



Mergers & Acquisitions Law Guide 2013/14

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The 1st Annual Guide to Practicing M&A Law in Asia

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Q&A Country Chapter:

Thailand: Weerawong, Chinnavat & Peangpanor Ltd.

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Thailand

Weerawong, Chinnavat & Peangpanor Ltd.



1. What has been the general level of M&A activity over the last 12 months in your jurisdiction? What were the most notable mergers and acquisitions during that period?

Thailand's economy continues to perform strongly despite recent global economic malaise and a decade of local political struggles. In 2012, the country experienced considerable growth in merger and acquisition activity, both in the number of deals and deal value. At the same time the stability and growth of Thai conglomerates catalyzed expansion through M&A transactions across Asia, with a particular focus on Southeast Asia and China. Importantly, inbound and outbound investment opportunities are now being promoted by the Thai government with a view to enhancing industrial competitiveness and in response to domestic resource limitations.

Thailand, one of the largest economies in Southeast Asia, has attracted foreign investors for many years. When looking at M&A deals in Thailand people tend to focus on foreign investors acquiring Thai businesses or investing in manufacturing or similar facilities. In 2012, cash-rich Thai businesses started looking overseas to invest and to diversify their business footprints. Given this recent development, we focus our initial discussion below, on the outbound transactions that dominated the M&A market in 2012 and early 2013. Thailand M&A deals announced in 2012 were valued at approximately US\$21 billion, according to the Institute of Mergers, Acquisitions and Alliances.

Two of the most notable outbound M&A transactions were:

Thai Beverage Public Company Limited/Fraser and Neave, Limited

In early 2013, Charoen Sirivadhanabhakdi, through Thai Beverage Public Company Limited (Thai Beverage) and its affiliates, completed a takeover bid for Fraser and Neave, Limited (Fraser and Neave) a company listed on the Singapore Exchange (SGX). Fraser and Neave have interests ranging from carbonated beverages to residential and commercial real estate, valued at an estimated US\$11.2 billion.

In September 2012, TCC Assets, an affiliate of Thai Beverage, made an initial bid of 8.88 Singapore dollars (S\$) per share or an estimated US\$9 billion for Fraser and Neave. In November, Singapore-based Overseas Union Enterprise Ltd. (Overseas Union) made a counter bid for Fraser and Neave of S\$9.08 per share. Over the next few months Thai Beverage and Overseas Union extended their bids without increasing them. Singapore's Securities Industry Council, to help ensure shareholder confidence, instituted a process which would have forced each of the bidders to adhere to rules of an auction process. Three days before the auction was to commence, TCC Assets increased its bid for Fraser and Neave to S\$9.55 a share – a bid that Overseas Union was not willing to match or increase. With its bid of S\$9.55 per share, Mr. Charoen was assured of a successful takeover and one that will greatly expand his already large business holdings.

CP Group/The Hongkong and Shanghai Banking Corporation/Ping An Insurance

The privately held CP Group, led by one of Thailand's most successful businessmen, Dhanin

Chearavanont, bought a 15.6 per cent stake in Ping An Insurance for US\$9.4 billion. Ping An is one of China's largest insurers with approximately 74 million clients. The CP Group is no stranger to doing business in China – Dhanin obtained his foreign investor license in China in 1978 and is believed to have connections within the upper echelons of China's ruling party. The deal almost toppled when financing from China Development Bank was abruptly pulled, forcing the CP Group to finance the deal itself. The deal also required approval from the China Insurance Regulatory Commission, which was only granted hours before a deadline that this approval was set to expire.

One of the most significant inbound transactions in Thailand was the acquisition by Prudential Plc., of Thanachart Bank's insurance unit. Thanachart is Thailand's sixth-largest bank by asset size with approximately US\$32 billion in total assets. The cash deal, valued at approximately US\$590 million, enabled Prudential to expand its footprint in one of Southeast Asia's largest economies, where historically, Prudential has maintained a low market share. According to Prudential, the transaction will double its market share in Thailand.

Another key aspect of the transaction was the inclusion of an exclusive partnership between Prudential and Thanachart to develop a bancassurance business with the term of the partnership lasting at least 15 years. It was speculated that one of the driving forces behind the acquisition was an attempt to catch up with AIA, which has a predominant position in the Thai market.

2. What are the most common methods for acquiring or merging with a public company in your jurisdiction?

The most common ways to acquire or merge with a listed public company are tender offers or

acquisitions by agreement. The most common way to acquire a private limited company is by way of a share or asset sale.

3. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction, and what are the government regulators and agencies that play key roles in mergers and acquisitions?

When companies are considering acquisition opportunities in Thailand, one of the principal considerations investors need to be aware of are the restrictions on business activities that can be undertaken by foreign entities.

The cornerstone piece of legislation relating to foreign investment in Thailand and M&A transactions, is the Foreign Business Act 1999 (FBA). The operation of businesses in Thailand by foreigners is restricted by the FBA under the administration of the Ministry of Commerce. The FBA restricts (and in some cases forbids) foreigners from engaging in a wide range of business activities, including most service businesses. For the purpose of the FBA restrictions, a 'foreigner' is classified as a foreign individual, a company incorporated outside Thailand, or a company incorporated in Thailand that has 50 per cent or more of its shares owned by foreign individuals or foreign companies.

The Schedule of the FBA sets out three 'lists' of business categories in which the participation of foreigners is either prohibited or restricted. Foreigners are prohibited from participating in the businesses specified in 'List 1', which includes antiques trading, broadcasting, farming, and forestry. Foreigners are restricted from participating in businesses specified in 'List 2' unless they obtain a foreign business licence (FBL) from the Ministry of Commerce and approval from the Thai Cabinet. 'List 2' includes activities that are concerned with national safety, agriculture, arts and culture,

and natural resources and environment. Finally, foreigners are restricted from participating in the businesses specified in 'List 3' unless they obtain an FBL from the Director-General of the Department of Business Development with the approval of the Foreign Business Committee. 'List 3' contains a total of 21 categories of restricted businesses, including fisheries, forestry, accountancy, engineering, construction (with certain exceptions), retailing and wholesaling (with certain exceptions), advertising, hotel operation (excluding hotel management), tourism, sale of food and beverages, and the catch-all category known simply as 'other services'.

A foreigner engaging in a restricted business under the FBA can obtain a foreign business certificate (as opposed to an FBL) by, (i) obtaining a promotion certificate from the Board of Investment Authority of Thailand (BOI), or (ii) is eligible under an international treaty (the most often cited example is the Treaty of Amity between the US and Thailand). Generally, the administrative process for obtaining a foreign business certificate is less onerous than for an FBL.

The BOI oversees almost all tax and non-tax incentives and privileges applicable to foreign investment in Thailand. At present, there are approximately 200 types of businesses that are eligible for BOI privileges (subject to investors meeting minimum capital requirements). Some of these businesses include those that would otherwise be restricted to foreigners under the FBA. This incentive alone is very attractive to many foreign investors as it obviates the need to apply for an FBL or enter into a joint venture arrangement with a Thai partner.

Incentives offered by the BOI to eligible foreign investors include majority shareholding by foreigners, acquisition of land for industrial use by foreign corporations, exemptions from or

reductions of import duties on machinery and raw or essential materials and exemptions from or reduction of corporate income tax up to a maximum of eight years.

4. Are hostile bids permitted?

There is no squeeze out mechanism under Thai law and hostile takeovers, whilst permitted, are not common.

5. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

Merger control in Thailand is governed by the Trade Competition Act (1999) (TCA). Section 26 of the TCA prohibits mergers of businesses that may result in monopoly or unfair competition, as prescribed by the Trade Competition Commission (TCC), unless permission is obtained from the TCC.

The TCA empowers the TCC to enforce the merger control provisions. In addition, the TCC is responsible for prescribing notifications to enforce the provisions of the TCA, including issuing notifications concerning the specific process by which a certain merger will be examined and/or approved. In this regard, the TCC is empowered to set a minimum threshold of market share, total sales, amount of capital, number of shares or quantity of assets that will be subject to prohibition under this section. This is part of the pre-merger notification requirement.

Since 1999, no notifications have been approved by the TCC under Section 26 of the TCA and, accordingly, the restrictions on mergers under that section are not currently enforceable.

However, on 6 June 2013, the TCC approved

certain pre-merger notification requirements with respect of the following:

- The merger of businesses which have an aggregate market share in any market for any goods or services before or after merger of 30 per cent or more, and had total sales (turnover) or income in the preceding year of two billion baht or more; and
- The acquisition of shares with voting rights accounting for at least 25 per cent of the total shares of a public company, or 50 per cent of a limited company, and the acquisition resulting in the business of a company or both companies having an aggregate market share of 30 per cent or more in any market of any goods or services before or after the acquisition, and a total sales volume (turnover) or income in the previous year of at least two billion baht.

Although this approval by the TCC represents some progress in the long-awaited issuance of notifications enabling the merger controls to finally become effective, the process under the provisions of Section 26 is far from complete.

There are details to be ironed out. The TCC will ask its legal sub-committee to draft the merger notification thresholds and details of the criteria for pre-merger filings in respect of particular businesses. Once these detailed notifications are approved by the TCC, they, like all laws, must be published in the Government Gazette, and a date set for their effectiveness. If a merger covered by such notification is made on or after the effective date of the notification, the merger must be approved by the TCC before it can take place.

It is not possible to predict when these notifications will be drafted, approved by the TCC and published in the Government Gazette. However, there is cautious anticipation that Section 26 will become

capable of enforcement either this year or in 2014.

6. What documentation is required to implement these transactions?

For an acquisition or merger of a listed company, in addition to a share/asset sale and purchase agreement as well as the relevant documents relating to corporate approvals and the disclosure documents as required by the Public Limited Companies Act (1992) as amended, the Notification of the Capital Market Supervisory Board No. TorChor 20/2008 re: Rules on Entering into Material Transactions Deemed as Acquisition or Disposal of Assets as amended), the Notification on the Board of Governors of the Stock Exchange of Thailand re: Disclosure of Information and Other Acts of Listed Companies Concerning the Acquisition and Disposition of Assets, 2004, and other relevant regulations, the documentation required to implement the transaction includes:

- a. In the case of a share acquisition
 - Report on Acquisition of Securities (Form 246-2)

Pursuant to Section 246 of the Securities and Exchange Act (1992) as amended (SEC Act), if an acquisition of securities, including shares, of a listed company increase the aggregate number of securities held by the acquirer and its concert parties as well as their related persons to a number which reaches any multiple of five per cent of the total number of voting rights of the listed company so acquired, eg, 5 per cent, 10 per cent, 15 per cent, 20 per cent, and so on, the acquirer of such securities must submit a report on acquisition of the securities (Form 246-2) to the Office of the Securities and Exchange Commission (SEC).

■ Documentation for Tender Offer

If the acquisition of securities, including shares, of a listed company results in the aggregate number of securities held by the acquirer and its concert parties as well as their related persons reaching or exceeding the thresholds of 25 per cent, 50 per cent or 75 per cent of the total number of voting rights of the listed company so acquired, a mandatory tender offer must be made to other securities holders to purchase all of their securities. The acquirer must comply with Sections 247 of the SEC Act and the Capital Market Supervisory Board's Notification No. ThorJor 12/2011 concerning Business Takeovers, for which the following key documentation is required to be submitted to the SEC:

- 1 Form 247-3, a statement of intent to make a tender offer;
- 2 Form 247-4, an offer to purchase securities (prepared by a financial advisor approved by the SEC);
- 3 Proof of funds, a letter or statement issued by any commercial bank to prove that the acquirer has sufficient funds to make a tender offer;
- 4 Form 247-6 Gor, a report on the preliminary result of tender offer; and
- 5 Form 256-2, a report on the result of tender offer.

Please note that the acquirer may make other categories of tender offer, ie, voluntary or partial tender offer, as well as apply for a waiver of tender offer subject to the details of the transaction and business arrangement of the acquirer. The documentation required for other types of tender offer or in the case of a waiver will be different.

b. In the case of an asset acquisition

- Documentation relating to the transfer of licenses related to the transferred assets (if transferable);
- Documentation relating to the registration of the transfer of ownership of the assets to the acquirer with the relevant authorities (if required); and
- Novation agreement or assignment agreement in relation to certain agreements related to the transferred assets (if required).

For an acquisition or merger of a private limited company, a sale or asset purchase agreement and, depending on the level of investment, a shareholders' agreement will be executed.

7. What government charges or fees apply to these transactions?

a. Acquisition of shares of a listed company or a private limited company

The rate of stamp duty on a transfer of shares is calculated at 0.1 per cent of the greater of the selling price and the paid up value, of the shares. If share transfer instruments are executed and kept outside of Thailand, stamp duty is not payable, unless the share transfer instruments are subsequently brought into Thailand.

In the case of the acquisition of shares of a listed company, and where the sale of shares involves a tender offer transaction, the acquirer who makes a tender offer is subject to payment of the following fees to the SEC.

	Rate of Fees (Baht)	Value of Tender Offer (Baht)*
1	50,000	< 10 million
2	100,000	≥ 10 million but < 100 million
3	500,000	≥ 100 million but < 500 million
4	1,000,000	≥ 500 million but < 1 billion
5	1,500,000	≥ 1 billion but < 5 billion
6	2,000,000	≥ 5 billion

*The value of Tender Offer is determined by the offer price multiplied by the maximum number of securities as indicated in the offer.

- b. Acquisition of Assets of a listed company or a private limited company;

The government charges/fees related to an acquisition or merger of assets of a listed company or a private limited company are subject to the assets transferred. For example, in the case of the acquisition of land, the registration fee for the transfer of ownership of land is imposed at the normal rate of two per cent of the appraised value of property of the Land Department. Please note that the transfer of land is also subject to a specific business tax, stamp duty and/or withholding tax (as the case may be).

- 5. Land title documents;
- 6. Trademark registrations; and
- 7. Ongoing litigation proceedings.

9. Do shareholders have consent or approval rights in connection with a deal?

A seller of shares is not required to obtain either board or shareholder approval but common practice, as a matter of good corporate governance, is to obtain at least board approval. That being said, one must also look to the articles of association of a company as these may contain restrictions on the transfer of shares that would need to be complied with.

Most housekeeping matters resulting from an acquisition require board and/or shareholder approval. For example, changing the company auditor, company name or fiscal year will all require approval from the shareholders. A few matters require a special resolution to be passed by the shareholders, which requires 75 per cent of the votes present and entitled to vote to pass the resolution, and which are relevant in the context of an M&A transaction. Those matters include: (i) amendments to the memorandum of association; (ii) amendments to the articles of association; (iii)

8. When conducting due diligence, what sources of information are available in the public domain?

Generally, the due diligence process will begin with local counsel conducting searches of publicly available information. Information of a target company that is in the public domain includes:

- 1. Memorandum of association;
- 2. Articles of association;
- 3. List of shareholders;
- 4. Company affidavit;

an increase or decrease of the registered capital of the company; and (iv) converting a limited company to a public company.

10. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Limited Companies

Directors must manage the business of a limited company: (i) under the control of shareholders acting through general meetings of the company; and (ii) in accordance with the regulations of the company as prescribed in its memorandum and articles of association.

Directors must, in their conduct of the business of the company, apply the diligence of a careful business person. In particular, the directors are jointly responsible for:

1. Payment for shares by shareholders actually being made;
2. Existence and regular keeping of books and documents prescribed by law;
3. Proper distribution of dividends or interests as prescribed by law; and
4. Proper enforcement of the resolutions of general meetings (subject to the resolutions being within the company's objects, consistent with its articles of association and practically enforceable).

A director must not, without the consent of shareholders in a general meeting of the company, undertake commercial transactions of the same nature as and competing with that of the company, either on his own account or that of a third person, nor may he be a partner with unlimited liability in another commercial concern carrying on a business of the same nature as and competing with that of the company.

Listed Companies

Directors must perform their duties with responsibility, due care and loyalty and shall comply with all laws, the memorandum and articles of association of the company, the resolutions of the board of directors and the resolutions of the shareholders.

11. Can conditions be attached to an offer in connection with a deal?

Generally, according to regulations of the SET, full disclosure of a deal should be made only once definitive documentation is signed. The definitive documents can and often contain conditions and deal security measures. For example, the parties can agree to break fees, non-solicitation and non-disclosure provisions. Break fees can be unilateral or bi-lateral depending on the cause of the termination; however, break fees payable by the target company in return of deposit made by the acquirer are more common.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

There is no squeeze out mechanism under Thai law.

13. What is the waiting or notification period that must be observed before completing a business combination?

This is not applicable under Thai law, and such conditions are generally found in industry-specific legislation.

14. Are there any industry-specific rules that apply to the company being acquired?

Industry-specific rules may vary widely depending on the relevant industry. For example, in the oil and

gas industry, transfer of concession rights requires both Ministerial approval and cabinet approval.

15. What are the main tax issues that can arise from the typical deal structures?

The acquisition of a Thailand limited company has no tax consequences on the acquirer except for the payment of stamp duty on a share transfer instrument. The rate of stamp duty on a transfer of shares is calculated at 0.1 per cent of the greater of the selling price and the paid up value, of the shares. If share transfer instruments are executed and kept outside of Thailand, stamp duty is not payable, unless the share transfer instruments are subsequently brought into Thailand.

The target company will continue to be liable for corporate income tax on the same basis as before the sale. The current corporate income tax rate in 2013 is 20 per cent. The utilization of tax losses is not affected by a change in shareholding.

Post-closing acquirers should be aware that repatriation of profits to a foreign company not carrying on business in Thailand through dividends, interest or service fees are subject to a 15 per cent withholding tax, except for dividends which are subject to a 10 per cent withholding tax. All dividends are subject to a 10 per cent withholding tax. Thailand has entered into a number of bilateral agreements to resolve the issue of double taxation which, in some cases, reduces the rate of withholding tax.

16. Are cross-border transactions subject to certain special legal requirements?

Cross-border transactions are not subject to any special legal requirements.

17. How will the labour regulations in your jurisdiction affect the new employment relationships?

Unlike in other jurisdictions, parties to M&A transactions in Thailand are not required to obtain the consent of employees, except in situations where employees may be transferred to a new company (eg, where an amalgamation is part of the deal structure, in which case employee consent must be obtained in writing).

18. Are there any proposals for reforms to the laws and regulations governing mergers and acquisitions currently being considered?

Employment

In early 2013, the Thai Government fulfilled its 2011 election campaign promise by adopting the new nationwide minimum wage policy. Under the new policy, Thailand's employers must pay all employees a minimum wage of at least 300 baht (approximately US\$10) per day. Employers who fail to comply with the new law are subject to six months' imprisonment and/or a fine of 100,000 baht.

The increase to the minimum wage has not been free from controversy – with employers and other business leaders warning against dire consequences, including company shutdowns for small and medium-size enterprises and highly labour-intensive industries. To date, there is little evidence that these dramatic events have come to pass.

Despite dismissing the fears of Thai businesses, however, the Thai Government introduced several measures to offset any real or perceived impact of the minimum wage increase. These included a significant reduction in corporate income tax from 30 per cent in 2011, to 23 per cent in 2012 and 20 per cent in 2013.

Tax

On 19 December 2012, Thailand signed an agreement for the avoidance of double taxation (DTA) with Taiwan. Of note was a reduction of withholding tax rate on dividends to 5 per cent – conditional upon the recipient holding not less than 25 per cent of the shares in the company paying the dividends. This was significant in that it was the first time since Thailand entered into a DTA with Sweden in 1963 that the withholding tax rate on dividends has been reduced to below 10 per cent (which is the rate currently applied under Thai law).

Interestingly, this reduction in withholding tax under the Taiwan DTA will also have an impact on Thailand's DTAs with Mauritius and the United Arab Emirates (UAE) – both of which contain provisions stating that the applicable withholding tax on dividends shall be equal to the rate stated in

the DTA (which in both cases is 10 per cent) or any lower rate of withholding tax agreed by Thailand in any subsequent DTA with any other country. Therefore, the rates of withholding tax applicable to Mauritius and the UAE will also now be reduced from their current rates of 10 per cent to 5 per cent.

Mauritius is a jurisdiction commonly used as an investment vehicle for offshore investors structuring M&A deals in Thailand – due to the already favourable terms under the DTA between Thailand and Mauritius and also because Mauritius has relatively relaxed reporting requirements, enhanced privacy protections, and straightforward incorporation procedures. Accordingly, this new development will give Mauritius a distinct advantage over other jurisdictions commonly used to incorporate investment vehicles for Thai M&A transactions, such as Hong Kong and Singapore.

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