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Big Leap Through the Rule of Law

Real Estate & Transaction Law (Business Law): Comparison and Practical Analysis of Real Estate Related Security and Enforcement Procedures in Asia-Pacific Countries – Legal Aspects on Real Estate Related Security and Security Enforcement Procedures in Thailand

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1. Introduction

This presentation focuses on the current practical issues relating to the existing legislative framework on the practice of giving security in respect of things and properties, including real estate rights in the context of local entities borrowing from local/foreign financial institutions, and enforcement of securities under the applicable laws of Thailand.

Thailand is one of the fast growing economies in the South East Asia region and is a very popular investment destination amongst foreigners. The applicable laws and regulations restrict foreigners in acquiring land¹ and from carrying out certain types of businesses only.² However, there are exemption rules and regulations for the determination of foreigners' land and business rights, which impose the rule that foreigners may acquire land and carry out the restricted business subject to approval by the officials.

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¹ Act Promulgating the Land Code B.E. 2497 (A.D. 1954) – “Land Code”

² Foreigner Business Act B.E. 2542 (1999)

To carry out a business, the investors, both Thai and foreign nationals, obviously need cash flow or working capital injected into the business operation. When the need arises, in borrowing money from financial institutions, the investors will have to provide property as security or collateral against the loan borrowed from a financial institution. The question is: what kind of property can an investor put as a guarantee which is acceptable to the lenders? In consideration of granting credit facility to the borrowers, the lenders must take into account whether the security property is valid and enforceable under the applicable law and how long it will take the lender to enforce the security property should the borrower be in default, thus necessitating the enforcement procedures of the security property.

In this regard, Thailand has improved its security law by enacting The Business Security Act B.E. 2558 (2015) in late 2015³, which came into force and effect on 2 July 2016. This new security law imposes additional kinds of property which are viable as security against the debt repayment, as well as creates the enforcement procedures for the security property, in addition to the existing procedures for mortgage and pledge.

2. Legislative Framework

Thailand has laws relating to the property, rights, transactions and other properties as prescribed in the Ministerial Regulations, which can be used by the security provider as a security for repayment of debts to the security receiver.

Thai laws prescribe that things, properties and rights represented by a written instrument, as well as other properties as prescribed in the Ministerial Regulations, can be used as securities in the form of mortgage and pledge. Those properties which can be pledged or mortgaged are, as applicable, prescribed in the Civil and Commercial Code (having first been amended in B.E. 2535 and many times since) (the CCC)⁴, the Securities and Exchange Act B.E. 2535 (1992)⁵, and the Trust for Transactions in Capital Market Act B.E. 2550 (2007).⁶ In addition, the most recent law, which was enacted in 2015 and came into force on 2 July 2016, is the Business Security Act B.E. 2558 (2015). This law prescribes that, amongst

³ The Business Security Act B.E. 2558 (2015)

⁴ Civil and Commercial Code

⁵ Securities and Exchange Act B.E. 2535 (1992)

⁶ Trust for Transactions in Capital Market Act B.E. 2550 (2007)

others, business, right of claim, intellectual property, movable and immovable property, and other properties prescribed in the Ministerial Regulations can be used as security against the loan.

3. Security Property

What is the “Security Property”?

The security property includes things and properties which, as prescribed by the applicable laws, can be used as a security against repayment of the loan, including things, properties, right of claim, business, intellectual property or other property prescribed in the Ministerial Regulations. The applicable laws prescribing the kinds of properties which can be used as security against the repayment of debts are as follows:

3.1 The Civil and Commercial Code

(i) Things and Properties

Things and properties (both movable and immovable) which can be used as securities are stipulated in the CCC, as follows: *“Things are corporeal objects⁷, while property includes things as well as incorporeal objects, susceptible of having a value and of being appropriated.⁸ Immovable property denotes land and things fixed permanently to land or forming a body therewith. It includes real rights connected with land or things fixed to, or forming a body with land.⁹ Movable property denotes things other than immovable property, including rights connected therewith.”¹⁰*

(ii) Rights Represented by Written Instrument under the CCC

Rights represented by written instrument under the CCC include a bill of exchange,¹¹ promissory note¹² and share certificate.¹³

⁷ The CCC, Section 137

⁸ CCC, Section 138

⁹ CCC, Section 139

¹⁰ CCC, Section 140

¹¹ CCC, Section 908

¹² CCC, Section 982

¹³ CCC, Sections 1127, 1128, 1138 (4)

3.2 The Securities and Exchange Act B.E. 2535 (1992)

Rights represented by written instrument under this Act comprise:

- (1) Treasury bills;
- (2) Bonds;
- (3) Bills;
- (4) Shares;
- (5) Debentures;
- (6) Investment units which are instruments or evidence representing the rights to the property of a mutual fund;
- (7) Certificates representing the rights to purchase shares;
- (8) Certificates representing the rights to purchase debentures;
- (9) Certificates representing the rights to purchase investment units; and
- (10) Any other instruments as specified by the SEC.

3.3 Trust Instruments under the Trust for Transactions in Capital Market Act B.E. 2550 (2007) and the Notification of the Securities and Exchange Commission

The real estate rights represented by a written instrument under said Act are in the form of a REIT certificate. According to Section 3 of said Act, “trust” means a legal relationship arising from a trust instrument. “Trust instrument” means a contract, whereby a person, called a settlor, transfers or creates real right, or any right appertaining to property, to or for another person, called a trustee, with trust and confidence in order that the trustee shall manage such property for the benefit of beneficiaries. This meaning includes a document showing the intention to create a trust, whereby a settlor and a trustee are the same person. “Trust property” means any property as specified in a trust instrument, including any properties, interests, debts and liabilities arising from management of a trust in compliance with a trust instrument or the said Act.

The Securities and Exchange Commission’s Notification No. Kor.Chor. 10/2552 on the prescription of additional security types (No. 5), Clause 1, prescribes that a trust certificate is a security under Section 4 of the Securities and Exchange Act B.E. 2535. Therefore, a trust

certificate is a type of written instrument according to the laws on securities and security markets. Hence, using a trust certificate as a security is equivalent to pledging a right in a written instrument. Therefore it must be done pursuant to the rules and procedures; similar to a pledge of share certificate.

Thai law allows the securitisation of the right in real estate into fixed-income-type instruments, where profit is earned by exploitation of the real estate in the form of a rent as the underlying asset through a property fund public offering. However, at present, a right to establish the property fund public offering (mutual fund) with the status of a juristic person has been cancelled, and the right to establish the REIT (the property fund) without the status of a juristic person under the law has been granted instead¹⁴; having a custodian as a holder of the right in the real estate, and a REIT Manager performing administration of the property in bringing the right to the real estate for exploitation for the benefit of the investors / Trust Certificate Holders.¹⁵ This is the same principle as the Collective Investment Scheme of REIT, which is currently employed by many different nations.

Foreign investors have enjoyed the same investment privileges with regard to taxation as Thai nationals, i.e. they can own real estate as a settlor (in law, a settlor is a person who settles property on trust for the benefit of beneficiaries. In some legal systems, a settlor is also referred to as a trustor or, occasionally, a grantor or donor) and Trust Certificate Holders. Trust Certificate Holders are not shareholders of the company;¹⁶ they are merely the Trust Certificate Holders in the trust. Foreigners are entitled to hold the “trust units” in the same way as Thai people. The trust units are not shares of the company.

There is no restriction on the number of investment units invested in by holding the trust units. This differs from investment by holding shares in the company, which is limited to not

¹⁴ Notification of the Office of the Securities and Exchange Commission No. SorRor. 26/2555 Re: Provisions relating to Particulars, Terms and Conditions in a Trust Instrument of a Real Estate Investment Trust, Clause 4(b)

¹⁵ Notification of the Office of the Securities and Exchange Commission No. SorRor. 26/2555 Re: Provisions relating to Particulars, Terms and Conditions in a Trust Instrument of a Real Estate Investment Trust, Clause 1

¹⁶ Notification of the Office of the Securities and Exchange Commission No. SorRor. 26/2555 Re: Provisions relating to Particulars, Terms and Conditions in a Trust Instrument of a Real Estate Investment Trust, Clause 8(1)

exceed 49% of the registered capital.¹⁷ The investors gain a tax benefit exceeding the investment in the company's shares. A net profit from exploitation of the right in the real estate by RIET is tax-exempt under Thai law; and a share of profits from REIT, paid to the Trust Certificate Holders, shall be taxed (a withholding tax) at the rate of 10% of the profit sharing amounts.¹⁸ With respect to the investment in the equity instrument, after the company pays the corporate income tax at the rate of 20% of the net profit; if the company pays dividends to its shareholders, the dividends paid to the shareholders shall be subject to a withholding tax at the rate of 10% of the received dividends.

At present, there is the ASEAN CIS¹⁹ Framework between Thailand, Malaysia and Singapore. Its aim is to provide a privilege on the legal limits to an inter-party offer to sell the investment units among member countries. The said agreement shall trigger an expansion and also increase the development of future investment in the real estate business in Thailand.

3.4 Business Security Act B.E. 2558 (2015)

The business security under the Business Security Act comprises the following properties:

- (1) Business;
- (2) Right of claim;
- (3) Movable property used by the security provider in business operation, such as machinery, inventory or raw materials used in the manufacture of goods;
- (4) Immovable property, in the case where the security provider operates a business of immovable property directly;
- (5) Intellectual property; and
- (6) Other property prescribed in the Ministerial Regulations.

¹⁷ Foreign Business Act B.E. 2542 (1999)

¹⁸ Section 70 of the Revenue Code

¹⁹ ASEAN Collective Investment Scheme

3.5 Land Code

Land, under the Land Code, means general land, including mountains, brooks, streams, swamps, rivers, canals, ponds, riverside villages, waterways, lakes, islands and shore land. Title deed means the document showing land ownership, including the title deed maps, the certificate of ownership in lieu of title deed and the pre-occupation certificate stamped “already put to use.” Land, under the Land Code, is an immovable property under the CCC and hence can be used as a security.

3.6 Condominium Act B.E. 2522 (1979)²⁰

An apartment, room or unit in a condominium building is an immovable property under the CCC.

Condominium, under the condominium law, means a building where persons hold title to a unit of real property which, in reality, is the air space which an apartment, office or store occupies. Each title holder has personal ownership in the property and joint ownership in the common property. Apartment means a separate part of a condominium that may be separately owned by an individual. Apartment title deed means the document showing the ownership of personal property and joint-ownership in common property. Juristic condominium means the juristic person registered under the Condominium Act.

The land title deed issued under the Land Code and ownership deed issued under the condominium law can be used as security when borrowing from financial institutions, by registering mortgage of such deeds with the competent official. Foreigners or juristic persons deemed by law to be foreigners may own condominium units in the condominium if they are foreigners that meet the qualifications described by the condominium law.²¹ Each condominium building may have foreigners with entitlement to buy or own the condominium units altogether not exceeding 49% of the total area of the condominium unit in the said condominium building at the time of applying for registration of the condominium building under the condominium law.²²

The financial institutions (creditors) who receive the land title deed and ownership deed as

²⁰ Condominium Act B.E. 2522 (1979)

²¹ Condominium Law, Section 19

²² Condominium Law, Section 19 bis

security by having them registered as mortgage with the official shall have preferential rights over the mortgage security.

3.7 Related Juristic Acts and Transactions on Real Estate/Property (Immovable)

(i) Sale

A sale of immovable property (including land) is void unless it is made in writing and registered by the competent official. The same rule applies to ships of five tons and over, to floating houses and to beasts of burden. An agreement to sell, to buy or a promise of sale of each such property is not enforceable by action unless there is some written evidence signed by the liable party or unless earnest is given, or there is part performance.²³ The ownership of the property sold is transferred to the buyer from the moment when the contract of sale is entered into.²⁴

(ii) Lease/hire of property (immovable)

A lease/hire of property is a contract whereby a person, called the lessor, agrees to let another person, called the lessee, have the use or benefit of a property for a limited period of time, and the lessee agrees to pay a rent therefor.²⁵ A lease of immovable property is not enforceable by action unless there is some written evidence signed by the liable party. If the lease is for more than three years, or for the life of the lessor or lessee, it is enforceable only for three years unless it is made in writing and registered by the competent official.²⁶

(iii) Sale and lease of condominium unit

(a) Sale

Units in condominium buildings are regarded as immovable property. Note that the Land Code prohibits foreigners from owning land; however, the condominium law does not prohibit foreigners to buy and hold title of condominium units, but not exceeding 49% of foreign owners in each condominium building.

²³ CCC, Section 456

²⁴ CCC, Section 458

²⁵ CCC, Section 537

²⁶ CCC, Section 538

(b) Lease

Foreigners can lease immovable property (land or condominium unit) under the provisions of the CCC. The lease of immovable property is not enforceable by action unless there is some written evidence signed by the liable party. If the lease is for more than three years, or for the life of the lessor or the lessee, it is enforceable only for three years unless it is made in writing and registered by the competent official. The term of lease of immovable property cannot exceed 30 years. If it is made for a longer period, such period is to be reduced to 30 years. The rights of the immovable property lease can be used as security for borrowing money from a financial institution and registered as a mortgage to the financial institution therefor. In this regard, the mortgagee shall have the preferential rights over the mortgage lease right.

4. Formality and Validity of Security

(i) Security with persons

Suretyship is a contract whereby a third person, called the surety, binds him/herself to a creditor in order to satisfy an obligation in the event that the debtor fails to perform it. A contract of suretyship is not enforceable by action unless there is some written evidence signed by the surety.²⁷

(ii) Security with properties

There are two types of security with properties under the CCC, namely mortgage and pledge.

(a) Mortgage

A mortgage is a contract whereby a person, called the mortgagor, assigns a property to another person, called the mortgagee, as security for the performance of an obligation, without delivering the property to the mortgagee.²⁸ Immovables of any kind can be mortgaged. However, movables can also be mortgaged provided that they are registered according to law, namely ships of five tons and over, floating houses, beasts of burden and

²⁷ CCC, Section 680

²⁸ CCC, Section 702

any other movable for which the law may provide registration for that purpose.²⁹ A contract of mortgage must be made in writing and registered by the competent official.³⁰

(b) Pledge³¹

A pledge is a contract whereby a person, called the pledger, delivers to another person, called the pledgee, a movable property as a security for the performance of an obligation. If the pledged property is a right represented by a written instrument, the pledge is void unless such instrument is delivered to the pledgee and written notification of the pledge is given to the debtor of the right.

(iii) Business Security Agreement

The business security law is enacted for use with a business security agreement. A business security agreement is an agreement whereby one party, called the security provider, places a property with the other contracting party, called the security receiver, as a security against debt repayment, without the need to deliver said property to the security receiver. The security provider may place his/her own property as a security against debt repayment payable by a third person.

Registration Proceedings

A business security agreement must be made in writing and registered with the competent registration officer (Section 13).

The Business Security Registration Office is a State agency under the Department of Business Development, the Ministry of Commerce. It is an agency with the authority to accept registration of a business security agreement. The Director General of the Department of Business Development is the competent registration officer with the power to register a business security agreement, amend and revoke the registration of a business security agreement, and to provide information on registration for public inspection.

In the case where the security property is a registered property, the registration officer must notify the registered property registrar and other creditors about the preferential rights in the security property, as appear in the registry evidential list.

²⁹ CCC, Section 703

³⁰ CCC, Section 728

³¹ CCC, Sections 747 and 750

(i) Parties

- Provider of business security may be an ordinary person or a juristic person (Section 6);
- Security receiver (Section 7) must be a financial institution (Section 3), namely:
 - Financial institutions according to the laws on financial institutions;
 - Companies with licenses to operate life insurance business according to the laws on life insurance businesses, and companies with licenses to operate an insurance against loss business;
 - Bank or financial institutions established through specific laws; and
 - Other persons as stipulated by the law.

(ii) Properties which can be used as business security

- Business (Section 3 and 8(1));
- Right of Claim (Section 3 and 8(2));
- Movable properties used in business operation (Section 8(3));
- Immovable properties, in cases where the security provider directly operates a real property business (Section 8(4));
- Intellectual property (Section 8(5)); and
- Other properties as stipulated in the Ministerial Regulations.

5. Enforcement Procedures

5.1 Enforcement of securities according to the Civil and Commercial Code

5.1.1 Enforcement of Mortgage³²

Written notice enforcing a mortgage must be sent to the debtor, demanding the obligation be performed by the mortgagor within a reasonable period of time. If the debtor or the mortgagor fails to perform such obligation within the reasonable period of time prescribed, the mortgagee has the right to bring a legal action in court for judgement; ordering the mortgagor to pay debt, or ordering the mortgaged property to be

³² CCC, Sections 728 and 729

seized and sold by auction. If the mortgagee wishes to bring a legal action in court for the foreclosure of the mortgaged property in lieu of the sale by auction, the debtor must have failed to pay interest for at least five years.

The security property must be seized and attached by the executing official of the Legal Execution Department, Ministry of Justice, and be sold by public auction.

5.1.2 Enforcement of Pledge³³

A pledgee shall first notify a debtor in writing of the enforcement of a pledge, demanding that the pledger performs his/her obligation within a reasonable period of time as stipulated in such notice. If the debtor fails to comply, the pledgee needs not bring a legal action in court, but is entitled to sell the pledge property only by means of public auction. For the public auction, the pledgee shall notify the pledger in writing of the time and place of the public auction by auctioneer.

5.2 Enforcement of Security under the Business Security Law

5.2.1 Enforcement of Property Security

There are three means of enforcing the security property (Section 36), as follows:

First – sale of the property by public auction

Procedures for selling property by means of public auction shall be:

- The security receiver sends a written notice stating the cause for enforcing security (Section 38);
- The security receiver sends a written notice notifying the debtor and the security provider to pay debt within 15 days of property possession (Section 39, paragraph 2);
- Selling of security property by an open bidding procedure (Section 40); and
- Allocating the proceeds from the sale of property (Section 52).

³³ CCC, Section 764

Second – enforcement through foreclosure of the property (Section 37)

Bringing a lawsuit in court for the foreclosure of the property has conditions, as follows:

- The amount of outstanding principal debt must equal or exceed the value of the security property;
- The debtor has failed to pay interest for five years and there are no other security / preferential rights registered over the security property; and
- The security provider does not object to the foreclosure of property.

Third – legal action

The security receiver/creditors take legal action against the security provider/debtors to the court for a judgement ordering the security provider or holder of the security property to deliver the possession of the security property, in case of a refusal to deliver; and

- The security receiver files a petition to the court for the court to render its judgement ordering an enforcement of security, stating in the petition also if the security enforcement is to be carried out by foreclose of the secured property or by sale of the the secured property for debt payment (Section 46).

Liability for Unpaid Debt

- In the case where the property is enforced through foreclosure, the principal debt and the debt under the business security agreement is deemed extinguished (any agreement made otherwise is void (Section 53));
- In the case where the security property has been sold (whether it is a case of the security receiver selling the property by means of public auction or the executing officer seizing and selling the property by auction, by virtue of the court's judgement) and the net proceeds of the sale are lower than the due amount, the debtor still remains liable for the outstanding amount (there is still an outstanding debt). However, if the security provider is not a debtor, the outstanding amount

cannot be demanded from the security provider (an agreement stating otherwise is void (Section 52)); and

- In the case where the security provider refuses to deliver the security property, the security receiver must bring a legal action in court (Section 46).

5.2.2 Enforcement of Business Security

Security Enforcer

- The security enforcer must receive a licence from the registration officer (Section 54);
- He/she must be qualified as a person; having knowledge, skill and expertise relating to the law, accountancy, economics, business administration or property appraisal (Section 55, paragraph one). Furthermore, he/she must not possess various prohibited descriptions, such as being or having been a bankrupt person, being or having been a dishonest bankrupt person or where the period of having been a bankrupt person has lapsed for less than five years; having been sentenced by a final court judgement to imprisonment for offences relating to property; having been a director, manager or a person with management power of a financial institution which has had its licence revoked, apart from being exempt according to the rules imposed by the Minister³⁴; being a director or a person with management power of the security provider or the security receiver; having been removed from the position of chief executive officer, director or manager under the Security and Exchange Act or under the provisions of other laws; being a political servant; being a civil servant with a permanent position or salary; or having any other prohibited description as prescribed by the Minister.

Procedures of Business Security Enforcement

- The security enforcer must notify in writing to the administrative receiver of the cause for security enforcement (Section 63, paragraph one);

³⁴ The Minister of Finance and Minister of Commerce shall have charge and control of the execution of the Business Security Act, Sections 3 and 4.

- The security enforcer must set the date, time and place of fact-finding inquiry within seven days (Section 63, paragraph two);
- The security enforcer must conduct the fact-finding inquiry and make decisions on the cause for security enforcement within 15 days (Section 66 and 68);
- The security enforcer must deliver the business which may comprise of the security, stamp, books of account, and documents relating to the properties and debts and rights, within seven days (Section 72); and
- The security enforcer must allocate the money received from the sale of business (Section 74).

The Significant Differences between the Enforcement of Property and Business Securities

- In enforcing security which is property, the security receiver is the one who shall proceed with the enforcement procedures. In enforcing security which is a transaction, the security enforcer is the one who proceeds (Section 36); and
- The procedure for enforcing security which is property is by public auction or by bringing a lawsuit in court for the foreclosure of the mortgaged property in lieu of the sale by auction. Enforcement of security which is business is by a sale according to the procedures as deemed appropriate by the security enforcer (Section 73).

A source from a Thai commercial bank revealed that since the new Business Security Act came into force on 2 July 2016 (about one year), business owners still have not widely adopted the securities according to said Act as much as they should have, particularly in placing their property as a security against debt repayment; most notably securities which are trade receivables, inventory and intellectual property which are aimed at business owners to adopt for their own advantages under the Business Security Act. However, they are still using the same property as a security as before enactment of said Act, such as savings accounts, land and machineries.

A report from the Department of Business Development showed that, over the past year, companies have applied for business collateral registration totalling 1.45 million applications, valued at Baht 2.67 trillion. This is divided into:

- (1) Savings accounts - 60%;
- (2) Movable property used in the business, such as inventory, raw materials, machineries, automobiles and ships - 19.65%;
- (3) Other types of claims, such as trade receivables, hire purchase contracts, sale and purchase agreements and lease and purchase agreements - 20.28%; and
- (4) Intellectual property - 0.07%.

6. Conclusion

In the current economic and business environment, which is becoming extremely competitive, Thailand very much welcomes foreign investment into the country. However, it has set various safeguards to ensure there are adequate laws in place to meet the objectives of investors and to assist investors in getting a good return for their investment. Accordingly, Thailand has enacted the business security law to extend to the kinds of property that are viable as security, and to improve the process of security enforcement.

Consequently, security providers can use more types of property, including businesses, rights of claim, intellectual property and other property prescribed in the Ministerial Regulations, as security against the debt without the need to hand over said security properties to the security receiver. Before the business law came into force, the properties which could be used as security against the debt in the form of pledge and mortgage by business operators was limited only to those prescribed in the Civil and Commercial Code, the Securities and Exchange Act, the Land Code, the Condominium Act and the Trust for Transactions in Capital Market Act. However, since the Business Security Act came into force on 2 July 2016, the investors/business operators can also use their properties as security provided that it is prescribed in said Act, namely business operation, inventory, raw materials used in the manufacture of goods, right of claim or intellectual property, amongst others. In a manner which suits the current world business circumstances, many more kinds of properties with economic value can therefore be used as security, thereby realising the full potential in real estate transactions.

Last but not least, the process of mortgage enforcement is rather slow, which is an impediment to business operation. Accordingly, the Business Security Act B.E. 2558 (2015) has been enacted to support the placing of property with economic value as a security against repayment of debt, with the description that there is no need to hand over the occupation of such property to the creditor; and also to create a

quick, effective and fair security enforcement system, which would be beneficial to entire business operations.

(Vira Kammee: 18 August 2017)

Thank You.