Asia Pacific Guide to Lending and Taking Security - Singapore

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?

Whether a lender, arranger, facility agent or security agent must be licensed, qualified or otherwise entitled to carry on business in Singapore depends on the type of business in which it is involved. Certain business activities are regulated by statute, so an entity must first be licensed under the relevant statute before it may engage in that business activity. Two examples are banking business, for which a license under the Banking Act 1970 ("**Banking Act**") or the Monetary Authority of Singapore Act 1970 is needed, and moneylending, for which a license under the Moneylenders Act 2008 ("**Moneylenders Act**") is needed. These are briefly discussed below.

Generally, where a lender, arranger, facility agent or security agent is not carrying on business or performing any regulated activity in Singapore (or if carried on wholly outside Singapore, and in a manner so as to not bring the activity within the regulatory ambit of the relevant Singapore legislation1), the mere execution, delivery or performance of, or the enforcement of rights under, the finance documents does not require that entity to be licensed to carry on business in Singapore from a regulatory perspective. If, however, the lender, arranger, facility agent or security agent is carrying out a regulated activity under the finance documents, it may be required to obtain the necessary license or approval from the regulator under one of the statutes referred to in the paragraph above, the failure to do so may result in penalties, and the finance documents may become unenforceable because of illegality.

**Bank license**

A person who wishes to carry on banking business in Singapore is required to possess a valid license granted under the Banking Act. "Banking business" is defined to include the business of receiving money on current or deposit account, paying and collecting checks drawn by or paid in by customers, the making of advances to customers. and includes any other business that the central bank of Singapore, the Monetary Authority of Singapore (MAS), may prescribe.

The advantage of a banking license is that a licensed bank falls within the category of "excluded moneylenders" under the Moneylenders Act and is not required to hold a separate license under the Moneylenders Act in respect of its lending activity. A lender that is not licensed as a bank is required to hold a moneylender's license, unless it falls under a different category of "excluded moneylenders" (discussed below).

For completeness, similar licensing requirements apply to deposit-taking businesses, and there is an express prohibition from soliciting deposits from Singapore persons unless the entity (whether in or outside Singapore) has a valid license in Singapore.

**Moneylender's license**

A person who lends a sum of money in consideration of a larger sum being repaid is, until the contrary is proved, presumed to be a moneylender under the Moneylenders Act. Under the Moneylenders Act, no person is permitted to carry on the business of moneylending in Singapore without a moneylender's license unless that person is an "excluded moneylender" or "exempt moneylender."

An "excluded moneylender" includes a lender that lends money solely to corporations, limited liability partnerships, trustees or trustee-managers of business trusts, trustees of real estate investment trusts and/or accredited investors2.

**Other licenses**

Please note that there are other activities, such as product financing3 and providing custodial services for specified products4, that are separately regulated in Singapore under the Securities and Futures Act 2001 (SFA). These are not considered in further detail here but if a lender, arranger, facility agent or security agent carries on business that constitutes those regulated activities, a capital markets services license may be required. Similarly, if a lender, arranger, facility agent or security agent acts as a payments intermediary or otherwise arranges for the transfer of monies from one party to another, a license under the Payment Services Act 2019 (PSA) may be required.

Note that there are extraterritorial provisions in the SFA where a foreign entity may be caught by the licensing regime if it conducts regulated activities partly in Singapore or wholly outside Singapore but where the acts have substantial and reasonably foreseeable effect in Singapore.

The PSA, similar to the Banking Act, has express provisions prohibiting any person (in or outside Singapore) from soliciting persons in Singapore to engage in payment services unless the person has the appropriate license under the PSA.

1 Note that any solicitation from or offer to Singapore persons will more likely than not result in an offshore entity falling within the regulatory ambit of the relevant Singapore legislation, even if the offshore entity conducts its activities wholly outside Singapore.

2 “Excluded moneylender” is defined in section 2 of the Moneylenders Act. “Accredited investors” is defined in Section 4A of the Securities and Futures Act.

3 Credit facility, advance or loan to facilitate subscription, purchase or continued holding of securities, securities- based derivatives (other than futures contracts) and units in collective investment scheme that are listed or to be listed.

4 Defined as securities, securities- based derivatives (other than futures contracts) and units in collective investment schemes

# 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?

**Residence**

Under Singapore law, whether a company is resident in Singapore is relevant for tax purposes. The test for tax residency for a company set out in the Income Tax Act 1947 ("**Income Tax Act**") is whether the "control and management" of its business is exercised in Singapore. Where "control and management" is exercised is a question of fact but is usually exercised through the meetings of the company's board of directors. Being a resident for the purposes of "service of process" is determined by certain rules relating to whether a company is carrying out business (discussed below) and whether it is registered.

Therefore, execution, delivery, performance or enforcement of the company's own finance documents does not result in that company being "resident" in Singapore.

In relation to the service of process on a company, a company's residency status is not strictly relevant. As long as a company is incorporated in Singapore with a registered address with the Accounting and Corporate Regulatory Authority (ACRA), court papers may be served on the company by leaving the papers at, or sending them by post to, the company's registered office.

Similarly, for foreign companies that are incorporated overseas, service of process in Singapore can be effected by: (i) leaving the papers at, or sending them by post to, the company's registered office in Singapore; (ii) addressing the papers to an authorized representative of the company and leaving them at, or sending them by post to, their registered address; or (iii) if the foreign company has ceased to maintain a place of business in Singapore, leaving the papers at, or sending them by post to, its registered office in its place of incorporation.

**Subject to Singapore tax**

Singapore has a territorial system of taxation. Under Singapore domestic laws, income tax is payable on income that is sourced in or derived from Singapore and foreign-sourced income brought into or received in Singapore or deemed received in Singapore (unless an exemption applies).

The question of where the income is sourced depends on the nature of the income and the case's facts and circumstances. Generally, the income is regarded as sourced at the place where the income-producing activities take place. For example, this may be where the operations are conducted or where the contracts are concluded in the case of  trade or business income. As such, in general, if the lender, arranger, facility agent or security agent executes, delivers, performs or enforces finance documents in Singapore, this may potentially give rise to a Singapore income tax risk for the lender, although the level of risk (if any) would depend on the facts and circumstances of the particular case.

There are also rules that provide for certain payments to be deemed sourced in Singapore. For example, the Income Tax Act provides for interest to be deemed sourced in Singapore if it is borne by a person resident in Singapore. As explained in the answer to question 5 of the "When lending to borrowers" section, these payments would trigger withholding tax obligations if they are made to another person not known to be resident in Singapore. The application of these deemed-sourced rules generally does not depend on whether the finance documents are executed, delivered, performed or enforced in Singapore.

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

Reporting requirements may vary depending on whether a particular statute regulates the lender, arranger, security agent or facility agent in relation to its business activities in Singapore. For example, in relation to licensed banks in Singapore, while there is no general requirement for banks to report specific loan and credit transactions to the MAS, there may be certain circumstances under which reporting obligations exist. In particular, under the Banking Act, the MAS may issue notices giving directions or imposing requirements on or relating to the operations or activities of banks regulated under the Banking Act. These directions or requirements may include reporting obligations. An example is MAS Notice 757, which requires banks licensed under the Banking Act to provide monthly reports to the MAS in respect of their aggregate outstanding loans of Singapore dollars to nonresident financial institutions.

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

It is not a legal or statutory requirement for a plaintiff or claimant to have established a place of business in Singapore to be able to enforce provisions of a finance document by the commencement of legal proceedings in Singapore. However, before commencing an action, a potential plaintiff or claimant should consider if Singapore is the appropriate forum to commence proceedings or risk having the action stayed, i.e., stopped, on the basis that there is clearly a more appropriate forum elsewhere. A potential plaintiff or claimant with few links to Singapore may also be required by the Singapore courts to provide security for the defendant's costs.

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

Generally, approaching local entities to provide banking services, such as offering loans or carrying out any other regulated activities in Singapore, may trigger licensing issues in Singapore for the foreign bank or financial institution. Please see our answer to question 1 above, including in particular the description of "banking business" activities that would require a valid license granted under the Banking Act and other activities that require a license under the SFA.

If the foreign bank/financial institution has obtained the relevant license/approval in Singapore (e.g., numerous foreign banks have registered branches in Singapore and obtained the relevant licenses and approvals from the MAS in respect of their Singapore branch), they may carry out such activities through the Singapore branch, subject to such conditions and restrictions as may be imposed by the MAS.

However, this does not mean that the head office and/or representatives of the head office of the foreign bank may approach local entities to offer regulated activities or carry out licensable activities. For example, if a foreign bank carries out activities through its head office or representatives of its head office, e.g., offers loans to Singapore persons that would be booked at the head office rather than the Singapore branch, regulatory issues may still arise for the foreign bank, notwithstanding that it has a registered branch in Singapore. Therefore, such foreign banks should ensure that they consult internal guidelines on cross-border dos and don'ts or a legal counsel on whether there are licensing issues and/or any applicable exemptions.

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