

Thailand

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Section 1 – Collateral/security

1.1 What types of collateral/security are available?

Thai law officially recognises only two methods of taking security:

(i) a mortgage, which is available for security over immovable property (such as land and buildings) and certain types of machinery (machinery which is eligible for registration under the Machinery Registration Act); and,

(ii) a pledge, which is available for security over movable property, such as shares in the pledgor's company, instruments of investment and unregistered machinery.

Although not recognised by Thai law as a form of security interest *per se* (for example, under bankruptcy and court-supervised reorganisation proceedings) the taking of contractual quasi-security by means of assignment (absolute or conditional) is also common in Thailand.

In project finance transactions, assignments will usually be provided with respect to rights under the various project documents, monies in bank accounts, and insurances.

Section 2 – Perfection and priority

2.1 How is a security interest in each type of collateral perfected and how is its priority established?

Thai law requires that a mortgage must be made in writing and registered with:

- (i) the Land Department, for land, buildings and installations;
- (ii) the Central Machinery Registration Office of the Ministry of Industry, for machinery.

The mortgage registered first will take priority over any mortgages registered at a later date.

Perfection of a pledge requires that the property which is the subject matter of the pledge is delivered by the pledgor to the pledgee (or a third party on its behalf). A pledge of shares will be recorded in the pledgor's share register. Otherwise, there are no registration, governmental consents or filings required in order to perfect a pledge.

2.2 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

For mortgages, a search at the relevant office of registration should be conducted by the creditor to ensure that there are no other mortgages duly registered over the relevant property.

For pledges of shares, the share register of the relevant company should be checked for existing pledges.

For pledges of other moveable property, physical inspection of the property will be required to ensure the property is not in the possession of another pledgee.

2.3 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?

To register a mortgage with the Land Department, a mortgage registration fee of 1% of the mortgaged amount is payable, subject to a maximum fee of bt200,000.

To register a mortgage of machinery with the Central Machinery Registration Office, a mortgage registration fee of 0.1% of the mortgaged amount is payable, subject to a maximum fee of bt100,000.

Stamp duty does not apply to a mortgage or pledge agreement, provided that the required stamp duty applicable to the related loan agreement (0.05% of the principal amount of the loan, subject to a maximum stamp duty of bt10,000) has been paid.

There are no lawful techniques to minimise or defer the above fees or stamp duties.

2.4 May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

In a syndicated project finance loan, the lenders will normally appoint one of the lenders as a security agent for the purposes of administering the security on behalf of each lender (however, note that for a mortgage, the lenders must all be named as mortgagees under the mortgage agreement, even if the lenders have appointed a security agent).

Thai law does not recognise the concept of a trust (and therefore the concept of a security trustee). The security agent alternative creates merely a contractual relationship between the security agent and the secured parties, which will be documented in the loan agreement.

Section 3 – Foreign investment and ownership restrictions

3.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies?

The principal law relevant to restrictions on foreign investment in projects in Thailand is the Foreign Business Act (FBA). The FBA lists three categories of business that may not be carried out by foreigners (a company in which 50% or more of its share capital is owned by a foreign individual or company) unless permission under the FBA is obtained or an exemption granted. It is not, however, possible to obtain permission to carry on business as a foreigner for certain Category 1 business activities.

Power projects and oil and gas projects are not included within the FBA restricted activities. Mining is, however, a Category 2 restricted activity and would require approval under FBA.

The Land Code also restricts ownership of land by foreigners, although a foreigner can lease land or obtain a concession from the Government.

3.2 Do these restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

The same restrictions apply in the event of foreclosure, and so foreclosure by a foreign lender will be limited accordingly.

3.3 Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Thailand has signed bilateral investment treaties with the US, Japan and Australia. Citizens or companies from these countries are accorded the same status as Thai citizens under the FBA in respect of certain restricted businesses.

Section 4 – Documentation formalities and government approvals

4.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Thai law does not expressly provide for the effectiveness and enforceability of a submission by a debtor to the jurisdiction of a foreign court.

A Thai court will not directly enforce a judgement obtained in a non-Thai court in connection with a non-Thai law governed document without re-examination of the merits of the case. Any judgment or order obtained in a foreign court may (at the discretion of the Thai courts) be admitted as evidence in new proceedings instituted in the Thai courts.

An express written waiver of sovereign immunity will be effective.

4.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable? For instance, does collateral need to be notarised?

Except for mortgage agreements and agreements for the sale or lease of land (which in each case must be registered with the relevant land registry), no financing or project document is required to be registered or filed with any government authority in order to be valid or enforceable.

Pledges of shares will, however, require recording in the pledgor's share register in order to be enforceable.

4.3 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority?

(a) Petroleum/Gas

The Department of Mineral Fuels under the Ministry of Energy has authority over the petroleum and gas sector. This department has the authority to issue concessions which allow parties to engage in petroleum and gas exploration and production.

(b) Mining

The Department of Primary Industries and Mines under the Ministry of Industry has authority over the mining sector. This department has the authority to issue concessions which allow parties to engage in mineral exploration and mining activities.

(c) Electricity

The Energy Regulatory Commission is Thailand's independent regulatory agency, with authority over the electricity business. It's authority includes regulating electricity operators, conducting tariff reviews and regulating tariff rates, granting licences for the electricity sector, and dispute settlement.

4.4 What government approvals are required in relation to environmental concerns for typical project finance transactions? What fees and other charges apply?

Prior to undertaking any project in the petroleum and gas, mining or electricity (in the case of a power plant with a capacity of 10MW or more) sectors, a project company must complete an environmental impact assessment (EIA), submit a report to the Office of Natural Resources and Environmental Policy and Planning (ONEP) and obtain a corresponding approval from ONEP of the EIA.

Section 5 – Natural resources

5.1 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Title to natural resources resides with the Government of Thailand. Concessions may be granted by the relevant body of the Government to private parties in order to exploit these natural resources.

Concessions for exploitation of petroleum and gas resources may be awarded to foreign investors. Mineral concessions may also be awarded to foreign investors, but are subject to the relevant approvals being granted under the FBA.

5.2 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

In the petroleum and gas sector, royalties are payable quarterly and are calculated on a sliding scale of 5% to 15% of the value of petroleum and gas sold each month. The royalty may be payable either as a cash royalty or a royalty in kind payable by delivery to the Government of an amount of petroleum and gas equal in value to the cash royalty.

Royalties on minerals are calculated based on the volume of extracted mineral multiplied by the price for the relevant mineral announced by the director-general from time to time.

For both the petroleum and gas and mining sectors, annual income tax at a rate of 50% per annum of the concessionaire's net profit will be payable.

5.3 What restrictions, fees or taxes exist on the export of natural resources?

Persons wishing to export petroleum and gas must be licensed by the Department of Energy Business under the Ministry of Energy.

Persons wishing to export minerals from controlled mines must be approved by the Department of Primary Industries and Mines under the Ministry of Industry. Export approval must be applied for separately for each export.

Thai law also allows for the imposition of restrictions on natural resource exports for reasons of national security.

5.4 Can private parties grant security over any such rights in natural resources, and in the event of enforcement of that security would the local granting body be bound by that security. Would change of control in the borrower (for example, upon exercise of share security) trigger a forfeit of those rights?

Private parties may grant security over their concession rights in natural resources (such as oil and gas fields and mines). In the event of enforcement of that security, while the local granting body will generally be bound by the security, amendment to the relevant concession (and corresponding permits and approvals) may be required for such enforcement, with such amendments requiring approval by the granting body. Although, as with any governmental approval, the granting body will have discretion as to whether or not to provide such approval, approvals are generally provided.

Section 6 – Bankruptcy proceedings

6.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?

In a liquidation proceeding, the secured lender retains rights against collateral given by the debtor prior to the receivership order. Enforcement against this collateral can be achieved and the secured lender is not required to file a claim in bankruptcy unless there is a shortfall after the enforcement of security.

In a court-supervised reorganisation, upon a court's acceptance of the reorganisation petition, a secured creditor's ability to enforce its rights is subject to a stay order. Only the bankruptcy judge may permit enforcement against the security while the stay order is in effect.

6.2 Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral/security?

Certain actions of the debtor may be subject to a three-month or a one-year look-back (preference) period commencing from the date on which the judge accepts a bankruptcy or reorganisation petition. These include settling bilateral contracts where the obligations of the bankrupt debtor exceed those of the counterparty, mortgaging or pledging assets, and conducting other transactions designed to dispose of assets. These transactions may be challenged by any creditor or the court-appointed receiver or liquidator.

In a liquidation proceeding, the following categories of creditors and debts must be paid prior to payment of any unsecured creditors:

- expenses of the official receiver in managing the debtor's estate;
- fees incurred while calling in the assets;
- fees of the petitioning creditors and counsel's fees (as the court or the receiver may decide);
- taxes (including land taxes) which have become due for payment within the six months prior to the order for receivership (in reorganisations, this priority is only achieved to the extent permitted in the approved plan);
- wages of the clerks, servants, or workers of the debtor, for two months prior to the order for receivership of the assets; and,
- any other unsecured debts.

In a court-supervised reorganisation, distributions are made in accordance with the plan.

6.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?

Thai law permits enforcement of pledges and contractual quasi-security arrangements without the need for court proceedings. In practical terms, however, enforcement may be difficult for lenders without court assistance and cooperation from the relevant parties (for example, the account bank with which the assigned bank account is held).

6.4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral/security?

Before enforcing a mortgage, the mortgagee must first provide the debtor with a notice demanding payment within a reasonable period. If the debtor fails to comply, the mortgagee may enforce the mortgage by commencing legal action in court for a judgement ordering the mortgaged property to be seized and sold by public auction, or by claiming foreclosure (taking title over the property). Foreclosure is rarely used, however, given the conditions required to be satisfied. In each case a judgement debt is required to be obtained before enforcing.

Enforcement of a pledge can be made without a court order. If the debtor fails to comply with a notice from the pledgee to make payment, the pledgee may sell the pledged property by public auction.

6.5 Does the jurisdiction recognise the concepts of trustees in bankruptcy, receivership, liquidators or similar persons?

In a liquidation proceeding, once the receivership order is issued, an official receiver (who is a government official) will be appointed by the court in order to collect and sell the debtor's assets for debt settlement.

In a court-supervised reorganisation, upon a court's order allowing the reorganisation, a planner will be appointed in order to collect the debtor's assets and prepare the reorganisation plan. Once the plan is approved by a creditors' meeting and sanctioned by the court, the plan administrator shall be appointed to implement the plan.

Section 7 – Foreign exchange, remittances and repatriation

7.1 What, if any, are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

Generally, remittance of investment funds and foreign loans into Thailand are freely permitted, provided they are conducted through commercial banks and, for remittances of more than \$20,000, notification of the same is given to the Bank of Thailand. There are no taxes or duties or other government charges applicable to foreign currency exchange transactions.

7.2 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Outward remittance of funds, such as repatriation of dividends and profits, loan repayments and interest, after tax deduction, may generally be made freely through commercial banks in Thailand provided documentary evidence of the underlying payment obligation (such as a copy of the credit agreement) is supplied to the commercial bank.

7.3 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

A Thai company must repatriate foreign earnings to Thailand within 360 days of receipt, and either convert them to baht and deposit them in an authorised bank account, or deposit them in a foreign currency account with an authorised bank.

7.4 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Project companies may establish and maintain foreign currency accounts offshore and in Thailand. In order for a project company to establish a foreign currency account offshore, however, approval from the Bank of Thailand will be required.

7.5 What, if any, tax incentives or other incentives are provided preferentially to foreign investors or creditors? What, if any, taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Tax incentives or other incentives providing preferential treatment to foreign investors or creditors are generally given by the Board of Investment (BOI). Key tax incentives available include a corporate income tax exemption of up to eight years, and custom tariff exemptions for importing machinery and equipment for the project.

Other available incentives include the right to repatriate earnings in foreign currency, own land and hire skilled foreign workers.

Interest on offshore loans is subject to 15% withholding tax, subject to any reduction under any applicable double taxation treaty which Thailand is party to.

Section 8 – Other restrictions

8.1 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Bringing in foreign workers, technicians or executives to work on a project in Thailand is subject to obtaining the necessary work permits from the Ministry of Labour, the granting of which is discretionary. In order to obtain a work permit: (i) the minimum paid-up registered capital of a Thai company employer must be at least bt2 million for each foreign worker hired; and, (ii) there must be a minimum of four Thai employees for each foreign worker hired.

However, for projects which have been granted BOI privileges, waivers of the above requirements will usually be provided and work permits generally granted.



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8.2 What restrictions exist on the importation of project equipment?

Generally, most goods can be imported into Thailand to form the fixed assets of a project, although certain restrictions exist to protect domestic manufacturers, the health and safety of the public and national security.

About the author

Maythawee Sarathai is a partner of Mayer Brown JSM Thailand. With more than 10 years' experience, Sarathai has advised on a broad range of matters relating to investment in Thailand, including project development, mergers and acquisitions, corporate structures and registrations. He advises investors in the energy and oil and gas sectors, including on applications for oil and gas concessions and acquisitions, and investors in independent power projects. Sarathai has acted extensively for bank steering committees in negotiating and documenting multi-bank cross-border corporate workouts and court-supervised reorganisations in Thailand. He also advises creditors, liquidators, planners, plan administrators, special managers and debtors on all aspects of both contentious and non-contentious corporate lending, restructuring and insolvency.



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Ben Thompson is a consultant in the Singapore office of Mayer Brown JSM's global projects group. He recently joined from a magic circle firm, and has more than 10 years' experience in projects throughout southeast Asia – six of these based in Bangkok. He has advised on the development and financing of many high profile projects in the region, including the Nam Ngiep 1, Nam Ngum 3 and Xe Pian Xe Namnoy hydropower projects in Laos PDR and the Nong Saeng and Gulf U-Thai IPP projects in Thailand. Thompson has particular expertise in renewable small power producer projects in Thailand, and is also advising on a number of power projects in Myanmar. He was named a rising star in Singapore and Thailand by *IFLR1000* 2013 and 2014.