

# บริษัท ที่ปรึกษากฎหมายแซนด์เลอร์และทองเอก จำกัด

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### PROJECT FINANCING IN THAILAND

Project financing is a well-established method of financing major projects in Thailand, in both the private and public sectors.

Recent examples of major project financings include:

<b>Chiengrai Solar</b>	Baht 875 million project financing of solar VSPP (signed June 2011)
<b>Biomass Electricity</b>	Baht 8,018 million project financing wood chip SPP (June 2011) Baht 875 million project financing of solar VSPP (signed June 2011)
<b>Akara Mining</b>	USD 100 million project financing of the expansion of a gold mine (signed May 2011)
<b>Bangpa-In Power</b>	Baht 5,033 million project financing gas-fired SPP (signed March 2011)
<b>Hongsa</b>	USD 2,762 million financing of 1,876 MW lignite fired power plant in Lao PDR (closing 29 October 2010)
<b>General Motors</b>	Baht 13.5 billion financing of new truck, SUV and diesel projects (December 2009)

This paper assumes the reader is familiar with project financing in general, and is limited to a summary of the unique elements of Thai project financings.

No special government approvals are required for project financings, other than the usual approvals associated with unsecured loan transactions, security by way of mortgage and licensing required under Thai laws. The liberalization of exchange controls in the early 1990's has largely eliminated concerns about exchange controls in project financings, although Bank of Thailand approval is required for the opening of offshore bank accounts by Thai borrowers. BoT has recently declined to approve requests to open offshore reserve accounts.

No Thai government guarantees have been available in recent years, even for projects involving state enterprises as borrowers.

Assuming more than one lender group (for example, foreign commercial bank lenders, Thai commercial bank lenders, export credit agencies, and international financial institutions), there will usually be a need for a separate security or inter-creditor agreement between lenders, security agents and borrower, setting forth the details of security, timing of establishing security interests, coordination and voting procedures, procedures for enforcement of security, and sharing of proceeds from enforcement of security and insurance.

There are a number of differences between U.S. law market practice, English law market practice and Thai law market practice, which need to be addressed.

The governing law issue is frequently resolved in practice in favor of foreign law to govern the common terms agreement and foreign credit agreements. Foreign law will also govern certain security, such as charges over foreign bank accounts, guarantees of foreign persons and assignments of project documents governed by foreign law. Thai law will be the governing law under Baht credit agreements and security documents re property and rights in Thailand.

Prior to 1998, the Thai Bankruptcy Act did not include provisions similar to Chapter 11 under U.S. bankruptcy law or equivalent provisions to facilitate a work-out in case the borrower became insolvent. In practice, this gave rise in project financings to a requirement for assignments of rights under project documents in favor of a substitute entity to be nominated by the lenders. However, because most licenses and permits associated with a major project cannot be transferred, the enforcement of security by way of assignment will leave certain licensing and tax issues to be addressed.

In 1998, the Thai Bankruptcy Act was amended to provide for reorganization proceedings. Further amendments in 1999 were enacted to resolve issues which had not been adequately addressed in 1998. On June 18, 1999 the new Bankruptcy Court opened. Work-outs are now usually conducted under reorganization proceedings instead of exercise of rights under assignments of rights to substitute entities.

### **Promotion of Renewable Energy Projects**

- 1. Policies re Renewable Energy:** On 26 December 2006, the National Energy Policy Council (NEPC) approved Electricity Generating Authority of Thailand (EGAT) purchasing power from generators using renewable energy, and instructed EGAT to revise its regulations for purchase of power from Small Power Producers using renewable energy. On 20 July 2010, the Thai Cabinet approved resolutions of NEPC adopted on 28 June 2010, including NEPC's guidelines for coordination and follow-up of promotion of renewable power production in compliance with the policy, and establishment of a committee comprising representatives from such related agencies of Ministry of Education and National Economic and Social Development Board, and to approve a Feed-in Tariff system.
- 2. 15-Year Alternative Energy:** On 28 January 2009, the Cabinet approved a 15-year alternative energy plan, and on 9 March 2009, the National Energy Policy Committee approved additional tariff "adders" for certain categories of alternative energy. The announced goal was for renewable energy to constitute up to 20% of total energy consumption by 2022. Both EGAT and the Provincial Electricity Authority (PEA) have published "adder" tariffs for renewable energy producers. The Department of Alternative Energy Development and Efficiency (DEDE) is responsible for implementation of the alternative energy plan. See its website at [www.dede.co.th](http://www.dede.co.th).
- 3. Carbon Market Financing:** There is a growing market for carbon market finance. Thailand established a Designated National Authority (DNA) to manage CDM projects, currently the Thailand Greenhouse Gas Management Organization (TGO). 138 letters of approval for CDM projects have been issued, and there are 53 registered Thai CDM projects, as of 7 July 2011.

### **Forms of Security in Thai Project Financings**

Thai law provides traditional forms of security, i.e. mortgages of land and buildings, pledges, mortgages of registered machinery, and sales with right of redemption. There is no equivalent of a "floating charge" on inventories or work-in-progress, or "charge" on a bank account. Certain classes of creditors have "preferential rights" under the Civil and Commercial Code ("CCC").

A draft secured lending bill was drafted by the Ministry of Justice in the late 1990's and was given priority status by the MoF and BoT. This bill provided for non-possessory security interests over a range of property. On 9 July 2009 the Cabinet approval the bill in principle, and it is currently under review at the Council of State. The bill has not been introduced in Parliament.

Below is a listing of unique features re security in Thai project financings:

- Limited forms of security: mortgage, pledge, right of retention, or creditor possessing preferential rights in nature of a pledgee. (Bankruptcy Act).
- No floating charges; i.e. no security over moveable property (with exceptions)
- No title insurance
- No “trustees”
- No mortgages of leaseholds or reclaimed land
- No assignment of “obligations”
- Differences in mortgage registration process (land vs. machinery)
- Fixing the “mortgage amount” in Baht currency
- Reinsurance (95% or more)
- No “pledge substitution” concept
- Interpretations under Foreign Business Operations Act re inter-company loans, guarantees, leases, etc.
- Bi-lateral investment treaties (approx. 30 in force); and ASEAN Investment Promotion Treaty (not in force).
- No specific security interest in bank accounts

Elements of a security package in a major industrial project in Thailand may include some of the following:

- (1) **Mortgage of land and buildings.** In the case of projects constructed on leased land, a conditional assignment of the land lease may be feasible. An approval of the MoF was required for foreign banks to be mortgagees under a land mortgage, but this rule was cancelled on 3 August 2008.
- (2) **Mortgage of registered machinery.** The mortgage may only be registered after import and installation of the machinery, and after registration of ownership of the machinery under the Machinery Registration Act.
- (3) **Interim security on imported goods by way of pledges.** This form of security is required to cover the gap in time between import of machinery and construction materials, and registration and mortgage of the machinery or mortgage of a building.

Thai counsel are divided as to whether this form of security is effective. A pledge poses practical problems in having to trace specific imported goods for the entire period until the time of mortgage of machinery. There is the need to maintain possession in a third party (e.g. construction contractor) on behalf of the pledgees. Issues of liabilities and indemnities often arise to frustrate these arrangements. To the extent that lenders are interested primarily in post-completion security, this element is not applicable.

- (4) **Guarantees and/or cost overrun agreements by shareholders, and completion guarantees by contractors or sponsors.**
- (5) **Take or pay agreements or other offtake agreements with customers.**
- (6) **Assignments of rights under contracts.** It is Thai practice for banks to require immediate or conditional transfers of rights and obligations of all major contracts, to hopefully facilitate a “workout” utilizing a substitute project vehicle. Under Thai law only rights (not obligations) may be assigned, with consent of or notice to the debtor. A novation is required in the case of an assignment of obligations.

Thai counsel have reservations about the practicability of enforcing such assignments of “rights” which involve activating a new project vehicle, because few of the licenses and permits which will be obtained by a project owner are transferable. A BOI promotion certificate is not transferable.

Customs duty and business tax may be payable on goods imported duty free, if they are transferred within 5 years.

Thai counsel also have reservations about the enforceability of immediate transfers of rights in cases in which the borrower retains any significant rights over the assigned property.

- (7) **Insurance, on terms and conditions approved by lenders, with “loss payee” clauses under insurance policies and/or assignments of insurance.** In some cases banks seek an interest in reinsurance by way of “cut through” clauses or assignments. The rights of beneficiaries under “loss payee” clauses are reinforced by the rights of third party beneficiaries under the CCC.
- (8) **Pledges of stocks and other movables.** Establishing a pledge requires satisfaction of elements of a pledge as prescribed in the CCC, including pledge of “specific goods”, and possession of the goods in the pledgee or third party. There is no “pledge substitution” concept under Thai law.

In major project financings in Thailand, the use of pledges on inventories has been explored in depth, but is usually rejected for practical considerations. In smaller projects informal pledges of inventories are established, utilizing segregated areas of factories with signage and nominal third-party supervision. Thai counsel have reservations about the validity of the pledge of inventories or machinery because the degree of control which the pledgor retains over the pledged property.

- (9) **Assignments or pledges of bank accounts and cash control arrangements, such as joint signature requirements, pledge of commercial paper, etc.** There are mixed views on the validity of assignments and pledges of bank accounts, compared to rights of set off.
- (10) **Custody of important documents, such as insurance policies, title documents, etc.**
- (11) **Assignment of receivables.** As in item (6) above, the consent of or notice to the debtor is required to perfect an assignment.
- (12) **Derivative instruments and swaps for hedging.**

There is some use of paying agents/trustees/escrow agents, although there are legal and tax uncertainties. Offshore reserve accounts in foreign exchange were common, and required approval by the Bank of Thailand on a case-by-case basis; the Bank of Thailand adopted a policy not to approve offshore reserve accounts in 2005.

There are 3-month and 1-year preference periods under the Bankruptcy Act, which create legal uncertainties in the case of transfer of rights and certain other of the above forms of security. However, these forms of security may have value, such as blocking attachments by third parties, outside the bankruptcy context.

Taking pledges of the shares of borrowers in major projects is common.

Major projects in Thailand are usually promoted by the Board of Investment (“BOI”) under the Investment Promotion Act, B.E. 2520. Conditions of promotion include a requirement for BOI consent to mortgage of machinery which has been imported exempt from customs duty. A statutory exchange assurance is available to foreign lenders under the Act, subject to a routine approval of the BOI.

### **Legal Opinions in Thai Project Financings**

Legal opinions issued in connection with project financings in Thailand contain a number of qualifications, some of which are common to those found in English law or New York law legal opinions in similar transactions. Qualifications unique to Thai projects deal with the following subjects:

- An assignment does not fall within the definition of “security” under the Bankruptcy Act. The effect of an assignment is similar to that of a transfer of ownership, and is subject to revocation under the preference provisions of the Bankruptcy Act.
- Thai law is silent on the admissibility in evidence and enforceability of a document signed in counterparts.
- The validity of obligations to reimburse legal fees in the event of a court case in Thailand is uncertain.
- Conditions of admissibility of documents into evidence is that stamp duty has been properly affixed and that Thai translations be provided for documents in a foreign language.
- The purchase of foreign exchange is subject to approvals of authorized agents of the Bank of Thailand.
- Generally, the charging of interest on interest is prohibited except where the lender and borrower have agreed that interest due for not less than one year shall be added to the capital and the whole shall bear interest.
- Certain documents must be executed in the Thai language, such as mortgages.
- Consent of the BOI is required to mortgage machinery which was imported under duty exemption or reduction.
- The assets of state enterprises are immune from execution in Thailand.
- Thai law is silent on the legal effect of a submission to the non-exclusive jurisdiction of foreign courts, waivers of objections to venue, and judgement currency indemnities.
- The appointment of an agent may be revoked.
- The ceiling on interest on foreign loans is 20% p.a.
- The choice of foreign law will be recognized, but only to the extent to which the law chosen is proved to the satisfaction of the court, and is not contrary to the public order or good morals of the people of Thailand.
- A judgement of a foreign court is not enforceable in Thailand, but is admissible in evidence in legal proceedings in Thailand. A foreign arbitration award is enforceable, subject to defences in under the Arbitration Act (2002).
- A money debt expressed in a foreign currency may be paid in Baht.
- Enforceability of pledges of bank accounts, and judgment currency indemnities, are uncertain.
- Thai courts have power to award legal fees and costs in their discretion, subject to ceilings in the Civil Procedure Code. The enforceability of covenants to reimburse legal fees is uncertain.
- The Act on Unfair Contract Terms give Thai courts broad authority to invalidate unreasonable contractual provisions under certain circumstances.

The security available under Thai law and documentation associated with project financing have become well-understood by major foreign lenders to Thai projects. Nevertheless, it is strongly recommended that

termsheets for proposed project financings spell out the elements of the security package in detail, in order to avoid misunderstanding at later stages, particularly in financings which include foreign lenders who have not had any past experience in Thai project financings.

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