

International Comparative Legal Guides



Fintech 2021

A practical cross-border insight into fintech law

Fifth Edition

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1 The Fintech Landscape

1.1 Please describe the types of fintech businesses that are active in your jurisdiction and the state of the development of the market, including in response to the COVID-19 pandemic. Are there any notable fintech innovation trends of the past year within particular sub-sectors (e.g. payments, asset management, peer-to-peer lending or investment, insurance and blockchain applications)?

In Thailand, mobile banking is rapidly being developed with the support of biometric technology. In addition to mobile banking, Thailand has recently seen the development of many e-payment services.

A number of businesses also involved with digital assets (i.e. cryptocurrencies and digital tokens) are active in Thailand. These businesses have been regulated since May 2018 by the Emergency Decree on Digital Asset Businesses 2018 (“Digital Asset Decree”). Following the enactment, the Securities and Exchange Commission (“SEC”) Office, the SEC and the Ministry of Finance (“MOF”) issued and amended a series of subordinate legislation related to this area.

Only a few players have been attracted to the crowdfunding business since its introduction in Thailand, therefore this has yet to become well established.

We have seen an increasing adoption of technology in the insurance sector in Thailand. The Office of Insurance Committee (“OIC”), which is the regulatory body for the insurance industry, has taken an active role in implementing legislation and the sandbox programme to support insurtech.

Regulators, especially the Bank of Thailand (“BOT”), are keen for blockchain technology to be used in the development of fintech businesses. An example of a blockchain application is Project Inthanon, which is a collaborative project involving the BOT, financial institutions and R3 to experiment with a proof-of-concept, decentralised real-time gross settlement system. This uses a wholesale central bank digital currency. Another example is the Distributed Ledger Technology (“DLT”) Scripless Bond Project, which is a collaboration between the BOT, the Public Debt Management Office, the MOF, the Thailand Securities Depository, the Thai Bond Market Association, financial institutions, the SEC Office and IBM (Thailand) Co., Ltd.

According to the BOT, the most prominent fintech achievement in Thailand is the development of QR codes for payment, which provides an alternative means for customers to make payments (using mobile phones) and enables small and medium-sized merchants to accept payments. In 2019, the BOT refreshed the Policy Guidelines on Standardized Thai QR Code for Payment Transactions.

During the COVID-19 pandemic, Thailand has gone through partial and total lockdowns and has implemented social-distancing requirements. The online banking system has been maturely developed since before the pandemic, but consumers and businesses have become increasingly reliant on online transactions and e-payments, as “contactless” is considered a measure to minimise the spread of COVID-19. KBank, a megabank which is also a pioneer in the fintech industry, reported that the total value of transactions on its mobile banking application grew 71% amid the COVID-19 pandemic.

1.2 Are there any types of fintech business that are at present prohibited or restricted in your jurisdiction (for example cryptocurrency-based businesses)?

No particular types of fintech businesses are prohibited outright in Thailand. However, any fintech business must be undertaken in accordance with requirements stipulated in relevant legislation.

2 Funding For Fintech

2.1 Broadly, what types of funding are available for new and growing businesses in your jurisdiction (covering both equity and debt)?

Traditionally in Thailand, founders of businesses have used their own savings, borrowings from financial institutions and funding from persons that they have a connection with (e.g. relatives, friends, affiliates companies, etc.). Thai regulators are catching up with global trends by developing and issuing several laws and regulations to support a handful of new tools for fund raising, such as equity crowdfunding, venture capital and initial coin offerings. At the stage where such small and medium-sized enterprises are ready to go public, an initial public offering (“IPO”) on the Market for Alternative Investment (“mai”) is also an option.

2.2 Are there any special incentive schemes for investment in tech/fintech businesses, or in small/medium-sized businesses more generally, in your jurisdiction, e.g. tax incentive schemes for enterprise investment or venture capital investment?

A few years ago, tax measures were put in place to encourage venture capitalists to invest in 10 types of targeted businesses (including tech-related business) in Thailand. This was provided that certain terms and conditions were met. Incentives included a corporate income tax exemption on dividends received from, and gains derived from the transfer of shares in, such promoted

businesses. A tax holiday was also applied to income from dividends received from, and gains derived from the transfer of shares or trust units in, companies operating a venture capital business or private equity trust that invested in those targeted small and medium-sized enterprises. The government is also considering additional special incentive schemes for angel investors and venture capital businesses for further promoting investment in start-up businesses.

2.3 In brief, what conditions need to be satisfied for a business to IPO in your jurisdiction?

There are two equity markets in Thailand, namely, the Stock Exchange of Thailand (“SET”) and the mai. Even though the two platforms aim to attract different sizes of companies (i.e. the SET provides a market for large companies with more than THB 300 million in paid-up capital after an IPO, while the mai is a source of funding for small and medium-sized enterprises), the requirements of the SEC for an IPO are essentially the same. The required qualifications include having the specified amount of paid-up capital, meeting financial conditions and having a track record (e.g. in terms of net profit or market capitalisation) as specified by the SET or mai. Proper systems of corporate governance and internal control are also required.

Due to the recent development of the relevant SET and SEC regulations, foreign companies may list on the SET either as a primary or secondary listing.

2.4 Have there been any notable exits (sale of business or IPO) by the founders of fintech businesses in your jurisdiction?

Based on publicly available information, fintech in Thailand is growing but we have not seen any notable exits so far.

3 Fintech Regulation

3.1 Please briefly describe the regulatory framework(s) for fintech businesses operating in your jurisdiction, and the type of fintech activities that are regulated.

The key regulators of fintech businesses with respect to financial services, securities and insurances in Thailand are (i) the MOF and the BOT, (ii) the MOF and the SEC, and (iii) the OIC, respectively.

Payment systems and payment services are mainly regulated by the Payment System Act 2017 (the “PSA”), which came into force and effect in April 2018 to streamline previously scattered regulations. To date, regulated businesses under the PSA include:

1. key payment systems, e.g. BAHTNET and ICAS operated by the BOT;
2. supervised payment systems (subject to an MOF licence), i.e. inter-institution fund transfer systems, payment card networks and settlement systems; and
3. supervised payment services:
 - a. services subject to MOF licences include the provision of debit cards, credit cards and ATM card services, extensive-scope e-money services, acceptance of electronic payment services (i.e. acquiring, payment facilitating and money acceptance on behalf of others) and fund transfer/money remittance; and
 - b. services subject to registration with the BOT include the provision of limited-scope e-money services and supervised payment services, which are to be experimented in the BOT’s regulatory sandbox.

Peer-to-peer lending platform operators are currently regulated under the BOT Notification No. SorNorSor. 4/2562 “Re: Rules, Procedures and Conditions for Undertaking Peer to Peer Lending Platform Business” (“P2P Notification”). The notification became effective from 30 April 2019 and applies to non-banks. A person who wishes to operate a peer-to-peer lending platform must participate in the BOT’s regulatory sandbox until completing a successful test and being ready to provide an extensive scope of service in Thailand. Once these conditions are met, the operator may apply for a licence from the MOF through the BOT. A peer-to-peer lending platform operator can only act as an online marketplace or matchmaker to facilitate THB loan agreements between lenders and borrowers. Lenders can be either individuals or juristic persons but borrowers must be individuals. Further requirements are set forth in the P2P Notification.

In May 2018, the Digital Asset Decree was introduced to regulate businesses relating to digital assets i.e. cryptocurrencies and digital tokens. Please refer to the answer to question 3.2 for more details.

Crowdfunding is regulated under the Capital Market Supervisory Board (“CMSB”) Notification No. TorJor. 21/2562 “Re: Rules Regarding Securities Offerings Through Crowdfunding Portals”, which was later amended by the CMSB Notification No. TorJor. 14/2563 (No. 2) in March 2020 (“CMSB Notification (as amended)”). The CMSB Notification (as amended) covers both equity and debenture crowdfunding of private and public limited companies through crowdfunding portals. This notification applies to (i) a crowdfunding securities offering (including provisions on qualifications of investors and companies offering crowdfunding securities), and (ii) approval for crowdfunding portal operators and standards applicable for its business operation. A crowdfunding portal operator must obtain a licence from the SEC Office.

To support insurtech, the Insurance Committee issued notifications in 2017 to reinforce and officially recognise electronic means of issuing insurance policies, offering insurance policies and paying damages or compensation pursuant to both life and non-life insurance contracts.

Mobile banking and internet banking provided by commercial banks are currently regulated under the BOT Notification No. SorNorSor. 3/2561 “Re: Rules Regarding Service Channels of Commercial Banks”. Information on products and services of commercial banks can be provided via digital channels without approval from the BOT. Other services offered via digital channels are subject to BOT approval in the first instance. Examples of these services are (i) commercial banking businesses such as money deposit, money withdrawal, money transfer, provision of credit, account opening and foreign exchange, and (ii) business incidental to or necessary for undertaking commercial banking business such as sale of insurance and securities (if a separate BOT approval is obtained).

3.2 Is there any regulation in your jurisdiction specifically directed at cryptocurrencies or cryptoassets?

Businesses relating to digital assets, i.e. cryptocurrencies and digital tokens, are regulated by the Digital Asset Decree under a supervision of the MOF and the SEC Office.

The Digital Asset Decree mainly covers (i) a digital token offering to the public, (ii) the operation of digital asset businesses, and (iii) prevention of unfair digital asset trading practices.

The term digital asset businesses includes (i) digital asset exchange, (ii) digital asset broker, (iii) digital asset dealer, and (iv) other businesses relating to digital assets to be prescribed by

the Minister of Finance under a recommendation of the SEC. Operators of these digital asset businesses must obtain approval from the Minister of Finance.

Digital token issuers that wish to offer newly issued digital tokens to the public must obtain approval from the SEC Office.

A digital token offering may only be made when the registration statement for an offering of digital tokens and the draft prospectus become effective. The digital tokens must be offered through a digital token portal service provider approved by the SEC.

Digital asset business operators and digital token portal service providers are regarded as financial institutions under the Anti-Money Laundering Act 1999 (“AML Act”).

As of March 2021, the SEC has been considering regulating investment tokens (both project-based and assets-backed) and not-ready-use utility tokens under the framework of the Securities and Exchanges Act B.E. 2535 (1992) instead of the Digital Asset Decree. The aim of this proposed change is to follow the international standards that regulate securities token offerings under securities acts.

3.3 Are financial regulators and policy-makers in your jurisdiction receptive to fintech innovation and technology-driven new entrants to regulated financial services markets, and if so how is this manifested? Are there any regulatory ‘sandbox’ options for fintechs in your jurisdiction?

Regulators in Thailand, i.e. the MOF, the BOT, the SEC Office and the OIC, are receptive to fintech innovation and technology-driven new entrants to regulated financial services, securities and insurance markets. We have provided below an overview of the regulatory sandboxes that exist in Thailand:

1. Financial services

The BOT first launched its regulatory sandbox guidelines in 2016. In March 2019, a new regulatory sandbox was introduced to repeal and replace the 2016 guidelines in their entirety in order to incorporate what had been learned from the regulatory sandbox, as well as incorporating feedback from both bank and non-bank financial service providers. Under the 2019 regulatory sandbox guidelines, the “own sandbox” was introduced to join with the existing “regulatory sandbox” which is subject to the BOT’s supervision.

A key principle of the regulatory sandbox is that financial service providers can experiment with their financial services or fintech innovations that incorporate new technologies under a limited scope of business operation and service provision, namely target customers, customer volume, transaction volume and experiment period (which should not exceed one year).

Financial services that can be experimented with in the regulatory sandbox must be: (i) under the BOT’s supervision; (ii) financial services or fintech innovation using new technologies that are new or differ in some way to the existing financial services or products in Thailand or an innovation to enhance the efficiency of existing products or services; or (iii) financial services that (a) are to be developed into infrastructure or standard practice for Thailand’s financial sector and the financial service providers to cooperatively experiment, or (b) relevant laws and regulations required to be experimented with in the BOT’s regulatory sandbox. Non-qualifying financial services providers may (i) consult with the BOT in order to enter the regulatory sandbox, or (ii) participate in their own sandbox that is subject to the financial service provider’s own supervision as well as risk management and customer care framework under relevant laws.

Regulatory sandbox participants encompass (i) financial institutions, (ii) companies within a group of financial institutions, (iii) non-banks under the BOT’s supervision, and (iv) fintech

firms and technology firms that wish to experiment with financial services or fintech innovation solely or in conjunction with the previously mentioned participants.

Examples of projects that joined the BOT’s regulatory sandbox include letters of guarantee using private blockchain, cross-border transfers using blockchain, iris recognition, QR code payment and account opening with ID verification using National Digital Identity.

2. Securities

Since 2017, the SEC has issued notifications allowing regulatory sandboxes for specific activities. These include (i) intermediary businesses, (ii) KYC, (iii) securities and derivative businesses, (iv) securities electronic trading platforms, and (v) post-trading service providers, such as securities clearing houses, securities depositories and securities registrars.

3. Insurance

As with the BOT, the OIC has implemented a new notification on the insurance regulatory sandbox in 2019 in place of the former notification issued in 2017. A key amendment is an implementation of the “own sandbox” for both life and non-life insurance industries.

According to the OIC, examples of projects under the insurance regulatory sandbox are related to telematics and dynamic pricing.

3.4 What, if any, regulatory hurdles must fintech businesses (or financial services businesses offering fintech products and services) which are established outside your jurisdiction overcome in order to access new customers in your jurisdiction?

Offshore fintech businesses that deal with customers in Thailand are likely to be viewed as conducting businesses in Thailand and as such are subject to licensing or registration requirements as well ongoing requirements under Thai law. In this case, such offshore company may need to establish a corporation in Thailand in order to satisfy the licensing or registration application requirements. Some types of fintech-related laws also set a minimum Thai shareholding for such onshore entity. It is advisable that offshore fintech companies consult with local legal counsels to gain an understanding of the legal implications with respect to each specific business and contemplated scheme.

4 Other Regulatory Regimes / Non-Financial Regulation

4.1 Does your jurisdiction regulate the collection/use/ transmission of personal data, and if yes, what is the legal basis for such regulation and how does this apply to fintech businesses operating in your jurisdiction?

The Personal Data Protection Act 2019 (“PDPA”) is a principle-based regime for the processing and protection of personal data in Thailand. The main provisions, such as data protection, data owner’s rights, and penalties, will become fully effective on 1 June 2021. The enactment of the EU’s General Data Protection Regulation has had significant influence on the PDPA.

The PDPA is applicable to local fintech operators that process any personal data, and to offshore operators that process personal data of people in Thailand. Two important points for fintech operators are: (i) on what basis they will process each type and item of personal data, and how they will create documentary support for such; and (ii) what level of physical and electronic security they must afford to the personal data they have

on hand. When the PDPA is in full effect, the operators must be fully compliant in terms of processing bases, but it is likely that the details of recommended or minimal required security measures will not be available just yet. This means that the operators simply have to abide by good industrial practices and should rely on practices in other jurisdictions as examples.

4.2 Do your data privacy laws apply to organisations established outside of your jurisdiction? Do your data privacy laws restrict international transfers of data?

The PDPA will apply to offshore data controllers and data processors only when (i) there are goods or services being offered to data owners in Thailand, regardless of whether payment is involved, or (ii) there is monitoring of activities of data owners in Thailand. The offshore entities may, in some cases, need to have a representative in Thailand. The PDPA also presides over international transfer of personal data, requiring a proper scope to be in place before a transfer can occur, whether on a contract basis, consent basis, or other statutory exemptions, many of which are still pending supplementary regulations.

4.3 Please briefly describe the sanctions that apply for failing to comply with your data privacy laws.

The sanctions for non-compliance include criminal and administrative sanctions. Data owners can make claims for non-compliance on the grounds of tort. Small punitive damages are available in severe cases. Criminal sanctions include a term of imprisonment of up to one year and a fine of up to THB 1 million. Administrative sanctions include various types of administrative fines of up to THB 5 million. If the offender is a juristic person and its offence is caused by the order of a director, a manager, or any person responsible for such action, then such person(s) shall also be liable to the penalty provided for such offence as well.

4.4 Does your jurisdiction have cyber security laws or regulations that may apply to fintech businesses operating in your jurisdiction?

The Cyber Security Act 2019 was enacted on 27 May 2019. The law aims to supervise cyber security activities as well as to prevent and combat cyber threats, both domestic and international, that may penetrate and damage the nation's infrastructures and its population. This law may apply to certain fintech operators in some circumstances, depending on what types of operations they engage in.

4.5 Please describe any AML and other financial crime requirements that may apply to fintech businesses in your jurisdiction.

The AML Act and the Counter-Financing of Terrorism and Dissemination of Weapons of Mass Destruction Act 2016 are two primary laws regulating anti-money laundering in Thailand. Fintech businesses may be required to comply with these two laws since they may deal with financial activities, such as e-payment systems, money exchange, or financial institutions (as prescribed under the AML Act (the "Specified Operators")). If a particular fintech business is included in the scope of the Specified Operators, such fintech operator is required to verify the identity of its customers upon commencement of certain types of activities, conduct the customers' due diligence, and report any suspicious transaction to the relevant authority.

4.6 Are there any other regulatory regimes that may apply to fintech businesses operating in your jurisdiction?

There are no other regulations in Thailand that specifically govern the fintech business. Any additional relevant regulation would be specific to the sector in which a particular fintech business operates or activities of the fintech business.

5 Accessing Talent

5.1 In broad terms, what is the legal framework around the hiring and dismissal of staff in your jurisdiction? Are there any particularly onerous requirements or restrictions that are frequently encountered by businesses?

In Thailand, hiring can be classified into hire-of-work whereby the hirer contains no controlling power over the services provider, and employment whereby the employer has controlling power over the employee. Contrary to employment, hire-of-work is not subject to labour laws.

Under the constitution of Thailand, discrimination on the grounds of nationality, gender, age, disability, health, status, social standing, religion belief, education, and political opinions is prohibited unless the nature of the work requires so.

Employment can be further classified into employment for a fixed period of employment or no fixed period. Employment for a fixed period shall only be allowed for a special project, which must be non-typical or seasonal work for the business of the employer with a fixed schedule. This type of employment must be completed within a period of two years. All other types of employment that do not fit into this criterion shall be considered employment without a fixed period. Any termination of employment initiated by the employer for employment without a fixed period shall be considered dismissal.

Dismissal requires the giving of advance written notice of one period of payment. This dismissal can be made immediately effective by paying the employee all the wages that the employee is entitled to in accordance with the dismissal notice.

Additionally, the employer must pay severance payment to the employee at the time of dismissal (or retirement). The amount of severance payment is subject to the employee's length of employment, ranging from 30 to 400 days of the last wages.

Due to the severance payment requirement, the probation period in Thailand usually does not exceed 119 days. However, termination of employment during the probation period is still subject to the advanced notice requirement (Supreme Court Decision 5131/2550). We note that employers often fail to comply with this requirement.

Employers can be exempt from having to make a payment *in lieu* of giving advance notice and severance payment if the termination of employment is due to the causes as specified in the Labour Protection Act 1998.

For the employer to be exempt from the requirement to make a payment *in lieu* of advance notice and severance payment, the notice of termination must clearly state the eligible reason(s). If these are not stated, the exemption would not apply.

5.2 What, if any, mandatory employment benefits must be provided to staff?

The employee must be paid at least a minimum wage, the amount of which depends on the place of business operation. No deductions can be made unless the deduction is made (i) for

tax payment, (ii) to support a labour union, (iii) to save co-operatives with prior consent from employees, (iv) as a security deposit or compensation for damage suffered by the employer due to a wilful act or gross negligence of the employee, or (v) for an accumulated fund.

Generally, the working hours shall not exceed eight hours per day and should be less than 48 hours per week with at least one day of holiday per week. Overtime and working on holidays are subject to consent of the employee unless a situation of urgency arises. Overtime pay must be at least 1.5 times of the usual wages. Pay for working during a holiday must be at least one times the usual wages (two times for daily employees who are not normally entitled to payment during a holiday), and pay for working overtime during a holiday must be at least three times the usual wages.

Each year, employees are entitled to at least: (i) 30 days of paid sick leave; (ii) three days of paid business leave; (iii) 98 days of maternity leave (which must include at least 45 days' paid leave); (iv) 13 days of paid national leave (including national labour day); (v) paid sterilisation leave (leave period subject to doctor's advice); (vi) 30 days of educational leave (or three times for educational leave, however, the employer may reject this if the leave may cause losses to the employer; such leave may be paid or unpaid subject to agreement between the employer and the employee); (vii) 60 days of paid military leave; and (viii) at least six days of paid annual leave for employees with more than one year of service.

Additionally, 5% of the employee's monthly wages (capped at THB 750 per month) shall be deducted for social security funds, to which the employer must contribute an equal amount.

5.3 What, if any, hurdles must businesses overcome to bring employees from outside your jurisdiction into your jurisdiction? Is there a special route for obtaining permission for individuals who wish to work for fintech businesses?

For foreigners to be working in Thailand, a non-immigrant visa type "B" and a working permit is required. The process for obtaining a work permit requires coordination with the employer. The quota for obtaining a work permit is subject to the registered capital of the employer and is generally limited to 10 foreign employees for each employer. Such number may be increased subject to various criteria, such as the number of Thai employers, nature of business, etc.

A special route for obtaining a work permit is available for businesses that are promoted by the Board of Investment ("BOI"). The BOI promotion-eligible activities are announced and revised from time to time subject to the current national policy. The eligible business operator may apply for the BOI promotional certificate and receive various tax and non-tax benefits, which include special permission to obtain work permits for skilled foreign employees and his/her immediate family.

6 Technology

6.1 Please briefly describe how innovations and inventions are protected in your jurisdiction.

Innovations and inventions related to fintech may be protected as a patent or copyright.

A patent would be granted to an "invention", which is defined as an "innovation or invention which creates a new product or process, or any improvement of a known product or process". The invention must be new, involve an inventive step, and be capable

of industrial application. However, this will not include scientific or mathematical rules or theories and computer programs. Therefore, only fintech innovations with relevant physical devices accompanying the innovations are eligible for patent registration in Thailand. Patents must be applied with the Department of Intellectual Property, Ministry of Commerce to be effective.

Copyrights are granted to creative works, such as literary work, dramatic work, artistic work, and musical work. Under Thai laws, computer programs are classified as literary work and are protected under copyright law. Copyright is effective immediately after the work is created and shall be protected for 50 years after the death of the creator. However, if the owner of a copyright is a juristic person, the copyright shall be effective for 50 years after the creation or 50 years after the advertisement, if such creative work is advertised.

6.2 Please briefly describe how ownership of IP operates in your jurisdiction.

Under Thai law, the patent owner is the inventor. However, the patent rights of an invention, which existed due to a hire-of-work or employment for the purpose of such hire-of-work or employment, shall belong to the hirer/employer, though this can be agreed otherwise. Additionally, the inventor of an invention, in cases where the patent belongs to his/her employer, can apply for special benefits privilege from the employer with the Department of Intellectual Property. The amount of special benefits privilege is subject to discretion of Thai's authority which is determined on a case-by-case basis.

6.3 In order to protect or enforce IP rights in your jurisdiction, do you need to own local/national rights or are you able to enforce other rights (for example, do any treaties or multi-jurisdictional rights apply)?

Thailand is member to the Berne Convention and the WIPO Copyright Treaty; thus, foreign IP rights may be protected in Thailand in accordance with these treaties. Additionally, Thailand is a signatory to the Patent Cooperation Treaty, and foreigners, who are from a country that is also a signatory to the Patent Cooperation Treaty, may file for a patent from his/her origin country.

6.4 How do you exploit/monetise IP in your jurisdiction and are there any particular rules or restrictions regarding such exploitation/monetisation?

IP may be exploited/monetised via grants of rights or transfer of IP. The formalities are different for each type of IP. An agreement for granting rights and transferring a patent must be registered with the Department of Intellectual Property, Ministry of Commerce. Any conditions, restrictions or terms that are unjustifiably anti-competitive are prohibited (e.g. limitation of production or sale of goods). While an agreement for granting rights and transfer of copyrights must be in writing, no registration with an authority is required. Both patents and copyrights can be transferred via inheritance.

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