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# Banking & Finance 2022

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## **Thailand: Law & Practice**

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## **Thailand: Trends & Developments**

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## Law and Practice

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## 1. Loan Market Panorama

### 1.1 Impact of the Regulatory Environment and Economic Cycles

Thailand's economy has gradually recovered from the market decline that occurred over the past few years as a result of government policies that continue to support funding for individuals and business operators. It is anticipated that Thailand's economy will not fully recover to pre-COVID-19 conditions until as early as 2023. The Thai banking system remained resilient with high capital funds, loan loss provisions and liquidity, which served as key mechanisms to accommodating loans to support the economic recovery, according to the Bank of Thailand. Recently, the Monetary Policy Committee has decided to increase policy interest rates from 0.5% to 0.75% and to 1.0% per annum. Due to debt restructuring and banks' loan portfolio management, markets are expecting a lower ratio of non-performing loans despite this rate increase. In the second quarter of 2022, corporate loans increased at a faster rate than consumer loans, reflecting businesses' need to expand their production and export capacities.

### 1.2 Impact of the COVID-19 Pandemic

While there are signs that the financing market has recovered and business activities are more active, the COVID-19 pandemic's impact remains on Thailand's economy. Since early 2020, the BOT has issued several measures designed to assist retail and small and medium enterprises (SME) who are experiencing difficulty repaying their debts. The relief measures include soft loans to support viable businesses, particularly for machinery and tool investments, loan repayment holidays to enhance the liquidity of debtors' cash flow so that they can meet necessary expenses, debt restructuring, etc.

For larger corporations, lenders tend to be more lenient when it comes to granting an extension for loan repayments, which may include a waiver of instalments for a certain period, or consent to amend the existing repayment schedule. Furthermore, there seem to be cases where the involvement of existing lenders is critical to implementing the debt restructuring process.

### 1.3 The High-Yield Market

The issuance of high-yield bonds has increased since 2020, with at least 70% being secured either by corporate guarantees or fixed assets such as land and buildings. Due to the high default risk associated with high-yield bonds, the Securities and Exchange Commission issued a regulation for establishing a high-yield bond fund for limited groups of investors (high net worth and institutional investors) in an effort to stabilise the high-yield bond market. While more attention has been given to the high yield bond market in 2022, the high-yield market has not yet played a significant role in raising funds by business operators, and traditional financial institutions remain the primary source of funding for most Thai companies.

### 1.4 Alternative Credit Providers

Traditional financial institutions, such as commercial banks and specialised financial institutions, continue to be the major credit providers in Thailand, especially when it comes to financing large corporate transactions. Non-banks and start-ups have become more prominent in the market for typical loans to individuals such as personal loans and nano-finance. By having a more approachable method for accessing loans with a less complicated process, such alternative credit providers can be a more convenient option for individuals and retail customers.

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## 1.5 Banking and Finance Techniques

### Digital Factoring Ecosystem

In the past, SMEs were generally unable to access factoring transactions because factoring business operators were concerned about the unreliability of invoices submitted by customers and their requests for double financing on the basis of the same invoices. Using central web services (CWS) technology, the BOT launched a platform for digital factoring. By using the central database of the platform, it is possible to verify the invoices of the customers in order to prevent double financing issues. In recent months, the platform has built confidence among factoring business operators, and more have agreed to enter into factoring transactions, which makes factoring a more readily accessible means of obtaining funding for SMEs.

### Peer-to-Peer Lending

Lending by an individual or a juristic entity to an individual can be done on a licensed peer-to-peer (P2P) lending electronic platform. The platform operator will act as an intermediary by matching lending and borrowing activities and arranging the execution of loan agreements. Furthermore, the platform operator will have to assess the borrower's creditworthiness and client suitability, as well as procure the funds through a custodian or an escrow account.

This method of lending excludes administrative costs that normal financial institutions have to bear, and the platform operator will be able to eliminate significant costs normally charged to the borrower for the similar services. Using this financing technique not only allows the borrower to access funds via a simpler and faster method, but also offers investors an alternative way to manage excess funds in addition to saving.

### Digital Lending

Digital lending is a financing technique that allows licensed personal loan business operators to employ digital technology and alternative data as part of its credit risk analysis. It helps customers who may not have regular income or sufficient assets to serve as collateral for a loan but may have other online information that proves their ability to repay a loan to access a source of funds. Business operators are urged to proceed with the borrowing and repayment processes through an electronic platform such as wire transfer or electronic money to create a digital footprint that will be useful for the customers when it comes to future financial products and services.

### Crowdfunding

Crowdfunding, either by way of equity or debt, can be performed through a licensed funding portal. A borrower or an issuer will have to submit a business plan to the funding portal, which conducts a screening process and discloses relevant information online. Investors will then consider the published information and if they decide to make an investment to such business, they will pay a subscription fee that will be held by an escrow agent. The borrower will then issue shares or debentures to investors and will be required to provide periodic updates on the progress of the business.

## 1.6 Legal, Tax, Regulatory or Other Developments

### Bill on the Supervision of Hire Purchase and Leasing of Automobiles and Motorcycles

Although the number of hire purchase and vehicle leasing businesses operated by non-banks in Thailand has steadily increased, there has never been a clear supervision over such activities. The BOT held a public hearing on a bill governing the supervision of the hire purchase and

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lease of automobiles and motorcycles. The bill introduces regulations on non-bank business operators conducting hire purchase and vehicle leasing businesses as part of their normal business operations. According to the bill, business operators are not required to obtain a licence in order to operate their businesses. However, they may have to file a report with the BOT, and the BOT may impose certain restrictions on the provisions of hire purchase or leasing contracts as well as restrictions on deposits, interest rates, security, penalties, etc. The BOT asserts that the bill is intended to protect consumers from being exploited by business operators, and to establish standards and enhance the operations of those businesses.

## **Development on Interest Rates**

Apart from the development in adopting digital technology in lending activities, there are significant developments in the law relating to interest in Thailand, particularly the following.

### **Statutory Interest and Default Interest**

Historically, one of the rules governing interest on monetary debts has been that if the agreement does not specify an interest rate or a default interest rate to be paid, and interest was to be charged, the statutory interest rate would be charged at a rate of 7.5% per annum, and statutory default interest would also be charged at a rate of 7.5% per annum. Consequently, the statutory interest rate has been reduced from 7.5% per annum to 3% per annum and the statutory default interest rate has been reduced from 7.5% per annum to 2% higher than the normal interest rate (ie, 3%), or 5% per annum. These rates are applicable only in cases in which there is no mention of the interest rate in the agreement.

### **Default Interest Rate**

There has been a change on how default interest can be charged, which also applies to loan transactions. In cases of debt being due in an instalment or revolving debt, the default interest rate can be charged on the defaulted principal amount only, instead of charging on the entire outstanding amount as previously done. Under a BOT notification, for loans where repayment is to be made in instalments or revolving loans granted to retail and SME customers, financial institutions regulated by the BOT can charge a default interest rate up to 3% per annum higher than normal interest rate as specified in the loan agreement.

### **Order of Application of Proceeds**

Loan agreements normally specify an order of application of proceeds when lenders receive payments from borrowers and such payments cannot satisfy the entire outstanding amount under the loan agreements. Under Thai law, for loan where the repayment is to be made in instalments or revolving loans granted to any customer, repayment proceeds by borrowers under a loan agreement entered into with financial institutions regulated by the BOT must be applied towards fees, default interest and the principal amount of the amount outstanding respectively. If the debt is due on an instalment basis, the proceeds must be applied towards the outstanding amount of each instalment based on the respective order above, from the longest overdue instalment to the shortest.

## **1.7 Developments in Environmental, Social and Governance (ESG) or Sustainability Lending**

Financial regulators, including the Fiscal Policy Office, the BOT, the Securities and Exchange Commission, the Office of Insurance Commission, and the Stock Exchange of Thailand have

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established a Working Group on Sustainable Finance to promote sustainable finance and to support the Thai economy in achieving sustainable development goals.

The BOT, the Thai's Banker Association and 15 commercial banks have jointly signed an MOU setting forth responsible lending guidelines for each commercial bank in order to promote sustainability within the banking sector and the national economy. A strong commitment to responsible lending, stakeholder engagement considerations, internal implementation mechanisms, and transparency are the four pillars of the responsible lending guidelines.

Financial institutions are increasingly integrating sustainability (environmental, social and governance) into their businesses and embedding it into their core strategies. To date, markets have shown promising development of sustainable finance products and an inaugural sustainability-linked loan was announced early in 2021, marking the first ESG loan in Thailand.

## 2. Authorisation

### 2.1 Authorisation to Provide Financing to a Company

Licensed commercial banks (Thai commercial banks, subsidiaries of foreign commercial banks and branches of foreign commercial banks) are authorised to provide financing to companies. In the case of non-banks, specific types of financing, eg, personal loans, nano-finance for occupational purposes and provincial retail loans (pico finance) are regulated and subject to licensing requirements. Licence applications can be submitted to the BOT or the Ministry of Finance for consideration and approval. Non-banks who conduct business that is not regu-

lated, and who are foreigners under the Foreign Business Operation Act, are also required to obtain a foreign business licence.

## 3. Structuring and Documentation Considerations

### 3.1 Restrictions on Foreign Lenders Granting Loans

In general, foreign lenders are not restricted from providing loans to Thai residents, except in the case when the loans are provided to individuals and can be classified as personal loans, nano loans or pico loans. In such cases, loans from foreign lenders are subject to the BOT's regulations.

### 3.2 Restrictions on Foreign Lenders Granting Security

There are no substantial restrictions on the provision of security or guarantees to foreign lenders, except for a provision of security under the Business Security Act B.E. 2558 (2015) to a foreign lender. In these cases, a foreign lender that is a commercial bank is required to grant a loan in syndication with Thai banks to be eligible to have security under this law, see 6.1 **Enforcement of Collateral by Secured Lenders**.

### 3.3 Restrictions and Controls on Foreign Currency Exchange

The purchase and remittance of foreign exchange is subject to the approval of authorised agents, usually commercial banks, for all bona-fide transactions that do not fall into the restricted purposes outlined under the Exchange Control Act, B.E. 2485 (1942), as amended.

If a transaction falls within such restricted purposes, specific approval from the BOT must be obtained. In any case, the remittance and pay-

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ment made under a loan, guarantee, or any other associated interest or fees are not categorised as restricted purposes; therefore, a specific approval from the BOT is not required.

While the BOT's approvals are granted on a case-by-case basis, such approvals have been routinely granted for all bona fide transactions, provided that the relevant supporting documents/agreements to prove a legitimate commercial purpose are submitted to the BOT together with other supporting documents, as required by the BOT.

### 3.4 Restrictions on the Borrower's Use of Proceeds

There are no general laws imposing a restriction on the borrower's use of proceeds from loans or any debt securities. Nevertheless, a borrower is prohibited from using the proceeds in connection with illegal activities.

In most loan agreements, purposes of the loan proceeds are specified and any deviation from such purposes would constitute a default, giving the lender the right to terminate the loan agreement.

### 3.5 Agent and Trust Concepts

Generally, the creation of a trust by a will or by a juristic act is prohibited under Section 1686 of the Thai Civil and Commercial Code. However, a trust can be established for purposes of securities, securitisation, and capital market transactions under the Trust for Transaction in Capital Markets Act B.E. 2550 (2007). Accordingly, the concept of a trust established for general purposes is not recognised under Thai law and the obligations of a person to hold anything in trust for any other person may not be enforceable, although analogous rights are recognised in certain transactions. However, such unenforceabil-

ity would not in itself affect the recognition of the validity of the particular transaction to which the person acting as trustee was a party.

Notwithstanding the above, an appointment of an agent is commonplace in financing transactions in Thailand and a concept of principal-agent relationship is recognised under Thai law. In a syndicated loan, lenders usually appoint a security agent among themselves to hold security for and on a lender's behalf. There is no specific licensing requirement for acting in a capacity as a security agent. However, mortgage registration does not allow the concept of a security agent, thus each lender must enter into a mortgage agreement as a mortgagee.

### 3.6 Loan Transfer Mechanisms

Typically, a loan may be transferred by way of assignment of rights under the loan or novation of the existing loan.

#### Assignment

A loan transfer by way of assignment of rights is usually made when loan disbursements have already been made in full and no commitments are available under the loan agreement. As a result, only right to receive loan repayments will be transferred.

An assignment of rights of the existing lender to the new lender must be made in writing. For an assignment to be valid against the borrower, a written notice must be given, or a written consent must be obtained from the borrower. Following the assignment, the rights over a mortgage, pledge and business security agreement existing on the loan and the rights arising from a guarantee established for the loan are automatically transferred to the new lender, provided that the transfer of a mortgage and business security agreement is registered with the appropriate



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authorities. Nevertheless, the security interest over an assignment of rights under the project agreements, insurances, etc, which is not considered as preferential rights under the law, will not be automatically assigned upon the assignment of the loan. Therefore, such assignments must be executed between the new lender and the borrower to ensure its validity.

Although a guarantee or any security interests created by a third party will be automatically assigned to the new lender, it is advisable that the notice of assignment is delivered to the relevant guarantor and a third-party security provider to ensure that the assignment is duly acknowledged.

## Novation

In a case where the loan has not been fully disbursed, an assignment of a loan may not be a viable option since the assignment only transfers the rights of the original lender to the new lender but not the obligations. In this situation, a novation should be executed to ensure that the new lender remains liable for any further disbursements of the loan.

A transfer of rights and obligations of the existing lender to the new lender may be executed by way of novation where a form of tripartite agreement is required to be entered into among the existing lender, the new lender and the borrower. Additionally, the parties may agree to transfer the security granted to the existing lender under the existing loan agreement to the new lender, provided that, if the security is provided by a third party, consent from such third party must be obtained.

A loan participation, where the existing lender wholly or partially assigns its right under the loan to the transferee, is also a viable option for

a transfer of a loan, provided that commercial banks may assign a loan to financial institutions that meet the requirements set out by the BOT.

## 3.7 Debt Buy-Back

Under Thai law, debt buy-backs by the borrower result in the loan's rights and obligations being vested in the same entity, and the loan will be extinguished. Even though the rights and obligations under the loan can be merged within the same entity, debt buy-back arrangements are not commonly used in Thailand. Often, lenders and borrowers will enter into discussions to restructure and reduce the amount of debt to be repaid by the borrower should there be a situation where the borrower is unable to pay debt in full amount.

For a debt buy-back by a third party, ie, a sponsor, there is no specific law or regulation explicitly prohibiting the sponsor to buy back the borrower's debts. Sponsors are legally permitted to repay the loan to the lenders (or purchase debt or claim rights against the borrower) and then subrogate the lenders' rights as creditors. However, loan agreements can specify that the transferee of the lender must appear on an approved list of banks, thus making the debt buy-back infeasible for the sponsor.

## 3.8 Public Acquisition Finance

In public acquisition transactions, if an acquiror wishes to acquire shares of a target company that reaches certain thresholds as specified by law, the acquiror must make a tender offer for all issued shares of the target company. The offeror is required to indicate the source of funding in its tender offer documents as a method of demonstrating its ability to fund the tender. If the source of funds includes funds secured by debt financing from a financial institution, a commitment letter issued by the financial institution

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must be submitted as a supporting document along with the tender offer documents, which are to be publicly filed with the Securities and Exchange Commission.

There is no specific requirement for details or minimum particulars in such commitment letter but in practice, commitment amounts and an effective period for such commitment are specified. Loan agreements for certain funds can be executed thereafter with certain condition precedent documents set forth by the lenders that are sometimes subject to lenders' satisfaction.

## 4. Tax

### 4.1 Withholding Tax

Interest, other fees, expenses, charges, penalties, and other payments made to an offshore lender are generally subject to withholding tax of 15%. However, the withholding tax may be reduced or waived by virtue of a tax treaty between Thailand and the resident country of the relevant lender.

### 4.2 Other Taxes, Duties, Charges or Tax Considerations

The payment of stamp duty on the following financing documents is a condition of entry into civil proceedings before the Thai courts.

- Loan agreements: stamp duty of THB1 for every THB2,000 or a fraction thereof of the total amount of the loan, but not exceeding THB10,000.
- Guarantee agreements: stamp duty of THB10 of the total guaranteed amount exceeding THB10,000.
- Pledge agreements: stamp duty of THB1 for every THB2,000 or a fraction thereof of the total amount of the loan, without limitation

(note that if the loan agreement, which is a principal obligation, has been affixed with stamp duties, the relevant pledge agreements are not required to be affixed with the stamp duty).

- Nominal duty on duplicates of dutiable instruments.

Stamp duties are required to be affixed within 30 days of bringing the document into Thailand if it is signed abroad, or within 15 days if it is signed in Thailand, otherwise penalties will be applied to late stamping and dutiable instrument without a stamp cannot be admitted into evidence in Thai courts.

Additionally, the following fees apply to the registration of certain securities under Thai law with the relevant government body:

- mortgage registration for land and/or building mortgage – 1% of the mortgage amount but not exceeding THB200,000;
- machinery mortgage registration – THB1 per THB1,000 of the mortgage amount but not exceeding THB120,000; and
- business security agreement registration – 0.1% of secured amount but not exceeding THB1,000, except for registration of security over land where the fee shall be equivalent to the land mortgage registration fee.

### 4.3 Usury Laws

The interest rate charged on a loan shall not exceed 15% per year in general. According to the BOT's Notification on practices regarding interests, discounts, service charges, and penalties for commercial banks, each commercial bank is entitled to announce its own maximum interest rate to be charged to its customers for Thai baht commercial loans above a cap of 15% per annum. The charging of interest on a foreign

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loan provided by banks or financial institutions registered and located in foreign countries is limited to 20% per annum.

Fees, penalties and other payments under a loan agreement which are in the nature of interest may be regarded as additional interest. If interest is charged at a rate in excess of the applicable ceiling, the entire interest charged may be held to be void and unenforceable.

### Default Interest

The default interest rate can be agreed to at a higher rate than that of the loan interest rate. High default interest rates can, however, be determined as a penalty by a Thai court. The court can use its discretion to reduce the default interest rate if it believes that such default interest rate is disproportionately high.

In addition, as mentioned in **1.6 Legal, Tax, Regulatory or Other Developments**, the newly amended Thai Civil and Commercial Code prescribes that where debts are due in instalments, the default interest rate shall be calculated on the due but unpaid principal amount of such default instalment. Thus, default interest can be charged only over the principal amount for each instalment. The interest on interest can be charged after it is overdue for more than one year, provided that the lender and the borrower have agreed in writing in advance, and that the entire debt shall be charged interest at a specified rate.

## 5. Guarantees and Security

### 5.1 Assets and Forms of Security

In Thailand, assets that can be provided as collateral are generally real estate, movable property, shares and claims. Security executed not in

accordance with the formalities and perfection requirements may be considered invalid, void, or unenforceable, as the case may be.

### Real Estate

A typical form of security interest over land and/or buildings is a mortgage. A mortgage agreement must be registered with the competent official at the relevant land offices where such land/building is situated, otherwise the mortgage is invalid. As mentioned in **3.5 Agent and Trust Concepts**, since Thai law does not recognise the concept of trust, so the mortgage agreement must be entered into between the mortgagor and the lenders or secured parties as mortgagees and not by a security trustee, to ensure each lender's preferential rights.

It is important to note that Thai laws prohibit a third-party mortgagor to be liable for the remaining balance of a secured obligation when the mortgage is enforced should the proceed from enforcement not cover the amount due. Additionally, Thai law also prohibits a third-party mortgagor from acting as a guarantor while acting as a mortgagor for the same underlying obligation.

### Movable Properties

Pledges and business security agreements over property are the most common form of security over movable property. Pledges require the actual delivery of the pledged property to the pledgee, and if the property is returned to the pledgor for any reason, the pledge is legally extinguished.

The Business Security Act allows the creation of security for movable property without the physical delivery of such assets to the security receiver. A Business Security Agreement (BSA) must be made in writing and registered via an online

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system with the Secured Transactions Registry Division. Due to this special feature of no actual delivery requirement, the use of the BSA over property prevails over the use of pledge of property in corporate loans.

Under the Business Security Act, the security receiver must be a financial institution, or any other person as prescribed under relevant Ministerial Regulations, which includes a foreign commercial bank that provides facilities in syndication with a financial institution as defined in the Financial Institutions Businesses Act B.E. 2551 (2008), eg, Thai commercial banks. A foreign commercial bank that intends to be a security receiver must serve written notice of its intention to be a security receiver under the Business Security Act to the Department of Business Development, Ministry of Commerce with supporting documents proving that it is a commercial bank under the relevant laws in the jurisdiction of its registration/incorporation.

## Shares

Shares are considered rights represented in an instrument and can be secured as collateral by way of pledge. When pledging shares in a company, in addition to the physical delivery of the share certificates to the pledgee, a record of pledge along with the name and an address of a pledgee must be registered in the share register book of a company to ensure the pledge is valid against a company and third party.

## Claims and Other Assets

Certain claims such as deposits in bank accounts, rights to receive proceeds, rights under agreements or intellectual property can be provided as collateral under the BSA.

In a project finance transaction, it is also common practice for a borrower to agree in advance

to conditionally assign its rights under project-related contracts, rights to receive proceeds under insurance policies, etc, for the purpose of providing collateral to secure loan obligations in favour of a lender. However, the assignee will not be considered a secured creditor in bankruptcy proceedings.

An assignment of right is not valid unless it is made in writing, and such assignment can be set up against the debtor or third persons if written notice thereof has been given to the debtor, or if the debtor has consented in writing to the assignment.

## Rights over Leasehold Assets

The Rights over Leasehold Asset Act B.E. 2562 (2019) introduced a new type of legal interest over land and/or buildings that is capable of mortgage registration, namely, the right over a leasehold asset (Sap-Ing-Sith). Rights over a leasehold asset is similar to leasehold rights whereby the owner of an immovable property registers with the relevant land office a right over a leasehold asset or the right to use the immovable property in favour of another person (the “Leasehold Right Holder”). The maximum duration for the registered right over a leasehold asset is 30 years. Rights over a leasehold asset can only be registered over land represented by a title deed, land with buildings constructed on land represented by a title deed, and condominium units under the Condominium Act B.E. 2522 (1979).

Traditionally, a person who could be a mortgagor, in relation to real estate, was limited to the owner of the land and/or building. However, pursuant to the Rights over Leasehold Asset Act, a Leasehold Right Holder is able to mortgage its rights over the immovable property that has been registered as right over a leasehold asset.



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Note that, in contrast to the limitation of a foreigner to hold ownership of the land, a foreigner is allowed to be a Leasehold Right Holder and can subsequently mortgage such rights in favour of the mortgagee.

## 5.2 Floating Charges or Other Universal or Similar Security Interests

There is no concept of a floating charge in Thailand, but the closest available option of security is business security that can cover present and future assets of the security provider without requiring it to deliver any of its assets to the security receiver. Business security can be created over a whole business.

However, the key difference between floating charges and security over the whole business under the Business Security Act is the Thai legal requirement to register all assets secured under the BSA over the whole business and the requirement to notify the security receiver of any changes in details in secured assets.

Contrary to the floating charge concept where a specification of a class of asset charged to the chargee is required only once, and re-registration for future assets acquired by the chargor or assets disposed of in the ordinary course of business is not required, the Business Security Act requires that security providers notify the security receiver when they acquire new assets so that the registration of the security can be amended.

Nevertheless, a party may agree to set a threshold of changes that require notification, for example, the duty to notify will apply only if inventory increases or decreases by 20%. As a result of this stringent requirement and the uncertainty of enforcement, to date, the BSA over a whole business has rarely been used in Thailand, espe-

cially in relation to large commercial loans or project financing transactions.

## 5.3 Downstream, Upstream and Cross-Stream Guarantees

There is no restriction in giving downstream, upstream and cross-stream guarantees under Thai law, and the arrangement can be structured to allow one company to secure another company's debt. A guarantee provided by publicly listed companies or their subsidiaries to secure debt of another company that shares the same controlling shareholder(s) or person(s) with management power is considered as a related party transaction that may require approval from board of directors or shareholders, and may be subject to reporting requirements (depending of the size of the transaction).

## 5.4 Restrictions on Target

There is no specific restriction for the target to grant a guarantee, security or financial assistance for the acquisition of its own shares. However, if the provision of a guarantee, security or financial assistance by the target for the acquisition of target's shares is considered to be a related party transaction, certain requirements must be met as prescribed in **5.3 Downstream, Upstream and Cross-Stream Guarantees**.

## 5.5 Other Restrictions

The following issues are of concern when providing security or guarantees.

### Requirement of a Licence

A foreign entity (which includes a Thai-incorporated entity of which its shareholding structure is majorly or wholly owned by a foreign entity) is considered as a "foreigner" under the Foreign Business Operation Act B.E. 2542 (1999), and that foreign entity is restricted from providing guarantees or any security to secure a third

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party's debts since provisions of a guarantee or security to secure a third party's debt are considered as provision of services under Annex 3 of the Foreign Business Operation Act. In such cases, a foreigner is required to obtain a foreign business operation licence before providing a guarantee or any form of security in Thailand. A foreign business licence is to be granted for each transaction individually, and the foreigner is required to apply for the licence each time it is required to provide security or a guarantee.

## Thai Guarantee Law Limitations

As a result of the amendment to the Thai Civil and Commercial Code, the Thai guarantee law imposes certain limitations on the provision of guarantees, such as:

- an individual guarantor is prohibited from the provision of guarantees as a primary debtor;
- in the event of an extension of time granted by the creditor to the debtor for the secured obligation, the guarantor's obligation shall be extinguished, unless the guarantor consents to such extension of time at the time or after such extension;
- in the event that the creditor reduces the amount of the secured obligation, interest, compensation, or any other charges and if the payment after deduction has been made either by the debtor and/or the guarantor, the guarantor shall be free from the guarantee; and
- when a debtor defaults, the creditor must deliver a written notice to the guarantor within 60 days from the date that the debtor defaults. If the creditor fails to do so, the guarantor is released from interests, compensation and any other charges relating to such obligation after such 60-day period has ended.

Any provision in the guarantee agreement in contrary to the guarantee law limitations will be rendered void and unenforceable.

## 5.6 Release of Typical Forms of Security

A full repayment of a secured obligation (a loan) will legally extinguish all ancillary obligations or security agreements related to such secured obligation.

If the security is registered with a competent official, ie, security created under a mortgage and BSA, the registration of release shall be made to reflect the actual extinguishment of the underlying loan agreement. For other types of security, a notice of release is usually served to the relevant obligors, and, in case of a pledge, the pledged property shall be returned to the pledgor.

## 5.7 Rules Governing the Priority of Competing Security Interests

With respect to security which requires registration (ie, a mortgage and BSA), the security interest that was registered the earliest has priority over interests registered later. Assets subject to mortgage can subsequently be collateralised under the BSA and vice versa. However, that asset subject to collateral under the BSA cannot subsequently be pledged, otherwise the pledge will be invalid.

In the bankruptcy proceedings, under Section 96 (1) of the Bankruptcy Act B.E. 2485 (1942), a secured creditor who has preferential rights over an asset may waive its priority by agreeing to relinquish such asset given as security for the benefit of all creditors and may apply for repayment of the debt in full. Nevertheless, it is uncertain whether the secured creditor can contractually waive its preferential rights over the secured assets prior to bankruptcy proceedings.

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With respect to the unsecured debt, contractual and structural subordination are feasible in Thailand. In a bankruptcy proceeding, a contractual subordination provision is recognised under Section 130 bis of the Bankruptcy Act and, as a result, the subordinated debt shall be payable after all other unsecured debts are repaid in full.

## 6. Enforcement

### 6.1 Enforcement of Collateral by Secured Lenders

Normally, collateral enforcement is triggered by an event of default under the relevant loan agreement.

Security enforcement typically involves the following methods:

- public auction through legal procedures with a court's order;
- out-of-court public auction; and
- foreclosure.

When enforcing a mortgage or BSA, public auction through legal procedures with a court's order are usually required, except when the mortgagor or the security provider consents for the enforcement of the secured asset; in this case, an out-of-court public auction may be conducted.

For enforcement of a pledge, the pledgee may enforce the pledged property by a public auction without court procedures.

The foreclosure of secured assets is a viable option; however, it is uncommon in practice due to the requirement that the debtor must have outstanding interest payments for at least five years and the value of the secured asset must not exceed the outstanding unpaid debt.

If there is an agreement in advance allowing the lender to dispose of secured assets contrary to the foregoing, for example, a private execution agreement, such an agreement is invalid.

Under the BSA, there are also special provisions for the enforcement of deposit claims and security over the whole business. Whenever the security receiver of a deposit claim is a financial institution, the enforcement procedures can be carried out immediately through direct settlement for those deposits, followed by a subsequent notice (without obtaining consent) to the security provider. For the whole business collateral, a third-party security enforcer appointed in advance by the parties will be responsible for enforcing and disposing of the whole business.

### 6.2 Foreign Law and Jurisdiction

The choice of foreign law agreed upon by the parties as the governing law of the loan will be recognised and applied by the Thai courts, but only to the extent that such law is proven to the satisfaction of Thai courts (satisfaction is within the discretion of the courts) and it is not considered as contrary to Thailand's public order or good morals by the Thai courts. The scope of the court's discretion on public order or good morals has not yet been definitively established.

A provision that allows the courts of a foreign jurisdiction to have exclusive jurisdiction to settle any dispute may not be enforceable in Thailand. However, Thai law is silent on the effect of the irrevocable submission to the jurisdiction of a foreign court, of the waiver to objection of venue and of the appointment of agents for service of process for the purposes of proceedings before such court. There is no precedent case under Thai law ruling that such submission, waiver or appointment invalid.

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An express waiver of sovereign immunity made in writing may be effective in Thailand.

## 6.3 A Judgment Given by a Foreign Court

A judgment of a foreign court will not be enforced by the Thai courts but may, at the sole discretion of the Thai courts, be admissible as evidence in an action in the Thai courts.

The award rendered by the arbitral tribunal is recognised and enforced in a Thai court under the New York Convention for recognition and enforcement of the arbitral award and the Thai Arbitration Act B.E. 2545 (2002). Arbitral awards are enforced by a Thai court upon due application of a party seeking to enforce the award. Generally, Thai courts will not review the merit of the dispute again since it has been considered and decided by the arbitration tribunal. However, a Thai court may refuse to recognise and enforce the arbitral award based on several grounds as prescribed in Section 40 of the Thai Arbitration Act, for example, if the court sees that the arbitral award is against Thai laws, public order or good morals.

## 6.4 A Foreign Lender's Ability to Enforce Its Rights

Due to Thai laws generally prohibiting foreigners from owning title to lands, there are very few exceptions where foreign lenders can enforce security over land by foreclosure. However, there are no restrictions that could affect a foreign lender's ability to enforce its rights under a loan or security agreement.

## 7. Bankruptcy and Insolvency

### 7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency Commencement of Business Rehabilitation

Business rehabilitation procedures outside of insolvency proceedings are available in Thailand. Either the debtor or the creditor has the right to submit to the court a petition for a business rehabilitation. If it appears that a debtor is insolvent or unable to pay its debt, is indebted to one or more creditors for a definite amount of not less than THB10 million, regardless of whether such debt is due immediately or not, and there is reasonable grounds and prospects to rehabilitate the business of the debtor, the court will usually accept the petition for rehabilitation proceedings.

#### Application for Repayment

As soon as the court issues an order to initiate the rehabilitation proceedings and appoints the planner (nominated by the one who filed the rehabilitation petition or by the creditors), all creditors (including foreign creditors) are required to file debt repayment applications, together with all supporting documents, against the debtor with the official receiver within one month from the date on which the order appointing the planner is published in the government gazette. A failure to file a claim by the end of such period (which is not extendable and no exceptions are provided for foreign creditors) will result in the creditor losing its claim on the debtor.

#### Business Rehabilitation Plan

After the plan has been prepared by the planner, a creditors meeting must be held for approval of the plan. The proposed plan must be approved by either:



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- two thirds of the outstanding debt value and 50% of number of the creditors from each class of creditors; or
- two thirds of the outstanding debt value and 50% of number of the creditors from at least one class of creditor, and 50% of the outstanding debt value of all classes of creditors.

Upon approval of the plan by the creditors and the court, the plan will be considered to be binding on all creditors who submitted an application for repayment, whether voting for or against the plan or absent at the voting. If creditors have not filed an application for repayment of debt, such creditors will lose their rights to repayment unless the rehabilitation plan states otherwise, or the court cancels the order for business rehabilitation.

In any case, the creditors will always have the right to claim the full amount of debt from any guarantor, joint debtor or third-party security provider, since they are not bound by the rehabilitation plan.

## 7.2 Impact of Insolvency Processes Bankruptcy Proceedings

Under bankruptcy proceedings, upon the receivership order, the unsecured creditors will be prohibited to enforce any of its rights of claims against an insolvent debtor outside of the insolvency proceedings and shall submit an application for repayment in order to be repaid.

The secured creditors may opt to enforce its security outside of bankruptcy proceedings. However, if the proceeds from enforcement of secured property does not cover the whole amount of debt, the secured creditors will not be able to apply for the repayment of debt in respect of the outstanding amount. The secured creditors may also choose to file an application

for repayment. In such case, the secured creditors will be entitled to any debt shortfall after enforcement of the secured property.

## Rehabilitation Proceedings

When the bankruptcy court accepts the petition for rehabilitation proceedings, an automatic stay, or moratorium, is levied to protect the debtor against actions by creditors such as litigation, enforcement of security and bankruptcy proceedings. As such, secured creditors would be unable to enforce their security outside the rehabilitation proceedings, unless otherwise approved by the bankruptcy court.

Creditors whose rights are restricted by the moratorium may submit a request to the bankruptcy court for an order to amend, modify or annul the limitations on their rights on the grounds that the restrictions are not necessary for the rehabilitation proceedings or that they do not sufficiently protect secured creditors' rights.

## 7.3 The Order Creditors Are Paid on Insolvency

According to Section 130 of the Bankruptcy Act, the payment on a corporate debtor's bankruptcy must be made in the following order of priority:

- expenses incurred by the official receiver in the management of the debtor's property;
- fees for the collection of property;
- fees incurred by the plaintiff creditor as well as lawyers' fees as determined by the court or the receiver;
- taxes and duties due within six months prior to the receivership order and money which employees are entitled to receive prior to the receivership order in return for the service performed for the employer debtor;
- other debts; and
- subordinated debts.

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If the money is not sufficient for full payment of debt in any order, the creditors in such order shall receive a share in the distribution pro rata.

The secured creditors will have preferential rights over its secured assets as mentioned in **7.2 Impact of Insolvency Processes**. Any debt shortfall after enforcement of the secured assets will be classified as other debts.

#### 7.4 Concept of Equitable Subordination

There is no concept of equitable subordination in respect of controlling shareholders in Thailand.

#### 7.5 Risk Areas for Lenders

The major risks to lenders when obligors become insolvent are the risks of the financing transaction or any related action thereof being subject to revocation under undue preference provisions pursuant to the Bankruptcy Act and the Thai Civil and Commercial Code.

In a case where it appears that the borrower, security provider or guarantor becomes insolvent and is subject to bankruptcy proceedings, other creditors or the official receiver may be entitled to claim to the court to cancel any payment made or provision of any security by the borrower, the security provider, or the guarantor to the lender with knowledge that it would prejudice other creditors. There is a legal presumption that if the payment or the provision of security made during a period of one year before the initiation of the bankruptcy proceedings and thereafter, it is presumed that the borrower, the security provider, or the guarantor and the lender knew that such action would be prejudicial to the other creditor(s).

In addition, in the bankruptcy proceedings of the borrower or security provider, the court has the power, upon the application of the official

receiver by motion, to order a cancellation of the transfer of property or any act performed by the borrower or security provider, or to do so with the borrower's or the security provider's consent during the period of three months before the bankruptcy petition and thereafter with the intent to enable any creditor to have an advantage over other creditors.

## 8. Project Finance

### 8.1 Introduction to Project Finance

Project financing in Thailand began around 1990, when the Map Ta Phut Industrial Estate, a large industrial park located along the eastern coast of Rayong Province, was established. The rapid growth of large infrastructure and industrial projects in Thailand, such as expressways, public transportation systems, airports, ports, and power plants, has led to the development of project finance as an important aspect of the economy. There are a number of laws and regulations governing project financing, including the Thai Civil and Commercial Code, The Foreign Business Operations Act, foreign exchange control, taxes, insurances, public-private partnerships, and any other laws that are applicable to the concerned business.

### 8.2 Overview of Public-Private Partnership Transactions

The Public-Private Partnership Act B.E. 2562 (2019) came into force in March 2019. The Act streamlines the process of investment partnerships between the public sector and the private sector. It is applicable to various types of projects ranging from infrastructure transportation, public services, energy, telecommunications, hospitals, schools and exhibition centres.

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In 2018, the Eastern Special Development Zone Act, B.E. 2561 (2018) was enacted. This Act creates an expedited process for the approval of public-private partnership projects within the so-called Eastern Seaboard.

Apart from the Eastern Seaboard initiative, under the Public Private Partnership Project Preparation Plans 2020-2027 (PPP Plans), there are 110 PPP projects in the pipeline with investment costs of over THB1.12 trillion to be executed within an announced timeframe.

Nevertheless, the lengthy bidding and drafting processes may lead to postponement of certain PPP projects specified in the PPP Plans.

### 8.3 Government Approvals, Taxes, Fees or Other Charges

In Thailand, project finance transactions between lenders and borrowers are generally permitted and there is no specific governmental approval required to enter into such transactions. The parties are required to consider other general laws applicable to certain activities involved in the project financing transaction (eg, exchange control regulations, etc).

In a transaction involving a foreign international bank, the governing law of a loan agreement is English law, whereas the governing law of security agreements for secured assets located in Thailand is typically Thai law. The governing law of project agreements depends on discussions among the parties and may depend on the country of incorporation of a relevant counterparty.

For information regarding stamp taxes and registration fees for certain security agreements see **4.2 Other Taxes, Duties, Charges or Tax Considerations**.

### 8.4 The Responsible Government Body

The following government agencies or departments have authority over typical oil and gas, power, and mining sectors:

- the Energy Regulatory Commission, which oversees gas and power sectors and administration of the Energy Industry Act, B.E. 2550 (2007);
- the Department of Mineral Fuels, which oversees the upstream sector of the nation's oil and gas industry;
- the Department of Energy Business, which is the primary regulator for and administration of the Petroleum Act, BE 2514 (1971); and
- the Department of Primary Industries and Mines, Ministry of Industry, which is responsible for granting permits and supervising the operations of the mining, mineral extraction and metal industry.

### 8.5 The Main Issues When Structuring Deals

In structuring deals, several types of risks need to be carefully considered by lenders and their advisors. To ensure lenders' protection, specific issues relating to cashflow projections, project operations, and the identities of relevant counterparties should be taken into account.

The project company is usually a limited liability company newly set up as an SPV for the construction and operation of a project. Certain businesses, such as service businesses, are prohibited to be operated by a company wholly or majority owned by foreigners, except when a business licence is issued to allow the operation of such foreign businesses. Treaties between Thailand and some other countries help accommodate the process of applying for licences.

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## 8.6 Typical Financing Sources and Structures for Project Financings

Bank loans are a major source of project financing in Thailand. The structure of the financing can be either bilateral or syndicated financing, depending on risk exposure of each project. Lenders normally require capital contribution commitments by the project's sponsors up to a certain ratio without any or only limited recourse. Security packages range from security over fixed assets to mere contractual rights of the project owner under project-related agreements. Export and import credit financing by a government-owned financial institution is also available for buyers overseas to support the export of products and services from Thailand.

## 8.7 The Acquisition and Export of Natural Resources

In general, any person who wishes to acquire or exploit natural resources will have to comply with specific regulation enacted for that particular natural resource. For instance, oil and gas is protected and regulated under the Petroleum Act B.E. 2514 (1971) and a concession shall be acquired from the Ministry of Energy with suggestion of the Petroleum Committee; mineral rights are regulated under the Mineral Act B.E. 2560 (2017) and a concession and a licence shall be granted by the Mineral Committee; groundwater is regulated under the Groundwater Act B.E. 2520 (1977) and a licence is granted by the relevant local government authority.

The exportation of certain natural resources, such as gold and any radioactive mineral, is prohibited unless there is approval from the relevant competent authority. Thailand also complies with UN sanctions and restrictions on export.

## 8.8 Environmental, Health and Safety Laws

The Office of Natural Resources and Environmental Policy and Planning Environment is the main regulatory body that imposes a requirement to conduct an Environmental Impact Assessment or an Environmental Health Impact Assessment for certain types of projects under the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992).

The Department of Industrial Works governs various environmental, health and safety issues such as electrical system safety, chemical and radioactive safety, workplace safety, fire hazard safety and general management for air and water pollution, as well as the submission of Environmental Safety Assessments in accordance with the Factory Act B.E. 2535 (1992).

In addition to two major regulators, there are various governmental agencies responsible for environmental, public health and safety issues, including:

- the Hazardous Substance Control Bureau, which is responsible for the management of hazardous substances namely, oil, gas and fuel;
- the Department of Energy Business, which is responsible for the operation and construction of huge oil storage facilities;
- the local authorities, which are responsible for construction and public safety; and
- the Department of Health, which is responsible for general public sanitation.



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**Chandler MHM** ensures international clients meet international standards of practice. Currently, the firm has 110 lawyers and 70 non-legal professionals, including 20 lawyers and six partners in its banking and finance practice. Its banking and finance practice group has advised on some of Thailand and neighbouring countries' most high value and complex financing transactions. The practice offers a breadth and depth of experience in representing lenders and

borrowers on a broad range of financing transactions, including major power, infrastructure, and real estate projects. The firm continues to focus on major cross border transactions, supported by its offices across Asia, including in China, Japan, Myanmar, Singapore and Vietnam. It has long-standing relationships with all major commercial banks in Thailand, and with leading, international financial institutions.

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## Trends and Developments

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Chandler MHM see p.29

### Leveraging Technology and Data for Financial Services

The Bank of Thailand (BOT) published a consultation paper named Repositioning Thailand's Financial Sector for a Sustainable Digital Economy for a public hearing in February 2022. The document provides a framework that outlines the BOT's upcoming regulatory initiatives, which could drive Thailand's financial sector towards a sustainable digital economy. There are three initiatives outlined in the consultation paper: technology and data, environment (discussed in environmental, social and governance below), and tiered supervision. Before the BOT issues further directions or policies, each initiative includes proposed policies that will be open to discussion among stakeholders.

Through its 'Open Competition, Open Infrastructure and Open Data' concept, the BOT encourages technology and data leveraging to foster innovation and customer-centric financial services. The following are some examples of key policies and initiatives that the BOT may implement or explore regarding technology and data:

#### *Virtual banks*

The BOT has proposed a policy that will allow new and existing players to establish virtual banks. The scope of virtual banks is the same as that of traditional banks, and they will be required to be established and headquartered or have parent companies in Thailand in order to be supervised. In the implementation of virtual banks in Thailand, mixed approaches are being taken from South Korea, Hong Kong, Singapore,

Malaysia and The Philippines, which address issues related to competition, financial innovation and financial inclusion of small and medium enterprises (SMEs) as well as retail customers.

#### *Open banking*

The concept of open banking falls under the umbrella of open data. In an open banking environment, data owners can conveniently transfer their own data retained with one service provider to another service provider without being prevented from selecting or switching to their preferred providers for particular services. To that end, tools such as consent management (ie, a mechanism that enables a data owner to provide consent for a service provider to disclose and transfer the owner's data to another service provider) and an Application Programming Interface (API) Standard will be required. A pilot project for this initiative called dStatement was launched in January 2022. Early stages of dStatement allow applicants of digital loans to request their banks to directly send digital bank statements to lending banks. This replaces paper bank statements that are customarily obtained by loan applicants for submission to lending banks.

#### *Retail central bank digital currency (CBDC)*

The BOT has explored a wholesale CBDC in the context of inbound and cross-border transactions since 2018 through Project Inthanon (Phases 1 and 2), Project Inthanon-LionRock (Phases 1 and 2 in collaboration with the Hong Kong Monetary Authority) and Project mBridge (in collaboration with the Hong Kong Monetary Authority, the Central Bank of the United Arab

Emirates and the Digital Currency Institute of the People's Bank of China).

In 2020, the BOT expanded the scope of its exploration of CBDC to include the private sector for the first time by developing a prototype payment system in cooperation with The Siam Cement Public Company Limited and Digital Ventures Company Limited. In this project, the CBDC was integrated into the procurement and financial management systems of The Siam Cement Public Company Limited in order to facilitate supplier transactions.

In April 2021, the BOT published a report named *The Way Forward for Retail Central Bank Digital Currency in Thailand* that discusses the impact of retail CBDC on the Thai financial sector. The BOT also held a public hearing on the development of retail CBDC and it was generally endorsed by stakeholders.

In 2022, the BOT issued a white paper regarding retail CBDC and intends to develop retail CBDC in collaboration with the private sector as part of a pilot phase. During the pilot phase, testing will be done through a foundation track and innovation track. The foundation track focuses on testing the efficiency and security of the system as well as technological design. The Giesecke+Devrient technology will be used by selected private operators between the end of 2022 and the middle of 2023 to test the use of CBDC payments for goods and services among approximately 10,000 pre-determined users in a limited geographical area. These operators include Bank of Ayudhya Public Company Limited, The Siam Commercial Bank Public Company Limited, and 2C2P (Thailand) Company Limited. On the innovation track, programmability that can foster innovation development for retail CBDC will be explored. However, in August

2022, the BOT stated that it did not intend to issue retail CBDC in the upcoming period due to a need for careful consideration of the implications.

The BOT has outlined plans to cancel ceilings for investments made by companies within commercial banks' financial business groups in certain types of fintech companies, extend the permitted scope of operations of monoline non-bank financial institutions, establish a Payment Council and Payment Scheme, enhance the use of micro-level data, etc.

## **Environment, Social and Governance (ESG)** *Sustainable Finance Initiatives for Thailand*

To promote ESG-embedded banking practices, a working group comprising the BOT, the Fiscal Policy Office, the Office of Insurance Commission, the Securities and Exchange Commission and the Stock Exchange of Thailand launched Sustainable Finance Initiatives for Thailand. Examples of encouraged activities include the financing of eco-friendly projects, financial inclusion of underserved borrowers, and promotion of financial literacy.

## *MOU on sustainable banking guidelines – responsible lending*

The BOT, the Thai Bankers' Association (TBA) and 15 commercial banks have signed an MOU on responsible lending to establish guidelines for commercial banks on how to incorporate ESG into their business practices. The MOU outlines four pillars namely, commitment and tone from the top to provide responsible lending, engagement of stakeholders, internal implementation mechanisms, and disclosure of responsible lending to the public.

## *The BOT's directions towards environmental sustainability*

Thailand has pledged to achieve carbon neutrality by 2050 and net zero carbon emissions by 2065. The financial sector plays a significant role in allocating capital within an economic system and could be a key actor in assisting the country to achieve these goals. In August 2022, the BOT, as the regulator of financial operators, released a Directional Paper on Transitioning towards Environmental Sustainability under the New Thai Financial Landscape. The document outlines strategies for achieving the following goals:

### *Reorientation of business operations of financial institutions*

Within 2022, the BOT will issue guidelines regarding financial institutions' end-to-end business operations taking into account the effects of climate change and the environment. These guidelines will be consistent with the principles of the Basel Committee on Banking Supervision and regulators in other countries. The BOT intends to issue an industry handbook by the first half of 2023 that will make it possible for financial institutions to develop resources-efficient products and services, as well as assess their environmental-friendly operations. The BOT will then monitor the quality of environmental management in the second half of 2023 and study the feasibility of integrating environment-oriented operations as one of the determinants of composite rating by the end of 2024. By the end of 2023, the BOT will have large commercial banks undertake climate scenario analyses and stress tests, and other commercial banks will do the same by the end of 2024.

### *Thailand Taxonomy*

Thailand Taxonomy will set out definitions and groups of eco-friendly activities and is intended to be the central benchmark for both private and

government sectors. The preparation of Thailand Taxonomy will materially follow the ASEAN taxonomy and standards of other countries in ASEAN. At the outset, Thailand Taxonomy will be based on principles, ie, activities will be classified into a Green List (green activities), an Amber List (transitional activities), and a Red List (brown activities). Due to their carbon emissions, energy and transportation are pioneering sectors to be subject to Thailand Taxonomy. Additionally, regulators are considering the use of cost-efficient local verifiers to assist the private sector in conducting environmental assessments in accordance with Thailand Taxonomy.

### *Data disclosure and data platforms*

The BOT will establish standards for the disclosure of environmental data by financial institutions by 2022. The standards will be aligned with those developed by the Task Force on Climate-Related Financial Disclosures. In 2024, the Domestic Systemically Important Banks (D-SIBs) will be required to make their first disclosure, followed by the remaining financial institutions in 2025. The BOT will also be collaborating with public and private sectors to implement big data with respect to the environment by setting up:

- an ESG platform that aggregates ESG verification data;
- a disclosure platform that, in the initial stage, combines data from reports made in accordance with international standards by listed companies and financial institutions;
- a data analytics platform that compiles in-depth environmental data for the purposes of analysis or policy determination; and
- a product programme platform that aggregates information regarding green financial products and services, product programmes or aids granted from government entities and financial institutions to the business sector.



## *Incentives*

During the transitional period, where business sectors may incur high adaptation costs in transitioning to environment-oriented operations, the BOT will incentivise the operators through subsidies, soft loans, etc.

## *Capacity building*

The BOT, in collaboration with public and private sectors, will be arranging courses and workshops regarding environmental risk management.

## *TBA's Declaration on ESG*

In August 2022, the TBA issued an ESG Declaration to define the banking industry's approach to ESG. Among the ESG issues addressed are climate change, diversity, human rights, and financial inclusion. The ESG Declaration is based on the following frameworks:

- Setting a well-defined scope of responsibilities regarding ESG for boards of directors;
- Integrating ESG missions into business strategies and setting sustainable finance frameworks;
- Including ESG matters in strategic risk management;
- Using digital technology to promote financial inclusion as well as environmentally friendly financial technologies;
- Instilling public consciousness regarding ESG among stakeholders; and
- Developing systems for monitoring and reporting financial data.

## *The Equator Principles (EPs)*

The EPs are the financial industry's benchmark for determining, assessing and managing environmental and social issues for projects. They serve as frameworks for financial institutions when conducting due diligence exercises that

are intended to support responsible decision-making prior to agreeing to provide funding to projects. Financial institutions as well as insurance companies, bilateral development agencies, and export credit agencies from all over the world have become signatories to the EPs by which they are bound to follow certain requirements and comply with continuing reporting obligations. The EPs website provides annual reports on transactions that reach financial close for each member and its EPs implementation process.

In Thailand, the BOT has mentioned the EPs as a guideline that Thai financial institutions should consider and implement. In early 2022, The Siam Commercial Bank Public Company Limited, one of Thailand's leading commercial banks, announced that it had become a signatory to the EPs. This marks the first financial institution in Thailand to adopt the EPs and represents a strong commitment by Thai financial institutions to ESG issues.

## *Financial market reaction to ESG*

In Thailand's financial market, many products and transactions that link with ESG factors have been announced. An inaugural sustainability-linked loan, which is the first ESG loan in Thailand, was announced in early 2021. In the case of ESG loans, interest rate structures are usually linked to some key performance indicators or indexes evaluated by reputable agencies so that if borrowers achieve pre-specified targets, interest rates for loans will be reduced. Additionally, there has been a significant increase in the issuance of green bonds, sustainability bonds and social bonds in the past few years, and markets expect more ESG bonds to be issued this year due to strong investor demand and regulatory support.

## **Cessation of the London Interbank Offer Rate** *Effect on the Thai financial market*

Previously, one commonly used reference rate for floating rate products in the Thai financial market was the Thai Baht Interest Fixing (THB-FIX). The THBFIX comprises the London Interbank Offer Rate (LIBOR) as a key element for calculation. Following the announcement of the UK Financial Conduct Authority on the cessation of LIBOR, the BOT has been working on developing an alternative reference rate as a replacement for the THBFIX.

### *Fallback Rate (THBFIX)*

In the interim, the Fallback Rate (THBFIX) has been established to be implemented as a substitute of the THBFIX. According to the BOT, the Fallback Rate (THBFIX) should be used only for legacy contracts and not for new contracts to be entered into by parties, especially contracts that are scheduled to mature after the end of 2025. The Fallback Rate (THBFIX) will be available until end of 2025 to help ensure a smooth transition from THBFIX to a newly established rate for existing contracts, particularly in derivatives transactions.

### *The Thai Overnight Repurchase Rate (THOR)*

The BOT is developing a new alternative reference rate to support permanent cessation of the THBFIX. Following global trends, the BOT is establishing a reference rate under which the underlying transaction is an overnight repurchase transaction. The BOT believes that the interbank rates for overnight repurchase transactions are a good representation of the Thai financial market and that their movement aligns with the policy interest rate. The high liquidity of overnight repurchase transactions as well as the non-fluctuating nature of such rates, based on USD liquidity, make interbank rates for overnight repurchase transactions a more preferable alter-

native to the THBFIX, which is still dependent on USD liquidity.

The interbank overnight private repurchase rate or THOR has been established as the new reference rate for this purpose. From a practical perspective, given that THOR is based on an overnight term, calculations must be done by using daily THOR rates on a compound basis throughout the calculation or interest period. Determination of THOR, as a backward-looking rate, can be made at the end of the calculation or interest period, as opposed to the previous practice where the THBFIX was determined at the beginning of the period. The BOT has been continuing to ensure that implementation of the new rate is practically viable and commercially acceptable by users.

### *The BOT's guidelines and market participation*

The BOT published guidelines on how market participants may implement THOR in their products. The guidelines include methods for calculation of the THOR, the BOT's pilot lending practices for loan products, guidelines for conventions of Overnight Interest Rate Swaps (OIS), USDTHB Cross Currency Swaps (CCS), and floating rate notes term sheets and calculation conventions. Additionally, the BOT's website includes a THOR calculator that serves as a tool for calculating compounded THOR.

To date, a number of new products have been launched as well as new transactions have been engaged using the THOR as a reference rate, including structured notes, loans, and derivatives. Financial institutions have been encouraged to review their legacy contracts that reference the THBFIX (as well as LIBOR) as a reference rate and discuss with their counterparties on how to respond to the discontinuation of the

THBFIX (and LIBOR). A number of alternatives may be available, including immediate changes to the new reference rate upon agreeing and amending relevant agreements, setting timelines for changing the new reference rate, incorporating language in relevant agreements to allow further discussion among parties, or awaiting the occurrence of certain events prior to implementing the changes.

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lenders and borrowers on a wide range of financing transactions, including major power, infrastructure, and real estate projects. It continues to focus on major cross border transactions, which is supported by MHM's offices across Asia, such as in China, Japan, Myanmar, Singapore and Vietnam. The practice maintains long-standing relationships with all major commercial banks in Thailand as well as with well-known international financial institutions.

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