



Thai Regulation on Foreign Companies (2/2)

- Basic regulations on banking, money lending, finance leasing, and real estate business

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Overview

As described in our September Newsletter, in most cases foreigners/foreign juristic persons who wish to undertake business in Thailand must obtain a Foreigner Business Licence (“FBL”) before commencing operations, unless the intended business qualifies as exempt. In this newsletter, we highlight general information and key requirements for Thai and foreign (if allowed under the Foreign Business Act; “FBA”) businesses involved with banking, money lending, finance leasing and real estate.

Basic regulation of banking business (specifically on establishment of financial institutions)

Banking is regarded as a type of financial institution business in Thailand, and is governed by the Financial Institution Business Act B.E. 2551 (2008) (the “FIBA”). The main authority which closely supervises business operators under the FIBA is the Bank of Thailand (the “BOT”). Hence, a foreigner who is interested in engaging in any type of business relating to banking and finance in Thailand should be aware of the kinds of businesses which are subject to the FIBA prior to commencing such business (in order to confirm whether the nature of the business and/or the business model to be implemented requires approval from the BOT).

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Under Section 4 of the FIBA, “financial institution business” is defined as commercial banking business,¹ finance business² or credit foncier business,³ and includes the operation of specialized financial institutions (certain financial institutions established under specific laws)⁴. The concept of a “financial institution business” mainly involves the acceptance of deposits from the public or the acceptance of money from the public for a specific purpose, which may differ depending on the type of business undertaken by the financial institution.

In addition to financial institution business, the aforementioned provision also defines another business type called “financial business”⁵ which covers a wider range of businesses.

Apart from specialized financial institutions formed under specific laws, the remaining types of operators of financial institution business are called “financial institutions” under the FIBA. As a result of the above, financial institutions can be divided into three types:

- commercial banks (licensed operators of a commercial banking business);
- finance companies (licensed operators of a finance business); and
- credit foncier companies (licensed operators of a credit foncier business).

With regard to the establishment of financial institutions, the following primary qualifications must be met in order to obtain a licence from the Minister of Finance, which is issued based on a recommendation by the BOT)

- i. Formation as a public limited company registered under Thai law;
- ii. The ordinary shares and preference shares of which must be entered in a name certificate with a par value not exceeding Baht 100, and the Articles of Association of which must not restrict the transfers of shares.
- iii. The financial institution must have Thai shareholder(s) holding voting shares of not less than seventy-five percent of the sold shares, and Thai nationals must constitute no less than three-fourths of all directors.

Note: In cases the BOT deems appropriate, it may permit certain financial institutions to have forty-nine percent non-Thai shareholders and non-Thai director(s) exceeding one-fourth (but not one-half) of all directors. In cases of necessity, in order to improve the operation status for stability of the financial institution or the financial system, the above restriction may be relaxed.

¹ “Commercial banking business” means the undertaking of the business of accepting deposits of money or accepting money from the public subject to withdrawal on demand or at the end of a specified period and of employing such money in one or several ways such as the granting of credit, buying or selling of bills of exchange or any other negotiable instruments, and the buying and selling of foreign exchange.

² “Finance business” means the undertaking of the business of accepting deposits of money or accepting money from the public subject to withdrawal on demand or at the end of a specified period, which is not the accepting of deposits of money or accepting money in the accounts to be withdrawn by cheques, and of employing such money in one or several ways such as the granting of credit, buying or selling of bills of exchange, or any other negotiable instruments.

³ “Credit foncier business” means the undertaking of the business of accepting deposits of money or accepting money from the public subject to withdrawal at the end of a specified period and of employing such money in one or several ways listed below:
(1) lending money by way of taking mortgage on immovable property; and
(2) buying immovable property by way of sale with the right of redemption.

⁴ Financial Institution Business Act B.E. 2551 (2008), Section 4.

⁵ “Financial business” means commercial banking business, finance business, credit foncier business, securities business, futures contracts business (under the law on futures contracts), life insurance business (under the law on life insurance), or other business prescribed or to be prescribed in the notification of the Bank of Thailand.

- iv. Any one person and his/her relations are prohibited from directly or indirectly holding shares collectively exceeding ten percent of the sold shares in the financial institution, unless he/she/they are granted approval by the BOT.

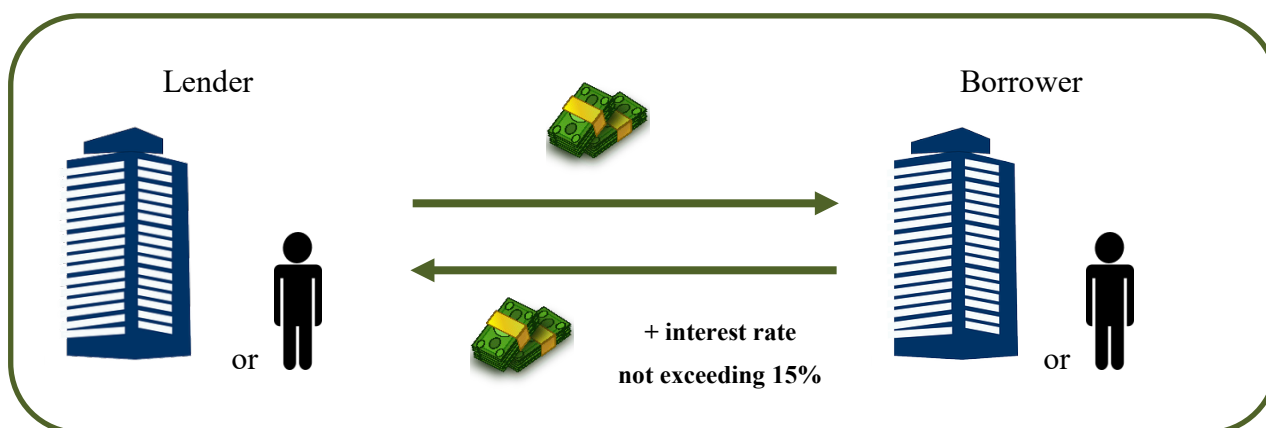
With respect to a commercial banking business, Section 10 of the FIBA allows a foreign commercial bank to establish a branch to operate commercial bank business in Thailand, provided that it must obtain a commercial banking business license from the Minister of Finance.

Basic regulation of money lending (including money lending by financial institutions)

- **General loan provision**

In general, loan provision is normally subject to the Civil and Commercial Code (“CCC”) and no license is required. For instance, lenders may occasionally provide loans to borrowers in situations where both parties are natural/juristic persons, e.g. a shareholder providing a loan to a company, a company providing a loan to its director, and so on. However, a foreign lender, including natural/juristic persons, must apply for and obtain an FBL, since provision of personal loans are regarded as “business” in List Three (21) “other services” according to the FBA, as mentioned previously in our September Newsletter.

With regard to the interest rate, it **shall not exceed fifteen percent per year** (according to Section 654 of the CCC). Nevertheless, such fifteen percent interest rate shall not apply to the following businesses, where their primary purposes commercially and directly relate to the money lending market, both short- term and long-term, as such application could have broad impacts on the financial status of consumers. Thus, those businesses shall be subject to specific treatments under specific laws instead.

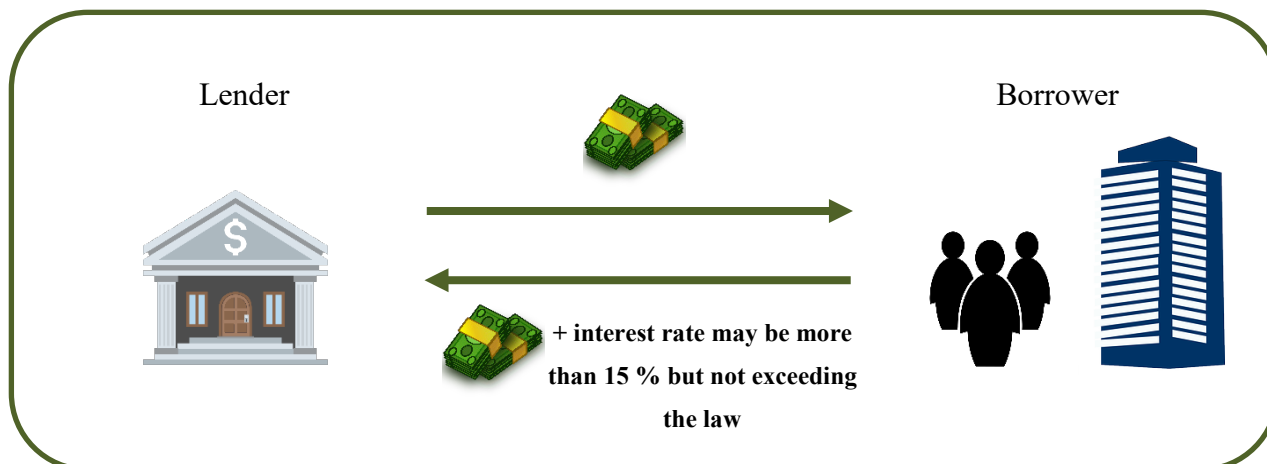


- **Loan provision by Financial Institutions**

In terms of financial institutions, e.g. commercial banks, finance businesses, etc., which hold licences under the FIBA and grant credit to the public, the Ministry of Finance is empowered to prescribe an interest rate **greater than fifteen percent per year** (calculated based on classification of the borrower), with the advice of the BOT, according to Section 4 of the Interest Rate of Financial Institution Act B.E. 2523 (1980). In such case, the Ministry of Finance shall issue a Ministerial Notification to set the ceiling interest rate (maximum) for each type of financial institution from time to time.

For example, the maximum interest rate to be collected from a borrower for finance business, credit foncier business, or security business shall **not exceed twenty-one percent per year** according to Section 4 of Ministry of Finance Notification Re:

Maximum Interest Rate of the Financial Institution to be Calculated from the Borrower (No. 7) B.E. 2533 (1990). Additionally, the financial institution, as the lender, must also comply with the BOT's regulations regarding qualification of the borrower, credit line, service charges, etc.



- **Loan provision by Non-Banks**

Apart from financial institutions, Non-Banks⁶ who provide loans to the public (limited to natural persons) **without assets or property as collateral** and collect interest in **excess of fifteen percent per year** from borrowers shall be considered as engaging in “personal loan business under supervision”, which requires BOT approval prior to commencement. Such provision of loans to natural persons by Non-Banks, as mentioned earlier, is not limited to lending originated from loan agreements (lending money directly) but also that originated from other contracts, e.g. hire-purchase and lease of product agreements (whereby the lessee is obliged to perform repayment of an agreed amount of product to the lessor - which can be deemed as a “lending transaction” under the BOT’s interpretation). Additionally, such lending shall include but not be limited to an extension of the credit period or an increase of the loan amount which may occur in the future as mutually agreed.

The type of licence for “personal loan business under supervision” is classified based upon the purpose of the loan and/or the borrower’s qualifications, which are as follows:

1. **Licence for Personal Loan Business under Supervision (P-Loan Licence)**

This type of licence governs businesses providing any of the following lending (P-Loan Business), according to Clause 2 of the Ministry of Finance Notification Re: Business Subject to Approval to Clause 5 of the Revolutionary Council Decree 58 (Personal Loan Under Supervision) dated 30 July B.E. 2563 (2020):

- 1) Lending **without** assets or property as collateral;
- 2) Lending originated from hire-purchases and leases of products (including but not limited to an extension of the credit period thereof) that **are not sold** by the operator in the ordinary course of business **except for** cars and machineries as illustrated in the flowchart below; and

⁶ There is no specific meaning of “Non-Banks” indicated in any BOT notification or any other law, but Non-Banks in our context means an entity under BOT supervision apart from those involved in the provision of “Financial Institution Business” including but not limited to providers of 1) credit cards, 2) personal loans (P-Loan) and/or Nano Finance Business under supervision, 3) asset management, 4) peer to peer lending platforms, and other business under BOT supervision.

- 3) Vehicle title loans which shall be provided to the owner of the vehicle defined under the Vehicle Act B.E. 2522 (1979) and Land Transport Act, B.E. 2522 (1979), e.g., private car, motorcycle, trailer, roller, tractor, etc., by receiving the vehicle registration book from the borrower as a repayment guarantee.

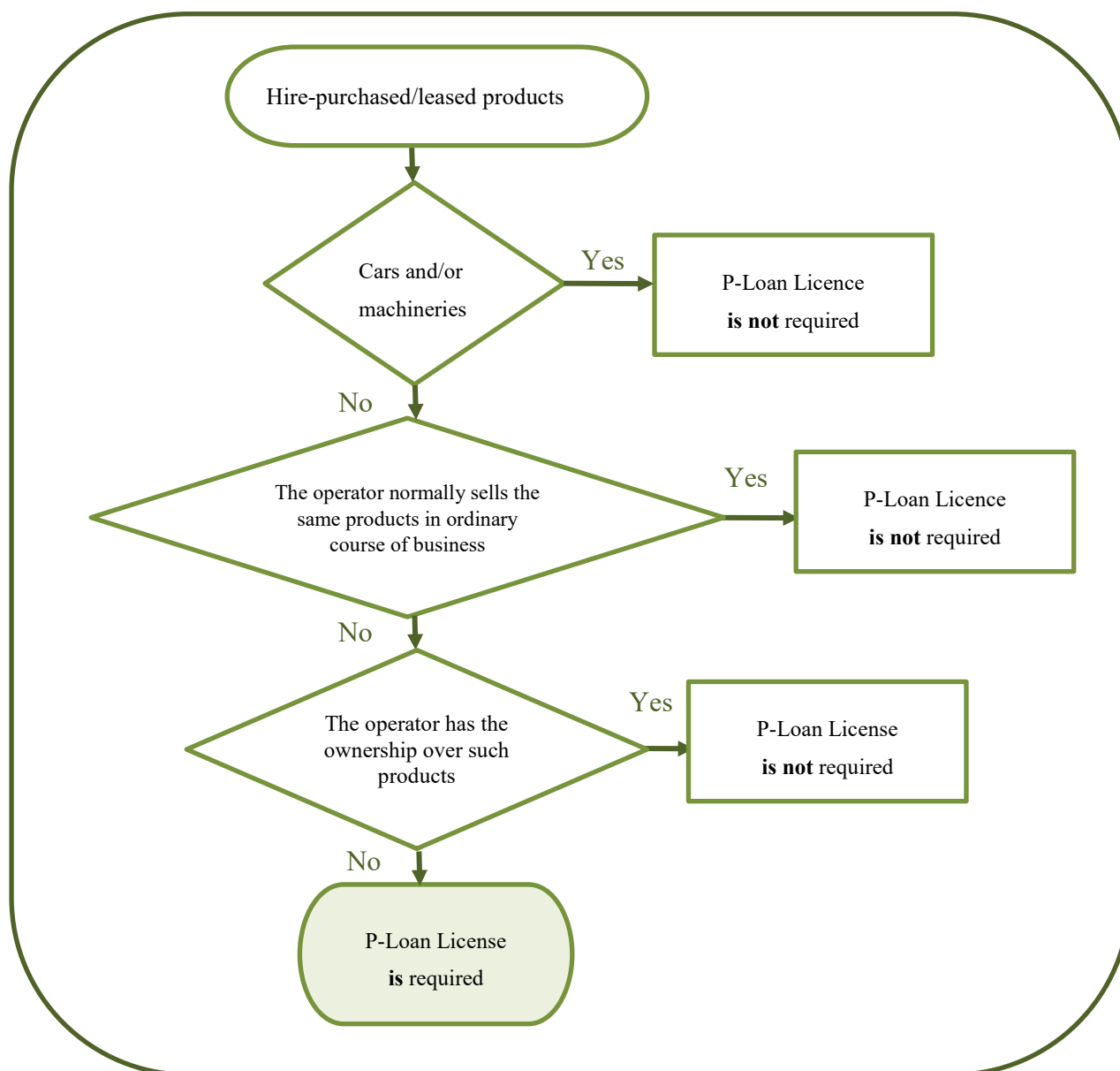
Regardless of the purpose of the loan, the qualifying products in P-Loan business can be for the borrower's personal and/or occupational purposes. This P-loan Licence seems suited to Non-Banks which wish to provide personal loans to borrowers who have stable income or cash flow in his/her bank account, e.g. employees of companies, government officers, etc., since a bank statement must be requested of the borrower in order to determine the credit line - according to BOT Notification No. Sor Nor Sor. 12/2563 Re: Prescription of Rules, Procedures, and Conditions for Undertaking Personal Loan Business Under Supervision dated 31 July 2020. Moreover, the BOT does not designate specific credit line amounts, as these are calculated based on the monthly average income of the borrower to ensure appropriateness and alignment with the debt repayment ability of the borrower.

With regard to the interest rate, this BOT Notification prescribes the ceiling interest rate (maximum) and other charges to be collected from the borrower based on the type of P- Loan product as follows:

Type of product	Applicable maximum rate of interest on debt outstanding and interest on defaulting debt, and service charges, and penalty fee for late payment (if any)
1. Lending without any property as collateral	All charges shall not exceed 25 percent per year (effective rate), excluding other actual specified expenses.
2. Lending originated from hire-purchase and lease of products under the specified condition	
3. Lending with vehicle title	All charges shall not exceed 24 percent per year (effective rate), excluding other actual specified expenses.

Previously, the BOT prescribed that the maximum rate noted above as not to exceed twenty-eight percent per year (effective rate), excluding other actual specified expenses, but it was amended by the aforementioned BOT Notification dated 31 July 2020.

Flow chart of criteria for considering whether a Non-Bank engaging in hire-purchase and/or leasing business shall be required to apply for a P-Loan Licence with the BOT



2. Licence for Nano Finance Business under Supervision (Nano Finance Licence)

A Nano Finance Licence governs businesses providing low value personal loans for the purpose of occupation undertaking (Nano Finance Business); the credit approval process is more flexible than with P-Loans. Loans provided in Nano Finance Business suit borrowers who may not have stable income, e.g. start-up businesses, greengrocers in fresh markets, and so on. The BOT clearly prescribes the maximum credit line as **not to exceed Baht 100,000** per borrower.

Given that the borrowers may not have stable income, such Nano Finance Business suffers a higher risk of non-performance than P-Loan Business. Thus, the BOT increases the maximum interest rate ceiling on outstanding debt and interest on default debt, service charges, and penalty fees for late payment, which is **not to exceed thirty-three percent per year** (effective rate)

according to BOT Notification No. Sor Nor Sor. 13/2563 Re: Prescription of Rules, Procedures, and Conditions for Undertaking Nano Finance Business Under Supervision dated 31 July 2020.⁷

To summarize, **Non-Banks** who wish to apply for P-Loan and/or Nano Finance Licencing must fulfil the following primary qualifications:

	Main Qualification	Requirement of P-Loan and/or Nano Finance Licencing Application
1.	Status of juristic person	Private company or public limited company
2.	Purpose of loan	P-Loan Business: Loan for personal purpose and/or occupational purposes Nano Finance Business: Loan for occupational purposes only
3.	Required registered capital	At least Baht 50 million (fully paid up) per company. (Even if a company engages in both P-Loan and Nano Finance businesses.)
4.	Required Debt to Equity ratio	P-Loan Business: N/A Nano Finance Business: Not exceeding 7:1 and must maintain such ratio throughout the entire business operation period. Note: regardless of the type of licence, foreign Non-Banks must have a Debt to Equity ratio not exceeding 7:1 according to the Foreign Business Act B.E. 2542 (1999) and relevant regulations.

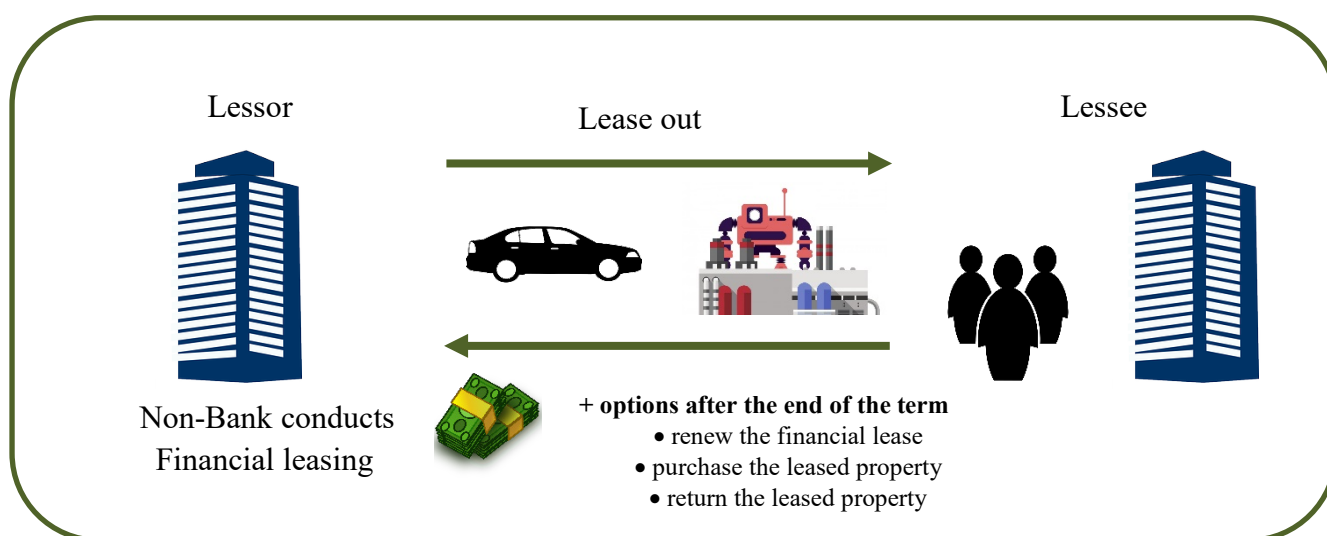
However, a P-Loan or Nano Finance Licence shall not be required if a Non-Bank provides a loan to natural and/or juristic persons with an interest rate **not exceeding fifteen percent per year** according to the relevant Finance Ministerial Notification. In such regard, Non-Banks must comply with the general loan provisions of the CCC instead, as mentioned earlier.

Basic finance leasing regulations

With regard to the principle of commercial transactions, the CCC prescribes the base principle for all financial or commercial transactions in Thailand, e.g. hire of property (rent) (Sections 537 - 571), hire-purchase (Sections 572 - 574), and so on. However, since the CCC does not specifically prescribe the provisions for financial leasing, the provisions for hire of property and hire-purchase shall apply *mutatis mutandis* to financial leasing in settlement of a dispute by a court.

Normally, Section 572 of the CCC provides that a “hire-purchase” transaction is a transaction whereby an owner of property lets his property out on hire and promises to sell such property to the hirer, provided that the hirer (or lessee) must fulfil payment of a specified amount for the property as mutually agreed. While financial leasing is, in practical terms, a loan transaction whereby the provider of financial leasing, as the lessor, procures properties designated by a lessee from a manufacturer, distributor, or other party in order for the lessee to utilize such property. The lessee then possesses the leased property and pays the fee throughout the agreed term. At the end of the term, the lessee may opt to renew the financial lease, or purchase or return the leased property back to the lessor.

⁷ Please note that the BOT previously prescribed the maximum rate noted above as not to exceed thirty-six percent per year, but this was amended by the aforementioned BOT Notification dated 31 July 2020.



In terms of operating a financial leasing business, it shall not be subject to any licence or permission from the authority unless a specific law prescribes otherwise. For instance, a commercial bank must obtain permission from the BOT for conducting hire-purchase and leasing businesses and the terms/conditions thereof must comply with BOT Notification No. Sor Nor Sor. 1/2551 Re: Permission for Commercial Banks to Conduct Hire Purchase and Leasing Businesses dated 3 August 2008.

For Non-Banks which wish to engage in financial leasing business, no permission or licence from the authority is required unless it falls under the criteria of P-Loan Business as mentioned above. In such case, Non-Banks must apply for a P-Loan Licence accordingly.

On the separate note, a foreign company, including natural and justice persons, must apply for and obtain an FBL since providing financial leasing shall be regarded as business in List Three (21) "other services" according to the FBA, and does not fall under any exempted activity, as mentioned previously in our September Newsletter.

Basic regulations on real estate business

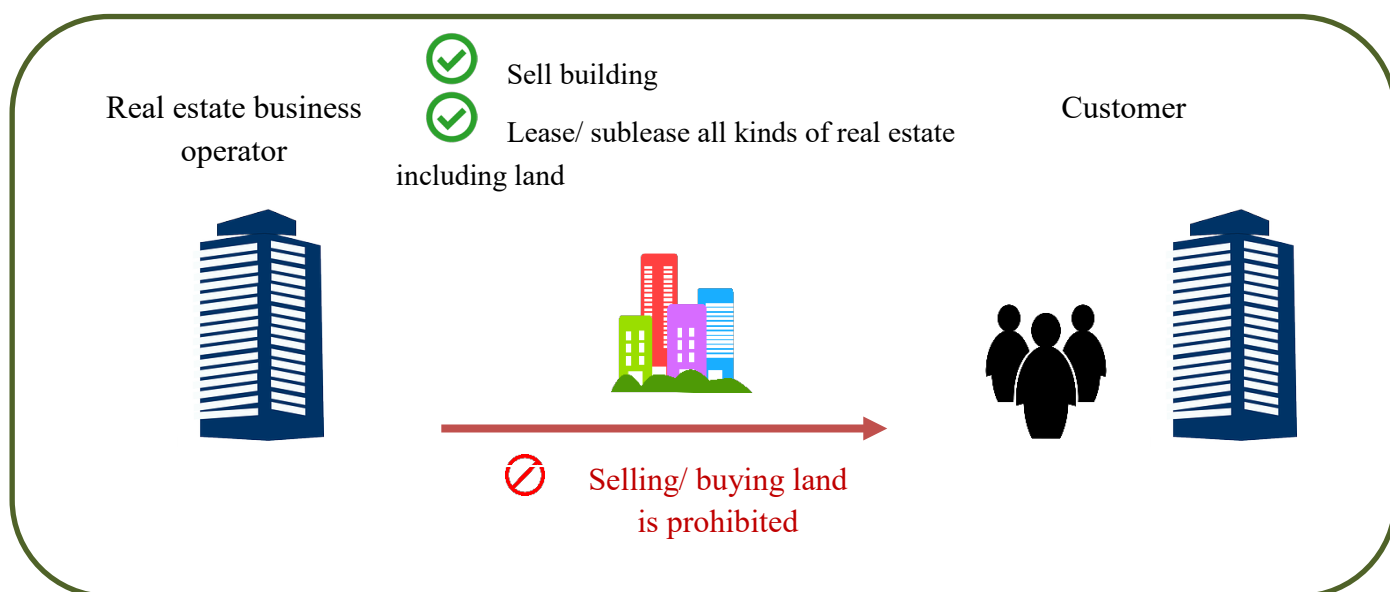
In terms of real estate business in Thailand, a foreign company may face some difficulties conducting real estate business due to restrictions created by the Thai authority. For instance, restrictions on foreign ownership of land according to Land Code B.E. 2487 (1954). Thus, foreigners shall not have ownership (or freehold) over land unless a specific law prescribes otherwise for the sake of investment incentive, e.g. under the permission of the Board of Investment of Thailand and/or Industrial Estate Authority of Thailand. Moreover, the land trading business (including but not limited to buying and selling land) in Thailand also excludes foreigners from such activity, as such business falls under List One prescribed in the list annexed to the FBA due to such business activities being reserved for "special reasons".

On the other hand, a foreigner can have ownership of a building if the foreigner complies with specified conditions. For example, for the ownership of a condominium, Section 19 bis of Condominium Act, B.E. 2522 (1979) provides that each condominium shall allow only qualified foreigners, regardless of natural person or juristic person status, to collectively hold ownership of a number of units **not**

exceeding forty-nine percent of the total units in such particular condominium at the time of making the registration of such condominium, which was previously explained in our June Newsletter.

Save for trading land, a foreigner can engage in trading other kinds of real estate, provided that the foreigner shall apply for an FBL with the Department of Business Development (the “DBD”) prior to commencing such trading activity.

Although a foreigner shall not have ownership over land, as mentioned earlier, foreigners are entitled to have leasehold over all kinds of real estate. Accordingly, a foreigner who wishes to lease out or sublease real estate to others must apply for an FBL prior to commencing such business.



Please note that if a foreigner has ownership over land under Land Code B.E. 2487 (1954), the foreigner may lease the land as an owner if the authority has granted such permission (something which is done on a case-by-case basis). In addition to permission from the relevant authority, a foreigner must apply for an FBL from the DBD to lease the land prior to commencing the lease.

In general, a building will be regarded as a component part of the land if the building is “essential” to the land, and cannot be separated from the land without destroying, damaging, or altering its form. Section 144 of the CCC provides that “...the owner of a thing has ownership in all its component parts”. The previous provision usually applies in cases where there is no evidence indicating the name of the building owner. In such cases, the law will presume that the owner of the land will also be the owner of the building, which is a component part of the land, unless other evidence (e.g., contract, registration, other proof) indicates otherwise. Despite the presumptions in the aforesaid provision, the owner of a building is able to exercise their right of ownership towards the building freely, excluding the land, according to Section 1336 of the CCC, i.e., right to use, dispose, and acquire its fruits, right to follow and recover it from any person not entitled to detain it, and right to prevent unlawful interference against the building.

However, if such foreign juristic person exempted from the foreign business permission performs the above activities, such foreign juristic person shall not be required to apply for an FBL or any permission from the DBD; for instance, if the said activity is necessary and relevant to operation of a commercial bank. As explained in our September Newsletter, financial institution business and other businesses relevant to operation of a financial institution and that of its related financial company group are exempted from

the requirement to obtain an FBL according to the Ministerial Regulation on business activities exempted from foreign business licence (No. 2) B.E. 2559 (2016).

In light of the above, foreigners who wish to conduct real estate business in Thailand must bear in mind the aforementioned restrictions and (if allowed) must apply for permission with the authority prior to commencing real estate business.

Summary

In conclusion, foreigners may engage in business involving banking, money lending, finance leasing and real estate business, however, several conditions must be considered:

- (i) With regard to banking business, in term of its establishment, the FIBA generally allows foreign commercial banks to establish a branch office, provided that the licence from the BOT must be granted beforehand.
- (ii) For money lending business, the type of loan business can be divided into (i) *Loans provided by Financial Institutions*; and (ii) *Loans provided by Non-Banks*. The interest rate to be charged by Financial Institutions or Non-Banks is varied due to differences in the governing laws. For Non-Banks, if one wishes to provide loans to individuals (the general public) without assets or property as collateral and with an interest rate not exceeding fifteen percent per year, it will not be considered, and thus not need to meet the requirements applicable to, a “personal loan business under supervision”. On the contrary, if the interest rate charged will be higher than fifteen percent per year, a Non-Bank will be required to apply for authorization approval through the BOT prior to commencing business, since it then would be regarded as “personal loan business under supervision”.

The type of licence for personal loan business under supervision may be classified as follows:

1. Licence for Personal Loan Business under Supervision (P-Loan Licence)

This licence can be sub-categorised into three types as follows:

- 1) Lending **without** assets or property as collateral;
- 2) Lending originated from hire-purchase and/or lease of products that **are not sold** in the ordinary course of business **except for** cars and machineries as illustrated in the flowchart above; and
- 3) Vehicle title loans based on submission of the vehicle registration book as the repayment guarantee.

2. Licence for Nano Finance Business under Supervision (Nano Finance Licence)

In order to distinguish the types of personal loan business, the purpose of borrowing must be considered, i.e. if the loan is for personal and/or occupational purposes, it will be categorised as a “P-Loan”. If the loan is for occupational purposes only, and of a limited amount not exceeding Baht 100,000, this is regarded as “Nano Finance Business.” The ceiling of the said “P-Loan” and “Nano Finance Business” is also different.

- (iii) For finance leasing, it is a loan transaction whereby the provider of financial leasing, as the lessor, procures properties to the lessee with the option to the lessee to re-finance or purchase or return the lease property at the end of the agreed term. Under Thai law, there is no specific regulation governing finance leasing unless a specific law prescribes otherwise, hence, the basic principle of hire of property (or rent) and hire-purchase under the CCC shall apply *mutatis mutandis*.
- (iv) In relation to real estate business, a foreigner shall not have ownership over land but can have ownership over the construction, e.g. condominium, house, building, etc. However, a foreigner is entitled to have leasehold over all kinds of real estate, including plots of land. Due to the above, the foreigner will be able to lease out or sublease the said real estate to others.

Lastly, foreigners must always bear in mind, before commencement of business, whether or not their intended business requires or is exempted from an FBL in order to legally operate in Thailand.



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