



Newsletter No. 240 (EN)

Thailand's Business Security Act

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I. Introduction

In procuring the capital to do business, some enterprises may have to obtain such funds from banks and financial institutes. In doing so, most lenders would normally require securities. Some SMEs may struggle to provide collateral to secure such loans.

Under the Civil and Commercial Code (“CCC”), there are several security options, such as suretyship (personal guarantee), mortgage, or pledge. However, these options may not be suitable for new businesses. For example, there may not be enough assets for the directors or shareholders to guarantee the loan, no assets can be mortgaged, or pledging is not an option as the assets would have to be transferred.

In order to provide more access to financial sources for new businesses, the Business Security Act B.E. 2558 (“BSA”), also known as Business Collateral Act was enacted. This law creates new ways for entrepreneurs to use their assets and businesses as collateral, while such assets and businesses can be used by and under the possession of the owner.

II. General Structure of the Business Security Agreement

A Business Security Agreement is an agreement whereby the Security Provider places a property/business as a security for the Security Receiver (Section 5 BSA). In case a business is used as a security, the enforcement will be undertaken by the Security Enforcer.

The Business Security Agreement must be concluded in writing between the parties and

must be registered with the authority (Section 13 BSA) to be effective and binding to the parties. The registration process will be discussed in detail in part V below.

III. Parties

There are generally 3 parties who are involved in the Business Security Agreement:

1. **Security Provider:** An individual or a juristic person who is the owner of the assets or businesses (Section 6 BSA).
2. **Security Receiver:** Only the financial institutes can receive the business security under the BSA (Section 7 BSA). The examples of the financial institutions under the BSA are as follows:
 - Thai banks or foreign banks with a branch in Thailand, or other special banks (e.g. government bank);
 - Licensed life insurance or non-life insurance companies;
 - Security companies, mutual funds, shareholders representatives under security law;
 - Assets management companies;
 - Juristic person operating in:
 - o Business of converting assets into securities;
 - o future contracts under future contracts law;
 - o factoring;
 - o leasing;
 - etc.

3. **Security Enforcer:** licensed person or a group of persons who is authorized to enforce the security under the BSA in case a business is used as a security (similar to a plan administrator under a restructuring process).

IV. Assets that can be used as securities

Under Section 8 BSA, there are 6 types of assets which can be used as securities:

1. **Business:** The business of the Security Provider can be used as a collateral under the BSA. This includes the assets used for the business or the rights in relation to the business operation, which can be transferred by the Security Provider (e.g. offices, cars, trucks, office equipment, etc.).

In case the parties use the business as a security, the parties have to select a licensed person or group of persons to be the Security Enforcer (Section 12 para. 1 BSA). A licensed person who agrees to be the Security Enforcer must notify the contracting parties in writing of his/her consent and shall also specify the rate or the amount of consideration in return therefor (Section 12 para. 2 BSA). The name of the licensed person(s) who consents to be the Security Enforcer must be indicated in the Business Security Agreement (Section 13 para. 2 BSA).

2. **Account Receivable (right of claim)**
The account receivable means “a right to receive payment and other rights, but does not include right of claim arising from financial instruments” (Section 3 BSA). Account receivable, right of claim for any outstanding, or other rights, including account receivable from the commercial debtor, bank account, lease rights, etc. can be used as collateral under the BSA.

3. **Movable property:** Movable properties used by the Security Provider in its business operation, such as machinery, inventory, or raw materials used in the manufacture of goods can be used as security under the BSA. Under the CCC, a movable property can be pledged as collateral. However, under pledge, such asset must be handed over to the creditor or security receiver, so it cannot be used by the owner. Therefore, the BSA was enacted to solve this problem; whereby the assets can be posted as securities while they remain in the possession of and can be used by the owner.

4. **Immovable property:** Immovable properties (e.g. lands, buildings, condominium units, allocated lands and housing projects, etc.) are the most tangible security accepted by a financial institute. Normally, these immovable properties are mortgaged under the CCC as securities. The BSA provides an additional mean to use these properties as securities.

5. **Intellectual property:** Copyright, patent, and trademark can be put up as collateral.

6. **Other properties:** So far, only “perennial plant” is announced as other property which can be used as security under the BSA.

V. Registration

As mentioned in part II. above, the Business Security Agreement must be registered with the authority (Section 13 BSA) to be effective and binding. Here are some considerations regarding the registration.

1. **Business Security Registration Office:** The Business Security Registration Office (BSRO) is established under the Department of Business Development

(DBD) to oversee and be responsible for all registrations under the BSA (e.g. registration of a notice, amendment of a registered notice, and revocation of the registration).

2. **Responsible person for the registration:** Under the law, the Security Receiver is responsible for the registration, with a written consent from the Security Provider.
3. **Particulars for the registration:** The registration shall at least contain the particulars as specified in Section 18 BSA, for example, registration date, information of the Security Provider and Receiver, Security Enforcer details (if any), amount of debt to secure, details of the assets used as securities, causes for security enforcement, etc.
4. **Legal consequences of the registration:** After the proper registration of the Business Security Agreement, the Security Receiver will be considered as a secured creditor under the bankruptcy law (Section 17 para. 2 BSA) and able to receive repayment of debt from the secured property before any ordinary creditor (Section 29 BSA).

VI. Right and duties of the parties

The followings are some of the rights and duties of the Security Provider and Security Receiver under the BSA:

1. **Rights of Security Provider:**
 - Rights to possess, make use of, exchange, dispose of the secured property, use the property in manufacturing process, but the assets cannot be pledged (Section 22 BSA);
 - Right to examine the outstanding debt (Section 26 BSA);
2. **Duties of Security Provider:**
 - Right to redeem the secured property at any time (Section 27 BSA).
 - Duty to inform the Security Receiver of any change of the secured property after it has been registered (Section 20 para. 2 BSA);
 - Duty to request for the revocation of the registration when the secured debt is ceased, with the consent of the Security Receiver (Section 21 BSA);
 - Duty to exercise care for the secured property as a reasonable person and liable for any decrease in value (Section 23 BSA);
 - Duty to allow the Security Receiver to inspect the secured property (Section 24 BSA).
3. **Rights of Security Receiver:**
 - Right to be compensated in case the value of the secured property is decreased (Section 23 BSA);
 - Right to inspect the secured property (Section 25 BSA);
 - Right to receive repayment of debt from the secured property before any ordinary creditor, whether or not the right in the property has been transferred to a third party (Section 29 BSA).
4. **Duties of Security Receiver:**
 - Duty to amend the registration in case there is any change in the detail of the secured property (Section 20 BSA);
 - Duty to revoke the registration in case the secured property is disposed of (Section 21 para. 2 BSA);

- Duty to issue a confirmation on the amount of debt (Section 26 BSA);
- Duty to issue a consent for the revocation of the registration (Section 28 BSA).

VII. Security enforcement

The method of the security enforcement depends on the type of the security as follows:

1. **Enforcement of property:** Once there is a cause to enforce the secured property and the Security Receiver issues a notification to notify the cause of enforcement, the Security Provider is prohibited from selling, transferring, or depreciating its value. The Security Receiver must issue a notification to the debtor and the Security Provider to repay within 15 days after the receipt of the notification.

Under Section 36 BSA, there are 2 ways to enforce the secured property:

- **to foreclose** the secured property and receive the ownership for repayment. This applies only in case outstanding debt is equal or more than the value of the security and the debtor does not pay interest for more than 5 years (Section 37 BSA). This is similar to the conditions for foreclosure under mortgage law. If there is no objection, the Security Receiver can possess and enjoy the secured property and its proceeds. In case there is an objection for the foreclosure, the secured property shall be sold through public auction instead (Section 42 BSA); or
- **to sell** the secured property and receive the sales price for repayment. The secured property will be sold

through public auction, which will have to be notified to the stakeholders (e.g. Security Provider, other Security Receivers, other preferential creditors on the secured property whose names are on the registration) at least 7 days in advance prior to the auction (Section 40 BSA). The buyer of the secured property will obtain the property free of any collateral or mortgage burdens (Section 42 BSA).

2. **Enforcement of business:** One of the main aims of the BSA is to use the whole business as collateral, while the owner can still operate such business and generate income. The enforcement procedures of a security which is a business are specified under Section 54 - 79 BSA.

The enforcement will be undertaken by a licensed Security Enforcer, who must be neutral and operate independently (Section 75 BSA). The Security Enforcer can be challenged in case he/she performs the duties dishonestly or negligently, cause damages, or is biased (Section 76 BSA).

The enforcement commences with a notification from the Security Receiver to the Security Provider, notifying the cause of the enforcement. Then the Security Enforcer will set up a fact-finding inquiry in relation to the cause for enforcement. The inquiry result must be made in writing and signed by the Security Enforcer, and concluded within 15 days from the 1st inquiry date. The result can be appealed to the court within 15 days, only on the ground that the inquiry is not in line with the procedure under the law. Such appeal is not the cause to delay the enforcement.

In case the inquiry result concludes that there is a cause for enforcement, the amount of payable debt has to be specified. Then, the management authority of the business, including the rights of the shareholders and partners (except the right to receive dividends) shall be passed on to the Security Enforcer immediately. Other judgement creditors are barred from executing the secured property, but they can submit requests to the Security Enforcer to participate in receiving properties or proceeds from the disposal of the business (similar to the request for payment under the bankruptcy law).

VIII. Termination of Business Security Agreement

The Business Security Agreement shall be terminated upon occurrence of the following events (Section 80 BSA):

- the debt ceases for any reason, but not by prescription period;
- the parties mutually terminate the agreement in writing;
- the secured property is redeemed;
- the disposal of the secured property under the enforcement or foreclosure;

The Security Receiver can still enforce the secured property even after the debt is time barred (the prescription period is expired), but the Security Receiver is entitled to the outstanding interest for not more than 5 years (Section 81 BSA).

IX. Penalty

There are criminal penalties (fine and/or imprisonment) for the violation of the BSA (e.g. concealing facts during the registration, disposing the secured property, provide false information, etc.).

X. Conclusion

This law was enacted for small businesses to gain more access to loans and use their business as security. Only financial institutions can be the Security Receivers under this law.

Foreign sellers may have to consider other options to secure their transactions, for example L/C, bank guarantee, retention of title. Please see our Newsletters NL013E and NL014E for more information.

*We hope that the information provided in this newsletter was helpful for you.
If you have any further questions, please do not hesitate to contact us.*

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