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## The Business Collateral Act: Creating a Robust Framework for Credit Markets

**M**uhammad Yunus, the founder of Grameen Bank and a Nobel Peace Prize laureate, once observed that “credit markets were originally created to serve human needs; to provide businesses and individuals with capital to start or expand businesses or expand other financial needs.” In other words, without access to credit, many businesses that could prosper and make significant economic and social contributions would not flourish.

As anyone who has applied for a credit card or mortgage knows, banks generally go to great lengths to assess the overall creditworthiness of potential clients. Borrowers who are able to use their assets as collateral tend to improve their creditworthiness, and therefore provide the borrowers with greater access to capital.

In Thailand, however, the traditional methods of providing collateral have been limited. Notably, the requirement to deliver movable collateral to the security holder has prevented borrowers from using inventory, machinery, and vehicles used in the course of business, or raw materials to secure their debts.

In recognizing the need to have a robust legal framework for credit markets, Thailand enacted the Business Collateral Act B.E. 2558 (BCA) in 2015, with the majority of its provisions coming into force on July 1, 2016.

### Overview of the BCA

The BCA establishes a new category of nominate contract called the “business collateral agreement,” in which a “security provider” places property with a “security receiver” as security against debt repayment, with no requirement to deliver the property to the security receiver. A security provider may be either a natural or juristic person, whereas a security receiver must be a financial institution or other class of persons prescribed by ministerial regulation. The security receiver will have the preferential right to receive repayment of a debt from the collateral before other creditors.

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The business collateral agreement must be made in writing and registered at the Business Security Registration Office of the Department of Business Development (DBD). To register a business collateral agreement, the parties must provide certain information, such as details on the debt being secured, a description of the collateral, the maximum amount being secured by the collateral, and causes for enforcement under the business collateral agreement, among a number of other requirements.

Collateral under a business collateral agreement can derive from:

1. a business;
2. a right of claim;
3. movable property used by the security provider in business operations, such as machinery, inventory, or raw materials used in the manufacture of goods;
4. immovable property, in case the security provider directly operates an immovable property business; or
5. intellectual property.

The Ministry of Commerce has the authority to prescribe further categories of property through promulgating regulations.

### Practical Considerations – Using a Business as Collateral

As the majority of the BCA’s provisions have not yet come into effect, a number of unresolved issues will need to be addressed in practice. For instance, if a business is used as collateral, the security provider and security receiver must agree to the selection of one or several experts who will act as the “security enforcer.” The name and address of the security enforcer, as well as the rates it will charge for its services, must be registered at the DBD.

Acting as a security enforcer is a new service that requires a license, issued by the DBD for an initial period of three years. The security enforcer must proceed with enforcement over a business, which includes conducting a fact-finding inquiry, issuing a decision on whether cause exists to enforce the security, and assuming control of the business in a manner similar to a court-appointed receiver.

Since the role of security enforcer is a new licensed activity, using a business as collateral will not be possible until there are licensed security enforcers appointed by the parties. It is currently unclear how many license applications will be submitted to or approved by the DBD.

An additional point that will need to be clarified in practice concerns the interaction between the security enforcer and the courts. In principle, when a business is used as collateral, the enforcement procedures are designed to take place entirely outside of court. The BCA specifically states that objections to the security enforcer’s determinations on cause and enforcement under the business collateral agreement may not be made to the court, unless the fact-finding inquiry was not in line with prescribed bases and procedures, or the decision contains a material flaw on the facts or the legal points. Court decisions which overrule the findings and determinations of the security enforcer are something to watch for as the BCA develops in practice.

A further point of uncertainty is how the new legal regime of out-of-court security enforcement will coincide with existing laws, such as Thailand’s Bankruptcy Act. If the security receiver attempts to initiate security enforcement over the business of a security provider while bankruptcy proceedings of the security provider are concurrently being initiated at the Thai courts, it is unclear whether the security enforcer is required to be deferential to the bankruptcy proceedings.

### A Major Shift?

While the BCA represents a major shift in the legal framework of secured transactions in Thailand, there are still a number of issues which need to be clarified in practice. Ultimately, whether the BCA proves to be helpful to Thai borrowers will depend on the extent to which it is relied upon by parties seeking to extend and obtain credit. 🏠