

# 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:

- 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
- 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 (such as 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 for 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; or, (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 one percent of the mortgaged amount is payable, subject to a maximum fee of Bt200,000 (\$6,200).

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 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.

### **3.3 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic/national security or other reasons?**

Yes, a government authority is entitled to block or unwind a transaction involving foreign investors after it has closed for strategic or national security, although this is rare in practice.

## **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 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?**

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.

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.

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

### **4.3 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 – Bankruptcy proceedings**

### **5.1 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.

### **5.2 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).

### **5.3 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.

## **SECTION 6 – Foreign exchange, remittances and repatriation**

### **6.1 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.

### **6.2 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.

### 6.3 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 7 – Public private partnerships

### 7.1 Is there a public private partnership act or similar statute authorising PPPs and are both Greenfield and Brownfield PPP projects permitted?

Yes. The Private Investment in State Undertaking Act (PPP Act) was enacted in 2013, replacing Private Participation in State Undertaking Act (which, unlike the new PPA Act, was not enacted with the intention of providing a legal framework for PPPs). The PPP Act covers government projects with an investment cost of Bht1 billion or above. The PPP Act is silent on the issue of whether only greenfield projects fall within its scope.

### 7.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?

Yes. Note that the concession contract itself can be used as “quasi” security by way of conditional assignment of the concession to the lender(s), and would generally be included in the security package when applying for project financing. Consent of the government or contracting authority is required.

### 7.3 Are government guaranties or other payment obligations of the government of contracting authority subject to appropriations or other periodic authorisations?

Given the long-term nature of the payment obligations for government contracts in project financings, non-appropriation clauses are not usual. Government guaranties are, however, uncommon in build-operate-transfer projects in Thailand.

### 7.4 May the government or contracting authority unilaterally amend or terminate a concession?

Generally, the concession terms themselves would prohibit the government from unilaterally amending or terminating a concession, triggering damages if this were to occur.

## SECTION 8 – National update

### 8.1 In no more than 250 words, please describe any relevant project finance developments within your jurisdiction. This can include noteworthy projects, new structures or techniques.

The political protests in late 2013/early 2014 and subsequent coup have not had a substantial impact on project financing in Thailand, with the power sector, and in particular small power projects, remaining active. Projects continue to attract financing from both Thai and international banks, in particular Japanese banks, who are willing to lend in baht as well as in dollars.

In July 2014, the new government approved a plan for further project investment focusing on infrastructure, including city rail links, additional lines for the Bangkok mass transit system, and expansion of international airports in other provinces. The majority will be executed using a build-own-operate model.



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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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#### About the author

Ben Thompson is a consultant in the Singapore office of Mayer Brown's global projects group. He has more than 10 years' experience in project financings throughout Asia – with six years based in Bangkok. He has advised both sponsors and lenders on a number of high profile power 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 Rojana IPP projects in Thailand. Thompson also has substantial experience in Indonesia and has been advising on a number of projects in Myanmar. He was named a 'rising star lawyer' in Singapore and Thailand by *IFLR1000* 2013 and 2014.