Asia Pacific Guide to Lending and Taking Security - Thailand

When lending to borrowers

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# 1. Are there any restrictions in relation to the type of borrower who may borrow foreign currency or in relation to the term of foreign currency and/or the amount of foreign currency borrowed by local entities?

No.

# 2. Are there any restrictions on the rate of interest or default interest that may be charged?

The charging of interest (that is not default interest) on a loan by a foreign financial institution is limited to a maximum interest rate of 20% per annum.

Moreover, although the compounded reference rate is a method used to calculate interest rate (and not a concept of compounded interest as prohibited by law), due to the lack of a Supreme Court decision on this matter, the enforceability of any provision in the facility agreements with reference to the compounded reference rate as part of the applicable interest rate and the payment of interest on the compounded rate loan is uncertain.

There is no restriction regarding the rate of default interest under Thai law. However, Thai courts have the discretion to review and subsequently reduce any default interest rate agreed between parties if the courts determine that the rate is disproportionately high. The default interest rates that have been successfully challenged in the past are those where the claiming party would earn significantly more from the default interest rate than from the contract if it had not been breached.

By virtue of the latest amendment to the Civil and Commercial Code of Thailand, default interest for any loan with amortizing repayments that becomes overdue from 11 April 2021 can only accrue on the principal amount of the relevant repayment installment that is overdue. Due to the lack of a Supreme Court decision on this matter, the enforceability of any provision in the facility agreement that entitles the lender to charge default interest on all outstanding loans in the event of interest payment default or non-payment default is uncertain.

# 3. Are there any restrictions on particular lenders or classes of lender entering into credit transactions with borrowers?

No.

# 4. Are there any exchange controls that will apply to payments to be made in foreign currencies or to foreign lenders?

Under the Notice of the Competent Officer on Rules and Practices Regarding Currency Exchange ("**Notice**"), Thai residents can generally make payments in foreign currencies or to foreign lenders provided that:

a. The payment is not made for the purposes set out in the negative list under the Notice
b. The payment does not exceed the applicable limit set out under the Notice
c. The relevant supporting documents evidencing the purpose of the payment can be submitted to the satisfaction of a commercial bank acting as a remittance bank in Thailand

If the conditions above are not satisfied, the Thai residents are required to obtain prior approval from the BOT to make such payment.

Fund remittance for the purposes of a loan repayment, interest payment and enforcement of guarantee or security interest under a security agreement are generally permitted up to the amount set out in the supporting documents in (c) above.

# 5. Is there any requirement to deduct or withhold tax from any amounts to be paid or repaid to a lender (whether domestic or foreign)? If so, at what rate must tax be deducted and from what kinds of payment?

No deduction or withholding tax is applicable to the repayment of any loan principal amounts.

There are taxes applicable to the payment of interest. A lender has an obligation to pay withholding tax on interest and default interest.

However, in relation to interest paid to a lender that is a commercial bank established under the commercial banking law of Thailand, the following points apply:

No withholding tax is imposed on interest or default interest

The payments of interest, default interest, front-end fees, commitment fees and other fees and expenses to a lender that is a commercial bank established under Thai commercial banking law are treated as gains from a lending transaction, and are therefore subject to a specific business tax at the rate of 3% on the amount paid.

If the lender is not a commercial bank established under the commercial banking law of Thailand, withholding tax at the rate of 15% is levied on interest and default interest. The withholding tax rate would generally be reduced if that lender were a financial institution that has tax residency in a country or jurisdiction that is party to a treaty for the avoidance of double taxation with Thailand. The amount of the rate reduction would depend on the terms of the treaty.

In relation to interest paid to a lender providing loans from outside Thailand, the following points apply:

Withholding tax at the rate of 15% is levied on interest and default interest. The withholding tax is generally reduced to 10% if that lender is a financial institution that has tax residency in a country or jurisdiction that is party to a treaty for the avoidance of double taxation with Thailand.

No specific business tax is imposed on interest or default interest.

Default interest for late payment, front-end fees, commitment fees or other fees and expenses paid for the account of a lender providing loans from outside Thailand may be treated as income in a similar way to interest on loans or gains from a lending transaction and therefore may be subject to withholding tax as described in the first bullet point above.

# 6. Are there any “thin capitalization” or other rules that may limit the extent to which interest payments may be deducted for tax purposes?

There are no thin capitalization or similar rules that would limit the extent to which interest payments may be deducted for tax purposes. However, interest payments that are deductible as expenses for tax purposes are the only payments in relation to a business that are subject to tax in Thailand.

# 7. Are there any registration, notarization, translation or reporting requirements in relation to the loan documents?

No registration, notarization or translation is required for a loan agreement or a facility agreement for the purpose of their validity. However, registration with the relevant governmental agencies is currently required to create and perfect a mortgage or business security related to the loan or finance documents.

To be admissible as evidence in the courts of Thailand, documents in foreign languages are required to be translated into the Thai language. However, if the case is brought to the Central Bankruptcy Court or the Central Intellectual Property and International Trade, a document in English may be admitted by the court if the parties agree not to translate it and the court is of the opinion that the document is not evidence in a major issue of the case.

The borrower does not have any reporting requirements in relation to the loan documents.

# 8. Are there any stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in relation to the loan documents? If yes, what are the amounts and when are they payable?

The original of any loan or facility agreement is subject to stamp duty at the rate of 0.05% of the amount of the total commitment under the agreement, but the amount payable is capped at THB 10,000 (approximately USD 300). Each duplicate copy of or counterpart to the original loan or facility agreement is subject to a nominal stamp duty of THB 5 per document.

This stamp duty is generally due and payable within 15 days after the date of execution of the relevant loan or facility agreement and a stamp is affixed to the relevant document to evidence the payment. However, according to the Notification of the Director-General of the Revenue Department on Stamp Duty (No. 37) dated 2 December 1995, a lender that is a commercial bank in Thailand or a branch of a foreign bank in Thailand is required to pay stamp duty at the local revenue office in place of affixing a stamp duty, as follows:

If the loan or facility agreement is executed between the first and the 15th day of the month, stamp duty must be paid by the 22nd day of the same month.

If the loan or facility agreement is executed between the 16th and last days of the month, stamp duty must be paid by the seventh day of the following month.

If the loan or facility agreement is executed outside Thailand, stamp duty is payable within 30 days from the date when the duly executed original of the relevant agreement is brought into Thailand. This requirement is normally applicable to a lender providing a loan to an entity not incorporated in Thailand.

Additionally, each appointment of an agent (i.e., facility agent or security agent) under a loan or facility agreement is subject to a maximum stamp duty of THB 30 for each appointment of an agent in relation to each principal.

# 9. Does the law recognize the subordination of the debt that a debtor owes to one creditor to that which the debtor owes to another creditor? If yes, how is this usually effected?

Thai law recognizes the concept of subordination of debt. Debt subordination is usually effected by a contractual agreement between a senior lender and a subordinated lender.

# 10. Are there any classes of unsecured and unsubordinated creditor whose claims against a debtor would rank equally with or above those of the debtor’s other unsecured and unsubordinated creditors (e.g., the claims of employees and tax authorities or the claims of creditors under particular kinds of instrument)? If yes, what classes of creditors are preferred?

Among unsecured creditors, the Bankruptcy Act B.E. 2483 (1940) (as amended) prescribes that the debtor's assets must be used to pay its debts in the following order of priority:

Expenses for the administration of a deceased debtor's estate.

Expenses of the receiver in managing the debtor's assets.

Funeral expenses of a deceased debtor appropriate to their status.

Fees for the collection of assets in relation to any appeal regarding a claim for the payment of a debt.

Fees of the petitioning creditor and counsel's fee, as the court or the receiver may prescribe.

Taxes that have become due for payment within six months prior to the insolvency and wages.

Other debts.

If the amount realized from the debtor's assets is insufficient to fully discharge the sum in any of the debt categories specified above, the creditors in each debt category must be paid equally.

# 11. Are there any consumer protection or similar laws that apply if credit is made available to individuals or other classes of debtor? If yes, what laws are applicable?

There are two subordinate pieces of legislation issued under the Consumer Protection Act B.E. 2522 (1979) that regulate the format (including the scope of terms and conditions) of loan agreements and credit card contracts to be entered into between individuals and a corporate lender or credit provider that provides loans or credit in its ordinary course of business. They are as follows:

Notification of the Committee on Contracts re: Declaring Consumer Loan Business of Financial Institutions to be A Controlled Business

Notification of the Committee on Contracts re: Declaring Credit Card Business to be A Controlled Business

These Notifications provide, among other things, that the following is applicable to the relevant contract:

Must be available in Thai

Does not contain any terms which create an unreasonable advantage for the credit provider over individual consumers, or which are unfair to individual consumers.

# 12. Are there any prohibitions or limitations on the extent to which a company can give financial assistance for the purchase of: (a) its own shares or those of any affiliated company; or (b) assets owned by it or any affiliated company?

There is no specific law governing the offer or receipt of financial assistance.

However, if the provision of financial assistance is a transaction between a listed company or its subsidiary and any connected person (e.g., management, a major shareholder, a controlling person or persons to be nominated as management or a controlling person of the listed company or its subsidiary) of the listed company, or a transaction between a subsidiary company and any of its connected persons, that financial assistance is deemed to be a "connected transaction" within the meaning of the Notification of the Board of Governors of the Stock Exchange of Thailand (SET) Re: Disclosure of Information and Other Acts of Listed Companies Concerning Connected Transactions 2003 (as amended) ("**Connected Transaction Rules**"). In accordance with the Connected Transaction Rules, a listed company is subject to certain disclosure and corporate approval requirements depending on the value of the transaction, as set out below.

**Disclosure of information**

A listed company is required to disclose its connected transactions in its annual report and make different levels of disclosure to the SET, depending on the type and value of the transaction to be undertaken.

**Corporate approval**

In the case of a transaction by which a listed company or its subsidiary offers financial assistance to a connected person who is a natural person or a juristic entity in which the listed company or subsidiary holds shares at a lower ratio than the ratio of shares held by any other connected persons, the following points apply:

If the transaction value is less than THB 100 million or 3% of the net tangible asset value (whichever is lower), approval of the listed company's board of directors must be obtained.

If the transaction value is greater than or equal to THB 100 million or 3% of the net tangible asset value (whichever is lower), approval of the listed company's shareholders by a majority, formed from at least 75% of all total eligible votes in the shareholders' meeting, must be obtained.

In all other cases involving the grant or receipt of financial assistance other than as described above, the following points apply:

If the transaction value is greater than THB 1 million or 0.03% of the net tangible asset value, but less than THB 20 million or 3% of the net tangible asset value (whichever is higher), approval of the listed company's board of directors must be obtained.

If the transaction value is equal to or greater than THB 20 million or 3% of the net tangible asset value (whichever is higher), approvals of both the board of directors and the shareholders of the listed company must be obtained (in the latter case, by a majority of at least 75% of all total eligible votes in the shareholders' meeting).

The Connected Transaction Rules set out the bases for calculating the value of transactions by which:

a listed company or a subsidiary of a listed company offers financial assistance to a connected person.

a listed company or a subsidiary of a listed company receives financial assistance from a connected person.

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