Asia Pacific Guide to Lending and Taking Security - Thailand

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# When considering whether to lend

## 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.

# When lending to borrowers

## 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.

# If taking security

## 1. 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 secured creditors?

No.

## 2. May security given by a company rank in a specified order so as to secure liabilities owed to different creditors of the company in that order and, if that is not possible, is it viable for parties to enter into a contractual arrangement for the purposes of moderating this order?

Security given by way of a mortgage or a business security under the Business Security Act B.E. 2558 (2015), which came into force in early July 2016 ("**Business Security Act**") may be ranked in a specified order on a "first in time" basis. In other words, where multiple security interests are registered over the same property as security for different underlying debts, the claim of a secured party (or a group of secured parties) that registers its security over that property will be, based on prior registration, senior to or will have priority over the claims of subsequent secured parties.

A mortgage can be created over land, buildings, machinery, ships or vessels weighing not less than five tons, floating houses or rafts, and certain animals that can be used as vehicles (such as buffaloes and oxen).

A business security under the Business Security Act can be created over specific assets or an entire business enterprise (which is likely to include contractual rights and movable property used in the business of the security provider such as machinery, inventory, raw materials and intellectual property).

A simple contractual arrangement cannot be used to vary such order, but it may be moderated and varied by managing the deregistration and reregistration of the mortgage or the business security.

## 3. Does this jurisdiction recognise the concept of floating security or similar equivalent (i.e., security over a changing pool of assets that the company giving the security is free to buy, sell and generally deal with)?

Thai law has recently recognized the concept of floating security following the introduction of the Business Security Act. It is now possible to create security over a "business" or "enterprise" as a going concern, which is broadly defined as all assets (including inventory and related rights) used in the operation of the security provider's business on a non-possessory basis. This most recently available security interest under the Business Security Act has attributes similar to those of a "floating charge."

## 4. If so, are there any practical reasons why floating security is difficult to take, maintain or enforce?

The creation of security over a changing pool of assets does not align with the fundamental concept in civil law systems that security must only be taken over an identifiable asset and that the asset must be specifically identified when taken as security. Many issues under the Business Security Act remain debatable, and further guidance and regulations from the authorities will be necessary for its successful implementation as intended. As it will take some time for the act to function smoothly, a considerable transition period is expected. As the act is implemented and tested over time, any difficulties in relation to the taking, maintenance and enforcement of floating security should become clearer.

Additionally, under the Business Security Act, individuals and juristic persons can become security providers under the act, but only "financial institutions" and those specifically designated under a ministerial regulation can accept business security as secured creditors. In this context, "financial institutions" refers to insurance companies under Thai insurance laws and financial institutions under the FIBA only. Note that foreign banks without a branch in Thailand participating in loan syndication with Thai financial institutions are also entitled to accept business security as secured creditors.

Therefore, foreign banks without a license to carry on commercial banking activities in Thailand that are not a party to a syndicate with Thai financial institutions are effectively excluded from taking business security as secured creditors under the current Business Security Act.

## 5. May security be granted to a trustee to be held on trust for the lenders from time to time, in such a way that a change of lenders does not require new security to be taken?

The Civil and Commercial Code of Thailand prohibits the establishment of a trust by any will or by any juristic act, unless the trust is established in accordance with a specific law for the establishment of a trust, i.e., under the Trust for Capital Market Transactions Act B.E. 2550 (2007), which specifically empowers parties in capital market transactions to establish a trust for specific purposes. There are currently no laws in Thailand that provide for the establishment of  a trust in relation to non-capital market transactions. As the borrowing and lending of monies by financial institutions are not regarded as capital market transactions, the obligation of any designated agent to hold any property or rights "in trust" for the secured parties may not be recognized or enforceable as a trust under Thai law.

Therefore, the use of a security trustee is not common in relation to loans that are governed by Thai law. In a transaction where there is more than one lender and a security agent is appointed, the security agent itself usually executes security documents in two capacities, namely as follows:

For and on behalf of the lenders and other secured parties (if any)

For and on its own account as the security agent

In this way, a principal and agent relationship is created between the lenders and the security agent. The security agent is duly singly empowered to act for and on behalf of the lenders in relation to a number of aspects of a transaction, such as the execution of security agreements and the holding of certain secured assets, such as pledged share certificates, for the benefit of the secured parties.

Notwithstanding this, a security agent may not be registered as the sole mortgagee on behalf of all secured parties in relation to a mortgage or as the sole secured party on behalf of all parties in relation to a business security. Instead, Thai mortgage law and the Business Security Act require every lender and secured party taking security over mortgageable property or assets of the business (as the case may be) in relation to the same underlying debt to be individually registered as a mortgagee or security holder.

## 6. If not, are there any techniques that can be used to achieve substantially the same effect (e.g., parallel debt structures)?

No. Please note that parallel debt structures are not recognized by Thai courts.

## 7. If an agent holds security for the lenders rather than a trustee, is it necessary to take new security on a change of lenders? If no, why not? If yes, are there ways to structure the transaction to avoid such a requirement?

As mentioned in the answer to question 5 of this section, the security agent itself usually executes security documents in two capacities, namely:

For and on behalf of the lenders (under the doctrine of agency rather than as a trustee)

For and on its own account as the security agent

Therefore, on a change of lenders, there is no need to re-execute the security documents because the security agent can act on behalf of the new lender, provided that the new lender duly and legally accedes to the finance documents (in which the provisions authorizing and appointing the security agent to act for and on behalf of the secured parties are also set out).

However, specific legal requirements governing the formalities for perfecting certain security interests (such as share pledges and mortgages) may require certain amendments to be made to existing security documents or additional actions to be taken to ensure that the new lender is granted effective and enforceable security. For example, notwithstanding the fact that share certificates are only required to be physically pledged with the security agent, the name and address of each individual lender taking security over the pledged shares as pledgee must be duly recorded in the share register book of the company that issued the pledged shares. In these circumstances, the new lender must also be recorded as a pledgee in that company's share register book.

Additionally, as stated in the answer to question 5 of this section, in relation to a mortgage and a business security created under the Business Security Act, each individual lender and secured party must be registered as a secured party. Therefore, an additional filing must also be made to register a new lender as a secured party.

## 8. Under the laws of this jurisdiction, is there any class of asset over which it is difficult or impossible to grant effective and perfected security, or in relation to which any security granted will be of limited effect?

Although a pledge over bank accounts is typically required as part of the security package in lending transactions as a matter of market practice in Thailand, a pledge over bank accounts (or more accurately, the pledge of the rights to the cash deposits in those bank accounts) is not clearly recognized as a valid security interest under Thai law. In fact, a number of Supreme Court judgments consistently follow the interpretation that a pledge cannot be created over a changing pool of cash deposited in a bank account.

Further, as mentioned in the answer to question 4 of this section, eligible persons that can become security holders under the Business Security Act are insurance companies under Thai insurance laws, financial institutions under the FIBA, and those specifically designated under a ministerial regulation to accept business security as secured creditors, which includes foreign banks that participate in a loan syndication with Thai financial institutions. Foreign banks without a license to carry on commercial banking activities in Thailand that are not party to a syndicate with Thai financial institutions are excluded from taking business security as secured creditors under the current Business Security Act.

## 9. Under the laws of this jurisdiction, are there any restrictions on offshore lenders taking security over any class of asset?

No.

## 10. Must a company receive a corporate benefit in return for giving a guarantee or security? In particular, are there restrictions on the grant of upstream and cross-stream guarantees and security? If yes, briefly what is the effect of these laws?

No statutory requirement stipulates that a guarantee or security must be given in return for a corporate benefit. If the act of giving a guarantee or any other form of collateral to secure the debts of a third party is within the scope of the company's objectives, as registered with the Ministry of Commerce, a company may give a guarantee or security for no consideration.

## 11. What type of security interests does your jurisdiction recognise, e.g., pledge, charge, mortgage, hypothecation? In relation to each type of security interest, please state the formalities required to create and perfect that security.

**Valid security interests under Thai law**

At present, a pledge, a mortgage and business security under the Business Security Act are the only forms of valid security interests that can be created over assets recognized by Thai law.

**Pledge**

A pledge can be created over movable property through the physical delivery of the pledged property to the pledgee's custody. Negotiable instruments such as bills of exchange, promissory notes, checks and negotiable certificates of deposit can also be pledged by endorsement and delivery of the instrument to the custody of the pledgee.

For a pledge of shares, the pledgor is required to physically deliver the share certificates representing the pledged shares to the pledgee and record that pledge in the share register book of the company that issued the pledged shares.

A pledge becomes automatically discharged if and once the pledged property has returned to the physical possession of the pledgor.

**Mortgage**

A mortgage can be created over land, buildings, machinery, ships or vessels weighing not less than five tons, floating houses or rafts, and certain animals that can be used as vehicles (such as buffaloes and oxen).

A mortgage will be created on the execution of a mortgage agreement made in the relevant official form by the mortgagor and the mortgagee and its registration with the relevant authority. A mortgage agreement must be only made in Thai language, but the parties can attach a supplement to the official mortgage agreement that contains additional specific terms agreed between the mortgagor and mortgagee. The mortgage agreement and its supplemental agreement must be executed in the presence of a competent officer at the time of filing an application for registration with the relevant authority. The secured amount of the mortgage must be stated in Thai baht in the mortgage agreement. Each individual lender must also be named as a mortgagee in the mortgage agreement and be registered as a mortgagee to be recognized as a secured creditor under Thai bankruptcy law.

**Business security**

Business security under the Business Security Act is created when the parties enter into a business security agreement (which must contain prescribed contents) in writing, and it is registered with the Ministry of Commerce via an electronic registration system. The business security agreements may be made in Thai or English, but the registration particulars required for registration must be in Thai.

**Other rights**

In practice, the parties may enter into any other form of contract (e.g., a guarantee, conditional assignment, subordination or option agreement) as part of the security package. However, these agreements will be enforceable between the parties but will not be recognized as having priority over other creditors under Thai law (in particular, under Thai bankruptcy law). In other words, they will be treated as unsecured debts, and a beneficiary under a guarantee and an assignee will be paid as unsecured creditors.

These arrangements can be effected as set out below.

**Guarantee**

A guarantee (suretyship) is a contractual right given by a third party to secure the performance of an obligation by a debtor. If the debtor defaults in the performance of its obligations under a separate underlying agreement, the guarantor must assume the payment obligations of the debtor. In order to be enforceable in court between the parties, the guarantee agreement must be made in writing and must be signed by the guarantor. It is not necessary for the creditor to sign a guarantee agreement.

A guarantor has rights of subrogation. After a guarantor has made a payment under the guarantee, the guarantor will have rights of recourse against the debtor for the amount paid.

**Assignment**

In project financing transactions, it is common for a debtor to be required to assign its rights (and/or obligations) under the major project agreements to secure the performance of its obligations under the financing agreements and/or to facilitate the enforcement of secured assets in relation to the project. However, it should be noted that there is uncertainty in relation to the legal operation of an assignment as a form of security in practice, due to the lack of legislation governing the matter.

Assignments of property lease rights and accounts receivable are the most common in business transactions.

The creation of an assignment of rights and/or obligations under a contract is made by way of a written agreement between the assignor and the assignee with notification to and/or consent from the counterparty of the contract under which the assignor's rights and/or obligations have been assigned. It is important to note that in the case of an assignment or transfer of an obligation by way of "novation," the written consent of the assignor's counterparty must also be obtained.

## 12. Are there any registration, translation or notarization requirements in relation to security, guarantees, subordination or intercreditor documents?

There is a registration and translation requirement for mortgages and business security as previously explained in the answer to question 11 of this section.

There is no notarization requirement for other security interests or other contractual security arrangements. However, in effecting the registration of mortgages, the competent officer may request that the supporting documents executed or sent from outside Thailand be notarized (and, if applicable, legalized) prior to its submission to the officer.

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 such court, should the parties agree not to translate it and if the court is of the opinion that the document is not evidence in a major issue of the case.

## 13. Are there any stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in respect of security, guarantees, subordination or intercreditor documents? If yes, what are the amounts and when are they payable?

**Stamp duty**

The original of any guarantee is subject to stamp duty of THB 10 and each duplicate copy of the guarantee is subject to nominal stamp duty of THB 5.

A pledge agreement is subject to stamp duty of THB 1 for every THB 2,000 of underlying obligations that that pledge secures (or only THB 1 for underlying obligations that the pledge secures that does not have a specified monetary value or pledge amount) and each duplicate copy of the pledge agreement is subject to nominal stamp duty of THB 5. A pledge is exempted from stamp duty when the pledge secures obligations under a loan agreement in respect of which the applicable stamp duty has already been paid.

The stamp duty for guarantees and pledge agreements is due and payable within 15 days after the date of execution of the relevant agreement. If the agreement is executed abroad, the stamp duty is payable within 30 days of the original being physically brought into Thailand.

Each appointment of an agent (i.e., facility agent or security agent) under an intercreditor agreement is subject to a maximum stamp duty of THB 30 per appointment of an agent per each principal.

**Registration**

The registration of a mortgage is subject to registration fees, payable to the relevant authority at the time of registration. The fees below relate to assets that are usually the subject of a mortgage:

For a mortgage of land and buildings, 1% of the mortgage value, but not exceeding THB 200,000 for each mortgage

For a mortgage of machinery, 0.1% of the mortgage value, but not exceeding THB 120,000 for each mortgage

For a mortgage of a condominium, 1% of the mortgage value for each mortgage

The registration of business security is subject to the following registration fees, payable to the relevant authority at the time of registration:

For business security over land, 1% of the maximum secured value, but not exceeding THB 200,000 for each business security

For business security over assets other than land, 0.1% of the maximum secured value, but not exceeding THB 1,000 for each business security

# If things go wrong

## 1. Please provide a brief description of the insolvency regime. In particular what rights and duties do unsecured and secured lenders have on the insolvency of a debtor? Are there any other matters of concern?

**Personal bankruptcy**

Personal bankruptcy in the Thai system commences exclusively by a creditors' petition being filed with the Bankruptcy Court. Thai law does not provide for the institution of voluntary bankruptcy proceedings. After receiving a bankruptcy petition, the court will set a first hearing date at which objections to the bankruptcy petition will be considered. At the hearing, the court will examine the bankruptcy petition. If the petitioning creditor can verify the debtor's state of insolvency and there are no reasons why the debtor should not be adjudged bankrupt, the court will accept the bankruptcy petition and issue an absolute receivership order. This order triggers the official receiver to locate and collect the debtor's assets and remove the debtor from having control over its assets.

One special feature of Thai law is the ability of a creditor to seek a temporary receivership order, through an ex parte injunction, to freeze the debtor's assets or require the debtor to provide security. This special pre-bankruptcy action is designed to prevent a debtor from liquidating its assets to the detriment of its creditors.

Prior to the first meeting of creditors, the debtor may propose to the official receiver a compromise of debts (i.e., an arrangement that specifies the amount that creditors will receive (which would be a lesser amount than they are owed)) or the method of management of the business and assets, and provide details of any security. Creditors may agree to accept a compromise of debts by a special resolution of a meeting of creditors, requiring the approval of creditors representing 75% of the debt by a majority of the creditors in attendance at the meeting. If the approval of a compromise of debts fails, the debtor will be declared bankrupt, and the seizure and liquidation of the debtor's assets will be carried out by the official receiver and distributed according to the creditors' preferential ranking.

The debtor can be released from bankruptcy by a post-bankruptcy compromise of debts and discharged from bankruptcy under the Bankruptcy Act B.E. 2483 (1940) (as amended) on any of the following four grounds:

That no creditor assists the official receiver in the collection of assets

That the debtor should not be adjudged bankrupt

That the debts of the bankrupt have been paid in full

That during the 10-year period after the closure of the bankruptcy action, the official receiver has been unable to collect any further assets of the bankrupt entity

**Corporate bankruptcy**

There are three types of procedures available for corporate debtors as set out below. The features of the three types of procedures are also discussed below.

**Creditor-initiated bankruptcy**

Under a creditor-initiated bankruptcy, the successful verification by the creditor of the debtor's insolvency leads to a court order of absolute receivership and the process falls under judicial supervision.

**Debtor-initiated bankruptcy**

A debtor-initiated bankruptcy occurs through voluntary liquidation. The shareholders may by a special resolution, if its contributions or shares are fully paid up and if its assets are insufficient to meet its liabilities, apply to the court through a liquidator to have the entity declared bankrupt.

**Business reorganization procedure**

A business reorganization procedure, either creditor-initiated or debtor-initiated, is available with the objective of rehabilitating the business. A reorganization planner ("**Planner**") or plan administrator ("**Administrator**") operates this procedure with judicial oversight.

**Features of a debtor-initiated bankruptcy and a creditor-initiated bankruptcy**

Thai courts tend to rely heavily on the balance sheets of the company. Therefore, in cases where a debtor attempts to inflate its assets to create a positive balance sheet in relation to a debtor-initiated bankruptcy, creditors will require strong proof to convince the court that the debtor is insolvent.

The ability to seek a temporary receivership order, the ability of the corporate debtor to propose a compromise of debts, and the methods of release from bankruptcy are also applicable to corporate bankruptcy.

The process for corporate bankruptcy is the same as it is for a personal bankruptcy. After receiving the bankruptcy petition, the court will set a first hearing date, at which objections to the bankruptcy petition will be considered. If the bankruptcy is accepted by the court, an absolute receivership order will be issued, and the official receiver will seize and assume control over all of the debtor's assets.

**Features of a business reorganization procedure**

The debtor, its creditor or relevant government authorities may submit a petition for a business reorganization. On the submission of the petition and the court's acceptance of the petition, an automatic stay will come into effect and parties will be prohibited from taking certain actions regarding the debtor. These actions include the following:

Commencing litigation proceedings or requesting the court to wind up the debtor

Taking a bankruptcy action against the debtor

Enforcing a judgment against the debtor's assets for debts incurred prior to the date that the court issues an order to approve the reorganization or rehabilitation plan

Transferring, disposing of, leasing out, incurring debts or undertaking any action that creates a burden over the debtor's property, except as is necessary for normal trade activities

Similar to typical bankruptcy proceedings, the court will set an enquiry hearing date at which objections to the petition will be considered. Following the court's order to reorganize the debtor's business, all powers to manage the debtor company will pass to the Planner and then to the Administrator after the court approves the reorganization or rehabilitation plan (except where the debtor acts as its own Planner or Administrator). After the Planner's details are published in the Government Gazette, creditors have one month to lodge their creditor claims with the official receiver, failing which, their creditor claims will be barred.

The reorganization or rehabilitation plan must be approved by the affirmative votes of the following:

A simple majority of creditors (i.e., 50% of creditors where each creditor has one vote) in each group of creditors, provided that the creditors voting in favor of the plan in each group hold debts representing at least two-thirds of the debts owed to that group

A simple majority of the creditors in at least one group of creditors provided that: (i) the creditors in that group hold debt representing at least two-thirds of the debt owed to that group; and (ii) the total debt owed to creditors in all groups who voted in favor of the plan represents at least 50% of the total debt owed to all creditors in all groups

In this regard, the majority creditors can impose a plan on minority creditors, including a plan relating to any difference between the amount of a particular debt and the security relating to that debt. Under Thai law, any debt that is forgiven under a reorganization or rehabilitation plan is exempt from taxation.

Subsequently, the court must approve or reject the reorganization or rehabilitation plan. In this regard, the court is required to examine any objections to the plan. If the plan is rejected, the court may simply revoke the order granting permission to reorganize the debtor's business and return the debtor to a state of normal business operations, or if there is a pending bankruptcy lawsuit against the debtor, order those pending bankruptcy proceedings to continue.

**Clawback**

An important feature of both the Thai bankruptcy and reorganization laws is the ability to have fraudulent acts, acts of undue preference and executory contracts invalidated during the bankruptcy or reorganization process.

The Planner, Administrator or official receiver may ask the court to cancel a fraudulent act by filing a motion with the court. A "fraudulent act" is defined as an act conducted by the debtor with the knowledge that the relevant act would prejudice its creditors. However, this nullification does not apply if the third party that received the benefit in relation to that act gave fair value for the act and did not know, at the time of the act, that the act would prejudice the debtor's creditors. The prescription period to request nullification of a fraudulent act is within one year from the time the creditor knew of the cause for nullification of the act or within ten years from the occurrence or commission of the act. If the alleged fraudulent act was conducted within one year of the filing of the application for bankruptcy or reorganization, it is presumed that the debtor and the third party had knowledge that it would prejudice the debtor's creditors.

When there appears to have been a transfer of assets or any other act that the debtor has committed or allowed to be committed within the three-month period prior to or after the filing of the bankruptcy or reorganization petition, with the intent to place any creditor in an advantageous position over other creditors, the Planner, Administrator or official receiver may file an application with the court requesting the nullification of that transfer or act.

In addition, within two months from the date that the Administrator is informed of the court's approval of the reorganization or rehabilitation plan, the Administrator has the right to refuse to accept rights under a contract where the obligations exceed the benefits to be received, provided that those rights were included as part of the reorganization or rehabilitation plan approved by the creditors' meeting and the court.

## 2. Is it possible to obtain a moratorium before insolvency?

Yes, a creditor may seek a temporary receivership order, through an *ex parte* injunction, to freeze the debtor's assets or set up a bankruptcy action against the debtor. If the court finds the debtor to be insolvent, it makes an order that places the debtor in absolute receivership, by which the debtor is suspended from any action related to its assets and any legal challenge in relation to the debtor's assets is put on hold.

## 3. When a company is the subject of a formal insolvency procedure, can the company’s pre-insolvency transactions be set aside?

Transactions in which a creditor allows a debtor to create additional debts even though the creditor knew at the time (e.g., because the debtor had not been servicing the relevant debt for several years) that the debtor was insolvent (i.e., assets are less than debts) can be set aside. A creditor that allows the additional debts to be created will be barred from filing a claim to recover the amount of those additional debts.

The additional debt does not include debts permitted to be created so that the debtor can continue its ordinary business operations.

## 4. When can a lender enforce its security? Can security be enforced out of court following an event of default (or other contractual trigger event), or is a court order required? Are there any restrictions that apply before a lender may enforce its security?

Security can be enforced upon the breach of the underlying obligations that the security secures, subject to contractual terms and conditions. The enforcement requirements differ depending on the type of security and they are set out below.

**Valid security interests under Thai law**

**Pledge**

A pledge can be enforced out of court. To enforce a pledge, a written demand notice must be given to the debtor requiring it to perform the obligations and all accessory acts within a reasonable time (as stated in the notice). If the debtor fails to comply with the notice within the prescribed period, the pledgee is entitled to sell the pledged property but it must be sold by public auction.

**Mortgage**

A mortgage can be enforced by a court order to either foreclose or sell the mortgaged property by public auction.

To enforce a mortgage, a written demand notice must be given to the debtor by the creditor requiring the debtor to perform the obligations and pay for all related charges within a reasonable time (as stated in the demand notice, which in any case must not be less than 60 days from the receipt of the creditor's written demand notice). In the case of a third-party mortgagor, the creditor is also required to serve a demand written notice on that third-party mortgagor within 15 days after the date of its demand notice to the debtor. If the creditor fails to serve the required written demand notice within the 15-day period, the third-party mortgagor is relieved from any liability for all interest, compensation and accessorial charges arising after that prescribed period.

**Business security**

A business security created under the Business Security Act can be enforced once an enforcement event (as specified in the business security agreement and the registration record) occurs. The enforcement in relation to specific assets and entire businesses are subject to different procedures.

In relation to specific assets, the creditor can choose one of the following:

Foreclosure

Sale of the secured assets by public auction by serving an enforcement notice on the security provider

Once the notice is served, the security provider is prohibited from disposing of the secured assets or causing the value of the secured assets to decrease and it is required to surrender them to the secured creditor that will then be entitled to take possession of the secured assets. No court proceedings are required except where the security provider refuses to surrender the secured assets to the secured creditor.

In relation to an entire business, enforcement must proceed through a duly licensed security receiver authorized to enforce the security. The parties appoint the security receiver by serving an enforcement notice on the security receiver. The security receiver will be responsible for the investigation in relation to whether an enforcement event has occurred. Once the security receiver determines that an enforcement event has occurred, the managerial power and shareholders' rights over the business (except rights to dividends) will be transferred to the security receiver. The security provider is required to deliver the entire business, related documents and related rights and liabilities to the security receiver within seven days after the receipt of the enforcement order from the security receiver. The security receiver is in charge of managing the business until it is sold, selling the business and allocating the sale proceeds.

**Other security interests**

**Guarantee**

To enforce a guarantee, upon a default by the debtor, the creditor must serve a written demand notice on the guarantor within 60 days of the default. The creditor may not demand that the guarantor perform its obligation before the written demand notice reaches the guarantor. If the creditor fails to serve a written demand notice within the 60-day period, the guarantor is relieved from any liability in relation to all interest, compensation and related charges arising after the prescribed period.

If the creditor is entitled to demand that the guarantor perform the obligations of the debtor after the default by the debtor, the guarantor can choose to do one of the following:

Perform that obligation in its entirety

Exercise its right to perform only the specific portion of the debtor's obligations for which the guarantor is liable under the terms and conditions of the obligations agreed between the debtor and the creditor prior to the default

In these circumstances, the guarantor will be exempted from paying interest at the default interest rate. If no payment is made within the period specified in the demand notice, the creditor may file a lawsuit in court.

**Assignment**

To enforce an assignment of rights, the relevant parties may give a demand notice to the counterparty stating their intention to enforce their rights under the assigned agreement. If there is no payment within the specified period under the demand notice, the creditor may file a lawsuit in court.

## 5. Do any limitation periods apply in relation to bringing an action to enforce security?

The limitation period for bringing an action under a loan is ten years from the date when the relevant claims can be enforced. The barring of claims because of an elapsed limitation period or time prescription does not prevent a mortgagee or a pledgee from being entitled to enforce its security in relation to the secured assets. However, enforcement in relation to the outstanding interest is only permitted for the amount outstanding in the five years preceding the enforcement proceedings.

## 6. Is there any particular way in which secured assets must be liquidated on enforcement (e.g., by auction or court sale)?

Secured assets must only be liquidated on enforcement by public auction.

## 7. Are there any particular legal or practical difficulties or delays in enforcing security?

A mortgage can only be enforced by a court order and the secured assets must be sold by public auction. The judicial process can take a considerable amount of time before a final judgment is obtained. Sometimes, no bidders may participate in the auction and this may further prolong the enforcement process.

In our experience, the enforcement of business security under the Business Security Act is still unprecedented.

## 8. In relation to enforcement, are there any specific requirements to be borne in mind if the lender is a foreign entity?

There are no specific requirements that apply to foreign entities in relation to the enforcement of security in Thailand. However, foreign entities should be aware that there are issues in relation to the recognition and enforcement of foreign court judgments. Thai law does not specifically provide for the direct enforcement or recognition of foreign court judgments in Thailand. Moreover, Thailand is not a party to any treaty or agreement by which the judgment of a foreign court is entitled to be recognized and enforced in Thailand. Therefore, new judicial proceedings based on the merits of the case must be initiated in Thailand. However, foreign court judgments and documentary evidence generated during any foreign litigation process, including settlement negotiations, may be admissible as evidence in new court proceedings initiated in Thailand.

## 9. Is there any reason why you think that arbitration rather than litigation might be advantageous in resolving disputes under the finance documents, and if so, why? Please outline the relative merits of arbitration and litigation, including the ease of enforcement of foreign judgments and foreign awards from different jurisdictions. Is it possible to rely on a hybrid enforcement provision that allows the lenders to opt for either arbitration or litigation as they see fit?

The advantages of arbitration over litigation are as follows:

 An arbitral award is likely to be obtained in a shorter time than court judgments because a court judgment is likely to be subject to subsequent appeal proceedings before two superior courts before it becomes final.

An arbitral award is final and binding on the parties in the arbitration proceedings. Under the Arbitration Act B.E. 2545 (2002) ("**Arbitration Act**"), neither party can appeal against the merits of the arbitral award, whether to the arbitral tribunal or the courts in an action for the enforcement of the arbitral award.

Thai courts generally recognize and enforce arbitration awards whether they are made in Thailand or elsewhere. However, the courts are more likely to enforce foreign arbitration awards if the parties involved are entitled to rely on the terms of relevant international conventions to which Thailand is a party. At present, Thailand is a member state of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (also known as the New York Convention 1958), and the Convention on the Execution of Foreign Arbitral Awards 1927 (also known as the Geneva Convention 1927). Therefore, an arbitral award made in a member state under either of these conventions will be recognized and enforced by Thai courts. Nevertheless, as discussed in the answer to question 8 of this section, Thai law does not specifically provide for the direct enforcement or recognition of foreign court judgments in Thailand.

In litigation proceedings before the courts of Thailand, the trial and all documentary submissions and pleadings must be conducted in Thai. However, in arbitration proceedings, although the seat of arbitration may be in Thailand, parties can agree to have the arbitration conducted in another acceptable language.

It is also possible under Thai law to rely on a hybrid enforcement provision that allows the lenders to opt for either arbitration or litigation as they see fit.

## 10. Are asymmetrical jurisdiction clauses enforceable? (By this we mean clauses that allow the lenders, but not the borrowers, to make certain choices in relation to choice of jurisdiction and how to litigate. These types of clauses allow the lenders, but not the borrowers, to commence proceedings in any court they choose, but restrict the borrowers to commencing proceedings in one jurisdiction only. This may also allow the lenders, but not the borrowers, to choose whether to litigate the finance documents before a court or to submit to arbitration in relation to them, but restrict the borrowers to either litigation or arbitration, as specified in the agreement).

We are not aware of any precedent judgment or decision in relation to this type of asymmetrical jurisdiction clause. In principle, Thai law does not prohibit the agreement for the submission by any person to the jurisdiction of a foreign court, but an agreement of this type does not prevent Thai courts from having jurisdiction over the case if, by virtue of the Civil Procedure Code of Thailand, it has jurisdiction over the case. It is likely that Thai courts would exercise their jurisdiction over any case within their power regardless of any contractual restriction.

In relation to the choice between litigation and arbitration, under the Arbitration Act, when the agreement to arbitrate exists and it is valid, the parties are prohibited from filing a lawsuit before any court and they are bound to refer the dispute to arbitration. If any party files a lawsuit before any court in breach of the arbitration agreement, the other party may ask the court to stay the litigation proceedings so that the case can be referred to arbitration. Unless this arbitration agreement is void or unenforceable, Thai courts will usually give effect to it and will stay the litigation proceedings.

# Working digitally

## 1. Is it possible for documents to be executed electronically (whether by the manual insertion of a digital signature or the use of an e-signing platform) under the laws of this jurisdiction? If so, is this limited to only particular types of finance documents?

The Electronic Transaction Act B.E. 2544 (2001) (ETA) supports the legal effect of the e-signature much like the traditional signature on paper, provided that the criteria of being an e-signature under the ETA is met. The Electronic Transaction Development Agency recently published a recommendation on the ICT standard for electronic transactions in June 2023. This is also subject to further general legal formalities for each type of finance document (such as security documents) to ensure the validity of such document.

## 2. Where the witnessing of a signing is contemplated, is it possible for the witness to verify the signature over a live video call?

In a case where the law requires the signature of a witness, it is arguable whether the witness has to be "present physically" at the same place as the parties that are signing the agreement, or whether electronically witnessing from a distance via a live video call would suffice. Both e-transaction-related laws must be met and general legal formalities for each document/transaction must be followed to ensure the legal validity of such document/transaction.

## 3. Is it possible to register/perfect security electronically without wet ink signatures?

The registration system of mortgages in Thailand currently requires documents to be executed in the presence of the officer in wet ink.

Other forms of security may be executed with an e-signature, but the legal requirements in relation to the perfection requirements, as mentioned in question 11 of the section "If taking security" will still apply.

## 4. Are there any other legal restrictions that may prevent the parties from executing a finance transaction electronically?

No.

# Contributors

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