai Financial Institutions Act B.E. 2551 including but not limited to commercial banks, finance companies and credit foncier companies, commercial retail banks, commercial banks being subsidiaries of foreign commercial banks and branches of foreign commercial banks
- > Life insurance/non-life insurance companies
- > Others as prescribed by the ministerial regulations

Please note that it has been proposed that additional parties should be included as security takers, e.g. special vehicle companies for the purpose of securitisation, trustees under the law relating to trust for capital market transactions, mutual funds or bondholders under the Security Exchange Commission Act, derivatives contract operators, asset management companies and factoring business operators.

Currently, offshore banks and financial institutions without a presence in Thailand are not eligible to take security under the Business Security Act as they are not regarded as security takers under the law. It is possible that the further ministerial regulations may be proposed to allow them to take security under this new law.

Security Enforcer

A security enforcer (similar to the English law concept of a receiver) is required to be appointed where security is granted over a “business”. The security enforcer’s consent is also required for the registration of “business” security.

A security enforcer needs to have knowledge, expertise and experience in any of the following areas: law, accounting, economics, business administration or property appraisal as prescribed by relevant regulations. The licence required to be obtained from the Registrar of the Business Security Registration Office (the “**Registrar**”) (see below) will be valid for 3 years from the issue date. Under the Notification of the Ministry of Commerce regarding the principles, procedures and conditions for obtaining a licence, its renewal and substitute licence for security enforcer dated 18 April 2016, a licence may be renewed within 30 days before the expiry date, otherwise an application for a new licence will be required. Pursuant to the Ministerial Regulation of the Ministry of Commerce regarding fees for registration, inspection of registration particulars and other fees relating to the business security dated 21 June 2016, a licensing fee is chargeable at Baht 1,500 and its renewal fee is charged at Baht 500.

Registrar

A Business Security Registration Office has been established under the Ministry of Commerce and the Director-General of the Department of Business Development is the Registrar.

Validity of granting security

The business security agreement must be made in writing and registered with the Registrar.

Registration

Under a Notification dated 7 June 2016, the Department of Business Development of the Ministry of Commerce (the “**DBD**”) requires each security taker to apply for a “user name” and “password”. In addition, the DBD also issued a Notification dated 17 June 2016 regarding the principle and procedure for registration of business security agreement which becomes effective on 2 July 2016. In essence, a security taker is responsible for the registration of the business security agreement with written consent from a security provider. The registration is made through an on-line electronic system in Thai language. The registration shall contain certain particulars including:

- > date, month, year and time of registration;
- > name and address and identification number of the debtor and security provider, and in the case of a legal entity, the registration number;
- > name and address and registration number of the security taker;
- > name and address and the rate or amount of remuneration of the security enforcer in case a “business” is granted as security;
- > obligations being secured for performance;
- > details of the asset used as security prescribing the type, quantity and value (specified in Baht currency) of such asset, and in case of asset with registration documents, details of the type and number of registration and the registrar responsible for such registration;
- > statement prescribing that the security provider has created a security interest over the asset specified in the registration particulars in favour of a security taker to secure its performance of obligations;
- > maximum amount (specified in Baht currency) agreed to be secured by the security;
- > events which allow for the enforcement of security under a business security agreement; and
- > name and address of other creditors having preferential rights over such assets given as security.

Payment of the registration fee needs to be made within two business days from the date of the registration, otherwise the registration will not be valid.

On 21 June 2016, the Ministry of Commerce also issued its regulations regarding the fees for registration, registration search and other fees with respect to the business security. Generally, the fee for registration is nominal and chargeable at 0.1 per cent of the secured amount but not exceeding Baht 1,000 for each business security agreement. In the case of the land, the fee for registration is equal to the land mortgage registration fee which is 1 per cent of the secured amount but does not exceed Baht 200,000.

Any security provider or security taker giving false statements or concealing facts relating to the registration process shall be subject to 3-year imprisonment or Baht 300,000 fine or both.

Where the security relates to assets with registration documents (for example, land mortgage agreement or machinery mortgage agreement), the Registrar will notify other registrars and other creditors with preferred rights over the property given as security as recorded in the registration documents.

Giving business as security

The parties must appoint a security enforcer who must notify in writing its consent to and remuneration for its performance as security enforcer and the security enforcer's name shall be described in the business security agreement and registration.

Consequences of registration

A security taker is recognised as a secured creditor under the Thai Bankruptcy Act and will be entitled to proceeds derived from the enforcement of the security in priority to other creditors except where there is a third party who has acquired the asset which is subject to the security in the ordinary course of business or in good faith with consideration or with the security taker's consent.

The preferential right of the security taker and other mortgagees is ranked by date and time of the relevant registration.

Enforcement of security

General enforcement

Below is a short summary of steps for security enforcement.

Event of enforcement	<ul style="list-style-type: none"> • Occurrence of an enforcement event under the business security agreement
Notify	<ul style="list-style-type: none"> • The security taker notifies the security provider in writing of the occurrence of the enforcement event
Actions	<ul style="list-style-type: none"> • The security provider is prohibited from disposing of the security • The security taker is entitled to take possession of the security to the extent it is not contrary to public order or good morals • Where the security relates to claims, the debtor under such claims (once it has been notified) is prohibited from making payments of the debt to the security provider and must pay such debt to the security taker on the due date
Delivery	<ul style="list-style-type: none"> • If the security provider agrees to deliver the security to the security taker, other judgment creditors cannot seize or attach the security but may apply for applicable distribution • If delivery is refused, the security taker may file a motion requesting for a court judgment to enforce the security
Notice to pay	<ul style="list-style-type: none"> • Debtor and security provider to be notified to pay the debt within 15 days • Other security takers and creditors referred to in the registration record must be copied on the notice • Notice is not required for perishable security which may be enforced immediately
Enforcement	<ul style="list-style-type: none"> • Auction: date, time and method to be notified to the security provider and other security takers and creditors • Foreclosure: if the security provider does not pay the debt, nor object against the foreclosure, within the period described in the notice, the asset and its interest may be foreclosed with effect from the date on which the security taker is entitled to take possession of the security • In any case, the foreclosure can only be made in the case where (a) the overdue principal debt is equal to or exceed the value of the secured assets, (b) the debtor fails to pay interest for at least five years and (c) there must be no other security or preferred rights over the secured assets to be foreclosed

Enforcement of deposits held by the security taker

After an enforcement event occurs under the business security agreement, the security taker may settle the debt directly from deposits held by the security taker. The security taker shall notify the security provider in writing within seven days from the settlement date.

Enforcement of deposits placed with other financial institutions

After an enforcement event occurs under the business security agreement, the security taker shall notify the relevant financial institutions in writing of such enforcement event and the relevant financial institutions can settle debts from deposits maintained with them for the benefit of the security taker.

Enforcement of security under mortgage

During enforcement by mortgagee under the Civil and Commercial Code:

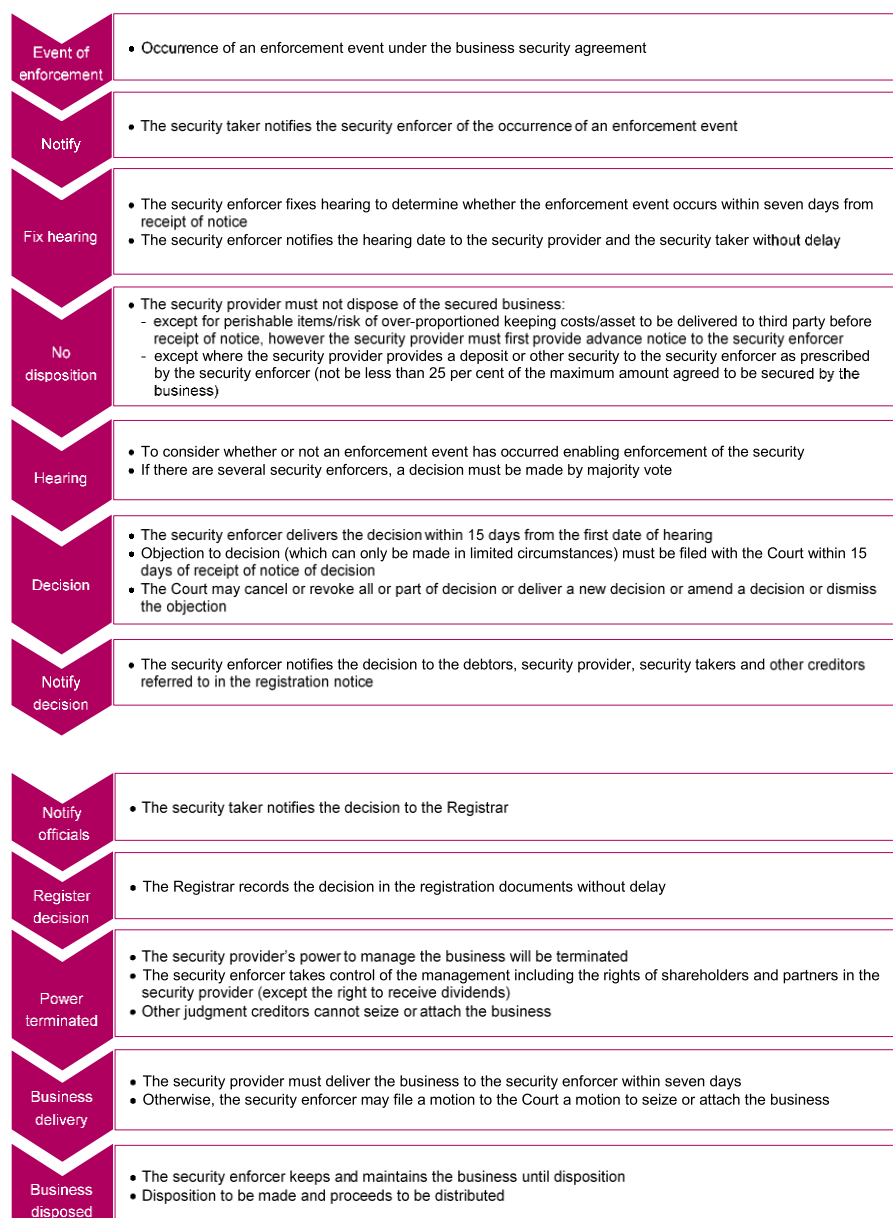
Upon being notified of enforcement of security by the security taker under the Business Security Act, the mortgagee must enforce the mortgage under procedures prescribed by the Business Security Act.

During trial of mortgage case: The security taker under the Business Security Act shall file a motion to the Court to suspend the trial. The Court will then order the trial suspension if grounds to enforce the security under the business security agreement are heard. The mortgagee therefore can enforce the mortgage under the Business Security Act.

During execution of court judgment: Execution officer will complete execution of judgment as soon as possible.

Enforcement of business as security

Below is a short summary of steps for enforcement of security over “business”.



Termination of Business Security Agreement

The business security agreement shall be terminated upon one of the following events:

- > Secured debt is terminated due to causes other than the statute of limitations.
- > Parties terminate the business security agreement.
- > Secured asset is released.
- > Secured asset is disposed by enforcement of security or foreclosure.

Stay tuned

It is expected that further ministerial regulations will be issued after the effective date of the Business Security Act in order to fully implement the Business Security Act. It will be interesting to see how this new security law can help develop debt and financing transactions in Thailand. Appropriate advice should be sought when it comes to assessing the impact of this new legislation in the context of particular transactions to ensure that the risks are considered and benefits are fully realised.

Further Information

This publication is intended to merely highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please speak to one of your regular contacts at Linklaters.

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