

Thailand's Business Collateral Act Will Come into Force on 2nd July 2016

The Business Collateral Act B.E. 2558 (A.D. 2015) (“**BCA**”) governing business securities allowed in Thailand was enacted recently on 5th November 2015 and will become effective on **2nd July 2016**. A business collateral becomes a new type of securities in Thailand in addition to guarantee, mortgage and pledge previously allowed under the Civil and Commercial Code (“**CCC**”).

Prior to the BCA pledges of movable properties and mortgages immovable properties were the few major secured types of collateral available. The CCC requires a pledger to deliver the pledged property into the pledgee's possession in order to constitute a pledge while the pledger needs to keep and use the pledged property for business operation. This makes pledges not very practical.

Under the BCA, the limitation on the type of assets that can be given as collateral and the requirement to deliver the pledged assets are eliminated. The BCA will help around 2.8 million SMEs in Thailand to have better access to funds from financial institutions and other types of lenders as it is now possible to have a business, a right of claim, moveable property of the security provider used in operating businesses as collateral without the requirement to deliver such property to the lender to create a valid and binding business collateral. This means SMEs can use and benefit from their property while it is used as a collateral.

The key points of the BCA can be summarized as follows:-

1. **Parties to a Collateral Agreement:** A collateral provider can be an individual or a juristic person whereas a collateral receiver must be a financial institution or a person to be prescribed in a ministerial regulation.
2. **Collateral Properties:** The property used by the collateral provider to operate his business, including rights relating to the collateral provider's business operation and such property or rights must be transferable or assignable to a third party in a way that the transferee or the assignee can immediately continue the business operation after the transfer or the assignment; and other properties which include right of claim, movable property used in the business of the collateral provider (e.g. machinery, inventory or raw materials), immovable property of the collateral provider who is engaged in the real estate business, intellectual property and any other kind of property to be prescribed in a ministerial regulation can be used as collateral.
3. **No Requirement to Deliver a Collateral Property:** Unless agreed otherwise by the parties, once a property is used as a business collateral, the collateral provider can retain the physical possession of the collateral property and he can put the collateral property to commercial use during the collateral period.

4. **Collateral Registration:** A collateral agreement must be made in writing as a contract and registered with the Business Collateral Registration Office (“**BCRO**”) at the Ministry of Commerce.
5. **Collateral Enforcement:** A collateral receiver may foreclose the collateral property or sell it at a public auction. Enforcement of a business collateral must be carried out by a collateral enforcer licensed under the BCA.

Miss Pongpun Gearaviriyapun, Director General Department of Business Development (“**DBD**”), said that DBD, which is in charge of the implementation of the BCA, has been preparing for the implementation of the BCA since November 2015.

Several regulations will be issued for implementation and enforcement of the BCA. These include some ministerial regulations and notifications which need to be enacted urgently, i.e. (1) Ministerial Regulation on Official Fees; (2) Ministerial Notification on Criteria of Collateral Enforcers; and (3) Ministerial Regulation on Criteria, Processes, and Requirement for Applying for Collateral Enforcer License, Renewal of Collateral Enforcer License and Getting Replacement of Collateral Enforcer License. The last one has already been issued and published in the Royal Gazette on 13th May 2016 and become effective since then whereas the others are in their draft versions.

DBD has been setting up the system for recordation and registration of a business collateral agreement online for financial institutions and it has already published the User Manual for filing a request to register a business collateral agreement for financial institutions. The Registrar will examine a request and if it is approved for registration, the information regarding the registered business collateral agreement will be available and accessible online. The preferential rights are established on and from the date and time of submitting the request to register the collateral agreement.

While the BCA represents a major shift in the legal framework of secured transactions in Thailand, there are still a number of issues which need to be clarified in practice. Eventually, whether the BCA proves to be helpful to Thai borrowers will depend on the extent to which it is relied upon by parties seeking to extend and obtain credit.



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