Asia Pacific Guide to Lending and Taking Security - Malaysia

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?

Two parallel banking systems operate in Malaysia: the conventional banking system and the Islamic banking system. The Malaysian Financial Services Act 2013 (FSA) regulates, among other things, the conventional banking industry in Malaysia. Under the FSA, the conduct of a banking business requires a license.

 The expression "banking business" is defined as:

The business of:

Accepting deposits on a current account, deposit account, savings account or other similar account.

Paying or collecting checks drawn by or paid in by customers.

The provision of finance.

Such other business as Bank Negara Malaysia (BNM), the central bank of Malaysia, may prescribe.

For an entity to be deemed to be carrying on "banking business," it must be carrying out all three of the activities listed in (a) (i), (ii) and (iii) above.

It is not necessary for any lender, arranger, facility agent or security agent to be licensed, qualified or otherwise entitled to carry on business in Malaysia by reason only of its execution, delivery or performance of the finance documents or to enable it to enforce its rights under the finance documents as those acts would only relate to one subparagraph and not all three.

The Malaysian Moneylenders Act 1951 (MLA) regulates the business of moneylending carried on by entities that are not licensed under the FSA. The MLA is relevant to foreign/nonresident unlicensed lenders that undertake the role of a moneylender in Malaysia. Under the MLA, a moneylender is any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to them (i.e., the principal plus interest). Section 5 of the MLA stipulates that no person shall conduct business as a moneylender unless they are licensed under the MLA. Section 15 of the MLA operates to render any contract by an unlicensed moneylender unenforceable.

# 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?

No, except that the Malaysian-sourced fees and other income may be subject to withholding tax.

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

Under the Foreign Exchange Notices issued by BNM ("**FE Notices**"), there are prohibitions on foreign lenders lending to Malaysian residents.

The exchange control regime in Malaysia is governed by the FSA and is supplemented by the FE Notices. Certain foreign loan transactions may fall within the prohibitions set out in the FE Notices and those prohibited transactions cannot be undertaken unless prior written approval from BNM has been obtained. Depending on the nature of the financing transactions (foreign currency borrowings or the provision of a financial guarantee/security) involving a nonresident, the prior written approval of BNM may be required.

# 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, although the prior written approval of BNM is required under the FSA for:

Acts, among others, of issuing, publishing or disseminating information in any form or advertisements which may lead, directly or indirectly, to the buying, selling, exchanging, borrowing or lending of foreign currency.

The giving or obtaining of any guarantee, indemnity or undertaking in respect of any debt, obligation or liability.

Acting on behalf of an unlicensed foreign institution to carry on, among other things, banking business in Malaysia (for the meaning of banking business see the answer to question 1 of this section).

In addition, the FSA prohibits any person from holding themselves out as an authorized person or registered person under the FSA unless authorized or registered under the FSA (as the case may be).

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