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# Banking & Finance 2021

Thailand: Law & Practice

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Chandler MHM Limited

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# THAILAND

## Law and Practice

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## **1. LOAN MARKET PANORAMA**

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

The regulatory environment for Thailand's lending activities has remained stable and continues to support access of funds by individuals and business operators following the introduction of several governmental policies to boost Thailand's economy. The Monetary Policy Committee has gradually reduced the policy interest rate from 1.25% as of early 2020 to 0.5% per annum, the lowest rate in Thailand's economic history. Together with the half-reduced contribution rate of the Financial Institutions Development Fund by commercial banks as announced by the Bank of Thailand (BOT), commercial banks are able to pass on such cost savings to customers by reducing benchmark interest rates for loans, which will make the loan market become more easily accessible to a wider group in need. It appears that in the second quarter of 2021, the number of corporate loans grew at a slower rate than usual, while the number of SME loans, mortgage loans and personal loans expanded at a higher rate.

### **1.2 Impact of the COVID-19 Pandemic**

The COVID-19 pandemic has tremendously affected the global economy and Thailand is not an exception. Since early 2020, the BOT has issued several measurements to support retail and SME debtors who have been experiencing difficulties in repaying their debts. Relief measures include soft loans to support viable businesses, a loan repayment holiday to pause loan repayments and 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 in granting an extension for loan repayments, which may be done by a waiver of

instalments on repayments for a certain period, or consent on amendments to the existing loan repayment schedule. There also appear to be cases where debt restructuring is required in which the involvement of existing lenders is critical in implementing the process.

### **1.3 The High-Yield Market**

There has been fair growth in the issuance of high-yield bonds since 2020, of which, at least 70% are secured either by corporate guarantees or fixed assets such as land and buildings. To help stabilise the high-yield bond market, the Securities and Exchange Commission issued a regulation for setting up a high-yield bond fund for limited groups of investors (high net worth and institutional investors), due to the nature of such bonds that possess high default risk. Nevertheless, the high-yield market has not played a significant role in raising funds by business operators, and conventional financing by financial institutions remains a key source of funds for most Thai companies.

### **1.4 Alternative Credit Providers**

Conventional financial institutions including commercial banks and specialised financial institutions remain to be the major credit providers in Thailand, especially for financing transactions of large corporations. For typical loans to individual customers such as personal loans and nano finance, non-banks and start-ups have become more prominent in the market. 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.

### **1.5 Banking and Finance Techniques 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 who

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will match lending and borrowing activities, and arrange for a loan agreement to be executed. The platform operator will also have to assess the creditworthiness of the borrower, client suitability, and the funds must be procured with a custodian or in 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. This financing technique not only allows the borrower to access funds via a simpler and faster method but also offers an alternative option for investors to manage their excess funds other than as savings.

## **Digital Lending**

Digital lending is a financing technique that allows licensed personal loan business operator to employ digital technology and alternative data as part of its credit risk analysis. Digital lending helps customers who may not have regular income or sufficient assets to be provided as collateral for a loan but may have other online information to prove 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 helpful for the customers in using other financial products and services in future.

## **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 who will conduct a screening process and disclose relevant information online. Investors will then consider published information and if they decide to make an investment to such business, they will

make payment for the subscription price that will be held by an escrow agent. The borrower will then issue shares or debentures to investors and will be required to report on the progress of the business on a periodical basis.

## **1.6 Legal, Tax, Regulatory or Other Developments**

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

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

One of the long-established rules relating to interest on monetary debt was that if an agreement did not specify an interest rate and a default interest rate to be paid and the interests were 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. Such statutory interest rate has been changed from 7.5% per annum to 3% per annum and the statutory default interest rate has been changed from 7.5% per annum to 2% higher than the normal interest rate (ie, 3%), or 5% per annum. These rates are applicable only to cases where the agreement does not indicate the rate of interest.

### **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**

Regulators of the financial sector including the Fiscal Policy Office, the BOT, the Securities and Exchange Commission, the Office of Insurance Commission, and the Stock Exchange of Thailand have established the Working Group on Sustainable Finance to co-operate on a sustainable finance agenda 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 to set forth responsible lending guidelines for each commercial bank as a key driver for the financial sector and national economy to promote sustainability in operating banking businesses. The four pillars of the responsible lending guidelines are a strong commitment to responsible lending,

stakeholder engagement consideration, internal implementation mechanisms and transparency.

Financial institutions have started to integrate sustainability (environmental, social and governance) into their businesses and embedded 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**

Banks (Thai commercial banks, subsidiaries of foreign commercial banks and branches of foreign commercial banks) that possess a commercial banking licence are authorised to provide financing to companies. For non-banks, specific types of financing, ie, personal loans, nano finance for occupational purposes and provincial retail loans (pico finance) are regulated and subject to licensing requirements. Applications for a licence can be submitted to the BOT or the Ministry of Finance for consideration and approval. In the case of any business conducted by a non-bank that are not regulated, and if such non-bank is a foreigner under the Foreign Business Operation Act, a foreign business licence is also required.

## **3. STRUCTURING AND DOCUMENTATION CONSIDERATIONS**

### **3.1 Restrictions on Foreign Lenders Granting Loans**

In general, foreign lenders are not restricted from granting loans to Thai residents, except in the case where the loans are provided to individu-

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als and the characteristics of the loans can be classified as a personal loan, nano finance or pico finance. 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 is required to grant a loan in syndication with Thai banks, 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 approvals of authorised agents, which are usually commercial banks, for all bona-fide transactions that do not fall within the restricted purposes 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 payment made under a loan, guarantee, or any other associated interest or fees are not categorised as restricted purposes; thus, specific approval from the BOT is not required.

Whilst 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 to such purposes would constitute an event of default, giving the lender's rights 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 unenforceability 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, the concept of a security agent is not permissible for mortgage registration, and thus each of the lenders needs

to enter into the mortgage agreement as mortgagees.

### **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. To be valid against the borrower, a written notice of assignment must be given to the borrower or a written consent from the same must be obtained. 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 should be registered with relevant officials. 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 loan. Thus, such assignments need to 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 merely assigns the rights of the original lender to the new lender but not the obligations of the same. In such case, 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. The parties may also agree to assign the security granted in favour of the existing lender under the existing loan agreement to the new lender, provided that in the case security is provided by a third person, a consent from such third person 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-back by the borrower results in rights and obligations with respect to an underlying loan being vested in the same entity and the loan will be extinguished. Even though the rights and obligations under the loan within the same entity can be merged, the arrangement of the debt buy-back by the borrower is 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. While it is legally possible for sponsor to repay the loan to the lenders (or purchase debt or right to claim against the borrower) and then subrogate the lenders' right as creditors, loan agreements may specify that a transferee of the lenders would have to be on an approved list of banks and thus makes the debt buy-back by the sponsor be infeasible.

### 3.8 Public Acquisition Finance

In public acquisition transactions, when an acquiror aims to acquire shares of a target company to a level that reaches certain thresholds as specified by law, the acquiror is required to make a tender offer for all shares issued of such target. The offeror is required to indicate the source of funds in its tender offer documents as a method to demonstrate its ability to fund the tender offer. If the source of funds includes funds secured by debt financing from a financial institution, a commitment letter issued by the financial institution 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 are subject to lenders' satisfaction.

## 4. TAX

### 4.1 Withholding Tax

In general, interest, other fees, expenses, charges, penalties, and other payments paid

to an offshore lender are 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

Payment of stamp duty of the following financing documents is a condition of admissibility of 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 not duly stamped cannot be admitted into evidence in Thai courts.

Additionally, in registering certain securities under Thai law with the relevant government body, registration fees would apply as follows:

- 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

In general, the charging of interest on a loan shall not exceed 15% per annum. In respect of Thai baht commercial loans, each commercial bank is entitled to announce its own maximum interest rates to be charged to its customers at a higher rate than the cap of 15% per annum pursuant to the BOT's Notification on practices regarding interests, discounts, service charges, and penalties for commercial banks. The charging of interest on a foreign loan nominated in foreign currencies 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. However, high default interest rates can be determined to be a penalty by a Thai court. The court can use its discretion to reduce the default interest rate if the court is of the view 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, the default interest can be charged over the principal amount for each instalment only. 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 whole shall bear 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, the mortgage agreement must be entered into between the mortgagor and the lenders or secured parties, as mortgagees, not by a security trustee, to ensure preferential rights of each lender.

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 does not cover the amount due. Additionally, Thai law also prohibit 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. A pledge requires an actual delivery of the pledged property to the pledgee and if a pledged property is returned to the pledgor by whatever reason, the pledge is automatically 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 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 has to 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 immovable property registers with the relevant land office a right over a leasehold asset or the right to use 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.

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 be created over a whole business, which can cover present and future assets of the security provider without a requirement to deliver any of its assets to the security receiver. 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 an asset charged with the chargee is required only once, and the re-registration for the assets that the chargor acquires in the future or assets disposed in the

ordinary course of business is not required, under the Business Security Act, when the security provider acquires new assets, the security receiver must be notified to amend the registration of the security.

Nevertheless, a party may agree to set a threshold of changes that are required to be notified, eg, the duty to notify will arise only when the inventory increases or decreases by 20%. Due to this stringent requirement and uncertainty of enforcement, to date, the BSA over a whole business is rarely used in Thailand.

## **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 as prescribed in **5.3 Downstream, Upstream and Cross-Stream Guarantees** must be complied with.

## 5.5 Other Restrictions

In provision of security or guarantees, issues of concern include the following.

### Requirement of 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 party’s debts since provisions of a guarantee or security to secure a third party’s debt is 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 prior to provision of a guarantee or any 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

Following the amendment to the Thai Civil and Commercial Code, the Thai guarantee law imposes certain limitations on the provision on 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

Upon full repayment of the secured obligation (a loan), all ancillary obligations or security agreements in relation to such secured obligation shall be automatically extinguished.

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.

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**

Enforcement of a collateral is usually consequential to the occurrence of an event of default under the relevant loan agreement.

Typically, methods of enforcement of a security includes:

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

Public auction through legal procedures with a court's order are usually required for enforcement of a mortgage and BSA, unless the mortgagor or the security provider has given consent for enforcement of the secured asset; in such case, an out-of-court public auction may be adopted.

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

Foreclosures of the secured assets are a viable option, yet uncommon in practice due to a 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 sum. If there is an agreement in advance to allow the lender to dispose secured assets in a manner contrary to the foregoing, for example or a private execution agreement, such agreement is invalid.

Additionally, under the BSA, there exist special features for enforcement of deposit claims and security over the whole business. For a deposit claim, where the security receiver is a financial institution holding those deposits, the enforcement procedures can be done right away through direct settlement for those deposits and are followed by delivering 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 shall be responsible for enforcement and disposal of the whole business.

### **6.2 Foreign Law and Jurisdiction**

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

A provision which 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.

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**

With very few exceptions, where foreign lenders may not enforce security over land by foreclosure, since Thai laws generally prohibit a foreigner to hold title in lands, there is no restriction that

might impact 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 are reasonable grounds and prospects to rehabilitate the business of the debtor, the court will usually accept the petition for rehabilitation proceedings.

#### **Application for Repayment**

After the court issues an order commencing the rehabilitation proceedings and appoints the planner (nominated by the one who filed the rehabilitation petition or otherwise, 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. Failure to file a claim by the end such period (which is not extendable and no exception are provided for foreign creditors) will result in the creditor losing its claim against 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:

- 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 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 under the moratorium may submit an application to the bankruptcy court requesting an order amending, modifying or annulling the limitations on their rights on the grounds that the restrictions are not necessary for the rehabilitation proceedings or because such restrictions do not sufficiently protect the rights of secured creditors.

### **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 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 and 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.

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).

Additionally, in the bankruptcy procedures of the borrower or the security provider, the court has the power to, upon the official receiver's application by motion, order a cancellation of the transfer of property or any act done by the

borrower or the security provider, or done with the borrower or the security provider's consent during a 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 finance in Thailand started around the time of the establishment of the Map Ta Phut Industrial Estate, a large industrial park in the eastern seaboard region in Rayong Province, launched in 1990. Rapid growth of large infrastructure and industrial projects in Thailand including expressways, public transportation systems, airports, ports, and power plants made project finance become more prominent. Project finance is subject to several laws and regulations ranging from the Thai Civil and Commercial Code, foreign exchange control, taxes, foreign business operations act, insurances, public-private partnerships, and other specific laws relating to the concerned business.

### **8.2 Overview of Public-Private Partnership Transactions**

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

In 2018, the Eastern Special Development Zone Act, B.E. 2561 (2018) was enacted. This Eastern Special Development Zone 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 67 PPP projects in the pipeline with investment costs of over THB90 billion to be executed within an announced timeframe.

Nevertheless, the lengthy bidding and drafting processes, together with the current COVID-19 situation in Thailand may lead to postponement of certain PPP projects specified in the PPP Plans.

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

Project finance transactions in Thailand between lenders and borrowers are generally permitted in Thailand and there is no specific governmental approval required for an entry into project finance transactions. Parties are required to take into consideration other general laws applicable to certain activities being performed for the project financing transactions (eg, exchange control regulations, etc).

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

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

### **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 oversees gas and power sectors and administration of the Energy Industry Act, B.E. 2550 (2007);
- the Department of Mineral Fuels oversees the upstream sector of the nation's oil and gas industry;
- the Department of Energy Business are primary regulators for and administration of the Petroleum Act, BE 2514 (1971); and
- the Department of Primary Industries and Mines, Ministry of Industry 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. Issues relating to cashflow projections, project operations, identity of relevant counterparties, and so forth should be taken into account to ensure lenders' protection.

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, among others, service businesses are prohibited to be operated by a company wholly or majority owned by foreigners, except for in cases that a licence is issued to allow such foreign business operation. Treaties between Thailand and some other countries help accommodate the process of applying for licences.

### **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; and 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 (EHS) Laws**

The Office of Natural Resources and Environmental Policy and Planning Environment is the main regulatory body that imposes a requirement to certain types of projects to conduct an Environmental Impact Assessment or an Environmental Health Impact Assessment 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 systems safety, chemical and radioactive safety, workplace safety, fire hazard safety and general management for air and water pollution, including the submission of Environmental Safety Assessment under the Factory Act B.E. 2535 (1992).

Apart from two major regulators, there are various governmental agencies responsible for environmental, public health and safety such as:

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

**Chandler MHM Limited** ensures clients of international reach an international standard of practice. The firm currently has more than 100 lawyers and 70 non-legal professional staff, with 18 lawyers, including six partners, in its banking and finance practice. Chandler MHM's banking and finance practice group has a track record of advising on some of Thailand's and neighbouring countries' most high-value and complex financings. The practice has breadth and depth,

acting for lenders and borrowers on a broad range of financings, including major power, infrastructure, and real estate projects. The practice continues to focus on major cross-border transactions which are supported by MHM having offices across Asia, including in China, Japan, Myanmar, Singapore and Vietnam. The practice has long-standing relationships with all the major commercial banks in Thailand, and with leading, international financial institutions.

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