Asia Pacific Guide to Lending and Taking Security - Malaysia

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?

Yes. A resident individual, sole proprietor or general partnership is permitted to borrow in foreign currency up to MYR 10 million equivalent in aggregate from a licensed onshore bank or a nonresident, with the sole exception of an immediate family member. The MYR 10 million threshold is computed based on an aggregate of borrowing in foreign currency by the resident individual, sole proprietor or a general partnership owned by the resident individual.

A resident entity is permitted to borrow foreign currency on the following basis:

Any amount from a licensed onshore bank.

Any amount from resident or nonresident entities within its group of entities.

Any amount from its resident or nonresident direct shareholder.

Any amount through the issue of foreign currency corporate bond or sukuk to another resident.

Up to the MYR 100 million equivalent in aggregate from nonresidents (including a nonresident financial institution and a non-resident special purpose vehicle which is used to obtain borrowing from any person outside the resident entity's group of entities); the MYR 100 million threshold is computed based on an aggregate of borrowing in foreign currency by the resident entity and other resident entity with a parent-subsidiary relationship.

Paragraphs (b) and (c) above do not apply to borrowings in foreign currency by a resident entity from a nonresident financial institution or a nonresident special purpose vehicle that is set up to obtain borrowings from any person who is not part of the resident entity's group of entities.

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

No, except as follows:

Exceptions apply in relation to loans to individuals (see the answer to question 11 of this section).

BNM has issued guidelines to regulate the charging of default interest. These guidelines are only applicable to financial institutions/entities licensed in Malaysia.

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

Yes, a resident borrower may only borrow foreign currency in excess of the relevant threshold applicable to such resident borrower (see the answer to question 1 of this section) if it receives the prior written approval of BNM.

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

Yes, although they do not apply if the payments are related to transactions that are permitted under the FE Notices or related to transactions that have been approved by BNM.

In relation to payments in foreign currency to be made to or by a nonresident foreign lender, a resident is generally allowed to make or receive payments for any purpose, **excluding** payment made for:

A foreign currency-denominated derivative offered by the resident, unless it is allowed under the FE Notices or it has been approved in writing by BNM.

Any derivative offered by any nonresident which market price, value, delivery or payment obligation is derived from, referenced to or based on exchange rate, unless it is allowed under the FE Notices or it has been approved in writing by BNM.

A derivative which is referenced to Malaysian ringgit, unless it is allowed under the FE Notices or it has been approved in writing by BNM.

# 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?

Withholding tax is deducted from gross interest income derived from Malaysia and payable to a nonresident lender. The Malaysian domestic withholding tax rate of 15% applies to interest paid to a nonresident, but it may be reduced under double taxation treaties.

# 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 currently no specific thin capitalization rules in Malaysia. However, the Malaysian income tax legislation provides that the Director General of Inland Revenue may disallow an interest deduction if they are of the opinion that the financial assistance granted by a person to an associated person who is a resident is excessive in relation to the fixed capital of that person.

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

Please see the answers to questions 11, 12 and 13 of the section "If taking security".

# 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?

Stamp duty is payable on a loan document within 30 days of the date of its execution (if it is executed within Malaysia) or within 30 days of the loan document being first received in Malaysia (if it is executed outside Malaysia).

With respect to loans denominated in Malaysian ringgit, stamp duty is payable on the principal instrument (typically the facility agreement) at the rate of 0.5% of the loan amount.

With respect to loans denominated in a foreign currency, stamp duty is payable on the principal instrument (typically the facility agreement) at the rate of 0.5% of the loan amount (calculated based on the Ringgit-equivalent amount).\*

For stamp duty payable on security documents, please see the answer to question 13 of the section "If taking security."

\*Updated after 1 January 2024

# 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?

Yes, this is legally valid as a matter of Malaysian contract law. In practice, this is most commonly achieved by an intercreditor or subordination agreement between the different classes of creditors and the debtor.

# 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?

Yes. The order of payment of those claims is set out in the final two paragraphs of question 1 of the section "If things go wrong".

# 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?

The Malaysian Consumer Protection Act 1999 (MCPA) does not apply to "professionals who are regulated by any written law." Although "professionals" is not defined in the MCPA, taking the purposive approach would suggest that foreign banks do not fall within the ambit of the MCPA.

Under the Moneylenders Act 1951, interest rates on loans extended to individual borrowers by moneylenders are capped at 12% per annum for secured loans and 18% per annum for unsecured loans. Further, under that Moneylenders Act 1951, the regulator may stipulate further restrictions, as they may think fit, in the license conditions applicable to moneylenders at any time during the duration of the license.

# 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?

Yes. Under the Malaysian Companies Act 2016 (MCA), there is a prohibition in relation to a company giving financial assistance for the purchase of its own shares or the shares of its holding company. However, there are four exceptions to this general prohibition:

Where the loan is given in the ordinary course of a company's business.

Where the company provides money for the purchase of, or subscription for, fully paid shares in the company or its holding company, by trustees of, or to be held by or for the benefit of, employees of the company or a subsidiary of the company, including any director holding a salaried employment or office in the company or a subsidiary of the company.

The giving of financial assistance by a company to persons, other than directors, bona fide in the employment of the company or of a subsidiary of the company with a view to enabling those persons to purchase fully paid shares in the company or its holding company to be held by them beneficially.

The making of a loan or the giving of guarantee or the provision of security in connection with one or more loans made by one or more other persons by a company in the ordinary course of business where the activities of that company are regulated by any written law relating to banking, insurance or takaful or which are subject to the supervision of the Securities Commission and where:

The lending of the money or the giving of guarantees or the provision of security in connection with loans made by other persons is done in the course of those activities.

The loan that is made by the company or where the guarantee is given or the security is provided in respect of a loan, is made on ordinary commercial terms in relation to the rate of interest or returns, the terms of repayment of principal and the payment of the interest or returns.

Notwithstanding the foregoing, the MCA provides for a financial assistance whitewash procedure. Private and public companies (but not public listed companies) may give financial assistance for the purpose of either:

Acquisition of their shares or their holding company's shares; or

Reducing or discharging liability incurred for such an acquisition,

if the following requirements are met:

A special resolution is passed by shareholders to approve the financial assistance.

A majority of the directors of the company agree that the company may give the financial assistance, that the giving of the financial assistance is in the best interest of the company, and that the terms and conditions pursuant to the financial assistance are just and reasonable to the company.

Each director who voted in favor of the financial assistance makes a solvency statement (similar to the statement made for a reduction of capital)

The aggregate amount of the financial assistance (including financial assistance previously given that has not been repaid) does not exceed 10 percent of the company's current shareholding funds.

The company received fair value in connection with the giving of the financial assistance.

The financial assistance is given not more than 12 months after the day the solvency statement was made by the directors.

The solvency statement must be sent to each member of the company within 14 days from the giving of the financial assistance, together with a notice stipulating details of the financial assistance given as set out under the MCA.

The prohibition in relation to a company giving financial assistance does not apply in relation to the purchase of assets owned by it or any affiliated company.

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