

THE NEED FOR A SECURED TRANSACTIONS LAW

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Under the present Thai law, security interests over assets are rather limited. The forms of security available under the Thai Civil and Commercial Code are primarily: (1) mortgage, (2) pledge, and (3) corporate or personal guarantee (surety). Thailand does not recognize a variety of security interests including liens, encumbrances, and charges commonly found in common law countries. In general, a contract of mortgage must be made in writing and registered with the relevant government authorities (i.e. the Land Office for land and buildings and the Central Machinery Registration Office of the Ministry of Industry for machinery). Furthermore, only certain types of property specified under the law can be mortgaged, i.e. immovable property and certain types of registered movable property. With regard to pledge, the transfer of possession of the pledged property from the pledgor to the pledgee or a third party custodian is essential for the perfection of pledge. Pledge without actual transfer of possession may not be fully enforceable under Thai law. Although such "quasi-pledge" arrangement without actual transfer of possession has been used in a number of loan transactions in Thailand, the breakthrough Supreme Court Judgment 5603/2544 (2001) ruled that such pledge is imperfect and, therefore, not enforceable.

In a society like Thailand whose economy and transactional culture have evolved so much since the Civil and Commercial Code was enacted, the need to recognize other types of security interests has become inevitable. Such a need became even more apparent during the economic crisis in 1997, when financial institutions and other creditors realized the defects and insufficiency of the existing forms of security interests. Hence, the Secured Transactions Act is one of many laws proposed after the 1997 economic crisis to hasten Thai economic recovery by modernizing various legal structures to be at par with global standards.

The principles of the draft Secured Transactions Act were approved by the Cabinet on May 9, 2000 and forwarded to the Office of the Council of State. As of today, the draft Secured Transactions Act is under the consideration of the Office of the Council of State. Fundamentally, the proposed Secured Transactions Act would allow the registration of almost any property as security, regardless of tangibility (Section 8 of the proposed Act). This would take place via a registry system whereby debtors may register security interests without necessarily transferring property to creditors (Sections 5 and 9 of the proposed Act). Consequently, the debtor or owner of the collateral property can exploit the property unless a court orders the seizure and garnishment of the property upon breach of debtor's obligation (Section 22 of the proposed Act). Furthermore, the creditor who first registers the property as security will have the privilege of receiving repayment

from the sale of such property prior to unregistered or subsequently registered creditors (Section 30 of the proposed Act).

Although this proposed Secured Transactions Act is likely to undergo many amendments before passing through the whole process of law enactment, i.e. approval by the House of Representatives and the Senate, we anticipate that it will or at least its basic principles will become law in the near future.