



Tilleke & Gibbins INTERNATIONAL LTD.

Mergers & Acquisitions: General Rules and Regulations

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INTRODUCTION

Opportunities for investment in Thailand are everywhere. After the economic crisis in the past decade, the economy is rebuilding. Thailand remains an important gateway to the Asia-Pacific region. While investors should exercise caution in choosing where to place their money, a well-calculated risk today could result in a huge pay-off tomorrow. In order to make a wise choice in the investment of your money, it is necessary to consider the current state of the Thai economy. This paper will touch on the general rules and regulations governing mergers and acquisitions (M&A) in Thailand.

I. Thailand's Current Investment Environment and Government Initiatives

In the aftermath of the economic crisis in 1997, Thailand has entered a period of restructuring and rebuilding. Generally, the government strategy has focused on ongoing monitoring of the economic situation while allowing the private market freedom to function and resolve difficulties. In addition, the government has passed certain key economic legislation in order to help Thailand recover from the effects of the 1997 crisis, to make them more responsive to the changing business environment, as well as to modernize Thailand's legal system, which in many crucial areas has not kept pace with the development of Thailand's business. These include:

- Bankruptcy Court Act
- Bankruptcy Amendment Act
- Condominium Ownership Act
- Civil Procedure Code Amendment Act
- Foreclosure Act
- Land Code Amendment Act
- Property Lease and Rights Act
- Prevention and Suppression of Money Laundering Act
- Anti-Dumping and Counter-Subsidization Act
- Trade Competition Act
- Unfair Contract Terms Act
- State Enterprises Corporatization Act
- Public Limited Companies Act
- Accounts Act
- Revenue Code Amendment Act
- Arbitration Act

These key laws and the implementing regulations will revise import tariffs, quota systems and inefficient customs procedures; improve value added tax refunds; improve the reliability of financial information issued by auditors in Thailand by revising auditing criteria; and develop a quick, enforceable arbitration system for private and public contracts.

In particular, the government, through the Board of Investment of Thailand ("BOI"), has reviewed its policies to encourage foreign investment by providing maximum benefits to existing projects and new investors. BOI is the major government agency responsible for providing incentives to stimulate investment in Thailand. The BOI is empowered to grant a wide range of fiscal and non-fiscal incentives and guarantees to qualified investment projects. To help revitalize Thailand's economy and to encourage both the expansion of

existing investment and new investment into Thailand, the BOI has issued various announcements and has developed measures to encourage investment in the current situation. These, among other things, include:

Incentive Enhancement

- Import duty exemption on replacement machinery for projects producing primarily for export.
- Renewal of privilege of import duty exemption on raw and essential materials used for the manufacture of products for export for those projects whose privileges have expired.
- Additional corporate income tax exemption for projects that are increasing their production capacity or generating employment to a substantial level.
- Exemption from corporate income tax and import duty on machinery for projects classified as priority activities by the BOI regardless of the location.
- Foreign investors may hold a majority or all of the shares in manufacturing projects, with no minimum requirement for export regardless of location.
- Import duty exemption on raw materials for existing projects in certain industries which are producing primarily for export.

Deregulation

- For joint venture projects located in zones 1 and 2 producing primarily for the domestic market, foreigners are allowed to hold all or a majority of the shares in existing manufacturing projects if the existing Thai shareholders give their consent.
- Projects producing primarily for export will be allowed to locate in any zone and will receive incentives existing for that zone.
- Import duty exemption on raw and essential materials used to produce for export, with no minimum export requirement.
- Allowing existing non-BOI manufacturers incorporated and operating in Thailand to apply for BOI promotion privileges; only non-tax incentives will be granted.
- Allowing the transfer of ownership of machinery to leasing and hire purchase companies.

Facilitation

- Permitting foreign-promoted companies to own land for office and residential purposes.
- Granting permanent residence to qualified investors and their family members.
- One-Stop Service Center for visas and work permits, where investors can receive work permits and one-year visa extensions within three hours.
- Non-tax incentives are offered to trade and investment support offices and regional operating headquarters offices of foreign companies to facilitate its operations in Thailand.

II. Legal Rules and Regulations in Mergers and Acquisitions (M&A)

Foreigners in Thailand derive their legal rights primarily from the domestic laws of Thailand, except for certain rights that are reserved only for the citizens of Thailand. This is not unusual as all countries have their own restrictions on the rights of foreigners. The rights of foreigners are restricted to a certain extent by such statutes as the Nationality Act, Immigration Act, Foreign Business Act, Land Code, and Alien Employment Act. Restrictions on foreign ownership in special industries such as commercial banks, insurance companies, commercial fishing, aviation business, commercial transportation, and tourism can be found under various statutes.

This paper will deal with the M&A of private companies only. The M&A of public companies are governed by the Securities and Exchange Act B.E. 2535 (A.D. 1992) as well as the Public Limited Company Act B.E. 2535 (A.D. 1992). For a public company whose shares are traded on the Stock Exchange of Thailand, the rules and regulations of the regulating authorities have to be complied with. Numerous rules and regulations are imposed on listed companies to ensure that, among other things, all shareholders of the company are treated equally and fairly. Thailand does not have specific legal rules and

regulations on M&A, and generally the parties are free to determine and agree on the terms and conditions. The most important law that needs to be considered is the Foreign Business Act, which restricts foreign ownership in certain activities hereunder described. Moreover, a thorough due diligence shall be conducted to check any hidden liabilities; to ensure that the change of ownership will not affect the current permits, licenses, or privileges granted by relevant authorities to the company; to ensure that the necessary approval from the shareholders or directors of the company or the relevant authorities are obtained, etc.

The Foreign Business Act

The Foreign Business Act B.E. 2542 (A.D. 1999) (the “Act”) significantly narrows the participation of aliens in Thai business activities. The Act reserves activities listed therein for Thai nationals. The Act provides a definition of “foreigner” and identifies the scope of foreign participation in business in Thailand.

“Foreigner” is defined as:

- A natural person who is not of Thai nationality.
- A juristic entity that is not registered in Thailand.
- A juristic entity incorporated in Thailand with foreign ownership accounting for one-half or more of the total number of shares and/or registered capital.
- A limited partnership or ordinary registered partnership whose managing partner or manager is a foreigner.

Businesses Subject to Restriction

These activities are divided into three lists, i.e. 1, 2, and 3 (see Appendix).

- Aliens cannot engage in activities stated in list 1.
- Aliens cannot engage in activities in list 2 unless permission is granted by the Minister of Commerce with the approval of the Cabinet, or a promotion is received from the Board of Investment of Thailand or other authorities. Such promotion is increasingly easy to obtain in view of the current situation.
- Aliens cannot engage in activities in list 3 unless permission is obtained from the Director-General of the Business Development Department, Ministry of Commerce, with the approval of the Foreign Business Committee. Such permission is not easy to obtain. Officials must be convinced that such businesses cannot be competently operated by Thais and/or granting of permission will not have a negative impact on existing Thai business operators.

A company limited is regarded as a Thai company if the majority of the shares in the company are held by Thai nationals. Thai law requires a minimum number of 7 shareholders at all times. A limited partnership or registered ordinary partnership is regarded as an alien if the managing partner or manager is an alien.

The existence of the Act has often led to the misunderstanding that aliens wishing to establish a company in Thailand must always find local partners to hold the majority of the shares. This is not correct. Most of the manufacturing activities are not covered by the Act. Foreigners wishing to invest in Thailand should first check whether their intended activities are covered by the Act. If they are not, it is possible to have a foreign majority-owned company engaging in such activities.

Such restrictions are sometimes legally complied with but in practice are actually being violated, i.e. actual control is exercised by foreign investors. The Act only has a requirement on the number of shares to be held by Thais but not on the membership of the Board of Directors which manages the company. Therefore, it is not uncommon for a majority of the Board of Directors of a Thai company to consist of foreign directors.

Another common way of achieving foreign majority ownership is to establish a company or branch office under the Treaty of Amity and Economic Relations between the United States and the Kingdom of Thailand (the “Treaty”). This option, however, is obviously restricted to Americans. Under the Treaty, an American-owned Thai company (i.e., the majority of the shares are American-owned) or a branch office of an American company is permitted to do almost anything a Thai company does except:

- Own land.
- Engage in business of inland communications.
- Engage in business of inland transportation.
- Engage in fiduciary functions.
- Engage in banking involving depository functions.
- Exploit land or other natural resources.
- Engage in domestic trade in indigenous agricultural products.

In addition, there are certain businesses under specific laws which limit the percentage of foreign ownership and number of foreign directors, unless otherwise relaxed by special permission from the authority concerned. These include:

<u>Businesses</u>	<u>Restriction on Foreign Ownership and Number of Foreign Directors</u>
Banking	25% of the total issued shares; not more than one-fourth of the total number of directors
Finance and Credit Foncier	25% of the total issued shares; not more than one-fourth of the total number of directors
Life and Casualty Insurance	25% of the total issued shares; not more than one-fourth of the total number of directors
Tour Agency	49% of the total issued shares; not more than half of the total number of directors
Marine Transportation	30% of the total issued shares; majority of directors must be Thai nationals
Air Transportation	30% of the total issued shares; majority of directors must be Thai nationals
Employment Agency (domestic)	49% of the total issued shares; manager must be Thai national
Employment Agency (abroad)	25% of the total issued shares and 25% of the total number of shareholders; manager must be a Thai

III. Other Regulatory Restrictions

The Trade Competition Act prohibits business operators from merging businesses which could result in a monopoly or unfair competition, as prescribed by the Trade Competition Committee in the Government Gazette, except where permission of the Trade Competition Committee is obtained.

The announcement of prescript by the Committee as mentioned in paragraph one must state that it shall apply to business mergers that result in the acquisition of market share, total sales revenue, amount of capital, amount of shares, or amount of assets of not less than a certain amount.

Business mergers as mentioned in paragraph one shall include:

1. A merger between manufacturer and manufacturer, distributor and distributor, manufacturer and distributor, or service provider and service provider, which results in the continued existence of one business and the demise of another, or the establishment of a new business.
2. The purchase of assets, whether in whole or in part, of another business to gain control over business management policy, supervision, or administration.
3. The purchase of shares, whether in whole or in part, of another business to gain control over business management policy, supervision, or administration.

At present, the Internal Trade Department of the Ministry of Commerce is considering and drafting the relevant, detailed regulations for Cabinet approval.

IV. Selecting and Structuring the Optimum Investment Method

Once the initial choice of investment is made, it is then necessary to decide on the optimum investment method. Merger and acquisition can take diverse methods. The main methods that are used in Thailand at present include the following:

- Share Acquisition
- Asset Acquisition
- Merger (Amalgamation)

Due to the unfavorable legal structure of amalgamation under Thai law, the first two methods of acquisition are widely practiced in Thailand.

Mergers of companies in other jurisdictions could result in the following scenarios:

- ◆ Company A merges with Company B = Company A
- ◆ Company A merges with Company B = Company B
- ◆ Company A merges with Company B = Company C

However, mergers in Thailand will always result in the last scenario, i.e. the original companies lose their status as juristic persons and a new company is formed. The new company is entitled to the rights and subject to the liabilities of the original companies.

V. Forms of Business Organizations

The principal forms of business organizations under Thai law are sole proprietorship, partnership, limited company, and public limited company. In addition, branch offices, representative offices, and regional offices of foreign corporations are recognized. The newest form of operation is the Regional Operating Headquarters (“ROH”) which the Ministry of Finance recently introduced, providing tax incentives to both ROH and its expatriate employees in order to promote foreign investment and stimulate investors to establish ROH in Thailand.

VI. Maximizing Opportunities and Overcoming Difficulties

Thailand’s opportunities for investment lie in the investment bargains available due to the current economic recession. Many companies are selling off their non-core, non-performing assets (including fully operational subsidiary businesses) at bargain prices. To attract investment into these companies, the Thai government has issued tax regulations granting relief on tax liabilities for parties involved in the debt restructuring process such as creditors, debtors, and shareholders.

In addition to the economic advantages of getting strong assets at low prices, investment in Thailand offers the chance to get a toehold in the Thai market and Southeast Asia generally. Such an opportunity may prove very attractive for certain investors.

To maximize the available investment opportunities and minimize adverse risks, a prudent investor in Thailand should do the following:

1. Look at the state of the national economy and the impact on the business operations of the company.
2. Conduct due diligence before investing.
3. Consider the opportunities and restrictions posed by the Thai government policies and regulations on foreign investment.
4. Understand the Thai debt restructuring processes in case the company becomes involved in restructuring itself and/or is dealing with other Thai companies undergoing restructuring
5. Be aware of the legal protections available when investing.
6. Consider obtaining security for your investment as protection against loss from future financial downturns.
7. Get assurances from the other parties for the continuation of proposed and/or ongoing business transactions (e.g., supply contracts, purchase contracts).
8. Negotiate to procure the best possible offers from major creditors.
9. Consider the degree of control that should be acquired in the Thai company.
10. Due to concerns arising with regard to unknown or undisclosed liabilities of the company, decide whether simply acquiring the assets or transforming business transactions would be a more appropriate investment strategy.
11. Contact banks and financial institutions to get information about the availability of bargain assets (especially from those companies that are being foreclosed). Also consider attending official auction sales by the Execution Department or various courts to cheaply purchase viable assets (e.g., land, buildings, machinery).

CONCLUSION

In order to take full advantage of the current investment opportunities in Thailand, an investor should be aware of the implications of debt restructuring on the economic climate. In the aftermath of the 1997 crisis, the economy is rebounding significantly due to government initiatives and increased investor confidence. The government is quite stable, increasingly transparent, and welcoming to foreign investment. Thailand's central location in Southeast Asia ensures that the country will continue to play a vital role in regional markets in the long term. Although investors should be careful with any investment decisions at this time, the opportunity for significant gain is certainly present. With the economic climate continuing to improve, investment in Thailand now could lead to an investor being in a very favorable position to take advantage of opportunities in the near future.

APPENDIX

LIST 1

Businesses which aliens are not permitted to operate for special reasons:

- (1) Newspaper business, radio broadcasting or television station business.
- (2) Rice farming, farming or gardening.
- (3) Animal farming.
- (4) Forestry and wood fabrication from natural forest.
- (5) Fishery for marine animals in Thai waters and within Thailand specific economic zones.
- (6) Extraction of Thai herbs.
- (7) Trading and auctioning Thai antiques or national historical objects.
- (8) Making or casting Buddha images and monk alms bowls.
- (9) Land trading.

LIST 2

Businesses related to national safety or security or involving art and culture, tradition, folk handicraft or natural resources and environment.

GROUP 1: BUSINESSES RELATED TO NATIONAL SAFETY OR SECURITY

- (1) Production, selling, repairing and maintenance of:
 - (a) Firearms, ammunition, gunpowder, explosives.
 - (b) Accessories of firearms, ammunition, and explosives.
 - (c) Armaments, ships, air crafts or military vehicles.
 - (d) Equipment or components, all categories of war materials.
- (2) Domestic land, waterway or air transportation, including domestic airline business.

Group 2: Businesses involving art and culture, traditional and folk handicraft

- (1) Trading antiques or art objects which are Thai arts and handicraft.
- (2) Production of carved wood.
- (3) Silkworm farming, production of Thai silk yarn, weaving Thai silk or Thai silk pattern printing.
- (4) Production of Thai musical instruments.
- (5) Production of goldware, silverware, nielloware, bronzeware or lacquerware.
- (6) Production of crockery of Thai arts and culture.

Group 3: Businesses affecting natural resources or environment:

- (1) Manufacturing sugar from sugarcane.
- (2) Salt farming, including underground salt.
- (3) Rock salt mining.
- (4) Mining, including rock blasting or crushing.
- (5) Wood fabrication for furniture and utensil production.

LIST 3

Businesses in which Thai nationals are not yet ready to compete with foreigners:

- (1) Rice milling and flour production from rice and farm produce.
- (2) Fishery, specifically marine animal culture.
- (3) Forestry from forestation.
- (4) Production of plywood, veneer board, chipboard or hardboard.
- (5) Production of lime.
- (6) Accounting service business.
- (7) Legal service business.
- (8) Architecture service business.
- (9) Engineering service business.
- (10) Construction, except for:
 - (a) Construction rendering basic services to the public in public utilities or transport requiring special tools, machinery, technology or construction expertise with a foreign minimum capital of Baht 500 million or more.
 - (b) Other categories of construction as prescribed by the ministerial regulations.
- (11) Broker or agent business, except:
 - (a) Being broker or agent for underwriting securities or services connected with future trading of commodities or financing instruments or securities.
 - (b) Being broker or agent for trading or procuring goods or services necessary for production or rendering services amongst affiliated enterprises.
 - (c) Being broker or agent for trading, purchasing or distributing or seeking both domestic and foreign markets for selling domestically manufactured or imported goods in the manner of international business operations with a foreign minimum capital of Baht 100 million or more.
 - (d) Being broker or agent of other categories as prescribed by the ministerial regulations.
- (11) Auction, except:
 - (a) Auction in the manner of international bidding not being the auction of antiques, historical artifacts or art objects which are Thai works of arts, handicraft or antiques or having historical value.
 - (b) Other categories of auction as prescribed by the ministerial regulations.
- (12) Internal trade connected with native products or produce not yet prohibited by law.
- (13) Retailing of all categories of goods having a total minimum capital of less than Baht 100 million or having a minimum capital for each shop of less than Baht 20 million.
- (14) Wholesaling of all categories of goods having a minimum capital for each shop of less than Baht 100 million.
- (15) Advertising business.
- (16) Hotel business, except for hotel management service.
- (17) Guided tour.
- (18) Selling food or beverages.
- (19) Plant cultivation and propagation business.
- (20) Other categories of service business except those prescribed in the ministerial regulations.
