Bangkok Post The world's window on Thailand

CORPORATE COUNSELLOR

Expanding the potential for secured transactions

Published: 14/06/2013 at 12:00 AM
Newspaper section: Business

Secured transactions refer to transactions secured by collateral, which guarantees the fulfilment of an obligation to repay loans. Currently, Thailand recognises only a limited class of security that can be put up as collateral, effectively limiting the potential for greater credit availability in the economy. This article examines the types of security available under other jurisdictions as well as registration and common enforcement mechanisms with an eye towards potential use in Thailand.

United States: A large variety of assets or properties can be used as collateral, all of which are governed by Section 9 of the Uniform Commercial Code (UCC). These include immovable assets such as real estate, movable assets such as agricultural and consumer products and intangible assets such as goodwill and future advances. The creation of security must be evidenced by contract. Upon default, UCC-9 stipulates several methods of enforcement, the most common being repossession of the security and strict foreclosure.

Japan: Secured transactions can only be created over specific movable assets. Articles 85 and 86.2 of the Civil Code define movable assets as property that is not real estate. Such properties include construction machinery, aircraft and ships as well as inventory and intellectual property.

There is no US-style system of registration and notification of mortgages created over movable property. Security is created by contract and enforced by the Civil Execution Act. If a defaults on a loan agreement, Chapter 3 of the Act specifies for the movable property to be sold at a public auction unless the parties have agreed otherwise.

Because a sale at a public auction is typically time-consuming and fetches lower prices, parties typically enter into foreclosure agreements in the contract, where the creditor is granted the right to dispose of property in a reasonable manner or take possession of the property upon a default.

India: Under India's General Clauses Act and Registration Act, any asset that is not immovable is classified as movable property. A large variety of movable properties can be used as security including uncalled share capital, booked debt, revenue and receivables, and intangible property such as goodwill.

A secured transaction must be evidenced in writing, signed by both parties and registered electronically under the Companies Act. Upon default, the creditor has a power of sale only with a court order. Foreclosure is largely limited to conditional-sale mortgages, and this remedy must be stipulated in the contract and a court order obtained. The right to appoint a receiver must be stipulated in the contract.

Singapore: A unified system of classification and registration of security known as "charges" under the Companies Act makes no distinction between immovable or movable property.

Charges can also be created over intangible assets such as shares, debentures and goodwill. Section 131 of the Act requires registration within 30 days of the creation of the charge. A failure to register the charge renders it void as against the liquidator and creditor upon insolvency.

However, this does not prejudice the repayment of money secured by a charge. When a charge is void for lack of registration, money secured thereby is immediately repayable. Such an approach effectively safeguards both the debtor's and the creditor's interests, creating an environment conducive for business.

Thailand: Under the Civil and Commercial Code (CCC), movable property can be pledged in exchange for credit, but there is a requirement to deliver possession of the property. Furthermore, immovable property can be mortgaged in exchange for credit. However, such mortgages are currently limited to real estate and specific movable property under the CCC. Automobiles, aircraft and machinery can be mortgaged if registered pursuant to specific procedures and under the relevant laws.

To enforce a pledge when a debtor defaults, the creditor can bring the pledged asset to sell at auction without the need to file a complaint. If the secured property suffers loss or damage to the extent that the remaining value is not sufficient as security, the creditor has the right to enforce the mortgage.

There are two alternatives to enforce a mortgage, and each requires filing of a complaint. The first is to seize the mortgaged property for sale at auction, while the second is foreclosure. If the debtor transfers the mortgaged property to a third party, the creditor needs to file a claim against the third party, requesting that the court seize the mortgaged property for sale at auction.

There have been discussions in Thailand about including other movable and intangible assets such as inventories, as is the case in several other jurisdictions. A major advantage would be raising the amount of credit in the economy.

Before such legislation is passed, however, close scrutiny must be paid to what classes of properties can be appropriately used. There must also be safeguards that protect the rights of both creditors and debtors.

As well, a system of registration and enforcement should be created to ensure the debtor's right has been protected in order to ensure clarity as to the specific property used as security and that a person who has the authority to enforce the secured property cannot intentionally, or unintentionally, disadvantage a debtor.

Finally, since ownership and possession of the security transfers to the creditor upon default, there should be a requirement that the debtor be advised of the risks involved in entering into such loan agreements.

This article was prepared by Kasamesunt Teerasitsathaporn, attorney-at-law, Michael Ramirez, consultant, and Charmaine Ng, intern, in the Dispute Resolution Department at Tilleke & Gibbins. Please send comments to Andrew Stoutley at andrew.s@tilleke.com