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## Business Collateral Act: Financing Intellectual Property Assets

With an aim to improve financial stability for small and medium enterprises by increasing access to funds from financial institutions, the Business Collateral Act B.E. 2558 (BCA) was published in the *Royal Thai Government Gazette* on November 5, 2015. Most of the provisions will become effective on July 1, 2016 (240 days after the date of publication), except some provisions which will become effective on the day following the date of publication, including those related to the appointment of receivers, appointment of the Minister in charge, control over the execution of the BCA, and appointment of the competent officials.

The BCA is expected to assist intellectual property (IP) owners to more easily obtain financing from financial institutions. In the past, the use of IP assets as collateral was entrenched with numerous hurdles. Under Thailand's Civil and Commercial Code, IP was not recognized as a financial asset, and therefore, it could not be used as an asset for mortgages, pledges, liens, or security deposits. Under the BCA, however, IP owners can use their IP assets as collateral to secure their loans without delivering these assets.

IP owners can be individuals or juristic persons. Secured

parties must be financial institutions or other persons specified under the Ministerial Regulations. In order to use IP assets as collateral to secure loans, an IP owner—as the debtor—must enter into a security agreement with a secured party or a lender. The IP owner would grant security interests in its IP assets to the secured party as collateral for a loan.

Importantly, the security agreement must be made in writing and registered with the Department of Business Development (DBD). The DBD will then coordinate with the Department of Intellectual Property to register the information and therefore provide the public with concordant records.

A search system is being developed to allow third parties to ascertain whether any assets are being used as collateral under the BCA. A secured party who receives written consent from an IP owner has the obligation to carry out the registration process.

The secured party is responsible to ensure that the information provided to the DBD is correct. When the registration process is complete, the secured party is recognized as a “secured creditor” under the Thai Bankruptcy Act. The secured party is then entitled to claim the collateral with priority over the other unsecured creditors. As to the priority among other secured parties of the collateral, the date and time of registration are determinative factors.

Although security interests are granted to the secured party by the IP owner, the IP owner is still entitled to use, exchange, dispose, transfer, manufacture, and use as security against other loans the IP assets that were collateral and its proceeds, unless the parties agree otherwise.

While the BCA takes significant steps toward facilitating the financing of IP assets, in practice, their use as collateral remains a challenge due to difficulties in valuation, foreclosure, and the lack of secondary markets for certain types of IP. Nevertheless, small and medium enterprises will find some measure of financial stability under the BCA, and the new law should be closely observed to align with current business practices. 🏠