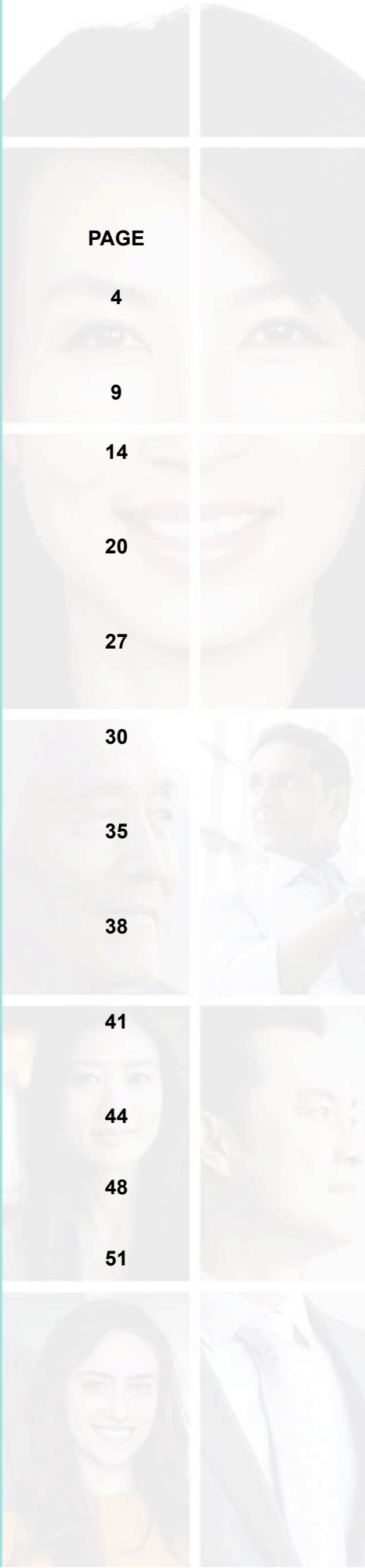
DREW NETWORK ASIA

ASEAN ROUNDUP



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SINGAPORE

DREW & NAPIER LLC

Banking & Finance Legal update

MAS Revised Guidelines on Fair Dealing – How to Deliver Fair Dealing Outcomes to Customers

Introduction

The Monetary Authority of Singapore ("**MAS**") has updated the Guidelines on Fair Dealing – Board and Senior Management Responsibilities for Delivering Fair Dealing Outcomes to Customers [FSG-G04] ("**Guidelines**") on 30 May 2024. A key change is that the scope of the Guidelines has been expanded to apply to all financial institutions ("**FIs**"), and all products and services they offer to their customers.

The updated Guidelines aim to raise standards of fair dealing and improve the experience of customers dealing with FIs. FIs will be expected to incorporate key principles of fair dealing at various stages of a product's life cycle, or services rendered. At the heart of the updated Guidelines are the Five Fair Dealing Outcomes that the FIs should achieve.

This update discusses the changes to the Guidelines and how the Boards and Senior Management of FIs may better ensure their internal processes are aligned with the updated Guidelines in order to achieve the Five Fair Dealing Outcomes.

The Five Fair Dealing Outcomes

To better consider the needs and interests of customers, the MAS has devised the Five Fair Dealing Outcomes ("**Outcomes**") that FIs should all achieve in the conduct of their business. The Outcomes are as follows:

a) customers have confidence that they deal with FIs where fair dealing is central to the corporate culture;

b) FIs offer products and services that are suitable for their target customer segments;

c) customers are served by competent representatives;

d) customers receive clear, relevant, and timely information that accurately represent the products and services offered and delivered; and

e) FIs handle customer complaints in an independent, effective, and prompt manner.

The provisions in the Guidelines serve the purpose of meeting one or more of the Outcomes. FIs are to consider how to best achieve the Outcomes in a proportionate manner, having considered their own business model, the nature of the products and services offered, and potential harm to customers. Special attention is drawn to the more vulnerable groups of customers, where FIs should pay special attention to their needs and interests.

Fair Dealing Outcome 1 – Confidence in FIs to deal fairly

The Board and Senior Management of FIs should spearhead the establishment of a culture that promotes fair dealing in all aspects of their business. Amongst other things, the Board and Senior Management of FIs should:

a) ensure that the FI's policies, systems, processes and business practices are based on the principle of fair dealing. This includes the FI's policies in the provision of its financial products and services, the management of its representatives and the management of its service quality and customer feedback;

b) ensure that their representatives reflect such values and those who disregard fair dealing policies are robustly dealt with; and

c) monitor the effectiveness of the strategy and policies in achieving the Outcomes. This can be done by establishing a management information framework, which can include the monitoring of complaints and misconduct trends, the surveying of the FI's customers, the conducting of mystery shopping exercises and the conducting of regular compliance reviews and audits.

Fair Dealing Outcome 2 – Offering only suitable products and services

The Board and Senior Management of FIs should take, among other things, the following measures to ensure their products and services are suitable to their customers, in particular those identified as being more vulnerable:

a) in the design and governance of their products/services, FIs should assess the performance of the products/services under different market conditions or scenarios and therefore its likely benefit or value to customers. The product/service should also be appropriately tested to meet the needs and financial objectives of the target customers. Feedback should also be obtained regularly;

b) FIs should undertake formal due diligence on any financial product they intend to distribute to fully understand the features of the product and to identify customer segments for which the product is suitable; and

c) FIs should also adjust their marketing approach to suit the different profiles of customers, where customer profiles that are not suited for a particular product should be identified and the sale of the product to these identified profiles should be prevented. For complex investment products, sufficient advice has to be rendered before they can be sold.

Fair Dealing Outcome 3 – Competency of representatives

The Board and Senior Management of FIs should ensure that their representatives are trained and competent, and that their remuneration structures align the interests of their representatives with those of their customers. This includes taking the following measures:

a) continuously equipping all of their representatives with sufficient knowledge and skills through training programmes dealing with relevant topics, including but not limited to determining the appropriateness of a product for each individual customer;

b) ensuring supervisors focus on their supervisory duties instead of their sales responsibilities;

c) customer scoring and risk profile methodologies should be properly designed and tested, and the FI's scope of financial products and services should be clearly disclosed, with anything beyond such scope to be made clear in writing; and

d) gifts and rebates should not be used to unduly influence the financial decisions of customers.

Fair Dealing Outcome 4 – The provision of clear, relevant and accurate information

The Board and Senior Management of FIs should take, among other things, the following measures to ensure that clear, relevant and accurate information that can be easily understood, is provided to their customers before, during and after the sales process:

a) furnishing to customers documents accurately stating what customers can expect from the products and services, and all relevant information for the same. When such information is provided verbally by representatives, FIs may consider providing standardised scripts to ensure the consistency of the information being provided;

b) ensure that all relevant information is provided to their customers before they make any financial decision. The information provided should be a fair and balanced representation of the product, with key risks highlighted. Their marketing materials should also clearly represent key features and risks, with misleading elements excluded. The range of all the possible outcomes for the financial product in relation to its returns or costs should also be disclosed to customers, including the worst-case scenario; and

c) ensure that information is provided on a timely and ongoing basis, where customers should be informed of updates and material developments about their financial investments.

Fair Dealing Outcome 5 – Independent, effective and prompt handling of complaints

The Board and Senior Management of FIs should also ensure, among other things, the following measures are taken when handling customer concerns and feedback:

a) complaints are handled independently and effectively. Clear information on the avenues and procedures for complaints should be made known to the customers, and such information should be easily accessible. This includes

informing customers of the option to resolve disputes with FIs through the Financial Industry Disputes Resolution Centre Ltd ("**FIDReC**");

b) proper systems for the documenting and monitoring of complaints should be implemented, and representatives handling customer complaints should be properly trained;

c) the facts and circumstances of each complaint should be thoroughly reviewed through clear assessment criteria, and FIs should be clear and transparent with customers regarding the review outcome and the basis of their decision. The complaints and the assessment outcomes should be properly documented; and

d) resolving customer complaints promptly, where reasonable timeframes should be implemented to acknowledge a customer's complaint, interview the customer and complete the review of the complaint. Sufficient resources should be devoted by FIs to resolve customer complaints in a prompt manner.

Commentary

The revised Guidelines is part of an ongoing trend towards balancing the rights and interests of FIs and their customers. FIs should expect this regulatory trend to continue, and their customers to increasingly rely on such guidelines in any potential claims against the FIs. The Board and Senior Management of FIs should regularly review their internal policies to ensure their adherence to the Guidelines. If FIs are unsure of how their internal policies may be enhanced to better comply with the Guidelines and to secure the Outcomes, please seek professional legal advice.

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Arbitration Legal Update

One Arbitration Agreement to Rule Them All

Introduction

In *Pertamina International Marketing & Distribution Pte Ltd v P-H-O-E-N-I-X Petroleum Philippines, Inc (also known as Phoenix Petroleum Philippines, Inc) and another matter* [2024] SGHC(I) 19, the Singapore International Commercial Court found that an arbitration clause in a memorandum of understanding applies to individual sale contracts with no dispute resolution clause but which were nonetheless concluded pursuant to the parties' understanding.

This update discusses the Singapore courts' analysis and the practical considerations for parties in long-term commercial relationships who are likely to enter into multiple individual contracts under a framework or 'umbrella' agreement.

Relevant Background

Pertamina and Phoenix were two active players in the petroleum market who wanted to establish a long-term strategic partnership through the execution of an MOU. The MOU was an 'umbrella' agreement which identified several workstreams for the parties to collaborate on, including the "*regional trading of downstream petroleum products*" ("**Workstream 1**").

Following the MOU, the parties commenced the trading of petroleum products as contemplated under Workstream 1. Pertamina supplied a total of seven shipments of petroleum products to Phoenix after a tender process where various suppliers (including Pertamina) submitted bids for Phoenix's consideration. The parties confirmed the commercial terms for these seven shipments through emails, which constituted binding contracts separate from the MOU ("**Sale Contracts**").

The MOU provided for any "*dispute arising out of or in connection with* [the MOU]" to be resolved by SIAC arbitration. In contrast, the Sale Contracts did not contain any arbitration clause or alternative dispute resolution mechanism.

Disputes eventually arose between the parties because Phoenix failed to make payment of outstanding amounts owed to Pertamina under the Sale Contracts. Pertamina commenced SIAC arbitration against Phoenix to recover these outstanding amounts, which Phoenix declined to participate in on the basis that there was no binding arbitration agreement between the parties under the Sale Contracts.

The tribunal proceeded to hear the dispute in spite of Phoenix's jurisdictional objection and made an arbitral award in Pertamina's favour ("**Award**"). Thereafter, the parties engaged in various court actions in both the Philippines and Singapore, including:

a) Phoenix's application in the Philippines for a declaration that the SIAC arbitration proceedings and the Award were void;

b) Pertamina's successful application in Singapore to register and enforce the Award ("**Enforcement Order**"); and

c) Phoenix's application before the SICC to set aside the Enforcement Order and Pertamina's cross-application for a declaration that the Award was valid and binding, along with an anti-suit injunction against Pertamina (collectively, "**Setting Aside Application**").

This update discusses the SICC's decision in the Setting Aside Application.

Singapore International Commercial Court's Decision

The SICC dismissed the Setting Aside Application and held that the disputes under the Sale Contracts fell within the scope of the arbitration agreement contained in the MOU.

In arriving at its decision, the SICC bore the following considerations in mind:

a) There is a presumption that parties in multi-contract relationships intend to have a one-stop adjudication, such that any disputes arising out of the relationship into which they have entered are to be decided by the same tribunal.

b) As the Sale Contracts came into existence pursuant to the parties' implementation of the projects as defined in the MOU, the parties' disputes under the Sale Contracts can be said to be connected with the MOU and therefore governed by its arbitration agreement.

c) The fact that the Sale Contracts themselves are silent on the applicable dispute resolution mechanism is readily understandable from a commercial perspective. Parties who have already included an arbitration clause in their framework or 'umbrella' agreement may not see the need to 're-agree' a term and instead focus their efforts on negotiating the key commercial or operative elements of the relevant transaction.

The SICC also held that it had the power to grant an anti-suit injunction against Phoenix and exercised its discretion to do so accordingly.

Commentary

The SICC's decision is a welcome reminder of the pro-arbitration stance of the Singapore courts. Even though the Sale Contracts themselves did not contain an arbitration agreement, the SICC was prepared to interpret the arbitration clause in the MOU expansively such that it also governed disputes arising out of contracts which were concluded to implement the MOU.

The SICC's decision also demonstrated the commercial practicality of the Singapore courts in recognising that parties negotiating multiple and/or repeat transactions in long-term strategic partnerships typically focus on the commercial terms of the deal, instead of seeking to 're-agree' a dispute resolution clause

which had already been expressly stated in the parties' existing framework or 'umbrella' agreement.

That said, parties in such long-term commercial relationships should nonetheless be careful not to assume that each and every contract they conclude will be governed by the same arbitration agreement as in their framework or 'umbrella' agreement. As highlighted above, one of the key factors underpinning the SICC's decision was the "*natural inference*" that the Sale Contracts came into existence "*pursuant to the parties' implementation of the Projects* [Workstream 1] *as defined in the MOU*". The SICC may not necessarily have reached the same conclusion if the parties' dispute arose from other projects or workstreams which were less closely connected to the MOU.

To avoid any potential dispute over the applicable dispute resolution forum, it would be advisable for parties in multi-contract relationships to include an arbitration clause in each individual contract or, at the very least, expressly refer to the arbitration clause in the parties' existing framework or 'umbrella' agreement (if any). Conversely, if parties intend for disputes arising out of a specific transaction to be adjudicated differently from other transactions in their existing framework, they should also explicitly state the alternative dispute resolution mechanism when concluding the relevant contract.

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INDONESIA

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Banking & Finance Legal Update

Indonesia's Interest Rate Reference Reform: Introducing IndONIA as the Replacement for JIBOR

In the global financial system, interest rate references or 'benchmark rates', play a significant role in determining interest rates for financial contracts and guiding monetary policy decisions. The Interbank Offered Rate ("**IBOR**") has long been a widely accepted global benchmark – calculated from daily submissions by major banks. One of the well-known forms of IBOR was the London Interbank Offered Rate ("**LIBOR**"), administered by the Intercontinental Exchange, a prominent global operator of financial exchanges and clearing houses. LIBOR served as a key global benchmark for decades until LIBOR ceased publication as of 30 June 2023. This led to financial institutions and regulators in several countries opting for alternative reference rates based on their currencies, such as the United States recommending Secured Overnight Financing Rate ("**SOFR**") to replace USD LIBOR.

Following this transition, Indonesia's main interest rate reference for IDR-denominated loans, the Jakarta Interbank Offered Rate ("**JIBOR**"), is also planned to be fully discontinued in 2025. This change will result in the complete adoption of the Indonesia Overnight Index Average ("**IndONIA**") as Indonesia's interest reference rate for both non-overnight and long-term tenors. This year, 2024, is designated as an acceleration period for this reform. In light of these global shifts and the imminent replacement of JIBOR, this Advisory outlines the importance of having IndONIA as Indonesia's interest rate reference, highlights key changes, and provides general guidance for preparing financing agreements in line with this shift.

JIBOR as the Pre-Reform Interest Rate Reference

Under Article 1 of Bank Indonesia Board of Governors Regulation No. 24/18/PADG/2022 on the Amendment of Board of Governors Regulation No. 20/19/PADG/2018 on the Indonesia Overnight Index Average and Jakarta Interbank Offered Rate ("**Regulation 24/2022**"), JIBOR is defined the average indicative unsecured lending rate offered by contributor banks to other contributor banks for rupiah lending for specified periods in Indonesia.

As the benchmark rate established by Bank Indonesia, JIBOR relies on daily offered rates from a panel of major contributor banks submitted between 7:00 AM WIB (Western Indonesian Time) and 9:30 AM WIB. The calculation of JIBOR involves determining the simple average of these submissions, excluding 15% of the highest and lowest rates. Bank Indonesia then publishes the finalized JIBOR on its website daily at 10:00 AM WIB.

Since 2 January 2019, the overnight JIBOR (but not for longer tenors) has been replaced by IndONIA. Consequently, the current JIBOR composition consists of only five tenors: 1-week, 1-month, 3-months, 6-months, and 12-months. Despite this change, concerns persist about potential manipulation due to JIBOR's reliance on offered rates submitted by banks, similar to what occurred with LIBOR. Recognizing the importance of a secure and credible interest reference

for financial transactions in Indonesia, Bank Indonesia has determined the need for a more reliable alternative.

IndONIA as a Near Risk-Free Interest Rate Reference in Indonesia

The National Working Group on Benchmark Reform ("**NWGBR**") was established on 23 November 2021 to anticipate the discontinuation of LIBOR and facilitate the reform of Indonesia's interest rate reference. The NWGBR consists of the Ministry of Finance, Bank Indonesia, the Financial Services Authority, and the Indonesia Foreign Exchange Market Committee. Its early agenda included designating IndONIA as the interest reference rate for overnight rupiah interest rates in the domestic financial market by 31 March 2022. To guide the transition from JIBOR to IndONIA, the NWGBR published the "Guidelines of Using IndONIA as the Reference Rate of Rupiah in Various Financial Contracts" in September 2022 ("**IndONIA Guidelines**"). According to the IndONIA Guidelines, the transition to IndONIA began with Bank Indonesia initiating the publication of its IndONIA benchmark rates as a 'near-risk-free rate' for overnight tenors on 1 August 2018, while simultaneously maintaining the use of overnight JIBOR. Subsequently, the overnight JIBOR (only) was discontinued on 2 January 2019.

Similar to SOFR, IndONIA is calculated based on market transactions. Serving as Indonesia's overnight interest rate reference, IndONIA has also had rates for longer tenors published by Bank Indonesia since 1 February 2023. However, in practice, banks are still referencing JIBOR for longer tenors because it has not been discontinued. Consequently, the plan will be for IndONIA to also be utilized as a long-term interest rate reference, ultimately replacing JIBOR.

a) **Overnight IndONIA**

The use of overnight IndONIA is regulated under Article 2 of Bank Indonesia Board of Governors Regulation No. 20/19/PADG/2018 on the Indonesia Overnight Index Average and Jakarta Interbank Offered Rate (as amended). Bank Indonesia determines IndONIA by calculating the volume-weighted average of transaction data conducted by banks for the overnight period in Indonesia. This data is reported by banks through their daily reports to Bank Indonesia, covering transactions between 7:00 WIB and 18:00 WIB. Subsequently, the data is published on Bank Indonesia's site every business day at 19.30 WIB.

b) **Non-Overnight IndONIA**

The determination of IndONIA for non-overnight/long-term tenors was introduced through Regulation 24/2022. Under the IndONIA Guidelines and Regulation 24/2022, there are two approaches for determining IndONIA interest reference rates for long term-tenors: the backward-looking rate and the forward-looking rate.

1. **Backward-looking term rate**

The backward-looking term rate uses historic data of IndONIA within a certain period. This approach calculates IndONIA by using the simple average interest IndONIA or the Compounded Average Interest IndONIA

method ("**Compounded IndONIA**"). Overall, the Compounded IndONIA method is considered more suitable, despite its more complex calculation method, as it provides a more accurate representation compared to the simple average interest method.

Simple Average Interest IndONIA

Simple Average Interest IndONIA determines interest rates by calculating either the sum of daily interest values in one period (from the initial determination date to the final determination date) or a simple average of the daily interest rate of IndONIA during the interest period.

Compounded IndONIA

Compounded IndONIA is defined as the interest rate calculated either from the compounded average interest from IndONIA over a certain period or from the IndONIA Index. The IndONIA Index represents the accumulated value of IndONIA, compounded and calculated daily.

Compounded IndONIA rates are published for the following standard tenors: 30 calendar days, 90 calendar days, 180 calendar days, and 360 calendar days.

Both simple average interest IndONIA and Compounded IndONIA can be calculated either in-arrears, in-advance, or through a hybrid of in-arrears and in-advance.

2. **Forward-looking term rate**

Employing a forward-looking term rate involves calculations based on an interest rate that anticipates the expected level of interest rates for a given period.

Although the transition of Indonesia's interest rate reference to IndONIA is inspired by the use of SOFR, substituting LIBOR after its cessation, it is important to note that IndONIA and SOFR have differences. While both benchmarks are calculated based on transactions, SOFR is derived from the U.S. Treasury repo (repurchase agreement) transactions involving collateralized borrowing.[1] SOFR is considered nearly risk-free since it is backed by government securities and involves secured overnight transactions with high-quality collateral, thereby reducing credit risks.[2] Meanwhile, IndONIA is determined based on the volume-weighted average of transaction data.[3]

Guidance for Future Financing Arrangements

As JIBOR will be discontinued by 2025, entering the year 2024 brings us closer to Indonesia's full adoption of IndONIA. Accordingly, the following matters will need to be considered for any Rupiah-denominated financing transactions:

a) **Incorporating Clauses on Fallback or Screen Rate Replacement Events**

Similar to the transition period from LIBOR to SOFR, Rupiah-denominated

financing transactions that still use JIBOR as the benchmark rate should include clauses to anticipate the cessation of JIBOR publication. Fallback clauses are commonly used as a temporary measure if the benchmark interest rate is not available for certain periods. Additionally, incorporating screen rate replacement event clauses is also advised to regulate on the parties' intentions when JIBOR is no longer published as the benchmark rate.

b) **Amendment of Financing Agreements and Future Agreements**

As IndONIA is already being published, rather than waiting until the cessation of JIBOR, any Rupiah-denominated financing agreements can be amended now to use the IndONIA interest rate reference instead.

Another consideration is with regard to the potential amendments to financing agreements which include the security agreements after the amendment. In general, security rights under Indonesian law should remain valid until the secured obligations are fully discharged or released. Notwithstanding this, further comfort (especially for the creditor) in ensuring that the security remains valid after the amendment is advisable, which in practice can be done by providing a security confirmation or amendment to the security.

Meanwhile, for financing agreements in the near future, having IndONIA as the interest rate reference for any Rupiah-denominated financing agreements can be started now, while also having an alternative reference rate that is suitable for the parties.

Conclusion

It is worth noting that IndONIA is not entirely new; it has been published by Bank Indonesia for quite some time through its website. However, due to the continued existence of JIBOR, IndONIA is not widely utilized as an interest rate reference for Indonesian Rupiah (IDR) loan. With the anticipated discontinuation of JIBOR in 2025, this reform is an important move toward establishing a more credible interest rate benchmark in Indonesia. This domestic reform marks a significant progression in the Indonesian financial system.

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[1] ARRC of the Federal Reserve Board and the New York Fed (2021), *An Updated User's Guide to SOFR*, p. 4. https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/users-guide-to-sofr2021-update.pdf.

[2] ARRC of the Federal Reserve Board and the New York Fed (2021), *ARRC FAQs*, p. 3., https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/ARRC-faq.pdf.

[3] National Working Group on Benchmark Reform (2022), *Panduan Penggunaan IndONIA Sebagai Referensi Suku Bunga Rupiah Pada Berbagai Kontrak Keuangan*, p. 8. https://www.bi.go.id/id/publikasi/ruang-media/news-release/Documents/Whitepaper-Penggunaan-IndONIA.pdf.

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MALAYSIA

SHEARN DELAMORE & CO.

TMT Legal Update

Malaysia's Cyber Security Act 2024 Comes into Operation

Introduction

We discussed the Cyber Security Bill 2024 in our April 2024 Legal Update. The Bill has since been presented for Royal Assent and has been officially gazetted. The Cyber Security Act 2024 ("**CSA**") came into force on 26 August 2024 along with the following regulations:

a) Cyber Security (Period for Cyber Security Risk Assessment and Audit) Regulations 2024 ("**Risk Assessment Regulations**");

b) Cyber Security (Notification of Cyber Security Incident) Regulations 2024 ("**Notification Regulations**");

c) Cyber Security (Licensing of Cyber Security Service Provider) Regulations 2024 ("**Licensing Regulations**"); and

d) Cyber Security (Compounding of Offences) Regulations 2024 ("**Compound Regulations**").

Will my business or organisation be subject to the new law and regulations?

Public and private entities (including private businesses) that are designated as national critical information infrastructure entities ("**NCII Entities**") and cyber security service providers will be expected to comply with the regulatory requirements under the CSA and the abovementioned regulations.

By way of recapitulation, entities within the following sectors may potentially be designated as NCII Entities: (i) Government; (ii) Banking and Finance; (iii) Transportation; (iv) Defence and National Security; (v) Information, Communication and Digital; (vi) Healthcare Services; (vii) Water Sewerage and Waste Management; (viii) Energy; (ix) Agriculture and Plantation; (x) Trade, Industry and Economy; and (xi) Science, Technology and Innovation.

Risk Assessment Regulations

The Risk Assessment Regulations prescribe the frequency at which a NCII Entity shall carry out cyber security risk assessments and audits under section 22 of the CSA. Pursuant to the Risk Assessment Regulations, a NCII Entity shall:

a) conduct a cyber security risk assessment at least once a year; and

b) carry out an audit at least once in every two years or at such higher frequency as may be directed by the Chief Executive of the National Cyber Security Agency ("**Chief Executive**") in any particular case.

The Risk Assessment Regulations define "cyber security risks" as the risks that a vulnerability in the cyber security of the national critical information infrastructure ("**NCII**") may be exploited by a cyber security threat or cyber security incident.

Please note that the cyber security risk assessment and audit shall be carried out in accordance with the CSA. This means that, among others:

a) the cyber security risk assessment shall adhere to the codes of practice as may be prepared by the relevant NCII sector lead ("**NCII Sector Lead**") and the directive as may be issued by the Chief Executive; and

b) the cyber security audit shall be carried out by an auditor approved by the Chief Executive.

Failure to conduct the cyber security risk assessment or audit in accordance with the abovementioned requirements is an offence under section 22(7) of the CSA and, if convicted, will entail a fine not exceeding RM200,000 and/or imprisonment for a term not exceeding three years.

Notification Regulations

The Notification Regulations prescribe the timelines and manner for notification of a cyber security incident to be made by the authorised person of a NCII Entity to the Chief Executive and the relevant NCII Sector Lead. As discussed in our April 2024 Legal Update, the CSA defines a cyber security incident as:

> *"an act or activity carried out on or through a computer or computer system, without lawful authority, that jeopardizes or adversely affects the cyber security of that computer or computer system or another computer or computer system."*

We summarise the timelines and procedures for making a notification, as required by the Notification Regulations, in the table below (the "**CSA Notification Requirements**").

These requirements, along with the necessary actions and responses, must be carefully considered and where appropriate, incorporated into a NCII Entity's cyber incident response plan, cyber legal playbook, as well as the relevant cyber security training, exercises and drills.

Where a cyber incident results in or otherwise involves personal data breach, NCII Entities shall evaluate how the CSA Notification Requirements interact with the upcoming data breach notification requirements under the Personal Data Protection Act 2010 ("**PDPA**"), which are yet to come into force as at the date of this Legal Update. We recently discussed the upcoming PDPA data breach notification requirements in our July 2024 Legal Update.

NCII Entities within certain regulated sectors (e.g. the banking sector) shall also evaluate how the general CSA Notification Requirements interact with their sectoral requirements that may already require cyber incident notification

to be made to the relevant sectoral regulators. This includes assessing how the general and sectoral requirements may align or conflict, and ensuring that any overlaps or discrepancies are effectively managed.

The CSA Notification Requirements are summarised as follows:

Timeline & Mode	Required Information
Immediately upon the cyber security incident coming to the knowledge of the NCII Entity ("**Timeline of Knowledge**"). **Mode:** By electronic means.	Notification that a cyber security incident has or might have occurred in respect of the NCII owned or operated by the NCII Entity.
Within 6 hours from the Time of Knowledge. **Mode:** Through the National Cyber Coordination and Command Centre System (or such other methods determined by the Chief Executive in the event of a disruption).	a) The particulars of the authorized person of the NCII Entity. b) The particulars of the NCII Entity concerned, the NCII sector, and NCII Sector Lead. c) The information on the cybersecurity incident including: 1. The type and description of the cyber security incident; 2. The severity of the cyber security incident; 3. The date and time the occurrence of the cybersecurity incident is known; and 4. The method of discovery of the cyber security incident.
Within 14 days after the initial notification made immediately at the Time of Knowledge. **Mode:** Through the National Cyber Coordination and Command Centre System (or such other method as determined by the Chief Executive in the event of a disruption).	a) The particulars of the NCII affected by the cyber security incident; b) The estimated number of hosts affected by the cyber security incident; c) The particulars of the cyber security threat actor; d) The artifacts related to the cyber security incident;

	e) The information on any incident relating to, and the manner in which such incident relates to, the cyber security incident; f) The particulars of the tactics, techniques and procedures of the cyber security incident; g) The impact of the cyber security incident on the NCII or any computer or interconnected computer system; and h) The action taken.
From time to time. **Mode:** Not specified.	Further updates of the cyber security incident as the Chief Executive may require.

Pursuant to section 23(2) of the CSA, it is an offence for any NCII Entity to fail to notify the Chief Executive and its NCII Sector Lead of such information in accordance with the CSA Notification Requirements, and such offence is punishable by a fine not exceeding RM500,000 and/or imprisonment for a term not exceeding 10 years.

Licensing Regulations

As discussed in our April 2024 Legal Update, the CSA provides for the licensing of cyber security service providers, but the types of services constituting "cyber security services" were unclear back then.

The Licensing Regulations now offer better clarity in this regard: unless any of the prescribed exceptions applies, providers of (i) managed security operation centre monitoring service and (ii) penetration testing service will have to be licensed. The definitions of these cyber security services are set out below.

Managed Security Operation Centre Monitoring Service
"Managed security operation centre monitoring service" is a service for: a) Monitoring the level of cyber security of a computer or computer system of another person by acquiring, identifying or scanning information that is stored in, processed by or transmitted through, the computer or computer system for the purpose of identifying or detecting cybersecurity threats to the computer or computer system; or b) Determining the measures necessary to respond to or recover from any cyber security incident and to prevent such cybersecurity incident from occurring in the future.

Based on the above definition, it would appear that service providers that offer assistance with responding to cyber incidents will also be considered as providing "managed security operation centre monitoring service" even if they do not provide monitoring services.

Penetration Testing Service
"Penetration testing service" is a service for assessing, testing or evaluating the level or cyber security of a computer or computer system, by searching for vulnerabilities on, and compromising, the cybersecurity defences of the computer or computer system, and includes any of the following activities: a) Determining the cybersecurity vulnerabilities of a computer or computer system, and demonstrating how such vulnerabilities may be exploited and taken advantage of; b) Determining or testing the organisation's ability to identify and respond to cyber security incidents through simulation of attempts to penetrate the cyber security defences of the computer or computer system; c) Identifying and measuring the cyber security vulnerabilities of a computer or computer system, indicating vulnerabilities and preparing appropriate mitigation procedures required to eliminate vulnerabilities or to reduce vulnerabilities to an acceptable level of risk; or d) Utilising social engineering to assess the level of vulnerability of an organization to cyber security threats.

Generally, an application for a licence to provide cyber security service and the renewal thereof shall be made by electronic means with payment of RM400 if the service provider is an individual, or RM1,000 if the service provider is a company, limited liability partnership, firm, society or other body of persons.

Providing any of the abovementioned cyber security services without a licence is an offence under section 27(5) of the CSA and, if convicted, will entail a fine not exceeding RM500,000 and/or imprisonment for a term not exceeding 10 years.

Compound Regulations

The Compound Regulations provide that the offences under sections 20(6), 20(7), 22(7), 22(8), 24(4), and 32(3) of the CSA are compoundable offences which may be compounded with the written consent of the Public Prosecutor.

Conclusion

Businesses are advised to take proactive steps in implementing necessary measures required by the CSA and the above regulations to ensure compliance.

Businesses and organisations operating within the NCII sectors are also advised to stay informed about developments relevant to their sectors, particularly with regard to the appointment of NCII Sector Leads, designation of NCII Entities, and the issuance of codes of practice and directives.

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This Update is issued for the information of the clients of the Firm and covers legal issues in a general way. The contents are not intended to constitute any advice on any specific matter and should not be relied upon as a substitute for detailed legal advice on specific matters or transactions.

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CAMBODIA

TILLEKE & GIBBINS

Intellectual Property Legal Update

Cambodia Launches Trial of Intellectual Property Rights Recordation System

The General Department of Customs and Excise ("**GDCE**") in Cambodia's Ministry of Economy and Finance launched a trial phase of its Intellectual Property Rights Recordation System ("**IPRRS**") on September 1, 2024.

The system compiles necessary information and documents related to intellectual property rights in the country, enabling customs authorities to swiftly access these documents and enhance their ability to identify and intercept potential parallel imports and infringing goods at the border. This will also better facilitate ex-officio actions by customs authorities. The system is currently referred to as being in a "trial phase" to support further amendments or updates to address any potential technical errors that may arise from public use. However, the IPRRS is already fully operational.

Types of Recordation

Currently, the IPRRS allows two types of recordation:

a) **Intellectual property recordation** is available for trademarks, geographical indications, copyrights, and related rights that are protected in Cambodia. It allows IP owners, authorized representatives, and legal representatives to record information and documents relating to such rights, including information on possible or potential counterfeit goods, with the GDCE. Recordation will give customs authorities quicker access to the information and enable them to promptly take action against potential counterfeit or infringing goods.

b) **Exclusive distributorship recordation** is meant to streamline the process that takes place after the Ministry of Commerce issues a notice of the recordation of exclusive rights. Under the current practice, after receiving a copy of a notice of the recordal of an exclusive distributorship issued by the Ministry of Commerce ("**MOC**"), the GDCE needs to enter the information into their system manually to enable them to promptly identify or stop potential parallel importation at the border. This reportedly causes delays in border officers' access to the necessary information. Recordation through the IPRRS, on the other hand, allows local exclusive distributors and their authorized or legal representatives to submit the MOC notice on the recordation of exclusive rights to the GDCE right away, ensuring that the officers have quicker access to these documents so they can take timely action.

However, IP owners seeking customs clearance are required to submit their complaints physically, as the digital system for customs clearance requests is currently under development.

Validity

Recordation under the IPRRS remains valid for as long as the IP rights are valid. If trademark rights expire, a renewal needs to be filed with the Department of Intellectual Property in the MOC, followed by a new recordation using the IPRRS. For exclusive distributorship recordation, the validity aligns with the MOC's notice on the recordal of exclusive distributorship. If the notice expires, a renewal must be done at the Department of Intellectual Property in the MOC, followed by a new recordation using the IPRRS.

Recordation Timeframe and Status

The result of a request for recordation will be available within two business days (or less) of filing. If the request is successful, the status on the IPRRS will appear as accepted, and there will be no official notice confirming the successful recordation.

There is no penalty for not recording IP rights or exclusive distribution rights on the IPRRS. However, doing so benefits IP owners and exclusive distributors by helping customs authorities take prompt action against counterfeit or infringing goods as well as parallel importation.

For more details on the IPRRS, or on any aspect of intellectual property rights enforcement in Cambodia, please contact Tilleke & Gibbins at cambodia@tilleke.com.

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Tax Legal Update

Cambodia Grants Tax Incentives for Investment Project Expansion and MSMEs

In May and June 2024, Cambodia's General Department of Taxation (GDT) issued two notable tax incentive packages that aim to encourage business growth in the country. The details of these incentives are outlined below.

Tax Incentives for Expansion of Qualified Investment Projects

The GDT's May 10, 2024, regulation (Prakas No. 313 MEF. PrK. PD) provides income tax incentives for expansion of qualified investment projects ("**QIP**"), including an income tax exemption for the following types of expansion:

a) Expansion of existing production;

b) Expansion through product line diversification within the same lines;

c) Implementation of new technologies that enhance productivity or protect the environment; and

d) Other forms of expansion set out in future sub-decrees.

The number of years for the income tax exemption depends on the investment activities of the QIP, in accordance with the business groupings provided in the Sub-Decree on the Implementation of the Investment Law in Cambodia—9 years for group 1, 6 years for group 2, and 3 years for group 3.

After receiving approval for the QIP expansion from the Council for the Development of Cambodia ("**CDC**") or one of its Provincial-Municipal Investment Sub-Committees ("**PMIS**"), the GDT will certify the income tax exemption period. The exemption begins on the date the enterprise first receives income from the QIP expansion.

QIPs seeking this tax exemption need to declare the amount of money that they intend to use for the expansion. Once allowed, the company must use that money for construction materials or new production equipment before the expiration of the tax exemption period.

The income tax exemption can be revoked if:

a) The enterprise does not use the capital to expand the QIP by purchasing the construction material and new production equipment as requested for the expansion;

b) The enterprise fails to invest the prescribed amount before the expiration of the tax exemption period; and

c) The enterprise does not fulfill its other tax obligations as required by law.

Tax Incentives for Micro, Small, and Medium Enterprises

On June 20, 2024, the GDT issued Instruction No. 18412, which provides tax incentives to micro, small, and medium enterprises ("**MSME**") to encourage companies in the informal economy to join the formal economy. This instruction sets out the eligibility, conditions, and procedures for the tax incentives.

The exemption will be granted to MSMEs that voluntarily register with the GDT and operate in the following priority sectors:

a) Wholesale, retail, and repair;

b) Accommodation and food services;

c) Handicrafts; and

d) Agriculture.

Taxpayers can voluntarily register with the GDT in person or online at the government's business registration website. Registered enterprises will receive a tax incentive certificate and official document for tax registration in a printable, digital format.

Enterprises that are registered unilaterally by the Tax Administration after failing to register within 15 days of receiving a second invitation letter from the Tax Administration will not be considered to have registered voluntarily and will not be eligible for the tax incentives.

The available tax incentives vary based on the size of the registering enterprise, as follows:

a) **Micro enterprises** that register with the GDT voluntarily in 2023–2024 will receive fee exemptions for tax registration, annual declaration of commercial enterprise ("**ADCE**") requirements, and issuance of their GDT registration certificate;

b) **Medium enterprises** that register with the GDT voluntarily in 2023–2028 will receive exemptions from the following:

    1. Penalties and tax debts such as tax payable, additional tax, interest, and monetary fines related to noncompliance with past voluntary GDT registration requirements;

    2. Fees for tax registration, ADCE, and registration certificate issuance;

    3. Patent tax at the time of tax registration and the two years following successful registration with the GDT in 2024 or 2025; and

    4. Prepayment of income tax, income tax, and minimum tax for two years starting from the year the tax registration is completed.

c) **Small enterprises** that register with the GDT voluntarily in 2024–2025 will receive exemptions from all of the items listed for medium enterprises, as well

as fee exemptions for tax registration, ADCE, and registration certificate issuance.

MSMEs that receive the tax incentives must fulfill certain obligations.

a) **Micro enterprises** must report the following to the tax administrator:

1. Annual turnover in a form determined by the tax administrator from January 1 to March 31 of the next financial year; and

2. Changes in address, name, telephone number, email, business objectives, or status of the business (i.e., transfer or dissolution of the business) within 15 days of the change.

b) **Small and medium enterprises** must do the following:

1. Notify the tax administrator within 15 days of any changes in address, telephone number, email, other contact information, legal structure, name, business objectives, shareholding (including transfers), management of the enterprise or branches, taxpayer, or bank account information, as well as any pending dissolution of the enterprise;

2. File tax returns in accordance with accounting statements, regardless of any tax relief or exemptions; and

3. Submit tax declarations and pay other value-added tax monthly and annually as required by applicable tax laws.

For more information on these tax incentives, or on any aspect of tax laws and regulations in Cambodia, please contact Tilleke & Gibbins at cambodia@tilleke.com.

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MYANMAR

TILLEKE & GIBBINS

Tax Legal Update

New Enforcement Procedures for Myanmar's Tax Administration Law

Following the enactment of the Tax Administration Law ("**TAL**"), Myanmar's Ministry of Planning and Finance has issued Notification No. 44/2024, which outlines directives and procedures for addressing violations of tax law provisions. These procedures, which came into force on June 13, 2024, primarily focus on three key areas: tax evasion, impeding tax administration, and failure to preserve secrecy.

The notification primarily aims to address tax evasion, impeding tax administration, and failure to preserve secrecy, classifying these offenses as either subject to arrest without warrant or not. Notably, tax evasion is classified as an offense subject to arrest without warrant, while impeding tax administration and failure to preserve secrecy are not. The notification also prescribed the forms for notifying taxpayers before taking any action.

Tax Evasion

Tax evasion refers to a taxpayer who willfully evades the assessment, payment, or collection of tax. Penalties for such offenses include fines of MMK 250,000 (approx. USD 120) or 100% of the evaded tax (whichever is greater), imprisonment for up to seven years, or both.

The enforcement process for tax evasion requires the chief officer of the township revenue department or an officer in charge (the tax authority) to assess the relevant documents and information provided by the taxpayer. If a taxpayer is found to be evading tax, the tax authority must send a notice in the prescribed form for verification within 15 days. Taxpayers may apply for a one-time extension of 15 days to submit requested documents and make disclosures. If the taxpayer cannot fulfill the requirements as instructed, the tax authority will seek approval from the director general of the Internal Revenue Department ("**IRD**") for criminal proceedings as cognizable offences.

Impeding Tax Administration and Failure to Preserve Secrecy

Impeding tax administration refers to obstruction or attempted obstruction of taxation staff or officers from carrying out their duties. Such a person is guilty of an offense and is subject to a fine of MMK 250,000 (approx. USD 120), imprisonment for up to one year, or both.

The enforcement process for these offenses is similar to that for tax evasion. The tax authority will send a notice to the taxpayer regarding the impeding tax administration matters. If the taxpayer cannot fulfill the requirements within the specified time, the tax authority may extend the deadline once, provided certain criteria are met. If the taxpayer still cannot fulfill the requirements, the tax authority will seek approval from the director general of the IRD for criminal proceedings as non-cognizable offenses.

Liable Parties in Civil and Criminal Proceedings

For civil lawsuits under the TAL, similar procedures by tax authorities are applicable. In these civil and criminal proceedings, taxpayers liable are:

a) **Corporate Taxpayers;**

1. The company itself
2. For nonliquidated companies that have ceased operations: chairperson, managing director, members of the board of directors, general manager, or operator managing the company on its behalf
3. For liquidated companies: The shareholders of the company before company liquidation or shareholders at the time the cause of action arose while the company liquidated

b) **Partnerships**: Members of the partnership;

c) **Trusts**: Trustees;

d) **Group Businesses (other than a company or partnership)**: Person responsible for the accounts on behalf of the group business;

e) **Citizens or Foreigners Living Abroad**: The manager or person liable for the business in Myanmar;

f) **Representatives**: All representatives if the taxpayer has two or more representatives;

g) **Deceased Taxpayers or Indebted Companies (if the indebted company's property is seized)**: The administrator, agent, or trustee of the taxpayer's property, or the person who continues or closes the business subject to tax; and

h) **Mortgagees**: In case of a business operation subject to tax for which mortgaged land or other assets are used.

Key Takeaways

Businesses operating in Myanmar should take proactive steps to ensure compliance with the Tax Administration Law. Important actions include maintaining accurate and up-to-date financial records, implementing effective internal controls to prevent tax evasion, and ensuring all staff involved in tax matters are well informed about these new regulations. Companies should also be prepared to respond promptly to any notices from tax authorities and consider seeking professional legal and tax advice to navigate these complex requirements effectively. By staying informed and compliant, businesses can mitigate the risk of severe penalties and maintain good standing with Myanmar's tax authorities.

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Employment Legal Update

Minimum Wage: Myanmar Increases Mandatory Daily Allowance

Myanmar has once again made significant amendments to its minimum-wage framework by introducing additional allowances for both public- and private-sector workers.

On August 9, 2024, the National Committee for Setting the Minimum Wage issued Notification No. 1/2024, which entitles private-sector workers to a new additional daily allowance of MMK 1,000 (approximately USD 0.48). This increase is on top of the MMK 1,000 additional daily allowance introduced last year. As a result, workers at private-sector employers with more than 10 employees are now entitled to the base minimum wage of MMK 4,800 plus additional allowances of MMK 2,000, for a total of MMK 6,800 (approximately USD 3.20) per day for an eight-hour workday, effective August 1, 2024.

A similar additional allowance had been announced for workers in government departments and organizations on July 26, 2024.

Background

The MMK 4,800 (approximately USD 2.29) minimum wage for an eight-hour workday (equivalent to MMK 600 per hour) was established in May 2018 for all workers, irrespective of location or job type. In September 2023, the Ministry of Planning and Finance announced an additional daily benefit of MMK 1,000 for workers in government departments and organizations, and on October 9, 2023, the National Committee for Setting the Minimum Wage extended this benefit to workers at private-sector employers with more than 10 employees, bringing the effective minimum daily wage to MMK 5,800 (approximately USD 2.77). These changes took effect on October 1, 2023.

Applicability of Additional Allowances for Private-Sector Workers

The latest announcement also entitles employees to the base minimum wage and additional allowances for days used from their entitlement to leave and holidays, in accordance with the 1951 Leave and Holidays Act.

However, the daily allowances—totaling MMK 2,000—are not to be included when calculating overtime payments. Instead, overtime payments must be calculated based on the base minimum daily wage of MMK 4,800.

For more details on these changes, or on any aspect of employee compensation or employment law in Myanmar, please contact Tilleke & Gibbins at myanmar@tilleke.com.

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THAILAND

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Capital Markets Legal Update

New Thai SEC Guidelines Simplify Market Entry for Foreign Securities Businesses

On September 18, 2024, Thailand's Securities and Exchange Commission ("**SEC**") issued comprehensive guidelines to make it easier for foreign business operators to provide investment services in Thailand. These guidelines are designed to support Thailand's goal of becoming a global financial hub and align with government efforts to enhance the ease of doing business.

The guidelines primarily focus on streamlining the process for foreign firms applying for securities and derivatives licenses, and ensuring quicker and more transparent entry into the Thai market for businesses offering securities (such as shares, mutual funds, and collective investment schemes) and derivatives (such as futures and options).

Fast-Track Licensing

Under the new guidelines, the SEC will provide support to foreign companies wishing to operate securities businesses in Thailand. This support includes a fast-track licensing process for foreign operators that meet certain qualifications, such as having a company incorporated in Thailand, having operated a system of group companies for at least five consecutive years, and being supervised by a regulator under the IOSCO MMoU (International Organization of Securities Commissions Multilateral Memorandum of Understanding).

The SEC will also collaborate with the Ministry of Commerce to grant exemptions from the requirement of a foreign business license for companies providing certain services relating to or supporting securities or derivatives businesses, such as net asset value calculation/confirmation for mutual funds, and promotion of capital market products. Applying for foreign business licenses has long been a complicated process for foreign operators, and this exemption can help reduce such complications.

Targeted License Exemptions to Reduce Regulatory Burdens

Foreign operators providing specific investment services may be exempt from full securities and derivatives licensing requirements, saving time and costs associated with the full licensing process, and allowing them to start their businesses quickly and efficiently. Key exemptions include:

a) Foreign operators providing derivatives services solely to institutional investors are only required to register as derivatives dealers. This is a light-touch approach compared to the stricter requirements of a license; and

b) Foreign operators (i) offering investment advice under qualified actions/protocols, or (ii) assisting Thai investors in offshore investments through locally licensed intermediaries are exempt from licensing.

Flexibility for Limited Operations in Thailand

Under the guidelines, the SEC continues to allow flexibility to businesses wishing to maintain a smaller footprint in Thailand. Foreign operators are able to:

a) Set up a representative office in Thailand to gather market intelligence, provided the activities of the office do not involve the operation of a securities business or the offering of securities in Thailand. The establishment of a representative office is still subject to SEC approval; and

b) Outsource non-core operations, such as research or back-office support, to local firms.

Despite the SEC's increased support and flexibility, foreign operators are recommended to consult local experts before entering the Thai market due to the complexity of the laws and penalties.

For further guidance on how your business can benefit from these streamlined processes, or any practical guidelines for marketing securities/derivatives products in Thailand, or to apply for licenses, contact our experts:

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Fintech Legal Update

Fintech Insights: The Bank of Thailand's Sandbox Framework for Fintech Innovation

One key component of Thailand's support for the development of fintech innovations is its sandbox framework, supervised by the Bank of Thailand (BOT). This framework supports business operators in experimenting with new technologies under controlled conditions.

This article explores the structure and significance of the BOT's sandbox program in driving fintech innovation in Thailand.

The BOT Sandbox Framework

In June 2024, the BOT updated its sandbox framework to provide a more comprehensive and flexible environment for testing fintech innovations. The framework allows participants to experiment with their ideas in a controlled and limited environment, balancing the need for innovation with the imperative of maintaining financial stability and consumer protection.

Three Types of Sandboxes

The BOT's framework encompasses three distinct types of sandboxes: the Regulatory Sandbox, the Own Sandbox, and the Enhanced Regulatory Sandbox.

a) **Regulatory Sandbox**

The Regulatory Sandbox is a mandatory testing ground for certain BOT-licensed financial services to ensure that potentially impactful innovations are tested and evaluated before wide-scale implementation. Participation in this sandbox is a prerequisite for:

1. License applications for specific financial services;
2. Implementation of new technologies or innovations in existing licensed services; and
3. Financial services that have the potential to become a structural element or standard of the Thai financial sector.

A prime example of a service requiring participation in the Regulatory Sandbox is the Thai QR code payment via PromptPay system, which involved various banks several years ago until the Bank of Thailand granted permission for these services to be provided to the general public.

b) **Own Sandbox**

The Own Sandbox is an optional program that the BOT encourages for financial service providers and fintech operators implementing new technologies. This sandbox provides a more flexible environment for testing

innovations that may not require the same level of regulatory scrutiny as those in the Regulatory Sandbox.

c) **Enhanced Regulatory Sandbox**

The Enhanced Regulatory Sandbox is a specialized testing environment for new financial products or services that are not yet authorized by the BOT for regulated financial operators. This sandbox operates under the close supervision of the BOT and is conducted under controlled conditions with limitations on how the product or service can be offered and tested.

Benefits of the Sandbox Approach

The BOT's sandbox framework offers notable benefits to both innovators and the broader financial ecosystem. Perhaps foremost is risk mitigation. By testing new technologies and business models in a controlled environment, potential risks can be identified and addressed before wider implementation. Participants can also gain insights into how their innovations fit within the existing regulatory framework. Additionally, the close monitoring enabled by the sandbox framework empowers the BOT to better safeguard consumer interests in a changing technological environment.

Conclusion

The BOT-supervised sandbox framework represents a significant commitment to fostering fintech innovation in Thailand. By providing structured environments for testing new technologies and business models, the BOT is helping to create a competitive fintech ecosystem while maintaining the stability of the financial sector.

This forward-thinking but responsible approach toward financial innovation has positioned Thailand as a potential leader in fintech development in Southeast Asia. Companies developing new technologies and considering market entry should understand and comply with the requirements and recommendations associated with the BOT-supervised sandbox framework, as this can prevent missteps and possibly even smooth their path launching new products and services in the Thailand market.

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VIETNAM

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Energy Legal Update

Potential Impact of Vietnam's New Land Law on the Energy Sector

On January 18, 2024, Vietnam's National Assembly passed a new Land Law ("**Land Law 2024**") that is scheduled to take effect on January 1, 2025, replacing the current Land Law 2013. To mitigate challenges faced by the real estate market, in late May 2024, the government proposed amendments to the Land Law that would move the effective date up five months, to August 1, 2024, pending approval by the National Assembly.

One of the key sectors to be impacted by the Land Law 2024 is the energy sector, which requires large land areas for power plants and infrastructure, especially given Vietnam's 2050 net zero emissions commitment. Below are highlights of how the new Land Law 2024 will affect Vietnam's energy sector.

Annual payment of land rental

Under the Land Law 2013, investors implementing energy projects (e.g., solar power projects) are entitled to choose to lease land with either (i) an annual rental payment or (ii) a single upfront payment for the entire term of use. Under the Land Law 2024, these investors are only allowed to use land in the form of an annual rental payment.

As the annual land rental is calculated in five-year cycles, based on the land price table decided by the state, this new restriction means that investors in energy projects will face an additional risk of a sudden increase in land rental, disrupting their financial planning.

Investors using land sites leased with annual rental payments are also not allowed to mortgage their land-use rights, but can only mortgage assets attached to the land, at credit institutions licensed to operate in Vietnam. Accordingly, this may affect the ability of energy projects to obtain financing during the development stage, because they no longer have assets that can be mortgaged.

Obtaining land

Under the Land Law 2024, investors can obtain land through a lease without any auction or bidding process; through an auction process (for selecting the land user of a land site); or through a bidding process (for selecting the investor implementing an investment project with the need to use land).
Investors in energy projects using public investment capital and public-private partnership ("**PPP**") projects can lease a land site from the state without an auction or bidding process. Further details on these conditions are to be provided by the government.

An auction process will apply to energy projects that intend to use land obtained from the land fund managed by the state if the following conditions are satisfied: (i) the land site is clean and does not require compensation or site-clearance work; (ii) the land site is included in the annual land-use plans approved for

auction; and (iii) a 1/500 plan and auction plan are approved by the competent authorities.

A bidding process will apply to energy projects that must conduct bidding to select investors according to specialized laws, such as the laws on electricity, if the following conditions are satisfied: (i) the land is on the list of land sites subject to bidding for selection of investors for an investment project as decided by the provincial People's Council; (ii) a detailed plan or a 1/2000 zoning plan is approved by the competent authorities; and (iii) other conditions under the laws on bidding are met.

Compared to the Land Law 2013, the Land Law 2024 supplements the bidding for projects using land as a new method for investors to gain access to land. This addition aims to increase competition and fairness for investors.

Compensation, support, and resettlement procedure

If the land for implementing an energy project is currently occupied, a compensation, support and resettlement procedure must be carried out. Under the current Land Law 2013, the decision on land recovery and the decision on the plan for compensation, support and resettlement are issued concurrently. Under the new Land Law 2024, the decision on land recovery will only be issued within 10 days after, among other conditions, the plan on compensation, support, and resettlement has been issued, if resettlement is not required; or the person whose land is recovered has had another land site allocated or handed over by a competent authority to build their own resettlement housing.

These new regulations will extend the length of the land clearance procedure considerably when the recovered land requires resettlement, as the decision on land recovery will only be issued after the resettlement is deemed completed.

Commercial arbitration as a dispute resolution mechanism

Another crucial aspect of the new law is that commercial arbitration is clearly recognized as a dispute resolution mechanism for land-related disputes. Previously, there was uncertainty surrounding whether disputes relating to land could be adjudicated by arbitration. Pursuant to the Land Law 2024, Vietnamese commercial arbitration can resolve disputes arising from commercial activities related to land in accordance with the law on commercial arbitration.

Outlook

The new Land Law aims to address overlapping and conflicting issues of related land policies and laws, while tackling practical challenges in land management and land use. It promotes the commercialization of land-use rights, fostering transparent real estate markets, modernizing land management systems, and implementing administrative and digital reforms to improve land accessibility, especially for energy projects.

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Technology Legal Update

Vietnam's Draft Personal Data Protection Law: An In-Depth Look

The first draft of Vietnam's new Personal Data Protection Law ("**Draft PDPL**") was released for public consultation on September 24, 2024, and was open for comments until November 24, 2024. (See further details here.) The draft was expected to be presented to the National Assembly before the end of 2024 and will be submitted for adoption in May 2025, with entry into force on January 1, 2026. As the Draft PDPL incorporates most of the provisions of Decree No. 13/2023/ND-CP on Personal Data Protection ("**PDPD**"), which has been the primary legal instrument on personal data protection since it took effect on July 1, 2023, it is likely that it will supersede the PDPD when it takes effect. [*Please contact our Vietnam data protection team to request a detailed comparison of the Draft PDPL to the PDPD.*]

Noting that there might be further changes to the draft once the public consultation period closes, the Draft PDPL proposes new specific requirements for a number of services. Some highlights of the current version include the following:

a) **Marketing services:** Although marketing services are already regulated under the PDPD, the Draft PDPL now recognizes that the use of personal data for marketing must comply with anti-spam regulations. The current draft does not clarify whether organizations are exempted from the consent requirement for the purpose of the initial call or message under the anti-spam regime. Marketing service providers are not allowed to outsource the services to another organization to perform or support the implementation of marketing business, which may prevent the sharing of personal data;

b) **Behavioral advertising:** Behavioral advertising (targeted personalized advertising based on a user's activity or personal data) requires the consent of the data subject in a modifiable manner that allows the data subject to refuse to share data in different contexts. As with marketing services, advertising service providers may only use personal data collected through their business activities to provide their advertising services;

c) **Big data processing:** Organizations are free to utilize personal data on platforms where the data subjects have disclosed such data without any restrictions (which seems to allow the processing of any publicly available data, for as long as the data subjects do not restrict the use), as long as the collected data is only used for business activities in accordance with the law. The Draft PDPL specifies that the information registered for social network accounts or OTT services will not be considered public data, and cannot be processed without consent;

d) **AI:** Organizations are entitled to use personal data for research and development of machine-learning algorithms, artificial intelligence, and other automated systems, provided that notice is given to the data subjects (including explanations on the influence of the algorithm, artificial intelligence,

or automated system on the legitimate rights and interest of the data subjects), and the data subjects are offered the right to opt out;

e) **Cloud computing:** The Draft PDPL now imposes the obligations on clients of cloud service providers to request that some content be included in the cloud computing contracts, notably that cloud service providers will only process their clients' data for the benefit of and on behalf of the clients (which is very close to the definition of a data processor); compensation for damages must be clearly addressed; security, technical and organizational measures must be enumerated; technical measures are in place to ensure that the right to access data is reasonably decentralized, etc. In addition, cloud service providers must comply with impact assessment dossier requirements and with regulations on personal data protection in general; appoint a data protection department; request subcontractors to comply with regulations on personal data protection; and apply technical and organizational measures adequate to the scale and level of processing;

f) **Labor and recruitment:** When monitoring employees using technological and/or technical measures, organizations must ensure the rights and interests of the data subjects, particularly that the employees are aware of and consent to the monitoring, which must not be contrary to the law. The Draft PDPL confirms that employees must consent to the processing of their personal data — taking a different approach from the European Union and disregarding the argument that employees' consent might not be voluntary considering the power imbalance with the employer. For intra-group sharing in a global employee database system, the legal entities must prove that the collection and processing of personal data is lawful, and the employees are responsible for the legality of the information provided. Further, the Draft PDPL indicates that the consent of the employees to share with one entity of the group does not mean the consent is given to the other entities of the group, which will be considered independently;

g) **Financial, banking and credit information services:** The sale and purchase of credit information is prohibited between financial institutions, credit institutions, and credit information institutions, as is the sending or transmission of unencrypted financial and credit data related to data subjects. Express consent is required to use the credit information of a data subject in credit scoring. The result of credit information assessment can only be binary (pass or fail; yes or no; true or false; etc.) or using a scale based on the database collected directly from the customers of the financial institutions, credit institutions, banks, or credit information institutions. De-identification measures must be applied at a specific stage of the processing. Credit information services/products can only be provided to financial institutions, banks, and credit institutions and when prescribed by law;

h) **Health and insurance:** Consent is mandatory for the collection and processing of health and insurance information. Organizations operating in the health sector may not provide personal data to healthcare providers or insurance providers, unless requested in writing by the data subject. This could hint that the data subject's consent alone would not be sufficient in this case, and that the sharing of health information can only be initiated at the request of the data subject. For the sharing of health information in the context of reinsurance, any transfer must be clearly stated in the contract with the data subject;

i) **Social network and communication services through cyberspace:** Notification to the data subject on personal data processing must clearly state the content of personal data collected when installing or using the services, and organizations must refrain from collecting personal data outside the scope agreed with the user. Service providers are not allowed to request a photo of the ID card as an account authentication factor. Users must be allowed to opt out of cookies and have a "do-not-track" option. The service provider can only track the usage of its platform/OTT services with consent. When providing advertising or marketing services, notification must include information on the sharing of personal data and on the security measures that are applied. Calls and text messages must remain private—any recording or monitoring without the data subject's consent is expressly stated as an illegal activity; and

j) **General B2C businesses:** Contracts must now contain a clause on personal data protection clearly stating the responsibilities, rights and obligations of the parties.

The Draft PDPL also recognizes new services of (i) personal data protection trust rating organizations, and (ii) personal data protection organizations and experts (notably DPO-as-a-service), making it evident that outsourcing data protection departments and data protection officers ("**DPO**") is accepted.

Personal data protection trust rating organizations

Personal data protection trust rating organizations assess the ability of an organization to fully comply with the personal data protection regulations. The assessment will evaluate risk factors and their impact on the ability to satisfy personal data protection obligations, and will notably cover market and business environment risks, technological risks, governance risks, personnel risks, and financial risks. Results of the assessment are given in four rating levels – "high trust," "trust," "pass" and "failing" – and are reported to a "trust rating council" (a term which has not been defined in the Draft PDPL).

Organizations must satisfy certain eligibility requirements to obtain a certificate to provide trust rating services, including notably:

a) Registered capital of VND 5 billion or more;

b) Having at least one year of experience in personal data protection; and

c) Employing at least three qualified personal data protection trust analysts.

Under the Draft PDPL, having a trust rating is mandatory for all organizations processing sensitive personal data. Considering the broad definition of sensitive personal data, which includes personal data that must be processed in an employment relationship (e.g., for salary payment purposes), this requirement will be practically applied to all organizations.

Personal data protection experts and organizations

A personal data protection expert ("**PDP Expert**") is defined as a person with technological and/or legal capabilities appointed by a given processing entity to act as personal data protection person (i.e., data protection officer). PDP Experts must obtain a competence certificate from a certification organization whose role is to ensure that the PDP Experts are sufficiently qualified to undertake their roles. The Ministry of Public Security ("**MPS**") will rely on licensed certification organizations to issue competence certificates to qualified PDP Experts who, at minimum, hold a college degree in a relevant field and have completed a data protection certification course.

A personal data protection organization ("**PDPO**") is an entity that can be designated by a given data processing entity (including data controllers, data controller-processors, third parties, data transferors, and data recipients—but notably not data processors) as its personal data protection department. The PDPO provides personal data protection services to meet the needs of its appointing entity. The MPS will be in charge of issuing the license to the PDPO, subject to the PDPO hiring at least one technological and/or legal PDP Expert; engaging in functions, tasks, business lines, or domains related to technology and/or law; and obtaining a "pass" trust rating or higher.

The Draft PDPL imposes new requirements on businesses engaged in data processing services, which is now defined as a conditional business line (including any data processor engaged to process data for a data controller), notably to have at least one technological and legal expert (or one technology expert and one legal expert), register business lines related to technology or legal services or consultancy about technology or law related to personal data protection, and obtain a "pass" trust rating level or above.

Outlook

In sum, the Draft PDPL recognizes new data protection services with what seems to be an ambition to build trust (with the certification mechanism for PDP Experts and PDPOs and the trust rating organizations) and provide for sector-specific regulations on personal data protection. As the level of awareness in Vietnam regarding personal data protection remains low, these new service lines and sector-specific regulations might further contribute to the MPS' efforts on capacity-building.

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