Global Private M&A Guide - Limited External Content - Thailand

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# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

Undertaking an activity without the required approval, license or permit is a common issue raised during the due diligence of corporate entities in Thailand, particularly where the corporate entity is operating in the real estate sector (e.g., the construction or alteration of buildings) or any other regulated sector.

Another common due diligence issue is the lack, or incomplete nature, of information provided for review by the buyer during the due diligence exercise. Title documents and other corporate documents (such as a proper share register book, or complete records of real property ownership) are often missing. This can make it difficult to verify the seller's ownership and title to the property being acquired by the buyer. Even where documents are provided for review, there may be some difficulties in verifying the authenticity of the title documents and whether they were duly issued by the relevant governmental bodies.

Tax is another common issue raised in due diligence. For instance, often the target company may not have properly affixed stamp duties in certain material contracts or documents or may not have properly submitted its tax returns.

If any of the issues described above (or any other significant issues) are discovered during the due diligence process, the buyer will usually require the seller to rectify those issues prior to closing. If an issue is not rectifiable, or is too costly to be rectified, buyers may, instead, ask the seller to give specific indemnities in respect of those issues. If one or more of the issues raised during the due diligence is material, especially in relation to ownership and title of real property, it may be a deal breaker for a buyer. However, depending on the nature of the buyer and its risk appetite, some buyers may be willing to accept the risks and proceed with the acquisition.

Bearing in mind the typical issues raised in due diligence (discussed above), a buyer looking to purchase a corporate entity in Thailand should conduct detailed due diligence of that target entity, with a particular focus on the adequacy of title documents to any relevant real properties.

**Pricing and payment**

Generally, an independent appraisal is not required to support the valuation of the target in a share deal or an asset deal unless required by any specific laws e.g., securities and stock market regulations, tax and etc. The price can be adjusted after due diligence or after completion via the purchase price mechanism in the definitive agreement.

Electronic transfers of funds, including through SWIFT Code international system, are the most common way of paying cash consideration.

**Signing/closing**

**Is a deposit required?**

A deposit is not required and can be negotiated between parties, but it is fairly common for a deposit to be given upon signing a share sale or an asset sale transaction in Thailand. A deposit may also be required upon signing a letter of intent before signing definitive transaction agreements. An escrow arrangement for a deposit is also common.

**Is simultaneous signing/closing common?**

Simultaneous signing/closing is not so common. Depending on the type of transaction, there is usually a time period between signing and closing to fulfil the necessary conditions precedent. If there is a simultaneous signing/closing, parties usually specify closing deliverables and arrangements to reflect actions to be fulfilled by the seller and buyer instead of conditions precedent.

**Notice to call a shareholders' meeting**

A notice to call a shareholders' meeting must be sent to all shareholders by receipt-acknowledged mail (except in cases where there are bearer shares issued by the company, in which case the notice is also required to be published in a local newspaper). This requirement should be considered when arranging for signing/closing. It is also necessary to carefully review the articles of association to see whether they impose any additional requirements relating to the notice to call a shareholders' meeting.

## Approvals/registrations

**Foreign investment restrictions**

There is a foreign investment screening procedure under Thai law. The foreign investment screening procedure is primarily focused on foreign business licensing requirements under the Foreign Business Act, B.E. 2542 (1999) (FBA).

The FBA lists businesses that are prohibited or restricted for foreigners. A foreigner must obtain a foreign business license or a foreign business certificate from the Ministry of Commerce before engaging in a restricted business in Thailand. For further information, see the more detailed section on "Foreign investment restrictions”.

**Antitrust/merger control**

Thailand's merger control regime requires pre-merger approval if a relevant transaction results in dominance, which is assessed by a dominance test that considers market share and turnover. The post-closing notification applies when the turnover test is met, focusing on revenue generated by the merging parties in a relevant market. The competition authority has 90 days to review the application, extendable by 15 days. There is no statutory deadline for post-closing notifications. For transactions subject to pre-merger approval, the buyer must file within six days from closing. For further information, see the more detailed section on "Antitrust/merger control".

**Other regulatory or government approvals**

Mergers and acquisitions related to specific businesses, such as insurance and financial institutions, have specific regulatory approval requirements.

## Employment

In share acquisitions, a target company, as an employer, continues to be the employer of its employees, and this does not result in any impact on the company's workforce. Hence, there is no requirement to obtain employee consents.

If there is an asset sale and employees form part of the in-scope assets, the transfer of employment does not take place automatically, and employee consents will have to be obtained first. Without consents from the relevant employees,, the employees will remain employees of the seller. If the seller subsequently wishes to terminate the employment of those employees without a statutory cause, those employees will be entitled to statutory payments upon termination, including severance pay. Moreover, the seller will also bear the risk of a claim of unfair termination from the relevant employees.

At the time of the transfer of employment, the transferee (the buyer) is required to assume all of the rights and obligations of the transferred employees from the transferor (the seller), including assuming those employees' years of service.

## Tax

In a sale of shares, stamp duty is payable on the original share transfer instrument at the rate of 0.1% of the sale price or the paid-up value of the sold shares, whichever is higher. A duplicate share transfer instrument is subject to minimal stamp duty of THB 5 each.

For a sale of immovable properties by corporate entities, there is a specific business tax at the rate of 3.3% of the higher of the following:

The official appraised value announced by the Land Department.

The sale price.

There is also a withholding tax at the rate of 1% of the higher of the following:

The official appraised value announced by the Land Department.

The sale price.

There is also a registration fee at the rate of 2% of the official appraised value announced by the Land Department.

For a sale of moveable assets or intangible assets (e.g., intellectual property and goodwill), there is a VAT of 7% of the sale price of the assets. For the sale of intangible assets, there is also withholding tax at the rate of 3% of the sale price.

Tax benefits are available for M&A transactions undertaken by way of special schemes, such as amalgamation, entire business transfer, and partial business transfer, subject to certain criteria and conditions.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

There are four main forms of M&A recognized in Thailand. Mergers and acquisitions can take the following forms:

Amalgamation or a consolidation

Merger

Acquisition of the shares in a target company

Acquisition of assets of the target company

In addition to these four main forms, there are some situations where, for commercial reasons, a combination of acquisitions is necessary. For instance, the transaction may begin with a share acquisition to acquire the target company, and then be followed by an amalgamation, merger or an entire or partial asset acquisition to transfer all or a part of the assets from the target company to the buyer.

An auction process is becoming popular, especially for businesses likely to attract a lot of interest from buyers. Indicative bid process letters are commonly used at the first offer stage.

Merger and amalgamation procedures are considered to be complex and relatively time-consuming, which means that acquisitions of shares or assets are generally more common in Thailand than merger or amalgamation procedures.

Under Thai laws, once two or more companies are amalgamated, the amalgamating companies will lose their legal personality and cease to exist. The new company will be established by operation of law and will inherit all of the assets, liabilities, rights, duties and responsibilities of the amalgamating companies.

In addition, the major drawbacks of an amalgamation are that the new corporation loses the opportunity to treat the tax losses brought forward by the original corporation as an expense when computing net profit for tax purposes, and the transaction may involve several complicated, time-consuming legal procedures.

An amendment to the Thai Civil and Commercial Code (effective as of 7 February 2023) introduced the concept of a "merger" in Thailand. A merger is another method of business integration in addition to the existing concept of an amalgamation. A merger involves a company (Company A) merging with another company (Company B) to become a merged company (either Company A or Company B becomes the surviving company), whereas an amalgamation involves a company (Company A) merging with another company (Company B) to become an entirely new company (Company C). In a merger, one company (the disappearing company) will lose its status as a juristic person and the other company (the surviving company) will receive the disappearing company's assets, liabilities, rights, obligations and responsibilities by operation of law.

Given that the concept of a merger has only recently been introduced, there are not yet any rules or regulations relating to its tax treatment and the Thai Revenue Department has not issued any guidance. It is not yet clear what the tax treatment for this new merger scheme will be.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

The nature and form of limited liability companies in Thailand are essentially the same as in many other jurisdictions. The capital is divided equally and is represented by shares in a designated (par) value. The liability of each shareholder is limited to the unpaid portion of the shares held. Limited liability companies may be either private companies, which are subject to the Civil and Commercial Code of Thailand, or public companies, which are subject to the Public Limited Company Act.

## What are the different types of limited liability companies?

There are two types of limited liability companies: a private limited company and a public limited company.

## Is there a restriction on shareholder numbers?

To establish a private limited company, at least two natural persons (not necessarily Thai citizens) must act as promoters (founders), with each holding at least one share, thereby becoming a shareholder upon incorporation. The par value of a share of a private limited company is at least THB 5 and each share must be at least 25% paid up. There is no maximum number of shareholders. For a public company, there must be at least 15 promoters for the incorporation of a company.

## What are the key features of a share sale and purchase?

In a share acquisition, both the buyer and the acquired entity (the target) survive, but the buyer becomes a shareholder of the acquired entity (the target).

## What are the key features of an asset sale and purchase?

In an asset acquisition, both the acquiring entity (the buyer) and the selling entity (the seller) survive the acquisition. The seller merely divests its assets or business(es) and transfers them to the buyer. After completion of the transaction, whether the seller is dissolved or is maintained to carry out different business activities can be considered separately to the acquisition.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

A letter of intent or term sheet is quite common but is not required. Parties can agree on whether the letter of intent or term sheet will be binding. It is quite common for the letter of intent, or term sheet, to be non-binding, except for a few crucial provisions, e.g., exclusivity, confidentiality etc.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity**: Depending on the size of the transaction, it is fairly common to have an exclusivity provision in a term sheet.

**Break fee**: It is not common to have a break fee provision in a term sheet.

**Confidentiality**: It is common to have confidentiality provisions in a term sheet.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Where the parties need to exchange confidential information prior to the discussion and negotiation of the letter of intent, or term sheet, they may wish to enter into a separate confidentiality agreement before the letter of intent, or term sheet, is signed.

If confidentiality, exclusivity and break fee(s) provisions have been included in the letter of intent, or term sheet, it is uncommon to have separately negotiated agreements on these matters prior to the definitive agreements stage.

The definitive agreements, e.g., the share purchase agreement, may include these sorts of provisions again to deal with the position post-signing.

## Is there a duty or obligation to negotiate in good faith?

There is a general provision under Thai law that every person must, in the exercise of their rights and in the performance of their obligations, act in good faith. The amount of damages that may be awarded for breach of this duty will be subject to the determination of the Thai court.

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Very common.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Cash free/debt free and working capital are very common. NAV is also common.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: This is usually prepared by the target company (but the buyer may be involved in process of preparing the accounts).

## Is the balance sheet audited (where applicable)?

Frequency/market practice: It is fairly common to have the balance sheet reviewed by an independent auditor, especially if there is a dispute between the parties.

## Is an earn-out common?

Frequency/market practice: Fairly common; earn-outs are more common in private equity transactions when the sellers continue to manage the target company after closing. They are less common where the seller exits completely . Earn-outs are commonly capped.

## Is a deposit common?

Frequency/market practice: Fairly common; it usually depends on the bargaining of the seller.

## Is an escrow common?

Frequency/market practice: Fairly common.

## Is a break fee common?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Fairly common.

## Is the MAE general or specific?

Frequency/market practice: Both are common.

## Is the MAE quantified?

Frequency/market practice: Fairly common.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Fairly common.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Waterfall provisions are rarely used.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Very common.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Fairly common; we generally get this for private deals.

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Fairly common. Notification of possible breach is also common. Where there is a material breach, there is a right to terminate in favor of the buyer.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Fairly common; materiality qualifiers and quantified amounts are commonly seen. The amount is commonly specified in either USD or THB.

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: Knowledge qualifiers are increasingly common. They are often limited to actual knowledge and due enquiry of a specified list of senior management.

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Very common; it is always requested by buyers, but is typically one of the most contested warranties.

## Is disclosure of the data room common?

Frequency/market practice: Very common.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Very common; repetition at completion is common.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: Rarely.

## Is a bring-down certificate at closing common?

Frequency/market practice: Bring-down certificates are not very common.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: True and accurate in all material respects is common but often carve out for fundamental representations that must be absolutely true.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely; double materiality is usually avoided.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: The cap for key warranties is usually higher than general warranties. It is common to end up with a cap at the purchase price for key warranties, e.g., fundamental warranties, (or even include other general warranties), but it is increasingly common to have a lower cap (of around 40% - 70% of the purchase price, or even lower) for general warranties, particularly where the transaction involves a knowledgeable seller.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: Both are seen regularly.

## What are the common exceptions to the cap?

Frequency/market practice: Key warranties are often excepted (e.g., title, capitalization and authority). Tax and specific areas of concern are also often excepted, sometimes with specific higher caps. Separate caps can be negotiated.

## Is a deductible or basket common?

Frequency/market practice: Fairly common.

## Is a de minimis common?

Frequency/market practice: Fairly common.

## How long does seller liability survive?

Frequency/market practice: This is commonly one to three years. Tax negotiations start at 10 years but often end up at around five years. Fraud warranty is normally unlimited.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: Fraud carve-outs are common. Tax carve-outs are not as common (and are usually negotiated as specific indemnities).

## Is warranty insurance common?

Frequency/market practice: Rarely; we are starting to see this in private equity exits.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Rarely.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Fairly common for actually received.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Fairly common for actually received.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Fairly common.

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: This is increasingly common.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: A choice of foreign law is permissible, unless it is contrary to public policy. Thai law is more common.

## What is the common governing law?

Frequency/market practice: Thai law is more common.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Arbitration is more common. Parties usually select Thai or Singapore arbitration.

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: Stamp duty (at 0.1% of paid-up value of the transferred shares, or of the purchase price for the shares, whichever is higher) is payable if the parties sign an original share transfer document in Thailand, or if the original share transfer document is brought into Thailand. Unless agreed otherwise, if the original share transfer document is signed in Thailand the seller is responsible for stamp duty payment within 15 days. If the document is signed outside Thailand and it is subsequently brought into Thailand, the first holder of the original share transfer document in Thailand is responsible for stamp duty payment within 30 days. The parties can, nevertheless, agree that the buyer is solely responsible for stamp duty payment, or that the stamp duty should be shared between both parties.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: It is fairly common to have tax indemnity, usually included in the purchase agreement.

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