

# Call in for a Coffee

RSM Nelson Wheeler, Thailand

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## Introduction

Welcome to RSM's eleventh edition of "Call in for a Coffee". As a result of the recent revival of the economy in Thailand, the Thai Government has proposed several policies for discussion to encourage and assist Thai businesses particularly in industrial sectors. One proposed governmental initiative is to increase the numbers of and types of assets that can be used as collateral to obtain finance.

## Collateral Assets - Example

One example of the types of new collateral assets used against borrowings was liquor located at warehouses belonging to Khun Charoen Wattanasiri. Khun Charoen Wattanasiri is the owner of many leading Thai hotels including the Plaza Athenee and the Imperial Queen's Park. The result of this governmental initiative was to allow swifter business growth to Khun Charoen's business.

## Government Legislation

During 2002, the Thai Government drafted a bill called "The Business Collateral Bill" to assist entrepreneurs with securing capital to finance their business.

## Definition of "Contract of business collateral"

The "contract of business collateral" can be defined as a contract where a party called "a collateral provider" registers its assets to another party called "a collateral receiver" whereby a guarantee is provided for the settlement of such debt without the requirement for the assets to be physically provided to the collateral receiver.

If these collateral contracts are capable of being enforced, they must be registered with the Registrar of Business Collateral.

To enable the enforcement of a collateral contract for non performance, it is necessary that both parties were signatories to the contractual agreement and that such agreement is ethical and in the interest of the public.

## Types of assets that can be used as collateral

The types of assets that can be used as collateral include but are not constrained to the following:-

- (1) **Businesses:** To register a business as collateral, the provider is required to appoint an authorised executor(s) to seize the collateral if non performance of the contract occurs.
- (2) **Claims:** To register a claim as collateral, the provider is required to prove the existence of such a claim.
- (3) **Business assets:** Assets supporting the business operations which may include machinery, inventory and raw materials used in production lines can be registered as collateral.
- (4) **Immoveable assets** from the real estate business of a provider.
- (5) **Other assets:** As declared in Ministerial Notifications on collateral.

## Duties and obligations of collateral providers and collateral receivers

The registration of business collateral creates certain duties and obligations that will apply to collateral providers and collateral receivers and which are as follows:-

- (1) The provider is entitled to possess, use, exchange, distribute, dispose, mortgage or alternatively to use such assets as collateral for the purpose of manufacturing or combining such assets used with other assets. However, collateral if provided, cannot be pledged as security for further debt repayment obligations.
- (2) The provider is required to maintain business assets held as collateral in good working condition and is liable for any defects caused by his/her acts.
- (3) The provider is required to prepare an account listing all business assets held as collateral in accordance with Ministerial Notifications.
- (4) The provider is required to allow the receiver or his agent to inspect the condition of business collateral assets provided that at least 3 days advance notice is provided.
- (5) The provider is entitled to redeem the business collateral provided that all contractual terms have been met.

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- (6) The collateral receiver has preference status over other ordinary secured or unsecured creditors with respect to collateral received.
- (7) The terms of 6 above also apply to combined assets provided as collateral.
- (8) The receiver is entitled to any gains from the business collateral either from its distribution, exchange, or replacement of the distributed or sold collateral or compensation from such sale or distribution.

#### **Pledge, Mortgage and Collateral Distinctions**

- A person receiving a pledged asset is entitled to use that asset for the period the asset is pledged.

A pledged asset can be used by the pledgee for that period of time that the asset is pledged. The pledgee can redeem the pledged asset prior at the end of the pledged period of time.

Collateral is different insofar as the collateral provider is entitled to distribute the assets that are subject to collateral at any time.

- A mortgage can only be provided for immovable assets.

#### **Governing Law with respect to the seizure of business collateral**

Business collateral may be seized in accordance with the terms and conditions under the prospective business collateral contract, or alternatively the civil and commercial code. This of course is dependent on this legislation coming into effect in the future.

#### **Qualifications of an authorised executor to seize business collateral**

In order for an authorised executor to be able to seize business collateral, he or she must: -

- (1) Be a licensed expert either as a lawyer or accountant with experience in business management, asset control & appraisal in accordance with Ministerial Notifications.
- (2) Be licensed in accordance with Ministerial Notifications and be approved by the Registrar of Business Collateral, respectively.

#### **Means whereby the extinguishment of “Contract of business collateral” can occur: -**

- (1) When the debt is settled within the prescribed period.
- (2) The provider and the receiver agree to end the “Contract of business collateral” in writing.
- (3) The business collateral is redeemed.
- (4) Either the business collateral is seized or alternatively, it is distributed to the collateral receiver in settlement of the debt.

RSM will advise readers of any further developments with respect to the proposed legislation.

#### **RSM News**

RSM is proud to announce that Mr. Mark Butters has been promoted to Director of its Business Services Division effective 1<sup>st</sup> July 2003.

#### **Free Consultation**

If you have financial, legal or other problems that require innovative solutions, please contact the RSM team and “Call in for a coffee” for a free consultation.

#### **Our Team**

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