

CLIENT UPDATE 2016 JULY-SEPTEMBER

Legal Developments in Thailand

Thailand Legislation Update

Business Collateral Act

The Business Collateral Act B.E. 2558 (2015) (“BCA”) came into effect on 2 July 2016 and substantially added to the traditional and limited forms of security previously available under the Thai Civil and Commercial Code.

Key changes include the following:

- A valid security interest can now be created over business as an ongoing concern, accounts receivable, inventory, intellectual property, as well as other assets which will be prescribed by Ministerial Regulations.
- Whereas certain moveable property normally used in business operations (such as equipment, machinery, feedstock, etc.) were previously required to be delivered to the creditor in order to create and perfect the security interest thereon, the BCA now allows the borrower to retain possession of those assets and continue making use of them.
- Non-court enforcement options have been introduced, which were previously unavailable.
- Written agreements evidencing the secured transaction must be registered with the Ministry of Commerce, which has expressed confidence in the potential positive benefit of this new law on SMEs.

Interestingly, it has been reported that 70% of SMEs in Thailand use their land as collateral, with the remainder using other assets. In developed countries, 30% use land as collateral.¹ The BCA is expected to dramatically change these statistics in the short-term.

If you would like more information on this development, please contact:

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Bankruptcy Act

Recent amendments to the Bankruptcy Act have also focused on improving the ability of SMEs and individuals to access rehabilitation proceedings provided for under the Bankruptcy Act.

Rehabilitation was a key amendment to the Bankruptcy Act made in response to the 1997 financial crisis, and has been pivotal in allowing debtors to obtain a stay preventing creditors from seizing their assets while seeking to rehabilitate their business. However, the requirement for a minimum debt of THB10 million, coupled with the fact that debtors such as natural persons and partnerships could not access its provisions, has substantially limited its usefulness for certain types of businesses.

Effective 25 May 2016, the amendments will allow the following debtors to have access to rehabilitation proceedings:

- Natural persons with a minimum debt of THB 2 million;
- Juristic bodies and partnerships (limited liability or registered/unregistered) with a minimum debt of THB 3 million; and
- Private limited companies with no less than THB3 million and no more than THB 10 million in debt.

¹ <http://www.bangkokpost.com/business/finance/1027773/sought-after-legislation-removes-barriers-to-smes>.

CLIENT UPDATE

2016 JULY-SEPTEMBER

The debtor who is entitled to access rehabilitation proceedings must be a small or medium sized enterprise under the law governing small and medium enterprises promotion, and be duly registered with the Office of Small and Medium Enterprises Promotion or other agencies.

The amendments do not only rely on the concept of “insolvency test” but, rather, the circumstances of “the inability of the debtor to pay debt” as further described in the Act.

The rehabilitation process for these debtors will be different from the original rehabilitation process. For example, it requires that the rehabilitation plan must be prepared in advance of the rehabilitation application and an affirmative vote of two-thirds of the creditors must be obtained at the time of filing the rehabilitation application.

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Customs Act

On May 24, 2016, the Customs Department announced Customs Notification No. 67/2559 re: Rules on appeal against duty assessment, request for a stay of duty payment and detention of goods under customs custody.

The right to request for a stay of duty payment pending appeal consideration is generally provided under Section 112 of the Customs Act B.E. 2469 (1926) (“**Customs Act**”); however, the process to request such a stay is unclear. This recently issued Notification sets out the process required to be followed in order to request for a stay of duty payment during appeal consideration by the Customs Department’s Board of Appeal (“**BOA**”) or the Court.

In brief, the stay request (in the required form) must be submitted to the authority which issued the notice of assessment within 30 days from the date of submission of the appeal or further appeal to the Court. A stay request must be accompanied by collateral equivalent to the duty amount, as well as surcharges payable. Collateral can be in the form of cash, bank guarantee, government bond or a bank book with a consent letter and a letter freezing the account, or other assets as deemed appropriate by the Director General of the Customs Department.

The stay request must be considered by the Customs Department within 30 days from the receipt of a complete set of documents, or within an extended period of 30 days in case of necessity. Where the stay is approved, the result, together with a stay period, would be notified to the applicant within 30 days from the date of approval. Where the stay is not approved, the result, together with the reason, would be notified to the applicant within 30 days from the date of determination, in which case, the applicant would be required to pay the duty and surcharge within 30 days from the date of receipt of such result. Failure to make payment would result in the Customs Department having the right to detain the goods of the applicant.

If you would like more information on this development, please contact:

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CLIENT UPDATE

2016 JULY-SEPTEMBER

Enforcement Trends

Establishment of a Corruption Court

On 16 August 2016, the Act to establish a Criminal Court for Corruption and Misconduct Cases was published in the Royal Gazette and became effective the following day.

The Criminal Court for Corruption and Misconduct Cases will be a Court of First Instance and is intended to hear “Corruption and Misconduct Cases” against State Officials, as well as against other persons, whether as a principal, instigator, supporter or accomplice. In brief:

- A “State Official” means State Officials, Foreign State Officials, and International Organization Officials under the Organic Act on Counter Corruption, the law on administrative measures for the prevention and suppression of corruption, and includes the Official under the Penal Code.
- “Corruption” means corruption under the Organic Act on Counter Corruption, the law on administrative measures for prevention and suppression of corruption, or other Organic Acts or other laws.
- “Misconduct” means an act that is not Corruption, but the performance or omission of a particular act on account of such person committing the offence having the position or duty, which violates the laws, rules, regulations, orders, or Cabinet Resolutions aiming to control the acceptance, keeping, or expenditure of money or property of the State.

The Corruption Court is expected to commence operation on 1 October.

We expect that the establishment of a Corruption Court will facilitate the trend towards greater enforcement of anti-corruption investigations and cases against officials and private parties who act as principals, instigators, supporters or accomplices.

Proposed Amendments to the Trade Competition Act

A draft amendment to the Trade Competition Act B.E. 2542 (1999) (“TCA”) will soon be presented to the Cabinet for consideration. The amendment would introduce broad changes to the TCA and is likely to trigger greater enforcement, a trend which we have seen developing over the past 18 months.

In addition to providing additional power and authority to the Office of Thai Trade Competition Commission, significant changes include extending the scope of the TCA to cover certain state enterprises and affiliated companies of business operators, specifying the criteria for triggering the application of the merger control provisions and amending the penalties for violating the substantive prohibitions in the TCA.

Importantly, the proposed amendments also provide for the establishment of a leniency programme in cartel cases, in line with international trends.

If you would like more information on either the new Corruption Court or the proposed amendments to the TCA, please contact:

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CLIENT UPDATE

2016 JULY-SEPTEMBER

Announcement

New Banking & Finance Partner in Thailand: Piroon Saengpakdee

We would like to welcome our new Banking & Finance partner, Piroon Saengpakdee, who joins the firm after more than twenty-five years in international law firms in Thailand.

Piroon has represented both major Thai banks and foreign lenders in transactions involving a wide range of industries in Thailand, Lao PDR and Myanmar: energy and resources, infrastructure, manufacturing, as well as telecommunications and technology companies. Piroon has substantial expertise in debt restructuring and insolvency proceedings, having advised creditors and debtors in restructurings involving companies in industries sectors such as telecommunications, infrastructure and real estate. Prior to commencing his private law firm legal career, Piroon spent time with the Council of the State and the Department of Labour Protection.

Piroon can be contacted at piroon.s@rajahtrann.com

Other Useful Thailand Resources

Practical Law

Employment and Employee Benefits in Thailand: Overview

Authors: Rajah & Tann Partners Sui Lin Teoh, Supawat Srirungruang, and Saroj Jongsaritwang, and Senior Associate Yingrak Treesaranuwattana, have drafted the Thailand chapter, which forms part of the Practical Law global guide to employment and employee benefits law. From Practical Law:

“The Q&A gives a high level overview of the key practical issues including: employment status; background checks; permissions to work; contractual and implied terms of employment; minimum wages; restrictions on working time; illness and injury; rights of parents and carers; data protection; discrimination and harassment; dismissals; redundancies; taxation; employer and parent company liability; employee representation and consultation; consequence of business transfers; intellectual property; restraint of trade agreements and proposals for reform.”

The Q&A can be downloaded in PDF format at: <http://uk.practicallaw.com/8-617-6522?q=thailand>

Practical Law

International Trade and Commercial Transactions in Thailand: Overview

Authors: Rajah & Tann Partners Surasak Vajasit, Melisa Uremovic, Pakpoom Suntornvipat and Supawat Srirungruang, with the assistance of Senior Associate Suwapak Jaru-ampornpan, have drafted the Thailand chapter, which forms part of the Practical Law International Trade and Commercial Transactions Global Guide. From Practical Law:

“The Q&A covers key matters relating to sale of goods contracts, including rules on formation, price and payment, delivery, passing of title and risk, variation and assignment, enforcement and remedies, exclusion of liability, choice of law and jurisdiction, and arbitration. It also provides an overview of the rules governing storage of goods, imports, trade remedies, exports and international trade restrictions.”

The Q&A can be downloaded in PDF format at <http://uk.practicallaw.com/5-617-8810>

CLIENT UPDATE 2016 JULY-SEPTEMBER

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CLIENT UPDATE

2016 JULY-SEPTEMBER

ASEAN Economic Community Portal

With the launch of the ASEAN Economic Community (“AEC”) in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch “Business in ASEAN”, a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN’s business landscape. Of particular interest to businesses is the “Ask a Question” feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at <http://www.businessinasean.com/>.

CLIENT UPDATE 2016 JULY-SEPTEMBER

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CLIENT UPDATE 2016 JULY-SEPTEMBER

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Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Rajah & Tann (Thailand) Limited.
