Asia Pacific Guide to Lending and Taking Security - Thailand

When considering whether to lend

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# 1. Is it necessary or advisable for any lender, arranger, facility agent or security agent to be licensed, qualified or otherwise entitled to carry on business in this jurisdiction: (a) by reason only of its execution, delivery or performance of the finance documents; or (b) to enable it to enforce its rights under the finance documents?

It is not necessary for any person or entity that acts as a lender to be licensed or qualified to carry on lending activities in Thailand because of the execution, delivery or performance of any finance documents to which it is a party or to enforce its rights under those finance documents.

However, if that lender also carries out activities in Thailand that fall within the scope of commercial banking business activities under the Financial Institution Business Act B.E. 2551 (2008) (FIBA), as amended from time to time, then a commercial banking license will be required prior to the commencement of that activity in Thailand and for that lender to enforce its rights under the finance documents that fall within the scope of commercial banking business.

Under the FIBA, "commercial banking business" is defined as the business of the following:

Accepting deposits of money from the public that are subject to withdrawal on demand or at certain periods

Buying and selling negotiable instruments

Buying and selling foreign currency

Please note that the following licenses are also required if any lender, arranger, facility agent or security agent is involved in the following activities in Thailand.

**Consumer finance business license**

If the lender intends to grant loans to individuals in the ordinary course of business without providing other banking services (i.e., non-bank), licenses relating to a consumer finance business may be required.

Certain types of consumer finance businesses in Thailand are regulated and require the operator to obtain the relevant license from the Ministry of Finance (MOF), through either the Bank of Thailand (BOT) or the Fiscal Policy Office (FPO), depending on the type of financing offered. However, not all consumer finance businesses are currently regulated under specific laws (e.g., the hire-purchase and leasing of vehicles and machinery are excluded).

The Declaration of the Revolutionary Council Decree No. 58 determines which consumer finance businesses are regulated and requires the business operator to obtain a license from the MOF for pico-finance1,  nano-finance2,  or personal loans3. These licenses allow the lender to operate and collect interest from borrowers that are individuals that is higher than the interest rate permitted by the general laws (i.e., 15% per annum under the Civil and Commercial Code of Thailand). These financing activities offered to individuals differ in their purposes, permissible interest rates and fees, qualifications of the borrowers, credit assessment criteria, and the maximum credit amount, etc.

The different licensing schemes can be briefly summarized as follows:

A pico-finance license is required for a business to make secured or unsecured loans to individuals within a designated jurisdiction (i.e., provincial level).

A nano-finance license is required for a business to make unsecured loans to individuals for occupational purposes.

A personal loan license is required for a business to make unsecured loans to individuals for the purpose of personal consumption or for non-specific purposes and also covers loans for occupational purposes. Under the personal loan licensing scheme, there are also other sub-categories that the lender is able to operate, which includes the vehicle registration loan4 and the digital personal loan5.

**Foreign business license**

If a foreign person or entity acts as an arranger, facility agent or security agent in Thailand, depending on the nature of that particular activity, it may be considered to be carrying on the business of providing services under the Foreign Business Act B.E. 2542 (1999) as amended (FBA). Under the FBA, foreign nationals are restricted from operating those businesses that are only permitted to be carried on by Thai nationals (and these businesses include service businesses) without a license. Generally, an activity that involves the performance of any valuable action, deed or effort to satisfy a requirement or fulfill a demand or the sale of intangible products (e.g., time, energy and expertise) for the benefit of customers in exchange for a valuable consideration is considered a service business.

Effective from 9 June 2017, the Ministry of Commerce issued a ministerial regulation removing certain businesses from the category of restricted business activities, which included businesses governed by the laws on financial institutions, including those operating a commercial banking business, acting as a banking agent and acting as an agent in receiving payments (collecting agent) or accepting applications.

The operation of a service business in Thailand is a restricted activity under the FBA. A foreigner is not permitted to operate a service business without a license. Any foreign arranger, facility agent or security agent carrying on a service business (other than those that have been removed from the category of business activities) would be required to obtain a "foreign business license" prior to providing the relevant arranging and/or agency services in Thailand.

1 "Pico-finance under supervision" means lending, purchasing, discounting, or rediscounting bills or any negotiable instruments to an individual with or without assets or property as collateral, in the province where the head office of the business operator is located, whereby the interest, fines, service fees and other fees exceed the permissible rate under the Civil and Commercial Code of Thailand. The following are not regarded as pico-finance under supervision: (i) travel loans for overseas employment; (ii) loans for staff welfare where the employer has signed a contract with the business operator; or (iii) any other loans as may be prescribed by the FPO in the future

2 "Nano-finance" means lending, purchasing, discounting, or rediscounting bills or any negotiable instruments, or hire-purchase transactions or leasing to an individual, without assets or property as collateral, with the borrower intending to use the money to carry on a business or for their occupation. The following are not regarded as nano-finance under supervision: (i) hire purchase; lease and sale and lease back of goods that are normally sold by the operators, cars and motorcycles and any other goods as may be prescribed by the BOT in the future; (ii) loans with vehicle registration certificate as collateral; (iii) travel loans for overseas employment; and (iv) other loans as may be prescribed by the BOT in the future

3 "Personal loan under supervision" means lending, purchasing, discounting, or rediscounting bills or any negotiable instruments to an individual, with or without the borrower aiming to receive goods or services, including lending with the objective of using the money to carry on a business or as a part of the borrower's occupation, without assets or property as collateral. Personal loans under supervision also include: (i) lending originating from the hire-purchase and lease of goods that are not normally sold by the business operator (except for vehicles and machinery); and (ii) vehicle registration loans. The following are specifically excluded from the definition: (i) loans for education; (ii) travel loans for overseas employment; (iii) loans for medical treatment; (iv) loans for staff welfare if the employer has signed a contract with the business operator; and (v) any other loans as may be prescribed by the BOT in the future

4 "Vehicle registration loan" is defined as lending money to a person who holds ownership of the vehicle, and: (i) the business operator accepts the vehicle registration or arranges for an agreement, document, or any other evidence that: (a) results in the vehicle registration being transferred in advance as collateral; or (b) allows the business operator to sell the vehicle or take any other action with the vehicle to repay the loan; and (ii) the debtor can still possess and use the vehicle as usual

5 In September 2020, the BOT introduced a sub-category type of personal loan business — the digital personal loan business. The intention was to promote financial inclusion and utilization of technologies and alternative data. Digital personal loan business operators are able to offer loans of up to THB 20,000 per customer with a tenure of no more than six months for each loan agreement via digital channels and methods. Under this scheme, there is more flexibility for the business operators in assessing the credit of the borrowers using new technologies (e.g., the ability or willingness to pay) without having to rely on the information provided by the credit bureau

# 2. Will any lender, arranger, facility agent or security agent be deemed to be resident, domiciled, carrying on business or subject to tax by reason only of the execution, delivery, performance or enforcement of the finance documents?

An offshore entity is subject to tax if, by its execution, delivery, performance or enforcement of the finance documents, that offshore entity is considered to be conducting business in Thailand. The act of "conducting business in Thailand" is broadly defined under the Revenue Code as follows:

A juristic company or partnership incorporated under a foreign law that has an employee, a representative, or a broker in Thailand for carrying on its business and thereby derives income or gains in Thailand, such juristic company or partnership shall be deemed to be carrying on business in Thailand.

According to the interpretation of this definition by the Revenue Department, an employee, a representative or a broker does not need to be stationed permanently in Thailand to fall within the scope of this definition.

In principle, any activity undertaken by an offshore entity that involves its employee, representative or broker carrying out the execution, delivery, performance or enforcement of any agreement that generates income for the offshore entity will likely be subject to tax. However, it will depend on the facts of each case.

An offshore entity receiving certain types of income from Thailand must pay income tax at a fixed percentage of the gross income. The party in Thailand that pays the income is generally required to withhold the tax at the payment source.

# 3. Are there any regulatory reporting requirements that lenders must observe in connection with those transactions?

There are some regulatory reporting requirements for lenders that are engaged in a "commercial banking business," regulated personal loan business or regulated retail loan business in Thailand (see the answer to question 1 of this section). There are no other regulatory reporting requirements that a lender must observe in relation to those transactions.

# 4. Is it necessary to establish a place of business in your jurisdiction in order to enforce any provision of the finance documents?

No.

# 5. Is a foreign bank/financial institution permitted to approach local entities for business?

Yes. The foreign bank/financial institution must obtain a license if the transactions intended to be executed between the foreign bank/financial institution and its local customer fall within the scope of the following prior to carrying on those regulated activities in Thailand:

A "commercial banking business license," under the FIBA, is required for banking business.

"consumer finance business licenses" (i.e., pico-finance, nano-finance or personal loan) are required for the lending activities granted to individuals. If the lender already holds the licenses to operate as a financial institution under the FIBA (e.g., a licensed commercial bank), such lender would be exempted from obtaining the consumer finance business licenses.

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