



THE THAI BUSINESS SECURITY ACT



I. BACKGROUND

The Business Security Act B.E. 2558 (2015) (the “BSA”), which came into effect as of 1 July 2016, is intended to address the need to facilitate a business enterprise (especially SMEs), and its financiers (especially banks), to use property of the business enterprise as collateral to secure financing transactions. The BSA broadens the scope of security that can be created under Thai law, which, prior to the BSA, was limited to the types permitted under the Civil and Commercial Code (the “CCC”).

Under the CCC, the types of security interest that can be created over property is limited to:

- (a) the mortgage – A mortgage can only be created over immovable property and certain types of movable property (such as ships of five tons and over, floating houses, beasts of burden, registered machinery and other registered movable property); and
- (b) the pledge – A pledge security can only be created over physical movable property (including legal rights represented by an instrument/certificate (such as shares, promissory notes and warehouse receipts)) because physical possession by the pledgee (or the agent of the pledgee; and the pledgor cannot act as the pledgee’s agent) of the pledged property throughout the security period is a legal requirement for the creation and subsistence of a pledge security interest.

The BSA, on the other hand, allows more types of property (e.g. intellectual property rights, bank account deposits, account receivables and inventory) to potentially be used as collateral. The concept of the BSA is derived from the concept of the “floating charge” recognized in common law jurisdictions like the United Kingdom and secured transaction in the United States.

2. BUSINESS SECURITY CONTRACT UNDER THE BSA

In order to create a security interest pursuant to the BSA, the security grantor and the security grantee are required to enter into a “Business Security Contract” (“BSC”) in accordance with the requirements of the BSA.

2.1 Form of BSC

A BSC must be made in writing between the security grantor and the security grantee and registered with the Department of Business Development, Ministry of Commerce (the “DBD”). BSC enforcement trigger events can be as agreed between the parties so long as they are not against the public order or good morals.

2.2 Parties to BSC

2.2.1 Security Grantor

- being a natural person or a juristic person; and
- having existing or future rights over the property that will be used as collateral (the future rights must be vested to the security grantor by way of contract or legal relation).

2.2.2 Security Grantee¹

- being a financial institution² or other persons as described in the Ministerial Regulations.

2.2.3 Security Enforcer³

- holding a valid license to act as a security enforcer;
- being a natural person with knowledge, expertise and experience on law, accounting, economics, business administration or property appraisal; and

¹According to the Ministerial Regulations prescribing persons eligible to be a security grantee, six additional entities are permitted to act as a security grantee; being (i) Special Purpose Vehicle for Securitisation, (ii) Trustee on behalf of Trust pursuant to law concerning trust for transactions in capital market, (iii) Securities Company, Mutual Fund or Bond Holder’s Representative pursuant to law concerning securities and securities exchange, (iv) Juristic Person operating derivatives business pursuant to law concerning derivatives, (v) Asset Management Company pursuant to law concerning business management company and (vi) Juristic Person having an objective to operate factoring business.

²“financial institution” under the BSA means: (1) a financial institution under the law governing financial institution business; (2) a company licensed to operate life assurance business under the law governing life assurance and a company licensed to operate against loss business under the law governing insurance against loss; and (3) a bank or a financial institution established under specific law.

³According to the Financial Institution Act B.E. 2551 (2008) (“FIA”), a financial institution is defined to include both (i) a commercial bank being a subsidiary of foreign commercial bank and (ii) a branch of foreign commercial bank approved to operate commercial bank business. In addition, under the FIA, a commercial bank means a public limited company being approved to operate commercial bank business in Thailand; Thus a foreign commercial bank or foreign financial institution which is not established or registered in Thailand in accordance with Thai laws would not be able to be a security grantee under BSA.



- being appointed by both the security grantor and the security grantee with written consent from the security enforcer.

2.3 Types of Collateral

2.3.1 Business

Business to be used as collateral can be any property which the security grantor uses in its business operation and any rights related to such business operation provided that once the security grantor transfers such property and rights to a transferee, the transferee can immediately operate such business.

2.3.2 Right of claim

Right of claim to be used as collateral can be any right to receive payment (such as accounts receivable) and “other rights”⁴, but excluding any right represented by an instrument⁵, such as bills⁶, share certificates and warehouse receipts, as the right represented by an instrument can be pledged under the CCC.

2.3.3 Movable property⁷

Moveable property which the security grantor uses in its business operation, such as machinery, inventory or raw materials, can be used as collateral without physical delivery.

2.3.4 Immovable property⁸

Immovable property can be used as collateral if the security grantor operates business of immovable property directly, such as property development.

2.3.5 Intellectual property, such as copyright, patent, trademark, etc.

2.3.6 Other property prescribed in the Ministerial Regulations⁹

Remark: According to Section 9 of the BSA, even though the BSA allows the collateral to be the property which the security grantor has possession or will possess the right over it at present or in the future, the rights of the security grantee over such property shall exist only when the security grantor has acquired such property.¹⁰

⁴As of 10 April 2017, there is no clarification from the DBD as to what is an example of “other rights”. However, the term “other rights” should include any other right apart from claims which are not a right represented by an instrument.

⁵According to the BSA publication (http://www.dbd.go.th/ewt_dl_link.php?nid=16191&filename=secured), right represented by an instrument was defined as “right specifying in an instrument that who is a debtor obliged to deliver assets or repay debt according to such instrument and the transfer of such instrument can be executed only if special method to transfer has been done pursuant to the type of each instrument”. Rights arising from loan, sale and purchase, or lease agreement are not considered as rights represented by an instrument.

⁶Regarding bills or bonds governed by foreign law, since a holder of bills or bonds could exercise the right to ask a debtor of such bills or bonds to perform obligations attached to such instruments, bills or bonds should also be under the term of “right represented by an instrument” which can be collateral under the BSA. However, please note that this point has not yet been confirmed by the DBD.

⁷Pledge of the same movable property is prohibited under the BSA. The parties cannot agree otherwise as it is considered as against public order and good morals.

⁸Since the BSA does not define the term “immovable property”, the definition of “immovable property” should be referred to Section 139 of CCC that immovable property denotes land and things fixed permanently to land or forming a body therewith. It includes real rights connected with the land or things fixed to or forming a body with land. Thus, the same immovable property can be mortgaged and/or placed as a security under the BSA pursuant to Section 35 depending on the intention of the relevant parties.

Regarding a building in the process of construction, it should be considered as immovable property under Section 139 of CCC since it is attached to the land in the permanent way if a building is under the construction *on or before* the date of the mortgage, such building should be considered as a mortgage property. According to Section 719 of CCC, the mortgage over land does not cover a building erected by the mortgagor *after* the date of the mortgage. In relation to the BSA, since there are no specific requirements or prohibition under the BSA, we are of the view that an under-construction building should be acceptable as a collateral under the BSA as well.

⁹As at 10 April 2017, there is no Ministerial Regulation in relation to other property which can be used as collateral under the BSA.

¹⁰As at 10 April 2017, there is no clarification from the DBD regarding Section 9. However, we understand that this Section allows future property to be collateral under BSA but the rights of the security grantee over such property such as right to possess or distribute, to inspect or to enforce the collateral will only be available once the security grantor acquires such property.



3. REGISTRATION OF BSC

- 3.1 BSC must be made in writing and registered with the DBD.¹¹
- 3.2 Once the registration is duly made, the security grantee is regarded as a secured creditor under the law governing bankruptcy.¹²
- 3.3 The BSC registration details can only be subsequently amended with the mutual agreement of the parties to the BSC. The security grantee shall be responsible for registering the amendment subject to written consent from the security grantor.¹³ The security grantee by receiving such consent from the security grantor shall proceed with the amendment of registration within 14 days from the date of receiving such consent. If there is any change to the collateral as indicated in the registered BSC, the security grantor shall notify the security grantee regarding such change in writing within 7 days from the date of change. If the change does not trigger any enforcement event, such notice will be regarded as a written consent of the security grantor. The security grantee shall proceed with registering the change within 14 days from the date of receiving such notice.

4. RIGHTS AND OBLIGATIONS OF PARTIES TO BSC

4.1 Security Grantor

- 4.1.1 Unless otherwise agreed, the security grantor has the right to possess, use, exchange, sell, transfer and mortgage the property that is used as collateral

under BSC, including to create any encumbrances (other than a pledge, and a purported pledge granted by the security grantor will be void), use in manufacturing processes, the right to consume (in the case of possession for consumption) and receiving the fruit of such property.

- 4.1.2 The security grantor must exercise care and skills to preserve the collateral as a reasonable person would do in operating such business and must also maintain and repair the collateral.
- 4.1.3 The security grantor must be liable for damage occurred in case that the collateral is lost or depreciated in value unless it is proved that such damage does not occur from a cause to which the security grantor has to be responsible.¹⁴
- 4.1.4 The security grantor must prepare a list of collateral pursuant to trade practices or as agreed upon by the contracting parties unless prescribed otherwise in the Ministerial Regulations.¹⁵

4.2 Security Grantee

- 4.2.1 The security grantee (or its agents) has the right to inspect the collateral and the list of property provided that written notice has already been sent to the security grantor at least 3 days before the inspection.
- 4.2.2 If the security grantor sends a notice stating the amount of outstanding secured debt under the BSA to the security grantee, the security grantee

¹¹According to the BSA publication published by the DBD, the registration of BSC with the DBD is not a form required by laws. If a BSC is not registered with the DBD, it is not void and can be enforceable between the parties under the CCC. There is no legal timeframe imposed under the BSA to register the BSC. Registration of the BSC with the DBD results in the BSC being governed by the provisions of the BSA. Accordingly, an unregistered BSC cannot be enforced pursuant to the BSA.

¹²As at 10 April 2017, there is no clarification from the DBD whether the security grantee has to be an actual lender or not. Since an agent of mortgagee is acceptable by the Court, pursuant to the Supreme Court decision No. 3497/2551, therefore, we are of the view that appointment of a security grantee acting as the agent of the actual lender should also be acceptable. This view was verbally confirmed by the Office of Business Security of the DBD.

In addition, according to the Notification of Bank of Thailand No. SorNorSor. 5/2554 regarding the Approval for a Financial Institution to Provide Other Services to Customers Supplementing from Business of Commercial Banks (<https://www.bot.or.th/Thai/FIPCS/Documents/PPG/2554/ThaiPDF/25540159.pdf>), a commercial bank can provide the service of security agent notwithstanding that such commercial bank is not a party to the related loan. Therefore, a commercial bank should be able to be appointed and performed as a security grantee under the BSA for other lenders.

¹³According to Section 20, the law does not allow the security grantee to disagree to the change of collateral. Section 20 merely specifies the process once there is a change to the collateral registered.

¹⁴It is a duty specified by law that the security grantor must be liable for any damage occurred to the collateral resulting in loss or depreciation in value except where the security grantor can prove that such damage does not occur from a cause that the security grantor has to be responsible. This Section provides for the presumption that the security grantor has to be liable for damage unless he can prove otherwise.

¹⁵As at 10 April 2017, there is no Ministerial Regulations regarding such matter.



must send a reply notice confirming or stating the correct amount of debt to the security grantor within 15 days from the date of receiving such notice. Otherwise, if any damage occurs as a result, the security grantee must be responsible for such damage.

- 4.2.3 Property being received for substitution of collateral, no matter by way of distribution, exchange or replacement including compensation obtained due to loss or damage of such collateral is also deemed as collateral. The security grantee shall have the right over such replacement property provided that the registration has been amended to include such property as collateral. In the case that the replacement property is a claim, the security grantee shall send a notice to the debtor of that claim to set up that claim against such debtor.

4.3 Third Parties

- 4.3.1 If the property, being used as collateral under a BSC, is used in the business operation and changing hands all the time, a third party obtaining such property by the normal trade practices or with the consent of the security grantee shall be entitled to such property free from encumbrance under the BSC provided that the third party acquires such property in good faith and for value or with the consent of the security grantee.
- 4.3.2 The priority of the security grantees and the mortgagees shall be in the respective order of the date and time of registration.
- 4.3.3 If there are other preferential rights relating to the collateral, the priority shall be as follows:
- If the collateral is a movable property, the security grantee has the same right as the pledgee under Section 282 of the CCC.

- If the collateral is a movable property and also mortgaged, the security grantee has the same right as the mortgagee under Section 287 of the CCC.
- If the collateral is an immovable property, the security grantee has the same right as the mortgagee under Section 287 of the CCC.

5. ENFORCEMENT OF PROPERTY COLLATERAL

5.1 Enforcement Methods

The security grantee may enforce the collateral by foreclosing, or by enforcement sale, for purposes of repayment of the underlying debt.

5.1.1 Foreclosing

The security grantee can foreclose the collateral only under the following circumstances:

- The principal of debt is equivalent to or exceeding the value of collateral;
- The debtor has not paid interest for 5 years; and
- There are no other security or preferential rights registered on the collateral.

5.1.2 Enforcement sale

Enforcement sale shall be done by an open bidding sale. In relation to such sale, the security grantee shall notify the date, time, place and method of the sale to the security grantor, other security grantees (if any) and other creditors who have preferential rights over the secured property and are listed in the registration list at least 7 days before the enforcement sale.

5.2 Enforcement Rights

- 5.2.1 After the enforcement trigger event occurs and the security grantee sends a notice to inform the security grantor of



such occurrence, the security grantor is prohibited from selling or transferring the collateral or act in any way which may damage or depreciate the value of the collateral. The security grantee shall accordingly have the right to take possession of the collateral provided that the exercise of such right is not against the public order or good morals.

5.2.2 After the enforcement trigger event occurs and the security grantee sends a written notice to inform the security grantor of such occurrence, if the security grantor or the person holding the collateral surrenders possession of the collateral to the security grantee with a consent letter to sell such collateral, the other creditors under court judgments (i.e. judgment creditors) shall be prohibited from seizing or attaching such collateral. However, such creditors shall send a notice to the security grantee for distribution of such collateral or money obtained from the sale of the collateral.

Note: If the BSC is duly registered, the security grantee is the secured creditor under the law governing bankruptcy. Being a secured creditor means that the security grantee has preferential rights over the collateral and will be repaid from such collateral prior to other ordinary creditors regardless of the transfer of collateral to third parties.

Thus, should the judgment creditors exercise the right to obtain distribution, the order of repayment depends on the type of such judgment creditors being:

- If the judgment creditors are ordinary creditors, they will be repaid after the security grantee;

- If the judgment creditors are preferential creditors (only by virtue of mortgage)¹⁶, the order of repayment depends on the order of registration of mortgage comparing to registration of the BSC. Therefore, if the mortgage (held by the judgment creditors) was registered prior to the registration of the BSC, such creditors will be repaid before the security grantee and vice versa.

5.2.3 If the collateral is a cash deposit with a financial institution:

- Where the security grantee is the financial institution accepting such deposits for itself or for the benefits of all security grantees, the security grantee may use such deposits to repay the debt immediately once the enforcement trigger event occurs. In relation to this, the security grantee shall send a letter to the security grantor within 7 days from the date of such enforcement; or
- Where the security grantor and the security grantee agrees that the financial institution can deduct deposit money to repay debt under the BSC, such financial institution may use such deposits to repay the debt upon receiving the letter from the security grantee that the enforcement trigger event has occurred.

5.2.4 If the net proceeds from enforcement sale of the collateral is less than the outstanding debt, the security grantee may claim the outstanding amount from the debtor only if the security grantor is the debtor. If the security grantor is not the underlying debtor, the security grantee cannot claim such outstanding amount from the security grantor but only from the underlying debtor. This provision cannot be varied or agreed otherwise by contract.

¹⁶Since pledge of collateral under BSA is void.



5.2.5 If the collateral is foreclosed, the principal debt and any debt secured by such collateral under the BSC shall be deemed discharged in full. This provision cannot be varied or agreed otherwise by contract, otherwise it will be void.

5.3 Court Enforcement Proceedings

If the enforcement trigger event occurs and the security grantor or person holding the collateral refuses to hand over such collateral, the security grantee may file a petition to the court for security enforcement.

After the court receives such petition, the court shall set a date for consideration and summon the security grantor or the person holding the collateral and the security grantee to give statements and testimony. In this regard, the court shall consider the case everyday consecutively without any postponement until the consideration and the judgment is done.

5.4 Enforcement relating to Mortgage

5.4.1 If the collateral under the BSC has already been or will be mortgaged (in accordance with the CCC) the mortgagee may enforce the mortgage by means of enforcement under the BSA.

5.4.2 If an enforcement event under the BSC occurs during the enforcement of mortgage, once being notified by the security grantee, the mortgagee must enforce the mortgage by means of enforcement under the BSA.

5.4.3 If an enforcement event under the occurs during:

- (a) the court proceedings on the enforcement of mortgage, the security grantee shall submit a petition to the court asking the court to suspend the proceedings. The court shall:
 - suspend the consideration if enforcement event under the BSA occurs. The mortgagee shall accordingly proceed with the

enforcement of mortgage by means of enforcement of security under the BSA and inform the court once such enforcement is done; or

- dismiss the petition if a enforcement event does not occur or is against public order or good morals; or

- (b) the execution proceedings pursuant to the judgment of the court, the executing officer shall proceed with such execution without delay.

5.4.4 A judgment or an order of the Court of Appeal shall be final.

6. ENFORCEMENT OF BUSINESS COLLATERAL

6.1 If the enforcement trigger event occurs, the security grantee shall send a written notice to inform the security enforcer. The security enforcer shall accordingly specify the date, time and place for fact-finding inquiry within 7 days from the date of receiving such notice and notify such details to the security grantor and the security grantee.

6.2 The security grantor shall send a notice to the security enforcer to inform details of the business collateral (as of the date the security grantor receives such notice) within 7 days from the date of receipt. Otherwise, it shall be deemed that the business collateral has details as shown in the registration particulars.

6.3 After receiving the notice, the security grantor shall not sell or transfer the business collateral, except:

- 6.3.1 where that business has property which are perishable goods or if they are held for a long period of time:
 - they may be damaged;
 - expenses for maintaining such property will exceed the value of the property; or



- the security grantor has an obligation under a contract or legal relation before receiving the notice; or
- 6.3.2 where the security grantor has placed deposit or security for damage which may arise from sale or transfer of the business collateral for the amount as specified by the security enforcer which must not be less than 25% of the maximum amount which the parties agreed to use the business as the security.
- 6.4 The security enforcer shall complete the process within 15 days from the first fact-finding inquiry date and notify the decision in writing to the security grantor, the security grantee and the other creditors who have preferential rights over the collateral.
- 6.5 The BSA prohibits objection to the decision of the security enforcer, except in the case where the fact-finding inquiry does not comply with the requirements or procedure under the BSA or the decision is impaired by the material facts or rules of law. An objector shall file a petition to the court within 15 days from the date of receiving the decision. The court may revoke such decision of the security enforcer wholly or partially. In relation to the revoked part, the court may require the security enforcer to reconsider or may make a judgment as the court may deem fit.
- 6.6 A judgment or an order of the Court of First Instance regarding the objection to the decision of the security enforcer shall be final and cannot be appealed to a higher court.

7. TERMINATION OF A BUSINESS SECURITY CONTRACT

- 7.1 Cause of termination
- 7.1.1 The secured debt is extinguished or discharged by reasons other than prescription;
 - 7.1.2 The security grantee and the security grantor have agreed in writing to terminate the BSC;
 - 7.1.3 The collateral has been redeemed; or
 - 7.1.4 The collateral has been sold by security enforcement, or foreclosed and vested in the security grantee by security enforcement.
- 7.2 Process after the termination
- 7.2.1 Where the BSC is terminated by a reason described in paragraphs 7.1.1, 7.1.2 or 7.1.3 above, the security grantor with the written consent of the security grantee shall proceed with revocation of the registration within 14 days from the date of receiving such consent.
 - 7.2.3 The security grantee shall immediately issue a letter of consent to revoke the registration. Otherwise, if any damage occurs, the security grantee must be responsible for such damages.
 - 7.2.4 Where the BSC is terminated by the reason described in paragraph 7.1.4 above, the security grantee shall proceed with revocation of the registration within 14 days from the date of sale or foreclosure of the collateral.



8. KEY DIFFERENCES BETWEEN BSC (UNDER THE BSA) AND PLEDGE AND MORTGAGE (UNDER CCC)

Topic	BSC under the BSA	Pledge under the CCC	Mortgage under the CCC
1. Delivery of Property	Not required	Required	Not required
2. Registration	Required in order to be governed by BSA	Not required	Required
3. Security Grantee	Limited to a financial institutions ¹⁷	No limitation	No limitation
4. Types of Collateral	<ul style="list-style-type: none"> ■ Movable property ■ Immovable property ■ Rights ■ Claims ■ Business 	Only physical movable property (including legal rights represented by an instrument/certificate (such as shares, promissory notes and warehouse receipts))	Immovable property; or Certain registered moveable property, being: <ol style="list-style-type: none"> 1. ships of 5 tons and over 2. floating houses 3. beast of burden 4. other movable property required to be registered (currently, airplanes, machineries and cars which can be mortgaged)
5. Enforcement Trigger Event	As agreed by the parties so long as it is not against public order or good moral	As agreed by the parties so long as it is not against public order or good moral	As agreed by the parties so long as it is not against public order or good moral
6. Security Enforcer (Preliminary stage)	<ul style="list-style-type: none"> ■ In the case of property collateral, a security grantee can require the security grantor or person holding security to handover the property collateral to the security grantee for enforcement; ■ In the case of business collateral, a security enforcer appointed by the parties will enforce the collateral. 	N/A (a pledgee can enforce the pledged property)	N/A (a mortgagee can enforced the mortgaged property)

¹⁷See footnote 1 above.



Topic	BSC under the BSA	Pledge under the CCC	Mortgage under the CCC
7. Enforcement Methods	<ul style="list-style-type: none"> ■ Foreclosure (subject to pre-conditions); ■ open bidding sale; ■ Immediate deduction in case of cash deposit at a financial institution 	Only public auction sale	<ul style="list-style-type: none"> ■ Foreclosure (subject to pre-conditions); ■ public auction sale
8. Deficits from the Proceeds from Sale of Collateral (where the security grantor is the underlying debtor)	Debtor is responsible for such amount.	Debtor is responsible for such amount.	Debtor is not responsible for such amount no matter the enforcement is done by way of foreclosure or public auction, unless agreed otherwise.
9. Legal Proceedings on Enforcement (if cannot be settled under item 6 above)	<ul style="list-style-type: none"> ■ Special legal proceedings: In the case of property collateral, Court of First Instance and Court of Appeal. ■ Special legal proceedings: In the case of business collateral, security enforcer and Court of First Instance. 	Normal legal procedures: Court of First Instance, Court of Appeal and Supreme Court.	Normal legal procedures: Court of First Instance, Court of Appeal and Supreme Court.
10. Court Proceedings Timeframe	Consecutive days of consideration are required.	Consecutive days of consideration are <i>not</i> required.	Consecutive days of consideration are <i>not</i> required.



OUR TEAM



Timothy Tan

Partner, Finance & Projects

Bangkok

T +66 2686 8550

timothy.tan@dlapiper.com



Dhanipa Hongspanij

Senior Associate, Finance & Projects

Bangkok

T +66 2686 8507

dhanipa.hongspanij@dlapiper.com



Sarita Pukaroon

Associate, Finance & Projects

Bangkok

T +66 2686 8554

sarita.pukaroon@dlapiper.com



www.dlapiper.com

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