

# COMMERCIAL COLLATERAL: A BOOST FOR THE THAI ECONOMY?

In the near future, businesses in Thailand may be endowed with a new tool that could help enhance their access to financial resources — arguably one of the most important resources to survive and thrive in today's highly competitive environment. This tool is "commercial collateral", a new form of security/security interest not previously available under Thai laws.

The draft Commercial Collateral Act proposed by the Fiscal Policy Office, Ministry of Finance, was approved by the cabinet on July 9 2009. The draft Commercial Collateral Act, when adopted, will effectively expand the types of security available and can be used to secure debts/financial obligations in Thailand.

The draft Commercial Collateral Act brings about a new form of security/security interest resembling the concept of floating charges not previously provided for under the Thai Civil and Commercial Code (CCC), which recognises only limited forms of collateral such as mortgage and pledge.

To support the draft Commercial Collateral Act, amendments to the CCC were also proposed and approved by the cabinet. The cabinet-approved draft Commercial Collateral Act and draft amendment to the CCC are now under the consideration of the Office of the Council of State.

Similar to mortgagees and pledgees, creditors secured by commercial collateral shall have preferential rights and be entitled to receive performance

---

## TILLEKE & GIBBINS INTERNATIONAL

of the obligation due to them from the commercial collateral granted in preference to other creditors. When one and the same property is used/given as security to/in favour of several creditors, the preferential rights created rank according to the respective dates and hours of registration/notification, and the earlier one shall be satisfied before the later one.

To create valid commercial collateral, it must be made in writing and registered with or notified to the Department of Business Development (DBD), the Ministry of Commerce, without requiring physical delivery of the property granted as collateral to the creditor. The Office of the Council of State is considering whether to adopt a registration regime (whereby the officers will be required to verify all details and particulars relating to the commercial collateral) or a notification regime (whereby verification would not be required) for the administration of the commercial collateral.

Properties/assets that may be used as commercial collateral can be classified into two broad categories: (a) businesses; and (b) other properties/assets, which

include claims, movable property used in business operation, immovable property in the case where the business operator engages in real estate business, and other property as to be prescribed by the ministerial regulations.

The concept of using the business as collateral is indeed a novel legal concept in Thailand. Under the draft law, when a business is used as collateral, it does mean the entire business. That is, if the collateral provider is in default, the creditor will be entitled to enforce the collateral, including through sale/disposal of the entire or part of the business of the collateral provider, according to the provisions of the Commercial Collateral Act.

The use of claims as commercial collateral differs from the transfer or assignment of claims under the CCC in that it would create a real right and valid security interest recognised under Thai law over the property. This differs from the CCC, under which it would be the transfer or assignment of claims/rights creating contractual obligations binding and enforceable only upon the contracting parties and the debtor of such claims.

In addition, unlike the pledge under the CCC, the right to possess and utilise the commercial collateral will remain with the collateral provider, provided that creditors are permitted to examine the assets. This is a big plus as the possession of the property does not have to be transferred to the creditor, which effectively removes the limitation on

the usage of the property.

To enforce commercial collateral, creditors may, with the consent of the collateral provider, sell or claim foreclosure of the collateral property; otherwise they have to take court action. In the cases where a business is used as collateral, the enforcement must be executed by an expert/executor licensed by the DBD.

However, the current draft of the proposed law does not clearly address the issue of whether the licences, permits, and approvals required for engaging in the relevant business or concessions granted by government authorities will also be transferred to the buyer of the business in the event of enforcement where the collateral is the business. This could create practical problems, unless properly resolved/addressed in the Commercial Collateral Act.

If the draft Commercial Collateral Act and draft amendment to the CCC are adopted, they will provide more options for both creditors and debtors. This could help businesses to seek bank lending to finance capital requirements and, if implemented in a timely manner, could also facilitate recovery during the current depressed economic environment where access to funds is vital.

---

By Santhapat Periera, Partner, and Yingyong Karnchanapayap, Attorney-at-Law, Corporate & Commercial Department, Tilleke & Gibbins International Ltd. Please send comments to Andrew Stoutley at [andrew.s@tillekeandgibbins.com](mailto:andrew.s@tillekeandgibbins.com).