Chapter 3

MERGERS AND ACQUISITIONS

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This chapter outlines legal aspects of mergers and acquisition ("**M&A**") transactions in Thailand, including certain noteworthy aspects applicable to M&A transactions specific to the nature of Thai laws.

In Thailand, the commonly used structures for acquisition of a business or company are (i) acquisition of shares, (ii) business transfers, and (iii) amalgamation where two companies are amalgamated into a new company (A + B = C). While structuring deals through a merger (where two or more companies merge and one merging company survives (A + B = A or B) is recognized in other jurisdictions, but currently this type of merger is not permitted under Thai law. However, a draft legislation to amend the Civil and Commercial Code of Thailand (the "**Amendment**") recently approved by the Parliament would permit this type of merger, including a mechanism whereby the dissenting shareholders would be provided with an option to sell their shares to a purchaser who is generally a controlling shareholder of the amalgamated/merged company (while other third party purchaser is also permissible). The Amendment will become effective after the lapse of 90 days from the publication in the Government Gazette, which the date of publication is expected soon.

Merger control regulations in relation to M&A are discussed in Chapter 14 (*Trade Competition*).

(1) Share Acquisition

A. Acquisition of Existing Shares of a Company

(i) Private Limited Companies

The shares of a Thai company are freely transferable without being subject to any pre-emptive rights or restrictions, unless provided otherwise in the company's articles of association (the "**AOA**"). Additionally, shareholders agreements or joint venture agreements may contain other contractual provisions in relation to the share transfer restriction that are not provided in the AOA. Failure to comply with the provisions in an AOA or contractual provisions could result in invalidating or rendering a share transfer unenforceable.

Under Thai law, shares can generally be transferred by a transferor to a transferee by execution of a share transfer instrument containing certain information as required by the law. Such share transfer instrument may be made in any language. A transfer of shares will be valid as against the company and third parties once the transfer and details of transferee are recorded in the share register book of the company. A new share certificate can then be issued in the name of the transferee. Unless stamp duty is duly affixed, the share transfer instrument will not be admissible as evidence in court.

In practice, the updated list of shareholders will also be submitted to the Department of Business Development, Ministry of Commerce (the "**DBD**") for the public record even though this is not a legal requirement.

(ii) Public Limited Companies

Like the transfer of shares in private limited companies, there are specific requirements applicable to shares in public limited companies that require a transferor endorse the share certificate specifying the name of the transferee, and such share certificate must be signed by both the transferor and the transferee. A public company may not specify any restrictions on

a transfer of shares unless such restrictions are for preserving the rights and benefits to which the company is lawfully entitled, or for maintaining the ratio of shareholding between Thais and foreigners. Like the acquisition of shares in private companies, shareholders agreements or joint venture agreements should be reviewed to ensure that any restrictions on share transfers complied with.

A shareholders' agreement is uncommon for a public company listed on the Stock Exchange of Thailand. This is because if the shareholders' agreement contains a provision that the parties have an intention to exercise their voting rights in the same direction, the parties will be regarded as concert parties. Consequently, their shares in the publicly listed company will be combined for the purposes of takeover rules and reporting obligations.

An acquisition or disposition of shares in a publicly listed company that crosses any multiple of 5% of the total voting rights is subject to reporting obligations to the Securities and Exchange Commission of Thailand. The report must be made within three business days from the date on which the transaction occurs.

An acquisition of shares in a publicly listed company may be subject to mandatory tender offers if the acquisition results in the acquirer reaching 25% or more, 50% or more, or 75% or more of the total voting rights.

Further details of the takeover rules and the rules on reporting of securities acquisitions and dispositions are discussed in in Chapter 10 (*Capital Markets*).

B. Acquisition of New Shares of a Company

(i) Private Limited Companies

An M&A transaction may also be structured to include an acquisition of new shares in a Thai company. However, a private limited company may offer and allot new shares only by way of a rights offering to all its existing shareholders in proportion to the shares held by them. If existing shareholders decline to subscribe to new shares, the board of directors may issue unsubscribed shares to other existing shareholders.

An issuance of new shares to an investor who is not an existing shareholder is possible if that investor first becomes a shareholder of the company by acquiring certain amount of existing shares followed by the company's capital increase.

(ii) Public Limited Companies

Public companies differ from private companies in that it is possible to conduct a capital increase through a third-party allotment of shares.

A subscription of newly issued shares in a publicly listed company may be subject to mandatory tender offers. Exemptions of the mandatory tender offer through a whitewash process are available subject to certain conditions.

Generally, the transfer of shares and change in shareholding percentage, or control of the company will not impact the licenses held by the company. However, some licenses are granted only to the company having specified qualifications, which may include Thai shareholding requirements. In addition, every change in shareholders of different nationalities in a BOI promoted company must

be notified to the Board of Investment of Thailand. This factor should be also considered before implementation.

Note that, in practice, if the existing shareholders remain shareholders of a company after an acquisition, it is common that the parties (both the new shareholders and existing shareholders) enter into a shareholders' agreement or a joint venture agreement to set out the terms and conditions governing the operation of the company and the rights of each shareholder group. These terms and conditions will be reflected in an amendment to the company's AOA, which must be registered with the DBD.

(2) Business Transfer

Another way of acquisition of a business is to acquire assets (and liabilities) from the target entity, which allows the acquiring entity to be more selective by acquiring merely some, but not all, assets, and liabilities of the business. Though it may look more attractive as some liabilities (including legal actions outstanding against a target company) may remain with the target entity and the exposure to downside risk can be minimized, the purchase of shares is simpler from legal perspective since an asset transfer may require burdensome legal formalities, including registration, applications, and consents, depending on the types of assets being acquired.

Complexity may arise if the business being acquired is heavily regulated as the required permits and licenses may take time to be transferred or reapplied for. An acquiring entity may also be required to meet certain specific requirements before being eligible to hold such permits and licenses, e.g., minimum capital requirements or Thai shareholding ratios. Note that transferring employees can also be challenging even though the original employment relationship is intact as a separate consent is required from each employee.

Corporate approvals of the board of directors and/or shareholders (if required by the AOA) of the target entity and the acquiring entity are required for the implementation of an asset transfer. In addition, the approval of shareholders for a transfer of assets is required if such assets are a material part of the business. The requirements are more stringent for listed companies as the acquisition and disposition of assets by the acquiring entity and the target entity themselves as well as their respective subsidiaries is subject to the requirements and procedures prescribed under the regulations issued by the Stock Exchange of Thailand and the Capital Market Supervisory Board.

Another major issue of note for a business transfer is tax implications and costs with registration of transfers of immovable properties, as transfers of different types of assets are subject to different tax liabilities. There are some schemes for business transfers recognized under the Thai Revenue Code which can minimize or exempt tax costs and governmental fees in relation to a transfer, i.e., an entire business transfer and partial business transfer; provided that conditions specified therein are met.

(3) Amalgamation

Under the CCC and the Public Limited Company Act, B.E. 2535 (1992) (the "**PLCA**"), an amalgamation means a situation whereby two or more companies are amalgamated into a new merged entity. The new merged entity must be registered as a new company and will automatically assume all the rights and obligations of both merging companies.

A. Amalgamation of Private Limited Companies

A private company may amalgamate with another private company by obtaining a special

resolution of shareholders.

The company must advertise and announce the amalgamation at least once in a local newspaper and notify all its creditors known to the company and the creditors then have 60 days after the date of notice to raise any objections they may have. If there is any objection, the company cannot proceed with the amalgamation unless it has satisfied the claim or given sufficient security.

After proceeding in accordance with the requirements for objections by its creditors, the joint meeting of the shareholders of all companies to be amalgamated must be held to consider various matters in connection with the incorporation of the new company.

Upon registration of amalgamation with the DBD by each amalgamating company, such amalgamating companies will cease to exist, and a new company will be automatically established as a result of the amalgamation.

B. Amalgamation of Public Limited Companies

Like the amalgamation of private companies under the CCC, an amalgamation of two or more public companies, or any public company and a private company can be done by a special resolution of the shareholders' meeting of each company being passed. The PLCA also prescribes a situation where a resolution for an amalgamation is passed but minority shareholders object to the amalgamation, the public company must arrange for the purchase of the objecting shareholder's shares. The purchase price is based on last price traded on the stock exchange prior to the date of the resolution if listed or based on a price determined by an appointed independent valuer if unlisted. If such minority shareholder does not agree to sell his/her shares, the company will proceed with the amalgamation, and it is deemed that such objecting shareholder is a shareholder of the new company formed by the amalgamation.

Like an amalgamation of private companies under the CCC, the amalgamating public company must notify its creditors in writing of the resolution of the amalgamation and publish such notice in a local newspaper. If any objection is raised, the company cannot proceed with the amalgamation unless it has satisfied the claim or given sufficient security.

After proceeding in accordance with the requirements for objections by its creditors, the joint meeting of the shareholders of all companies to be amalgamated must be held within six months (extendable to one year) of the date on which all the companies have passed resolutions for the amalgamation in order to consider various matters including the allotment of shares of the amalgamated company to the shareholders, the capital of the amalgamated company.

Upon registration, the amalgamating companies will cease to exist. A company which has been amalgamated and registered will be entitled to all the assets, liabilities, rights, duties, and responsibilities of all the former companies.

The transfer of rights and liabilities resulting from the amalgamation is by operation of laws. Some governmental authorities treat licenses issued to the amalgamating company as still valid and will automatically be transferred to the new company by operation of law. The new company will only apply for a change to the license holder's name after the amalgamation. In some cases, the authorities require that the amalgamating company holding a license apply for the transfer of the license to the new company or otherwise require the new company to reapply for such license.

Despite the automatic transfer of rights and liabilities described above, Thai labour law also

requires the amalgamating companies to obtain prior consent from their employees for a transfer of employees to the new amalgamated company. If any employee refuses to give the consent, it is deemed that such employee has been terminated from their employment, and will be entitled to severance pay and, if the court rules that the termination is considered unfair, compensation for unfair dismissal.

In addition to points discussed above, certain business operations and specific industries have specific requirements regarding acquisitions of a business via share acquisitions, amalgamations, or asset acquisitions. Provisions of the laws governing those specific industries/businesses, for example, power, insurance, etc., may include prior approval obtained from, or notification submitted to, the regulating authority prior to any transaction. Such requirements must be complied with.

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