

Dealing with the Problem of Mortgage and Pledge over the Same Property

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การแก้ไขปัญหำจำนองและการจำนำเหนือสิ่งหำริมทรัพย์เดียวกัน Dealing with the Problem of Mortgage and Pledge over the Same Property

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บทคัดย่อ

จำนองและจำนำเป็นสัญญาประกันหนี้ซึ่งเกิดขึ้นจากข้อตกลงระหว่างเจ้าหนี้กับเจ้าของทรัพย์สิน อันเป็นการก่อให้เกิดผลทางกฎหมายโดยมีผลให้ผู้กู้ทำให้ทรัพย์สินนั้นเป็นวัตถุในการประกันหนี้ ข้อผูกพันนี้เป็นการประกันได้ว่าหนี้จะมีการชำระจากทรัพย์สินที่มีการประกันหากลูกหนี้ไม่ชำระหนี้ตามสัญญา แต่ไม่ว่าอย่างไรก็ตาม มีทรัพย์สินบางอย่างที่สามารถจะเป็นประกันทั้งการจำนองก็ได้และการจำนำก็ได้ ทรัพย์สินเหล่านี้เรียกว่าสิ่งหำริมทรัพย์ชนิดพิเศษ หรืออาจพูดอีกนัยหนึ่งได้ว่าสิ่งหำริมทรัพย์ชนิดพิเศษนี้สามารถที่จะนำไปจำนองและจำนำได้ ดังนั้นปัญหาที่ควรจะต้องคิดต่อไปก็คือ 1) เราสามารถที่ทำสัญญาจำนองและสัญญาจำนำเหนือทรัพย์สินเดียวกันได้หรือไม่ 2) อะไรจะเกิดขึ้นหากมีใครบางคนนำรถยนต์ไปจำนองแล้วนำไปจำนำต่ออีกหลังจากนั้น 3) จะเป็นไปได้หรือไม่หากสัญญาที่กล่าวถึงจะถูกทำขึ้นในทางกลับกัน 4) ผลในทางกฎหมายคืออะไร 5) ใครเป็นผู้มีบุริมสิทธิดีกว่า โดยส่วนใหญ่แล้วกฎหมายที่เกี่ยวกับจำนองและจำนำได้ถูกบัญญัติไว้ในประมวลกฎหมายแพ่งและพาณิชย์ แต่ไม่มีบทบัญญัติไหนที่ระบุถึงการแก้ปัญหาลำเนา

จากเหตุผลที่กล่าวมา บทความที่จะกล่าวต่อไปนี้จะอธิบายถึงหลักการของจำนองและจำนำและการที่สัญญาเหล่านี้ผูกพันต่อคู่สัญญา นอกจากนั้นบทความนี้จะแสดงให้เห็นถึงความขัดแย้งที่เกิดขึ้นระหว่างสัญญาจำนองและจำนำโดยเฉพาะอย่างยิ่งปัญหาที่เกิดขึ้นหลังจากเมื่อหนี้ที่เกิดขึ้นตามสัญญาจำนองและจำนำทับซ้อนกันเหนือทรัพย์สินเดียวกัน โดยสุดท้ายผู้เขียนจะได้นำเสนอถึงแนวทางแก้ไขปัญหาลำเนา และบทสรุปที่ดีที่สุดในการแก้ไขปัญหาลำเนา

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Abstract

Mortgage and pledge are secured contracts that are created by an agreement between a creditor and the owner of a property in order to establish a legal effect that binds such property as security for a loan. This guarantees that payment will be made out of the property if the debtor fails to perform on the contract. There are some objects of mortgage that are also subject to pledge. These are items that are known as special movable properties. In other words, special movable properties may be subject to either mortgage or pledge. As a result, the following questions are raised: 1) Can we make contracts of mortgage and pledge over the same property? 2) What will happen if someone mortgages his car and subsequently pledges it in a separate contract? 3) Can this be done in the opposite order? 4) What are the legal effects to the parties? 5) Who is afforded preferential rights? Laws concerning these contracts are provided in the Civil and Commercial Code of Thailand, but, none of them deal with these problems.

This article will describe the principals of mortgage and pledge in Thailand and discuss the various ways in which the contracts bind the parties. In addition, this article will clarify the legal primacy where there are conflicting mortgage and pledge obligations. In particular it will examine the problems that occur after the securing of overlapping mortgage and pledge contracts over the same property. Lastly, I will suggest solutions together with proposed bills to cope with these problems and offer a conclusion as to which one is the best result.

คำสำคัญ : จำนอง, จำนำ, สหกรมทรัพย์ชนิดพิเศษ

Keywords: mortgage, pledge, special movable property

1. Introduction

The principle of mortgage in the Civil and Commercial Code of Thailand, Section 702., paragraph one, states that, “[a] mortgage is a contract whereby a person who is called the mortgagor assigns the property to another person who is called a mortgagee as a security for the payment of a debt without giving a possession of his property to the creditor.” This provision means that a mortgage is a security contract that can be executed without giving possession of the property to the creditor. Therefore, such a property remains in the possession of the owner. This security contract enables the owner to use his property in his daily life even though it is bound to warrant the debt.

There are several kinds of properties which can be mortgaged. The Civil and Commercial Code of Thailand, Section 703., paragraph one, states that, “[t]he immovable property of any kinds can be mortgaged.”. Furthermore, paragraph two of this provision states that, “[t]he following movable properties can be mortgaged, if they are registered according to the law:

- “1) A ship or vessel which size is five tons or bigger;
- 2) A floating house;
- 3) A beast of burden; and
- 4) Any other movable property as specified by law”

This provision means that there are some kinds of movable properties that also can be mortgaged. In addition, machinery and automobiles are included in subsection four of this Section as items specified by other laws which include Machinery Regulation Act B.E. 2514 (1971) and Vehicle Act B.E.2522 (1979). These properties are usually called special movable properties. **In short, there are two kinds of properties that can be subject to mortgage, which are immovable and special movable properties.**

Regarding a pledge, the definition of a pledge is found in the Civil and Commercial Code of Thailand, Section 747., which states that, “[a] pledge is a contract whereby a person who is called the pledgor delivers possession of movable property to another person who is called a pledgee to secure the

payment of the debt.” This means that the principle of pledge is that the pledge is a security contract that can be formed by giving possession of property to the creditor. In addition, this Section also means that **there is only one kind of property that is subject to the pledge, which is movable property.** The movable property can be any kind of property that is movable, such as computers, televisions, motorcycles and so on. Hence, this would also include special movable properties, which are the objects that are listed in the Civil and Commercial Code of Thailand, Section 703., paragraph two, as aforementioned in paragraph one.

2. The overview of problems that may occur when mortgage and pledge over the same property

Based on the aforementioned, when a comparison between the objects of mortgage and those of pledge is made, it is found that **the type of property which can be either mortgaged or pledged is special movable property.** Thus, the question is raised whether special movable property may be mortgaged and then pledged, or whether the same property may be pledged and then mortgaged. What is the consequence of the law when someone mortgages his car and then pledges it later, or it is done in reverse order? There is, however, no law to cope with this problem. At this juncture, the first thing that should be taken in to account is whether allowing or not allowing one property to secure two debts is appropriate.

2.1 In the case where the law should not allow mortgage and pledge over the same property.

There are a few reasons that mortgage and pledge over the same property should not be allowed by law. The first consideration is that there would be two creditors, being the mortgagee and the pledgee. These creditors usually do not know if the property has been pledged or mortgaged before. Secondly, since there are two creditors over the same property, which one possesses the right more

preferable to the other? These problems are complicated and difficult to deal with. Thus, mortgage and pledge over the same property should not be allowed by law. The next question is how to devise a law to prohibit this problem. This will enable all Thai people to learn that making two secured contracts over the same property is unlawful.

In order to improve this provision, the first consideration that must be taken into account is: should there be a modification of a current law or the introduction of a new law? For this question, modifying the current law is more suitable, because most parts of the law relating to mortgage and pledge are provided in the Civil and Commercial Code of Thailand. Hence, a modification of the Civil and Commercial Code of Thailand is needed. Then, the next question to be taken into consideration is: to which Section of the Civil and Commercial Code of Thailand add the new provisions? The laws of mortgage are usually founded in the Civil and Commercial Code, from Section 702 to 746. They are arranged in priority order. The first part of this law, Section 702 to 714, consists of general provisions. Section 714. states that, “[a] contract of mortgage must be made in writing and register by the competent official.” Therefore, a new provision should be added, as Section 714/1., in order to prohibit the making of a contract of pledge after a contract mortgage.

Regarding the amendment of a pledge, the principal of pledge is found in Section 747. In addition, Section 748. refers to the allocation of the money after the pledged property is sold in public auction. And, Section 749. explains that the parties to the pledge can agree that the pledged property can be kept by the third party. Then, Sections 750. to 757. refer to the pledge of the instrument. Thus, a new provision must be added, as Section 749/1., to prohibit the making of a contract of mortgage after a contract of pledge.

For all reasons stated above, the Civil and Commercial Code of Thailand should be modified by adding Section 714/1. and Section 749/1. to this law. Section 714/1. should state that when the property is mortgaged, it cannot subsequently be pledged. Also, Section 749/1. should state that when the property is pledged, it

cannot subsequently be mortgaged. The drafted law should be proposed as follows:

Drafted law
for
Amendment of Civil and Commercial Code of Thailand (issue)
B.E.

Where it is deemed to be appropriate to amend the Civil and Commercial Code of Thailand.

Section 1. This Act shall be called Amendment of Civil and Commercial Code of Thailand (issue)

Section 2. This Act will come into force the day after its publication in the government gazette.

Section 3. The following statement will be added as section 714/1 into the Civil and Commercial Code of Thailand:

“When the mortgagor mortgages the property, he cannot pledge such a property while the mortgage contract is still in effect.”

Section 4. The following statement will be added as section 749/1 into the Civil and Commercial Code of Thailand

“When the pledger pledges the property, he cannot mortgage such a property while the pledge contract is still in effect.”

.....

In conclusion, amending the current law as stated above would be the most straightforward way to deal with the problem because the creditors will not have to worry that a special property that they receives has been pledged or mortgaged previously. Also, there is no inferior creditor to be concerned about, and no burden of proof for these creditors to comply with. This would be in favor of creditors. On the other hand, there are some disadvantages. Firstly, the proposed bill would deny the debtor the right to seek latter creditors. Secondly, the debtor could not gain

additional capital. Thirdly, there would be some legal rules that would need to be complied with. The said rules will be discussed later in item 2.2

2.2 In the case where the law should allow mortgage and pledge over the same property.

As mentioned in the last paragraph, since there are some disadvantages to amend the current law to prohibit a latter secured contract, a new bill should be introduced in order to cope with the problems. Hence, these are several reasons why the law should support a mortgage over the same property.

Firstly, Thailand has a mixed economic system, like most countries in the world. This means that most part of the country's trade and industry are controlled by private owner for profit while the government play a part in several economic activities. Thus, most of the Thai people need cash flow to invest in their businesses.

Secondly, most of the Thai constitutions have upheld the principles of free trade and capitalism. For example, the Constitution of Thailand B.E. 2550, Section 84 (1)., provides that "[t]he state shall implement the economic policy as follows:

"To promote a free and equitable economy through market forces and sustainable development of economy by repealing and refraining from enacting business control law and regulation ..." This means the government should support the liberal economy and market mechanism and ought not to allow any law to hinder these processes.

Thirdly, there is a Latin maxim that serves as a general principle of law. The terminology or Latin legal is "prior tempore, potior jure"¹. This means that anyone who is before in time is before in right, in other words, it means "first came, first served". It is a law of nature. Thus, this motto is reflected in the laws of several countries. For example, under Shari'a law, the law states that "anyone who first

¹ Joseph R. Nolan and M., j. Conoly, **Black's Law Dictionary Special Deluxe**. 5th ed. (St. Paul, Minn.: West, 1979), p. 1075.

takes possession (lhez) of a thing which is not the property of anyone else is considered to be the owner of that thing,”² Another example is “Under the French Civil Code the first person who take possession of an unowned item acquires title, whether or not it was formerly owned by another”.³ In addition, this motto is also embodied in several sections of the Civil and Commercial Code of Thailand. For example, Section 708. of this law states that “[a] person whose right of ownership over a property is subject to a condition may mortgage such property only subject to such condition”. This means that a person who makes a contract with the owner of the property before the mortgagee will retain his right over the property even though the owner of the property mortgages his property afterward. For instance, when the owner of the property rents his house to a renter, the renter will retain his rights over the house even though the house is mortgaged to the mortgagee afterward. Also, the mortgagee who comes afterward cannot terminate the renter’s rights. In vice versa, Section 722. of the Civil and Commercial Code of Thailand states that “[when] a property has been mortgaged and a servitude or other real right is registered after the registration of the mortgage without the consent of the mortgagee, the mortgage has priority over the servitude or other real right and the latter will be erased from the register where its existence prejudice the right of the mortgagee on the enforcement of the mortgage.” The principle of the motto will strongly support the idea of the first creditor will possess more preferable right than the latter creditor.

Fourthly, according to the principles of mortgage, one property can secure several obligations. Under the Thai legal system, the Civil and Commercial Code of Thailand, Section 712., states that, “[n]otwithstanding any clause in the contract to the contrary, a property mortgaged to one person may mortgage to another person during the continuance of the provision contract.” This section means that the object of mortgage can be mortgaged repeatedly. In other words,

² John G. Sprankling, *The International Law of Property* (Oxford: Oxford University Press, 2014), p. 239.

³ Ibid.

one property can be mortgaged again and again continually. These agreements can be done several times, as long as the mortgagor and the latter mortgagees are satisfied. This would imply that capital is important. Thus, the law should allow properties to generate cash flow liberally, so that people can earn a living and invest in a business.

Finally, there is Section 730. of the Civil and Commercial Code of Thailand. This provision states that “When one and the same property is mortgaged to several mortgagees, they rank according to the respective dates and hours of registration, and the earlier mortgagee shall be satisfied before the later one”. This means when there are several creditors of mortgage over the same property. The prior mortgagee will possess a more preferable right than latter mortgagees. Hence, this provision should also be the simplest solution for dealing with the problem of mortgage and pledge over the same property, and it is also based on the aforementioned Latin motto. Therefore, this principle should be applied to the mortgage and pledge over the same property too.

As mentioned above, allowing pledge and mortgage over the same property will have several advantages, including enabling a debtor to achieve more cash flow. This also complies with the general principle and other rules of law. However, there are some disadvantages. The first problem is that the creditors may not know whether or not a special property has been pledged or mortgaged previously, and the second problem is that the second creditor will be an inferior creditor. Therefore, there must be the burden of proof requiring the first creditor over special property to prove that he is the first creditor.

Thus, the creditors of mortgages and pledges must well be aware that every time they accept a special property to guarantee a debt. They will be at risk of being an inferior creditor, Since Section 4. of the Civil and Commercial Code of Thailand, paragraph two, states that, “[w]here no provision is applicable, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law.” This means that although there is no law to cope with a particular case, the court might apply the nearest provision in the code for considering the case and producing its decision. Hence, at present, in

the case of mortgage and pledge, the court might apply the doctrine of Section 730. of the Civil and Commercial Code of Thailand. Therefore, the creditors must check if such a special property has been pledged and mortgaged already. For example, if a debtor wants to pledge a car, the pledgee must look into the register book to see if the property has been mortgaged earlier. Similarly, for mortgage, the mortgagee also must check to see if the car is in the possession of the debtor before registering a mortgage. This will enable the mortgagor to make sure that the car has not been pledged before.

For the reasons stated above, I strongly believe that allowing the Thai people to both mortgage and pledge over the same property is an appropriate course of action. Then, the next question is to figure out how to revise the law. There are two alternatives for improving the law. These are: 1) amending the current law; or 2) proposing a new law. But, which one is more appropriate? For these questions, I do believe that making a proposal of the new law is more appropriate since the current law, the Civil and Commercial Code of Thailand, usually refers to the laws of mortgage and then refers to those about pledge. In other words, this law refers each kind of the security contracts at a time. But, the new provisions will refer to specifically all about the laws of mortgage and pledge over the same property in the same place. Therefore, a new law should be appropriate to grapple with these problems.

In order to introduce a new bill, there is a regulatory impact assessment that must be complied with, since this rule is stipulated in the new constitution⁴. Also, before drafting a new bill, the following considerations must be taken into account as guidelines for the draft: 1) What is the title of the bill? 2) When will the law be effective? 3) What words should be defined in the definition section? 4) What is the main idea that should be reduced to a straightforward statement to be used in a section below the definition section? 5) What is the legal consequence when a creditor receives a special property as the guarantee for a debt? 6) If the second

⁴Constitution of the Kingdom of Thailand B.E. 2560 (A.D. 2017) section 77, paragraph 2.

creditor acts contrary to the interests of the first creditor, should this problem be prohibited? 7) When the secured property is sold at public auction, how will the money be allocated?

Regarding the questions stated above, for the first question, the bill should be under the title of “Securing the Debt by Mortgage and Pledge over the same Property,” because a gist of the bill will address two types of securing contacts over the same property. For the second question, under Thai law, the bill will usually be effective on the day after its publication in the gazette; however, in some cases, such as when the National Assembly wants to enact a new law over an old law, a period of 180 days after the proposed bill is published in the gazette must be allowed for the old law to remain in effect before its revocation. With respect to third question, the words that play an important role in the proposed bill will have to be identified specifically and clearly. These words include “securing the debt by mortgage and pledge over the same property,” “prior creditor,” and “latter creditor.” For the fourth question, the most important idea that should be declared in the section below a definition section is, “making two securing contracts over the same property is lawful”. For the fifth question, the legal consequence that should be stated in the bill is that the creditor will take at his own risk if he is found to be a latter creditor. For the sixth question, the conflict between the prior creditor and latter creditor may occur, for example, when the due date of the second debt comes before the due date of the prior creditor. In this scenario, the latter creditor may enforce the secured property debt before the first secured creditor. At this juncture, this action may cause some damages to the prior creditor. This problem may also happen in the case of making several mortgages over the same property. However, under the Civil and Commercial Code of Thailand, there is Section 731. to deal with such a problem. This section states that “[a] latter mortgagee cannot enforce his right to the injury of the earlier one.” Thus, a prohibition must be made by applying the same principle to the proposed bill. In addition, there is a Supreme Court decision holding that the latter mortgagee could not enforce the mortgage

before the earlier one even it was a mortgaged property auction.⁵ In plain English, the prior mortgagee is the only person who has the right to enforce the mortgage first.⁶ For the seventh question, this problem can be solved by determining in the bill that the amount of money must be allocated to the prior creditor first and then the latter creditor afterwards. If there is any money left, it will be returned to the owner of the property. Finally, as noted, the draft would be introduced as follows:

Drafting
Act of
Securing the Debt by Mortgage and Pledge over the same Property
B.E.....

Section 1. This act shall be called “The act of securing the debt by mortgage and pledge over the same property B.E. ...”

Section 2. This act shall come into force after the date of its publication in the government gazette.

Section 3. In this act

“Securing the debt by mortgage and pledge over the same property” means bringing the movable property stated in the civil and commercial code of Thailand section 703 paragraph 2 to mortgage and then pledge, or to pledge and then mortgage.

“Prior secured creditor” means the creditor who is guaranteed to be paid first by mortgage or pledge before the other secured creditor, who is also guaranteed to be paid by pledge or mortgage, but only after the prior secured creditor is paid.

⁵Deka, **Supreme court decision 1711/2530** [Online], available URL: <https://deka.in.th/view-61278.html>, 2017 (November, 10).

⁶Panya Tanomrod, **Civil and Commercial Code of Thailand on Loans, Suretyship, Mortgage, and Pledge**. 5th ed. (Bangkok: Institution of Legal Education of the Thai Bar, 2008), p. 251.

“Latter secured creditor” means the creditor who is guaranteed to be paid by mortgage or pledge after the other secured creditor who is guaranteed to be paid first by pledge and mortgage.

Section 4. Securing a debt by mortgage and pledge over the same property shall be done under this act.

Section 5. The person whose debt is secured by a property which can be both mortgaged and pledged shall assume the risk for any damages which may occur if he is later found to have been a latter secured creditor.

Section 6. A prior secured creditor is entitled to be paid first before a latter secured creditor.

A latter secured creditor cannot exercise his right in conflict with a prior secured creditor.

Section 7. When the property that is secured by mortgage and pledge is sold by public auction, the amount of the money shall be allocated to the creditors in order of precedence. And, if there is any surplus remaining, it shall be returned to the owner of property.

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In conclusion, the purpose of this article is not only to make people aware of the problems that may be confronted in the near future, but also to propose the appropriate solutions and the drafted laws to deal with the problem of mortgage and pledge over the same property. The alternatives that are mentioned above should provide appropriate guidance to the solution. The common audience will benefit from this article by learning how to avoid the problem and the academician will learn how to take action in respect to such a problem, The prior mortgagee will possess a more preferable right than latter mortgagees. And, I hope this article shall be useful for all audiences.

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