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## **Thailand**

### **Negotiated M&A Guide 2022**

Corporate and M&A Law Committee

#### **Contacts**

**Kowit Somwaiya**

*Lawplus, Bangkok*

[kowit.somwaiya@lawplusltd.com](mailto:kowit.somwaiya@lawplusltd.com)

**Naddaporn Suwanvajukkasikij**

*Lawplus, Bangkok*

[naddaporn.suwanvajukkasikij@lawplusltd.com](mailto:naddaporn.suwanvajukkasikij@lawplusltd.com)

## **1. INTRODUCTION**

This guide provides an overview of the law and practice dealing with private M&A transactions in Thailand. This guide does not constitute legal advice. Anyone involved in private M&A transactions should seek specialist advice.

Private M&A transactions of private limited companies in Thailand are usually made in the form of a share purchase or an asset purchase, but can also include an amalgamation. Generally, share transactions are more common than acquiring just the business and assets, but this will depend upon the circumstances. M&A transactions are specifically regulated in Thailand under the Trade Competition Act B.E. 2560 (AD 2017) (TCA). Other legislation which may impact an M&A transaction includes the Civil and Commercial Code (CCC) and the Foreign Business Act B.E. 2542 (AD 1999) (FBA).

This guide discusses the practices and requirements of private M&A transactions, in the form of acquisitions of shares or assets of private limited companies registered in Thailand.

## **2. MERGER CONTROL**

A merger of businesses under the TCA includes a merger that results in:

- a) maintaining the status of one business operator and terminating the status of the other business operator;
- b) forming a new business operator; or
- c) a purchase of shares or assets of another business operator either in whole or in part with the aim to control its business management policy, supervision or administration.

A merger in the above forms can be subject to merger control listed below.

### **2.1 Post-merger notification**

A merger of businesses that may result in a significant reduction of competition in a particular market must be notified to the Trade Competition Commission (TCC) within seven days from the merger date.

### **2.2 Pre-merger approval**

A merger of businesses that may result in a monopoly or a business operator having a dominant market position must be approved by the TCC before the merger. The TCC may impose conditions as part of its pre-merger vetting/approval requirements on a case-by-case basis. A merger of businesses for the purpose of an internal reorganisation of the business operators, which have a relationship in terms of policy or administrative power, is not subject to the post-merger notification or the pre-merger approval.

## **3. PRELIMINARY REVIEW**

An M&A transaction normally begins with the acquirer obtaining basic information about the target company, and its assets and liabilities. A potential purchase price of the shares or the assets is often roughly estimated at this stage, subject to adjustment at the negotiation stage. Other issues discussed at the preliminary stage may include key employee employment matters, important licences, major assets and liabilities and the general business operation of the target company.

## **4. LETTER OF INTENT**

It is common that, before proceeding with legal due diligence and other due diligence reviews, the acquirer will prepare and send a letter of intent or memorandum of understanding (the LOI) to the shareholder who wants to sell shares in the target company or the target company which wants to sell its assets.

The LOI will set out the major terms and conditions of the transaction. It can cover major legal and commercial issues that need to be negotiated before the execution of a share purchase agreement (SPA) or an asset purchase agreement (APA). Significant clauses that will usually be contained in the LOI are:

### **4.1 Intent**

Both parties express their intent to enter into the M&A transaction subject to legal due diligence review and execution of the SPA or the APA, as well as the basic details of the shares or assets to be acquired and their price, or a formula for the calculation of the price.

### **4.2 Due diligence**

In a major acquisition transaction, there will often be several due diligence investigations, including legal, accounting and tax. A period for the due diligence to take place may also be set out. During the due diligence period, the selling shareholder is often asked to agree not to enter into discussions with any other potential acquirer.

### **4.3 Undertakings**

The LOI can also set out initial terms and conditions to be included in the SPA or the APA if, after completion of the due diligence investigation, the acquirer decides to proceed with the SPA or the APA.

The LOI is entered into between the acquirer and the shareholder who is selling the shares (or the target company which is selling the assets). It will usually be non-binding, except for certain provisions such as, for example, an exclusivity period for negotiations or confidentiality provisions. It is not uncommon for the target company to also sign the LOI, even though it is not directly involved in the transaction, to ensure that it is aware of the potential acquisition and to facilitate the due diligence investigation by the acquirer.

## **5. LEGAL DUE DILIGENCE**

Legal due diligence is an important part of any merger or an acquisition transaction. To conduct legal due diligence, a checklist should be prepared by the buyer to set out the scope of the due diligence and the documents to be reviewed. A legal due diligence exercise on a Thai legal entity is similar to many other jurisdictions but there are some specific matters that are worth noting as follows.

### **5.1 Corporate matters**

#### **5.1.1 Registration details**

The registration details of the target company as registered with the Ministry of Commerce (MOC) should be obtained and reviewed. These include officially certified copies of the company's affidavit, memorandum of association, articles of association (AoA), list of

shareholders and other registration documents. The authorisation of the directors who can act for the company must also be determined, to ensure that the directors who sign the transaction documents for the target company have the power to sign such documents and bind the company. A private limited company must have at least three shareholders and it must have a share register book showing details of the shares and shareholders. The share register book contains the records of all transactions related to the shares. Restrictions on share transfers may be specified in the AoA.

### **5.1.2 Restricted business activities**

The shareholding structure of the target company must be reviewed because there are foreign ownership limits under the FBA. A company with foreign shareholders holding more than 49 per cent of its total shares is a 'foreigner' under the FBA; it cannot operate certain restricted business activities unless it has obtained a foreign business licence from the Director-General of the Department of Business Development of the MOC (DG), with the recommendation of the Foreign Business Committee or an investment promotion certificate from the Board of Investment of Thailand (BOI), or a permit for land use and business operation from the Industrial Estate Authority of Thailand (IEAT). A foreign business certificate is also required to be obtained from the DG under the FBA after a BOI promotion or an IEAT permission is granted.

Some specific examples of the restricted business activities include air and land transportation, accounting and engineering services and the selling of food or beverages. In general, service businesses are a restricted business under the FBA, except for those exempted under the MOC Ministerial Regulations such as securities business, asset management, life insurance and non-life insurance, and services to government sectors.

### **5.1.3 Resolutions**

Minutes of the board of directors and shareholders meetings of the target company for the past few years should be reviewed. A company is required to hold an annual general meeting (AGM) of shareholders at least once a year to approve its annual financial statements, appoint directors to replace the directors who retired by rotation, and appoint its auditor and their remuneration. An extraordinary general meeting (EGM) of shareholders is required for approving other important matters, such as the appointment of a new director, relocation of the company address and increase of the registered capital. A board of directors' resolution and/or a shareholders' resolution is normally required under the AoA for major financial or commercial transactions of the company.

## **5.2 Employment matters**

The employment contracts, work rules, the code of conduct and all announcements related to employees of the target company should be reviewed to ensure that they comply with the minimum requirements under the labour protection law, such as working hours, working days, holidays, annual leave, salary payment and severance pay. If the target company outsources its employees from a workforce service sub-contractor, the law requires the company to be liable to the sub-contracted employees as if it were the direct employer.

A company and its employees are required to be registered with the Social Security Fund (SSF) and contribute funds to the SSF monthly. A company is also required to be registered with the Workmen Compensation Fund (WCF) and contribute funds annually to the WCF.

The documents showing that the target company has been registered with the SSF and the WCF and paid its monthly contributions to the SSF and its annual contributions to the WCF should be reviewed.

A provident fund scheme is not required by law, but it is normal for a large company to have a provident fund arrangement whereby the company is required to pay monthly contributions to the provident fund in the same amounts as the monthly contributions of the employees. Documents related to the provident fund arrangement and the monthly contributions should be reviewed.

### **5.3 Material agreements**

A review of any material agreements entered into by the target company related to its assets and business operations is always important. Material agreements can include shareholders or joint venture agreements, land and building purchase or lease agreements, plant or machinery purchase agreements, or other material commercial agreements, such as manufacturing agreements, distribution agreements or franchise agreements.

The due execution and the validity and enforceability of the material agreements must be reviewed. Obligations and penalties in case of a breach must be reviewed. Particular attention should be given to any agreements between the target company and its directors or their related parties.

### **5.4 Major assets**

Where the major assets of a target company include land, buildings or factories, the land ownership is evidenced by a land title deed or *chanode*. There are several other kinds of land documents in addition to the land title deed. These include certificates of land utilisation and notices of possession.

The official copies of such land documents and all agreements related thereto should be obtained from the land office and reviewed. If the ownership in the target company is more than 49 per cent foreign, it is prohibited from owning land except in a few cases, such as holding the ownership of land in an industrial estate under the law on industrial estates or certain other laws. A land lease for more than three years is required to be registered with the land office, otherwise it will be enforceable only for three years. A long-term land lease cannot be registered for a term longer than 30 years.

A company can create encumbrances over its business, accounts receivable, inventory, intellectual property, moveable and immovable properties, etc, to secure its own debt or obligations of another person under the business collateral law. A business collateral agreement must be made in writing and registered with the Business Collateral Registration Office at the MOC. Only basic information on a registered business collateral agreement is available to the public.

### **5.5 Licences and permits**

If the target company owns and operates a factory, all required licences and permits must be in place. These include, but are not limited to, licences for construction of the factory, operating the factory business and using the land for an industrial purpose. If the target company leases a factory, a factory lease agreement and documents showing ownership of the machinery used in the factory should be reviewed. Companies are required to hold several other kinds of licences and permits depending on their business activities and shareholding structures.

Other licences and permits as required for the target company operating a regulated business under Thai law – such as a hotel licence, a payment service licence or a digital asset business licence – must also be reviewed.

## **5.6 Environmental law issues**

Most large-scale industrial and real property projects are required to comply with the law on protection of the environment and the law on national health protection.

The major requirement for large-scale projects is an environment impact assessment (EIA) study or the environmental and health impact assessment (EHIA) study. The Ministry of Natural Resource and Environment (MNRE) determines the types and sizes of projects which need the EIA or the EHIA with approval of the National Environment Board. The EIA or the EHIA reports predict the impact of the project on the environment and human health and must be approved by the Office of the Natural Resources and Environmental Policy and Planning, and the Expert Review Committee.

In addition, for smaller projects located in environmental protection areas as prescribed by the MNRE – eg, Phuket, Krabi, Petchaburi, Chonburi, etc – an initial environment examination (IEE) study is required. Therefore, if the business operation of the target company requires any IEE, EIA or EHIA reports, the evidence showing that such reports have been approved and that all the subsequent filings and compliance have been made by the target company should be reviewed.

## **5.7 Intellectual property**

The target company may own patents and trademarks. Documents showing that they have been registered with the relevant authorities should be reviewed. The target company may also own copyrights in literary works (including computer software), dramatic works, artistic works, musical works, audiovisual materials, motion pictures, sound recordings, broadcasting works, or any other work of literature, science or fine art. Copyright works are not required to be registered, although they may be deposited with the Copyright Office. All the intellectual property licence agreements made by the target company as a licensor or a licensee must be reviewed.

## **5.8 Disputes and litigations**

It is possible that the target company is a party to existing disputes or lawsuits, either as a plaintiff or a defendant. An existing dispute can lead to a civil or criminal lawsuit in the future. It is a common practice to conduct litigation searches against the target company at the major courts in Bangkok, such as the Civil Court, the Criminal Court, the Central Intellectual Property and International Trade Court, the Central Labour Court, and other courts outside Bangkok within whose jurisdiction the registered office of the target company is located. An insolvency and bankruptcy search should also be made against the target company with the Central Bankruptcy Court and the Legal Execution Department.

After completion of the legal due diligence review by the legal counsel, a legal due diligence report is prepared for the acquirer to review before deciding whether to proceed with entering into the SPA or the APA.

## **6. BASIC REQUIREMENTS FOR THE ACQUISITION OF SHARES**

### **6.1 Shareholders and votes**

A Thai private limited company must have at least three shareholders at all times. Some important matters, such as increase of the registered capital and amendment to the AoA of a company, require votes of shareholders holding at least 75 per cent of the total shares. Therefore, an acquirer who acquires more than 25 per cent of the voting shares in the target company effectively holds the blocking vote for important matters of the target company. A preference share structure is allowed but a preference share structure for the purpose of avoiding the foreign ownership limits under the FBA could be subject to investigation by the MOC and/or the Department of Special Investigation (DSI).

### **6.2 Share transfer deed**

Assuming the shares to be acquired are represented by a share certificate, the transfer of the shares from the shareholder (as the transferor) to the acquirer (as the transferee) must be made in a written share transfer deed signed by the transferor and the transferee and witnessed by at least one witness, otherwise the share transfer will be void.

The share transfer deed must specify the details of the shares and the consideration for the share transfer. The share transfer deed must also be affixed with a duty stamp at the rate of THB 1 for every THB 1,000 of the paid-up value of the shares; its duplicate must be affixed with a duty stamp at the rate of THB 1 if the original share transfer deed is subject to a duty stamp of not more than THB 5 or THB 5 if the original share transfer deed is subject to the duty stamp of more than THB 5. Without these, the share transfer deed cannot be used as evidence in court.

The details of the share transfer must be recorded in the share register book of the target company so that the share transfer can be enforced against the company and third parties. It is recommended for the target company to submit a new list of its shareholders, showing the details of the acquirer as a new shareholder, to the MOC as soon as practicable after the share transfer date.

## **7. ACQUIRING EXISTING SHARES AND NEWLY ISSUED SHARES**

### **7.1 Acquiring existing shares**

Where the acquirer acquires existing shares from one or several of the existing shareholders, unless the AoA of the target company requires otherwise, the selling shareholders can sell the shares that they own in the target company without obtaining approval from the other shareholders or the board of directors of the target company.

### **7.2 Acquiring newly issued shares**

It is also possible for an acquisition to be of newly issued shares following a capital increase in the target company, by the target company increasing its registered capital.

To increase the registered capital of the target company, a special resolution must be passed at a shareholders' meeting. First, the newly issued shares must be offered to the existing shareholders in proportion to their current shareholdings. If they waive their rights to subscribe for the newly issued shares, the newly issued shares can only be sold to the acquirer after it has become a new shareholder of the target company. In practice, the acquirer will first acquire at least one existing share in the target company from an existing shareholder so that the acquirer

becomes an existing shareholder, and is then entitled to purchase all the newly issued shares after all other shareholders have waived their pre-emptive rights. The increase of the registered capital must be registered with the MOC within 14 days from the date of passing the special resolution.

### **7.3 Protection of minority shareholders**

If the acquirer acquires less than 50 per cent of the issued shares in the target company and becomes a minority shareholder, the acquirer should negotiate with the selling shareholder to include protection measures for minority shareholders in the AoA of the target company or in a shareholders' agreement. For example, the AoA can be amended to require that decisions of the company on important matters must receive the approval of the shareholders holding more than 75 per cent votes of the total shares. There are no provisions under Thai law to give an acquirer the right to compulsorily acquire a minority's shares.

A shareholder holding 25 per cent or more of the issued shares in the target company has certain statutory rights: for example, the AoA cannot be amended without shareholders holding 75 per cent of the voting rights attached to issued shares voting in favour of the amendment.

## **8. SHARE PURCHASE AGREEMENT**

### **8.1 Drafting the SPA**

Once the legal due diligence review is completed and the acquirer decides to proceed with the acquisition, focus turns to the SPA. There is no rule as to who will draft the SPA but, in practice, the SPA is normally drafted by the legal counsel of the acquirer.

### **8.2 Standard SPA clauses**

The complexity of the SPA will depend on the issues and matters required by the parties to be included in the SPA. The SPA normally includes the following key provisions.

#### **8.2.1 Details of acquired shares**

The number and type (ordinary or preference) of the shares to be acquired must be specified. The ownership of the shares (Thai law does not distinguish between legal and beneficial ownership) and any encumbrances (if any) must be clearly identified in the SPA.

#### **8.2.2 Price and payment**

The purchase price or a method for its calculation, and the method of payment, such as payment by a wire transfer of funds, will be specified. The price can be paid in one lump sum or split into instalments and paid at different stages, such as upon signing the SPA, completion and/or fulfilment of the conditions subsequent (if any). The payment can be paid directly to the seller or to an escrow agent.

#### **8.2.3 Conditions precedent**

These will depend on the particular transaction, but important conditions precedent can include consents or approval from the other shareholders, the board of directors of the target company, or relevant governmental authorities. Completion of the transaction should not take place until all these conditions are fully satisfied or waived.



If the target company is also a party to the SPA, approval from its shareholders for it to enter into the SPA and to perform its obligations thereunder must be granted by a shareholders meeting.

#### **8.2.4 Management of the target company**

The acquirer normally appoints one or more new directors to the target company. The directors who represent the selling shareholder normally resign. Appointment of a new director nominated by the acquirer must be approved by a meeting of the shareholders of the target company. The resignation and appointment of directors, including the change of authorisations of the directors (if any), must be registered with the MOC within 14 days.

#### **8.2.5 Representations and warranties:**

The acquirer will want to receive warranties from the selling shareholder on the shares, the company and its business. Typical warranties include:

- a) that the shares and the assets are free and clear from any pledge, option, charge, lien or any other encumbrance; and
- b) that the entering into the SPA and their performance of their obligations thereunder will not violate any law or regulation or constitute a breach of an existing agreement with any third party.

#### **8.2.6 Termination**

Usually, the SPA will only be capable of termination in limited circumstances, for example if the conditions precedent are not satisfied or waived, or there is a breach of the warranties or other material terms of the SPA.

#### **8.2.7 Dispute resolution**

The choice of dispute resolution mechanism will depend upon the circumstances and the parties' preferences, but could be by submission to a court, mediation or arbitration.

For arbitration, the number of arbitrators, the venue, the rules and the language of the arbitration should be specified. Even if arbitration is chosen, the parties may wish to retain the ability to apply to the courts in certain circumstances, for example for injunctive relief. If the dispute is dealt with by a foreign court outside Thailand, the judgment of the foreign court cannot be readily enforced in Thailand. The winning party must file a new lawsuit in Thailand and adduce the foreign judgment as evidence in the Thai court proceedings.

If an arbitral award is made in a member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, such foreign arbitral award is recognised and enforceable in Thailand. However, the party who would like to enforce an arbitral award must file an application with the competent court within three years from the date on which the award is enforceable.

#### **8.2.8 Governing law and jurisdiction**

The parties can agree that the SPA is governed by Thai law or foreign law, and that the Thai court or a foreign court is the court of jurisdiction.

If the target company is in Thailand, the governing law should be Thai law and the court of jurisdiction should be the Thai court. This is mainly because enforcement of the SPA against the selling shareholder and the target company and their Thai assets is best made in Thailand.

If the governing law is a foreign law, it will be recognised as a valid choice of law by the Thai court only to the extent that the existence and validity of such law is proven to the satisfaction of the Thai court, and such law is not considered contrary to the public order or good morals of the people of Thailand.

#### **8.2.9 Escrow agent**

An escrow agent can be appointed to hold all or part of the funds for the payment of the purchase price and the share ownership documents from execution of the SPA up to completion of the acquisition. An escrow agent will usually be a financial institution, such as a commercial bank, with a licence issued by the Ministry of Finance.

An escrow agreement must be made amongst at least the acquirer, the selling shareholder and the escrow agent. Typically, there is any dispute between the parties, the escrow agent cannot deliver the shares to the acquirer nor pay the purchase price to the selling shareholder until the dispute has been settled or the court has given a final judgment.

### **9. BASIC REQUIREMENTS FOR ACQUISITION OF ASSETS**

There is no concept of an acquisition of a business where there is any automatic transfer of rights or liabilities: for example, employees do not automatically transfer on a sale of a business. Assets of a target company that are normally acquired are the underlying business, which may include land, buildings, factories, machinery, accounts receivable and other rights and entitlements. If the acquirer is a foreign legal entity, or a Thai company of which more than 49 per cent is owned by a foreigner, it is prohibited by the Land Code from owning land. Therefore, if a foreign entity or person intends to acquire land it must ensure that it or its acquiring vehicle registered in Thailand does not have more than 49 per cent foreign ownership. There are a few exceptions, including certain investment promotion schemes granted by the BOI and the acquisition of land located in an industrial estate zone under the law on industrial estates.

Acquisition of assets from a company is not required by law to be approved by its shareholders or board of directors but it would be prudent to obtain board approval. The AoA may require that a transfer of assets with a high value be approved by a shareholders' meeting or a board of directors' meeting.

### **10. ASSET PURCHASE AGREEMENT**

The APA is generally made between the acquirer and the target company as the owner of the acquired assets. The major shareholders of the target company may also sign the APA to confirm that they will procure the target company to perform its obligations under the APA.

An APA is generally more complex than an SPA, as the assets being transferred will often need to be dealt with specifically and the relevant legal requirements applicable to the asset being sold will need to be met. For example, land purchase requires registration with the land office, and the acquisition of accounts receivable requires a notice given to the debtor of the receivables.

## **11. TAX LIABILITIES**

Income received from the sale of shares and/or assets, including goodwill, are assessable income under the Thai Revenue Code (RC). The seller, either an individual or a legal entity, is subject to personal income tax or corporate income tax respectively at the applicable tax rates prescribed under the RC.

The seller of the shares and/or the assets is required to withhold/deduct tax from the selling price of the shares and/or assets, and submit the withheld amount to the Revenue Office, subject to certain exceptions.