



NEWS BY DFDL

## BUSINESS COLLATERAL ACT (2015)

*The National Legislative Assembly, supported by the Ministry of Commerce, has recently enacted the Business Collateral Act (Act) to address problems faced by small and medium enterprises (SMEs) in Thailand in accessing funds from financial institutions.*

Prior to this latest law, pledges or mortgages over movable and immovable were the only kinds of security permitted (under Article 702 of the Civil and Commercial Code (CCC)). This meant that many kinds of valuable assets could not be mortgaged. Further, Article 747 of the CCC required a pledger to deliver the pledged property into the pledgee's possession. If not, a pledge could not be constituted. Both provisions created significant obstacles for taking security under the Thai legal system, affecting the growth of the SME business sector.

Once the Business Collateral Act becomes effective, SMEs will be able to access funding more easily as they will be able to grant security over their assets as collateral. This will reduce the problem of loan-sharking, as some SMEs that were unable to obtain funds from financial institutions have been forced to rely on illegal lenders. The new legislation will also allow SMEs easier access to capital at

lower interest rates and should enhance the confidence of creditors in lending to SMEs. This streamlined and more flexible approach is likely to be a major turning point for the Thai economy and serve to create opportunities for entrepreneurs who wish to retain possession of their property while offering it as collateral for loans.

### **Definition of a Business Collateral Contract**

Under a business collateral contract, a security provider grants security over property to a security receiver in return for the performance of an obligation without the need to deliver the property to the security receiver. As a business collateral contract falls under the general principles of contract law contained in the CCC, parties will not be able to enter into any agreement that is contrary to the law, public order or good morals. This kind of contract must also be in writing, otherwise it will be void.

### **Key Provisions of the Business Collateral Contract Act**

#### **Parties to a Business Collateral Contract**

While a security provider can be an individual or entity, the security receiver must be a fi-

nancial institution or a person prescribed under the Ministerial Regulations issued in accordance with the Act.

#### **Collateral**

The following property can be collateral:

- a business;
- a claim;
- movable property used in the security provider's business (e.g. machinery, inventory, or raw materials);
- immovable property (where the security provider is engaged in the real estate business);
- intellectual property; or
- any other asset as provided for in the Ministerial Regulations issued under the Act.

The following property cannot be used as collateral:

- property which is not required by law in the execution of a judgment;
- property under the Condominium Act; and
- public property or property used for a public service under the Land Management Act.

The Act also makes it clear that any asset which the security provider will receive in the future in accordance with the business collateral contract could be used as collateral.



# Swiss Thai



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### Registration

Registering, amending, canceling and revoking a business collateral contract must be done in writing at the Business Collateral Registration Office, which is under the supervision of the Department of Business Development of the Ministry of Commerce. The registered collateral information will be made available for public search.

### Collateral Enforcement

The enforcement procedure normally mandated by the CCC and Civil Procedure Code has also been amended by the Act. The Business Collateral Act establishes two methods for enforcement:

- the enforcement of property security; and
- the enforcement of business security.

There are two options for the enforcement of property security: collateral disposal and collateral foreclosure. For the enforcement of business security, there

must be an authorized mediator, referred to as the "security enforcer" to lead the enforcement procedure. The security enforcer may be an individual or entity that meets the qualifications required by the law.

### Civil and Commercial Code Amendment

Certain articles of the CCC, including Article 305 paragraph 1, which provides that rights existing under a mortgage or pledge and rights arising from a suretyship established under the mortgage or pledge pass to a transferee with the transferred claim, will need to be amended to be consistent with the Act. Business collateral will need to be included in these provisions as a new type of security so that a transferred claim of rights passes automatically to a transferee.

The amendment to the CCC is pending the King's endorsement and announcement in the Royal Gazette. It is expected to be-

come effective before the enforcement of this Act.

### Penalties

This Act imposes penalties for a number of offences, including giving false information and using or obtaining confidential information related to a collateral provider's business for one's own interests. Individuals who act dishonestly will be subject to fines or imprisonment. Penalties also apply for the acts of individuals who are representatives of an entity or its management.

### Effective Date

The Act will be in effect within 240 days (eight months) after its announcement in the Royal Gazette, which should take place in early October 2015.



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