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**Thailand: Law & Practice
and Trends & Developments**

Siregran Sakuliampaiboon
and Sarun Poonyabavornchai
Weerawong C&P



THAILAND



Law and Practice

Contributed by:

Siregran Sakulimpaiboon and Sarun Poonyabavornchai
Weerawong C&P

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Contributed by: Siregran Sakulampaiboon and Sarun Poonyabavornchai, **Weerawong C&P**

Weerawong C&P is an independent Thai law firm established on 1 January 2009. Formerly the Bangkok office of White & Case LLP, which commenced business in Thailand in 1993, it is now one of Thailand's largest independent law firms, with a team of more than 100 legal professionals. Weerawong C&P represents purchasers, sellers, advisers, lenders and financial intermediaries in domestic and cross-border M&A, leveraged buyouts, joint ventures and di-

vestments. The firm adds value to transactions through its extensive experience in structuring bids, negotiations, drafting agreements and financing documentation, as well as in structuring exit strategies for investors. The firm also advises clients on regulatory, competition law, intellectual property, real estate, labour and employment, and environmental issues in relation to complex cross-border M&A.

Authors



Siregran Sakulampaiboon specialises in M&A, the establishment of business in Thailand, corporate structuring, and corporate management and control, focusing on cross-

border transactions. She has extensive experience leading legal due diligence for M&A transactions, and in drafting and negotiating various types of commercial contracts for M&A transactions. She provides legal advice to a wide variety of multinational clients in a broad range of sectors. Siregran obtained an LLB degree (First Class Honours) from Chulalongkorn University, an LLM degree (Merit) from London School of Economics and Political Science (LSE), and an LLM degree from the University of Cambridge, UK.



Sarun Poonyabavornchai is a senior associate in the M&A practice group at Weerawong C&P. He assists clients in domestic and cross-border transactions. Sarun also has

experience in capital markets, private equity funds and trusts. He obtained an LLB degree (First Class Honours) from Chulalongkorn University and a dual LLM degree from Harvard Law School, USA.

Weerawong, Chinnavat & Partners Ltd

Weerawong, Chinnavat & Partners Ltd
22nd Floor, Mercury Tower
540 Ploenchit Road
Lumpini, Pathumwan
Bangkok 10330
Thailand

Tel: +66 (0)2 264 8222
Fax: +66 (0)2 657 2222
Email: info@weerawongcp.com
Web: www.weerawongcp.com



1. Market Trends

1.1 Recent Changes

As the situation in Thailand has gradually returned to normal after the COVID-19 pandemic and during the last 12 months, businesses have branched out beyond their areas of expertise and usual operations and have sought M&A opportunities in new sectors through diversification and asset allocation. This has given rise to a number of strategic joint ventures (JVs), venture capital investments and other strategic alliances, especially in technology, e-commerce, renewable energy, healthcare and life sciences.

Another new trend that arose during the height of the COVID-19 pandemic was digital disruption, and this continues to drive much of JV activity in Thailand.

1.2 Key Industries

In Thailand, while there is no single specific industry or sector that has stood out as more active regarding JV activities, the following have, together, continued to dominate JV activity in

Thailand thus far and have become the standout performers in the Thai market:

- technology;
- telecommunications;
- industrial manufacturing and automotive;
- financial services;
- energy;
- health industries; and
- real estate.

These JV activities align with the prevailing trends in M&A. This is partially driven by:

- market trends;
- technological advancements;
- emerging businesses;
- the need to adapt to evolving and constantly shifting markets;
- consumer habits and demands; and
- existing legal foreign ownership restrictions.

2. Types of Joint Venture (JV)

2.1 JV Vehicles

Vehicle Choices

While several options are available for JV vehicles, the overwhelmingly most common type of vehicle used is a private limited company. In a distant second place is the consortium, which, in a legal sense, is not actually a type of vehicle but simply a term used to refer to a business co-operation arrangement between two or more entities that share (to a certain extent) common objectives but which do not form a separate legal entity.

Save for public companies, other alternatives are limited to partnerships, which are rarely used in the context of large-scale JVs primarily due to the potential unlimited liability involved (even in a so-called limited liability partnership) that requires at least one individual with unlimited liability to be a partner. However, it is worth noting that there have been court cases where unincorporated JVs or business collaborations were treated as unincorporated unlimited liability partnerships, even when there were no partnership agreements between the JV participants.

For the sake of brevity, the remaining discussion in this questionnaire will only focus on the use of a private limited company as a JV vehicle in the context of a 50:50 JV, unless specifically indicated otherwise.

Advantages and Disadvantages

Using a limited company as a JV vehicle offers several advantages, such as the following.

Separate legal personality and limited liability

The primary advantage is the distinct legal personality of a limited company and the limitation of liability it provides. Shareholders' liability

towards the creditors of the company is limited to any unpaid capital contributions (in addition to the funds and assets that have been contributed, which are the property of the JV company). This protects shareholders' personal assets from the debts and liabilities of the JV company.

Continuity of business operation

The separate personality of a company, at least in principle, ensures continuity of the business operations of the JV company regardless of the financial standing of the JV participants. For example, bankruptcy of the JV participants will not automatically result in bankruptcy at the JV company level, and vice versa.

Ease of interest transfer

When the JV is structured as a private limited company, selling (part or all) of the equity interest in the JV is generally straightforward when compared to selling the assets or business of the JV. This facilitates changes in ownership without disrupting the JV's business operation.

Established corporate governance framework

The use of a private limited company allows the participants in the JV to benefit from an established body of corporate law governing its operations. JV participants can rely on this established framework, allowing them to focus their negotiations on crucial issues in the JV agreement without needing to reinvent the wheel.

Generally speaking, the advantages tend to outweigh the disadvantages, which include the following.

Public disclosure of potentially sensitive information

Thai companies are required to register their articles of association (AOA) (which, in the case of JV companies, generally reflect the key terms of

the JV agreement between their shareholders) with the relevant authority, making them public documents. Additionally, they are required to submit regular public disclosures of their financials, including their audited financial statements. Consequently, sensitive information, such as the governance arrangements between the JV participants (as outlined in the AOA), will become accessible to the public. In contrast, consortiums (including unincorporated partnerships) need not make such public disclosures.

Rigidity in terms of resource-sharing and risk-sharing

The flip side to benefiting from the presence of an established body of corporate law is that there are certain constraints under the legal framework, in particular those related to the sharing of resources and risks. Resources from any shareholder will be treated as the assets of the same JV company. Consequently, any profit or loss, regardless of which asset, activity or segment of the company from which such profit or loss originates, is distributed primarily based on the number of shares held by the shareholders. Shareholders may not be able to carve up the JV company's business and selectively take the risks and profits of certain parts of the business. While Thai law allows for multiple classes of preference shares (with a single class of ordinary shares) with varying rights attaching to them (eg, different dividend entitlements), such structure does not segregate the profits and losses arising from different activities of the company which, by contrast, is possible with consortiums.

2.2 Choice of JV Vehicle

As regards vehicle choices for JVs, JV participants are in practice confined to private limited companies and consortiums under Thai law, as partnerships carry the risk of unlimited liability for the participants. When deciding between

the two, one crucial factor is how the JV participants intend to pool resources and allocate profits and losses. For example, if each participant is expected to make vastly different, well-defined contributions to the project, especially where such contributions concern different parts of the value chain, and neither wishes to share the profit or bear the loss from the other party's contributions, a consortium may be preferred. After all, in a consortium, the consortium partners tend to act independently, allowing for a more distinct separation of responsibilities and financial outcomes among the participants. Other drivers, such as management structure and decision-making, may play a role but, in general, they can be similarly addressed in both types of structures.

However, the choice of JV vehicle is not strictly an either/or decision. A combination of different types of vehicles may be appropriate in some contexts. For example, for a cross-border infrastructure project involving multiple participants, the key participants may opt for a consortium to govern their co-operation at the project level, with other participants being involved through JV companies set up specifically for distinct parts of the project. A hybrid approach may allow for a flexible and tailored structure that best suits the needs and dynamics of their collaborative efforts.

3. Regulation

3.1 Regulators

Excluding business-specific regulations and regulators, below are the primary statutory frameworks and regulators that are relevant to JVs in Thailand when the vehicle of choice is a limited company.

The Civil and Commercial Code

The main legal framework governing the incorporation of private limited companies, capital structure, corporate governance, and the rights and obligations of directors and shareholders (such as shareholders' rights and directors' fiduciary duties) is found under the corporate law section of the Civil and Commercial Code (CCC), including the rulings of the Department of Business Development, Ministry of Commerce, which hosts the central company registry and serves as the regulator responsible for overseeing and implementing this law.

The Securities and Exchange Act and the Public Limited Companies Act

Where any JV participant is a listed company, the parties may also have to take into account the provisions of the Securities and Exchange Act BE 2535 (the "SEC Act") and its subordinate regulations, although their application is generally limited in scope and relevance in this context. The primary focus is on disclosure requirements imposed on listed participants. The Office of the Securities and Exchange Commission (SEC) is the primary regulator in this regard. In addition, given these listed participants are, by definition, public companies, another piece of legislation to consider is the Public Limited Companies Act BE 2535 (PLCA) which governs the corporate approval aspect at the public JV participant level.

3.2 AML

Thailand's laws on anti-money laundering (AML) and combating the financing of terrorism (CFT) are largely in line with the FATF Recommendations. Thai AML/CFT laws are a comprehensive set of regulations designed to prevent and combat money laundering and terrorist financing activities. Key pieces of legislation are the Anti-Money Laundering Act, BE 2542 (1999)

and the Counter-Terrorism and Proliferation of Weapons of Mass Destruction Financing Act BE 2559 (2016) (the "Counter-Terrorism Act"). The primary regulator is the Anti-Money Laundering Office (AMLO).

In addition, certain types of businesses may be subject to business-specific laws. For example, commercial banks are subject to specific requirements imposed by the Bank of Thailand. Aside from the penal measures (eg, predicate offences and asset confiscation) which are not the focus of this discussion, Thai AML/CFT laws encompass standard crime prevention and detection measures – such as know-your-customer (KYC) and customer due diligence (CDD), transaction reporting and record-keeping – all of which are imposed on financial institutions and other "reporting entities" such as jewelry and precious metal dealers. In the context of JVs, KYC and CDD measures may be most relevant.

3.3 Restrictions and National Security Considerations

In the context of JV formation, national security restrictions are incorporated into specific laws governing businesses that are deemed to concern national security. Typically, these restrictions take the form of limits on foreign ownership, embedded in the law as licensing requirements or nationality-based eligibility for licences. For instance, the types of businesses listed under Category 1 of Schedule 2 to the Foreign Business Act BE 2542 (1999) – eg, arms manufacturing and land transportation – are regarded as relevant to national security. As a result, any company intending to engage in such businesses would need to be majority-owned by Thai individuals or entities unless they obtain a foreign business licence (although, in practice, obtaining such a licence may be challenging as the authorities may not have a policy for granting

it). Other examples can be found in sectors such as telecommunications, which impose relatively strict foreign ownership limits in the form of eligibility for applying for licences.

On a related note, in Thailand, sanctions laws apply in the context of counter-terrorism measures under the Counter-Terrorism Act. Individuals or organisations listed on the sanctions list of the United Nations Security Council may be deemed “designated persons” by the AMLO and listed on Thailand’s sanctions list, in which case financial institutions in Thailand are required to freeze their assets (including businesses) and report relevant information to the authorities. If a JV company or any of its shareholders is classified as a designated person, this could lead to significant disruption to the JV’s business operations.

3.4 Competition Considerations

The formation of a JV is not currently regulated by the merger control provisions of the Trade Competition Act BE 2560 (2017). However, the creation of a JV by acquiring an existing business may be deemed an indirect acquisition of shares or assets of the target company, and the act could potentially apply.

Notwithstanding the above, the competition authority, the Trade Competition Commission of Thailand, is currently undergoing a review and revision of the merger control regime, with the revised scheme anticipated to potentially include JVs.

3.5 Listed Party Participants

While there are no specific rules on listed companies’ participation in a JV, it is important to note that listed companies (and, indirectly, JV companies to the extent they are considered their subsidiaries or associated companies) are subject

to the regulatory framework under the PLCA and the SEC Act as well as the various regulations of the SEC and the Stock Exchange of Thailand. These statutes and regulations mainly pertain to approval and reporting requirements when listed companies (or their subsidiaries) enter into a transaction, such as when establishing a new subsidiary or investing in a company.

Moreover, in cases where the JV involves the acquisition of shares in a listed entity, there are also securities law considerations. Specifically, if the JV participants intend to jointly exercise their voting rights in the same direction or allow others to exercise their voting rights for the purpose of achieving common control over a listed company’s voting rights, they may be considered as “persons acting in concert” or “concert parties”. The implication is that the securities holdings of concert parties would be aggregated for the purpose of determining whether a mandatory reporting requirement or a mandatory tender offer would be triggered under the SEC regulations when the shares in a listed company are being acquired by the JV or any of the JV participants.

3.6 Control/Ownership Disclosure Requirements

The formation of a JV is not currently regulated by the merger control provisions of the Trade Competition Act BE 2560 (2017). However, the creation of a JV by acquiring an existing business may be deemed an indirect acquisition of shares or assets of the target company, and the act could potentially apply.

Notwithstanding the above, the competition authority, the Trade Competition Commission of Thailand, is currently undergoing a review and revision of the merger control regime, with

the revised scheme anticipated to potentially include JVs.

4. Legal Developments

4.1 Significant Recent Decisions or Regulatory Developments

In terms of significant legal developments, on 25 November 2022 the Energy Regulation Committee (ERC) released a draft regulation on the eligibility and procedures for electricity business licences. Notably, this draft version of the regulation introduced industry-wide foreign-ownership restrictions for power producers in Thailand, which is a departure from the current law that has no such restrictions (with the exception of certain sub-segments, such as qualifications imposed on power producers selling electricity generated from renewable energy under feed-in tariff during 2022–2030).

If enacted, this new regulation will mandate that all prospective power producers applying for a licence must be Thai majority-owned, unless exempted under a specific treaty or other laws. This would also affect existing power producers during the licence renewal process, as they too would be subject to the new nationality requirements.

5. Negotiating the Terms

5.1 Negotiation Documentation

The types of documents required for negotiation and execution depend on the nature of the transaction. Broadly speaking, transactions can be grouped into two key categories: those that involve the sale and purchase of an existing company or assets from a JV participant, and those that do not.

In the former category, the transaction effectively combines a sale and purchase with a JV, meaning the documents will have to encompass both aspects. The documents typically include:

- a memorandum of understanding (MOU), a term sheet or heads of terms that outline both the sale and purchase and the JV aspects;
- due diligence documentation, such as a due diligence questionnaire; and
- a sale and purchase agreement (or a share subscription agreement) and a shareholders' agreement (which may be combined into a single document).

On the other hand, transactions that do not involve any sale and purchase of existing assets from any JV participant typically require fewer documents. In such cases, an MOU or term sheet and a shareholders/JV agreement are usually sufficient. However, if the transaction involves the purchase of an existing company or assets from a third party by the JV company (for instance, when two or more parties jointly acquire an existing business from a third party through a JV vehicle), additional documents would include an MOU or term sheet and a sale and purchase agreement with the third-party seller.

During the initial stage, non-disclosure undertakings or agreements may be documented separately between the parties. In any case, they are often incorporated as part of the main documentation, such as in the MOU or term sheet.

Before the negotiation of JV agreements, the parties would generally be expected to agree on standard market provisions in relation to the following matters, which may be incorporated in a term sheet:

- shareholding – the parties’ respective shareholding proportions;
- shareholders’ contributions – the shareholders’ respective contributions to the JV company (eg, specific services such as know-how contributions, client sourcing and personnel recruitment);
- board seats – how many directors each party will be entitled to nominate;
- authorised directors – the signing authority of the authorised directors (eg, a common arrangement in a 50:50 JV is that directors from both sides jointly sign to bind the company);
- voting – voting thresholds and requirements for resolutions to be adopted by the board or the shareholders;
- reserved matters – what matters will require the approval of both sides (mostly relevant in the context of JVs with unequal shareholdings); and
- senior management – which key management positions each party will be entitled to fill.

5.2 Disclosure Requirements and Timing

Where the JV involves a listed company (for example, where one of the JV participants is listed or the JV involves acquiring an existing company or asset from a listed company), there might be a requirement for the listed company to make public disclosures about the JV, including its identity and other relevant details.

As a general rule, the SET Information Disclosure Guidelines require the disclosure of a transaction only when such transaction is confirmed. In practice, therefore, a listed company should disclose the transaction once any definitive agreement is signed. However, there are exceptions under which the company could prematurely disclose such information regarding a deal – for example, when incorrect information that affects

the stock price is leaked to the public. However, not all JVs involving a listed company are subject to mandatory disclosure.

5.3 Set-Up

Setting up a JV vehicle using a private limited company in Thailand is relatively straightforward. Below is a brief overview of the process for incorporating a JV company in Thailand.

Step Zero: Negotiating and Finalising the Terms of the JV Agreement

This is an important step which needs to be performed before incorporating the JV company, as one of the documents to be filed for incorporation – namely the company’s AOA – will need to reflect the terms of the JV agreement between the parties.

Step One: Preparing the AOA

Once the JV agreement is finalised, the parties will have to prepare the AOA for the JV company, which should reflect the terms of the JV agreement as much as is practicable. Care should be taken in terms of what will be included in the AOA, given that certain terms of the JV agreement may be commercially sensitive (eg, deadlock resolutions mechanism involving predetermined figures). Given that the AOA must be filed in the Thai language, if the JV agreement is in any other language, this process will involve translation into Thai.

Step Two: Preparing for Incorporation

This step includes all preparatory work that must be completed before the actual incorporation, such as:

- gathering and filling in all information required in the various incorporation forms;
- holding the statutory meeting; and

- the payment of capital contributions by the shareholders.

Step Three: Incorporation at the Ministry of Commerce (MOC)

Assuming all requisite documents are in order, the actual incorporation can be completed in one day. This mainly involves the filing of all relevant documents and responding to questions from the MOC official (if any). In the authors' experience, most of the time required for this step concerns the MOC official's review of the JV company's AOA, which, in some cases, may extend the incorporation process to another business day. For instance, if the JV company's AOA is unconventional, the official review may not be completed in one day or the AOA may be rejected outright by the MOC official.

6. The JV Agreement

6.1 Agreement Documentation

Regardless of the form of the JV vehicle, the terms of the JV agreement should generally cover certain basic terms (although they may be termed differently for different types of vehicles).

- Capital structure and financing – as a minimum, it is necessary for the parties to agree on how the JV will be financed – eg, if the JV vehicle is a private limited company, this usually includes specifying the equity and debt contributions from each participant and external financing.
- Expertise contributions – where applicable, the parties may outline the expertise and other non-monetary contributions each party will bring to the JV.
- Decision-making – regardless of the vehicle type, the parties should at least agree on the decision-making process and requirements.

For instance, if the shareholding/stake held by each participant is different in size, the agreement should specify which matters can be decided by the majority participant and which would require mutual consent of all participants (generally known as reserved matters).

- Transfer restrictions – JV agreements usually include restrictions on the ability of each participant to transfer its interests in the JV, including the share transfer restrictions and the participants' pre-emptive rights. This may include other exit rights such as put and call options, and drag-along and tag-along rights.
- Non-competition – with limited exceptions, JV agreements typically prevent any JV participant from engaging in a business that competes with the JV, though sometimes with an exemption for where new opportunities are first offered to, but rejected by, the JV. Another common exemption is for an existing business carried out by any JV participant at the time of the signing of the agreement.
- Deadlock resolutions – well-drafted JV agreements should provide clear and automatic deadlock resolution mechanisms, minimising discretionary elements, although in some cases the parties may leave these provisions vague on purpose. Deadlock triggers are often limited to deadlocks on reserved matters. Effective resolutions typically involve a buyout by a JV participant with clear mechanics on price determination (eg, with a fixed formula or binding determination by an independent third party) or a joint sales process to a third party.
- Termination of the JV – for private limited companies used as JV vehicles, termination is usually triggered when only one of the JV participants holds all the shares or when the company is wound up. The consequences of termination are straightforward in the case

of a private limited company – eg, pro rata distribution of the company’s assets following liquidation when the JV is still owned by all JV participants at the time of termination. For unincorporated JVs, the consequences of termination may vary depending on the nature of the JVs (eg, the parties’ contributions).

6.2 Decision-Making

In a two-party JV (which, in the authors’ experience, is the most common JV arrangement), the decision-making process is largely influenced by the nature and level of control (in particular, the relative shareholding) held by each party.

In JVs with equal or near-equal shareholdings, a common arrangement is joint control where practically all matters require mutual agreement between both parties (whether through the approval of directors nominated by each party or a consensus in shareholders’ meetings), although, for smooth operation, either party may be authorised to handle certain day-to-day matters independently.

In JVs where one party holds significant majority control (eg, 70% of the voting power), the majority shareholder typically holds the final decision-making authority on most operational matters. However, all fundamental matters (eg, those relating to shareholders’ rights, the capital structure of the company, etc) and almost all significant financial matters (eg, taking out a loan exceeding a certain amount) would fall under “reserved matters”, which require the approval of the minority shareholder. The extent of the list of reserved matters depends on multiple factors, including the shareholding ratio and negotiation power.

In a JV with no participant having majority control (eg, a tripartite JV), most decisions are made

by two or more participants holding majority control where the agreement may require consensus for some *fundamental* reserved matters (usually dealing with the fundamental rights of shareholders – eg, changes to the capital structure, dividend distribution).

In any case, Thai law sets a minimum 75% voting threshold (in shareholders’ meetings) for certain fundamental matters, such as:

- amendments to the AOA;
- changes to the registered capital;
- amalgamation or merger;
- winding up; and
- conversion into a public limited company.

6.3 Funding

JV funding can vary significantly, with no specific pattern. The authors have seen all sorts of capital structure, ranging from pure equity JVs (most common in new and high-risk businesses or those with uncertain cash requirements) and highly leveraged JVs (particularly in the energy sector and in businesses with substantial capital needs and with reliable cashflows). Loans are often initially provided by the JV participants themselves in the form of shareholder loans.

Unless there is a well-defined plan for future funding (equity or debt) requirements, parties typically leave this matter for future mutual decisions to be made as a reserved matter. To the extent any party fails to contribute as agreed, an appropriate mechanism should be put in place to address the default. For instance, if the funding is through equity, the defaulting party may face equity dilution, as the other party takes up the unfunded portion. Additionally, other remedies may be applied, such as implementing a put or call option with a premium or discount, depending on the circumstances.

6.4 Deadlocks

Regarding deadlock resolution in JV settings, the vast majority of JV agreements would first refer any deadlock to discussions between the senior management of the parties. Some JV agreements do not address any further process if the senior management fails to reach an agreement. More commonly, more comprehensive procedures are outlined, including a definitive end point where one or both parties can exit the venture.

The deadlock resolution mechanism can be designed to be as automatic as possible while minimising discretion on the part of the parties. This may involve the implementation of mechanisms such as put or call options, provisions such as Russian roulette and Texas shootout, or a joint sales process. These provisions are put in place to prevent the company from becoming non-operational due to a deadlock at the shareholder level.

6.5 Other Documentation

Depending on the deal structure and context, a JV formation may involve additional ancillary agreements, such as:

- asset transfer agreements;
- collaboration agreements;
- services agreements; and
- IP licensing agreements.

These agreements may be made between the JV company and one of the JV participants or its affiliate, or an unrelated third party. For instance, in a JV formed to establish and operate a hotel asset, one participant may own valuable hotel brands and operational know-how, while the other participant may own land in a strategic location and wish to also contribute financially. In such a scenario, it is common to have:

- a trade mark licensing agreement and a hotel management service agreement between the JV company and the brand owner; and
- a land lease agreement between the JV company and the landowner.

7. The JV Board

7.1 Board Structure

For a JV corporate entity, the composition of the board is structured based on the relative shareholdings of the participating parties. In 50:50 JVs, board seats are typically allocated equally, with neither party having a casting vote (through the chairman of the board). However, variations may arise when one of the parties intends to consolidate its financial statements with those of the JV company, where such party has to demonstrate a certain level of majority control over the JV company. In such cases, to satisfy the auditor's majority control requirements, the shareholdings may remain equal with the consolidating party holding a casting vote; otherwise, a nominal majority shareholding (eg, one share or 1% majority) may be introduced.

In other shareholding arrangements where one participant holds a significant majority shareholding, board seats are allocated in proportion to the shareholding ratio, or as close to proportional as is practically feasible. It is worth noting that privately held JVs usually have no independent directors, as their boards consist of representatives from the respective participating parties based on their shareholding proportions.

In Thailand, boards of directors do not have weighted voting rights. Such concept only exists in the form of dual- or multiple-class shares at the level of shareholders' meetings.

7.2 Directors' and Board's Duties and Functions

Under Thai law, the directors of a private limited company owe several duties to the company. In the JV context, principal duties include:

- duty of care – directors are required to exercise the same level of care and prudence that a reasonable and prudent businessperson in the relevant industry would exercise while managing a company;
- duty not to compete – unless otherwise approved by a shareholders' meeting, directors are prohibited from engaging in any business that has the same nature as, and that competes with, the business of the company, whether for their own benefit or for the benefit of a third party; and
- duty to implement shareholders' resolutions – directors are required to implement the resolutions passed at shareholders' meetings.

While the board of directors of a private limited company is permitted to delegate its functions to subcommittees, the foregoing duties inherently lie with the directors.

7.3 Conflicts of Interest

In a JV company, directors installed by one JV participant would usually have two roles – one as a director of the JV company and the other as a director or employee of the JV participant. This practice is not considered inappropriate – and in fact is fairly common. However, conflicts may arise when these directors need to make decisions regarding a transaction between the JV company and one of its shareholders, which could result in potential benefits for either party.

For example, consider the scenario where the JV company has entered into a service agreement with one of its shareholders, and the share-

holder has committed a material breach of its obligations, entitling the JV company to terminate the agreement. The directors nominated by the breaching shareholder may find themselves in a position of conflict – between the interests of the JV company and the breaching shareholder. While the laws that govern private limited companies do not explicitly deal with a director's conflict of interest in such situations, there are general grounds for derivative suits by shareholders, potentially exposing the directors to lawsuits. As a general principle, directors are expected to act in the best interests of the company. In practice, therefore, the board of a JV company would usually defer decisions on such matters to a shareholders' meeting (whose resolutions will have to be implemented by the board).

8. Intellectual Property and the JV

8.1 Key IP Issues

When establishing a JV company, various intellectual property (IP) considerations may arise, depending on the nature of the business and the transaction. In scenarios where the JV involves a new business venture without pre-existing IP, a crucial issue is determining the ownership of IP developed either by the JV company or jointly by the parties for the venture's purposes. Generally, the IP should be owned by the JV company, and this should be clearly stipulated in the JV agreement.

Conversely, for JVs that rely on existing IP, this may involve other IP issues such as proper valuation of the IP and the terms of IP assignment or licensing to the JV company. For the latter, a separate agreement between the JV company and the IP owner would generally be necessary.

In a well-drafted JV agreement where IP is significant for the JV or any of the parties, it is essential to set out how the JV company's IP will be dealt with at the end of the JV. For instance, the JV agreement may require a forced sale of the IP to one of the JV participants.

8.2 Licensing and Assignment

Where a JV requires the existing IP one of the JV participants, one issue that usually comes up is whether to license or assign such existing IP to the JV company. While there is no one-size-fits-all approach to this, as the decision would usually be influenced by various factors including transaction costs, the authors have observed two main approaches.

- The most common approach is IP licensing. This approach is often favoured when the IP owner wishes to maintain ownership and control over the IP, either for continued use or simply for ownership retention. With this approach, when the JV is terminated, the licensing agreement can be terminated accordingly, simplifying the process and possibly avoiding certain transaction costs that may be incurred with IP assignment and re-assignment.
- In some cases, existing IP may be assigned by a JV participant to the JV company. The adoption of this approach is mostly limited to situations where such existing IP was specifically developed for the JV (and both parties may have shared the development costs). In such situations, the complete transfer of IP ownership to the JV company might be more appropriate.

9. ESG and the JV

9.1 ESG Regulations and Developments Affecting JVs

Environmental, social, and governance (ESG) considerations can play an important role in the formation and operation of a JV. The term ESG can have varying interpretations, and from a legal standpoint, Thailand has historically operated under diverse and disparate laws and regulations concerning ESG matters, such as the various environmental and labour protection laws, albeit without a unified legal framework. However, this article will focus on ESG considerations that have garnered attention from companies, investors and regulators all over the world in recent years.

In terms of policy development, below are some recent examples of ESG-related policies laid out by different authorities, with some being non-mandatory government guidelines.

Thailand Taxonomy

On 30 June 2023, the Bank of Thailand (BOT) and the SEC introduced Thailand's first green taxonomy – Thailand Taxonomy Phase I. The taxonomy classifies environmentally sustainable economic activities and provides criteria and a guide for climate-aligned projects and assets with an aim of creating a unified framework for green financing and promoting capital flows to genuine green projects. This is intended for use by financial intermediaries and participants such as financial institutions, bond issuers, statistical agencies and investors. The project is divided into phases, with Phase I covering energy and transportation, and Phase II expected to cover the manufacturing, agriculture, real estate, construction and waste management sectors.

BOT Policy Statement

In February 2023, the BOT issued the *Policy Statement re: Internalizing Environmental and Climate Change Aspects into Financial Institutional Business*. This policy statement outlines the BOT's expectations for financial institutions (including their group companies) in Thailand to, among others, assess environmental impacts in their decision-making process.

Green Bonds

In the bond market, the SEC has been actively promoting the issuance of green bonds, social bonds, sustainability bonds and sustainability-linked bonds, and has published various guidelines over the years. The specific requirements for these bonds are focused on disclosure standards which borrow from international standards such as the International Capital Market Association Bond Principles (ICMA).

Carbon Credit

The Thailand Voluntary Emission Reduction Program (T-VER) is a greenhouse gas (GHG) emission reduction initiative created by the Thailand Greenhouse Gas Management Organization (TGO). It aims to encourage all sectors to voluntarily engage in reducing greenhouse gas emissions and allows participants to trade emission reduction units or carbon credits known as "TVER" within the voluntary domestic market. Rules and procedures have been established for project development, GHG emission reduction methodologies, and certification of carbon credits. All projects participating in T-VER must contribute to GHG emission reduction or carbon sequestration within Thailand.

ESG considerations and measures in the JV context are context-dependent, influenced by key factors such as the industry and the JV participants' commitments. For instance, JVs

in the renewable energy sector are often inherently concerned with ESG considerations due to green financing requirements and carbon credit benefits, requiring compliance with specific ESG measures. Moreover, ESG-conscious JV participants may impose specific ESG requirements on JVs and their JV partners in emerging economies such as Thailand, often stipulated in the JV agreement as representations and undertakings of compliance with international laws and standards on, for example:

- environmental protection;
- human rights;
- no involvement with sanctioned entities; and
- anti-bribery and anti-corruption.

10. Completion of the JV's Purpose, Winding Up and Redistribution of JV Assets

10.1 Termination of a JV

In Thailand, JVs are usually established with no fixed expiry date, and their termination occurs when:

- one party holds all the shares in the JV company;
- the agreement is terminated; or
- the company is wound up.

The specific matters to be addressed upon termination of the JV would depend on how the JV is terminated. The authors have observed the following general patterns.

- Share sale – a JV may be terminated because one party sells (or is forced to sell through a call option) its shares to the other party. As the JV company itself is not dissolved and liquidated, matters to be dealt with in this

scenario would be largely limited to the sales process in relation to the shares held by one party and valuation thereof.

- Joint sale – both parties may agree to jointly sell their shares in the JV company to a third party, often through a bidding process. Matters to be addressed in the JV agreement include defining the trigger points for initiating the sales process and outlining the rights and obligations of the parties with respect to the sales process.
- Dissolution – parties may agree to wind up and dissolve the JV company (which may not be a common approach to deadlock resolution) in the case of an unresolved deadlock. This would entail selling the JV company's assets, either to one of the parties or to a third party.

10.2 Transferring Assets Between Participants

The termination of a JV rarely involves asset transfers between the JV company and JV participants, but when it does (eg, when the JV agreement specifically requires such transfer upon JV termination but before the company's liquidation) there are several considerations to take into account – two of which are as follows.

- Legal and regulatory compliance – the parties have to ensure that all asset transfers comply with relevant laws and regulations, particularly when they relate to a transfer of land or other type of asset for which there are regulatory ownership restrictions or requirements for government approvals.
- Valuation – asset valuation can become a critical and contentious issue at the end of a JV. Key considerations include establishing fair market value, seeking expert opinions and addressing conflicts of interest (if any). A well-drafted JV agreement should provide clear valuation procedures and guidelines and a dispute resolution mechanism.

From a legal perspective, there is no difference between assets contributed by a participant and those originating from the JV itself, as both are treated as the JV company's assets. However, in terms of asset valuation, for the former category of assets, the parties may rely on the original valuation at the time the assets were transferred to the JV (at the outset) as a starting point for the valuation.

Trends and Developments

Contributed by:

Siregran Sakuliampaiboon and Saran Sajjanukool
Weerawong C&P

Weerawong C&P is an independent Thai law firm established on 1 January 2009. Formerly the Bangkok office of White & Case LLP, which commenced business in Thailand in 1993, it is now one of Thailand's largest independent law firms, with a team of more than 100 legal professionals. Weerawong C&P represents purchasers, sellers, advisers, lenders and financial intermediaries in domestic and cross-border M&A, leveraged buyouts, joint ventures and di-

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Authors



Siregran Sakuliampaiboon specialises in M&A, the establishment of business in Thailand, corporate structuring, and corporate management and control, focusing on cross-

border transactions. She has extensive experience leading legal due diligence for M&A transactions, and in drafting and negotiating various types of commercial contracts for M&A transactions. She provides legal advice to a wide variety of multinational clients in a broad range of sectors. Siregran obtained an LLB degree (First Class Honours) from Chulalongkorn University, an LLM degree (Merit) from London School of Economics and Political Science (LSE), and an LLM degree from the University of Cambridge, UK.



Saran Sajjanukool is an associate in the M&A practice group at Weerawong C&P. He advises clients in a wide range of industries, including the real estate, consumer products,

energy and utilities sectors. He also has experience in capital markets, corporate governance, company secretary, labour matters and foreign direct investment. Saran obtained an LLB degree (First Class Honours) from Chulalongkorn University. He is a Thai barrister-at-law and a notarial services attorney.

Weerawong, Chinnavat & Partners Ltd

Weerawong, Chinnavat & Partners Ltd
22nd Floor, Mercury Tower
540 Ploenchit Road
Lumpini, Pathumwan
Bangkok 10330
Thailand

Tel: +66 (0)2 264 8222
Fax: +66 (0)2 657 2222
Email: info@weerawongcp.com
Web: www.weerawongcp.com



Introduction and Overview

Joint ventures (JVs) are widely adopted by local and foreign business operators in Thailand for various purposes. They are often the preferred vehicle for:

- short-term investment in a specific project;
- long-term investment in a sustainable business; and
- investing in a new business (greenfield) or in an existing business (brownfield).

JVs allow a participant to benefit from the know-how, resources and expertise of other JV participants, as well as from market access and fundraising. Notably, JVs are utilised by foreigners for investing in certain local businesses that are subject to foreign ownership restrictions and are considered the most common form of partnership between local and foreign corporations.

In Thailand, JVs are usually set up in the form of a private limited liability company, which allows more flexible corporate governance compared to that of a public limited liability company. The JV participants generally invest their respective

portions of shares in the JV company, and concurrently enter into a shareholders' agreement or JV agreement prescribing the terms and conditions in relation to the governance of the JV company, as well as other rights and obligations of the shareholders or JV participants.

Generally, the JV participants have the freedom to agree on their respective responsibilities and various aspects of the corporate governance of the JV company (including voting rights, veto rights, reserved matters, dividends, share transfer restrictions, deadlock resolution, future funding, exit strategies, allocation of liquidation proceeds), provided that such provisions do not contradict any mandatory provisions of the Civil and Commercial Code (eg, minimum share price payment, meeting notice period, number of votes required for special resolution on certain important matters, statutory reserve).

The contractual corporate governance arrangement in the JV agreement should be specified in the articles of association of the JV company to ensure its enforceability against third parties. However, certain sensitive commercial terms (eg,

put and call options, exit strategies) are usually omitted from the articles of association as they will be registered with the Ministry of Commerce and accessible to the public.

The shareholders' agreement is often accompanied by certain ancillary agreements relevant to the transaction or to the JV company, such as:

- a shareholder loan agreement;
- a share purchase agreement;
- a share subscription agreement;
- a service agreement;
- a collaboration agreement; and
- a business transfer agreement.

This is dependent on the deal structure, the participants' contributions and the nature of the transaction.

Economic Trends and Key Sectors for JVs

JV arrangements are widely adopted and utilised across all business sectors, especially in industries that require a substantial amount of funding or that face legal constraints on foreign ownership. Over the past few years, the authors' firm has been actively involved in numerous JV projects, especially in the real estate (residential condominiums and mixed-use real estate projects), food and beverage, and transportation and logistics sectors. This can be attributed, in part, to the existing legal restrictions on foreign ownership and other economic factors – for instance, the conservative lending policies of financial institutions that compel local business operators to seek alternative funding through JVs. Other noteworthy sectors leveraging JVs include financial services, energy, industrial manufacturing and automotive industries.

Government Support

The Thai government promotes investment by Thai and foreign investors through several measures, the most significant and notable of which are the incentives granted by the Board of Investment of Thailand (BOI) under the Investment Promotion Act BE 2520 (1977) (the "Investment Promotion Act"). Such incentives include tax incentives (eg, exemption or reduction of import duties on machinery or raw materials, exemption of corporate income tax on net profit and dividends) and non-tax incentives (eg, permit to bring skilled workers and experts into Thailand to work in promoted activities, to own land, and to operate such promoted activities without being subject to foreign ownership restrictions under the Foreign Business Act BE 2542 (1999) (FBA)).

The BOI regularly updates the promoted activities to align with current trends and emerging industries – for example, by adding new business categories for those utilising modern and advanced technology – and establishes guidelines for promoted activities to facilitate the decision-making process for potential investors. While these incentives primarily focus on promoting new investment in promoted activities and offer the benefit of bypassing the foreign business restrictions under the FBA, they can also be attractive for foreign investors seeking an opportunity to establish a presence in Thailand with local Thai partner(s) via a JV in a new project.

Regulatory Framework

For a JV in the form of a limited liability company, the key governing laws are the following.

The Civil and Commercial Code

The main legal framework governing the incorporation of private limited companies, capital

structure, corporate governance, and the rights and obligations of directors and shareholders (such as shareholders' rights and directors' fiduciary duties) is found under the corporate law section of the Civil and Commercial Code (CCC). The Department of Business Development, Ministry of Commerce hosts the central company registry and serves as the regulator responsible for overseeing and implementing this law.

The Securities and Exchange Act and the Public Limited Companies Act

Where a JV participant is a listed company, the JV participants may also have to take into account the provisions of the Securities and Exchange Act BE 2535 (1992) (the "SEC Act") and its subordinate regulations, although their application is generally limited in scope and relevance in this context. The primary focus is on disclosure requirements imposed on listed participants. The Office of the Securities and Exchange Commission is the primary regulator in this regard. In addition, given these listed participants are, by definition, public companies, another piece of legislation to consider is the Public Limited Companies Act BE 2535 (1992) which governs the corporate approval aspect at the public JV participant level.

Where there is participation of a foreigner in a JV company, the foreign-ownership restrictions under the FBA and the Land Code, as well as exemptions under other applicable laws (eg, the Investment Promotion Act and the Industrial Estate Authority of Thailand Act BE 2522 (1979)) and other restrictions under specific laws governing the business (eg, laws governing insurance businesses, financial institutions and telecommunications businesses) should also be considered.

While the formation of a JV is not currently regulated by the merger control provisions of the Trade Competition Act BE 2560 (2017) (the "Trade Competition Act"), the creation of a JV by acquiring an existing business may be deemed an indirect acquisition of shares or assets of the target company and the act could potentially apply.

As for the choice of dispute resolution, arbitration (rather than through Thai courts and local judicial systems) may be the more preferred method for a JV between local and foreign JV participants. Therefore, the Arbitration Act BE 2545 (2002) and applicable arbitration rules should also be considered. If arbitration is chosen as a dispute resolution method, the Arbitration Rules of the Singapore International Arbitration Centre and the International Chamber of Commerce are widely adopted.

A critical aspect of ensuring a successful JV is to establish a clear and viable exit strategy well in advance. Although one always looks forward to seeing the sustainable growth of the JV, planning for the end of the JV from the very beginning allows all JV participants involved to have a comprehensive understanding of how the venture will conclude and reduces the risk of potential conflicts and uncertainties in the future. In addition to traditional exit strategies, such as a buyout between the participants or sale to a third party, initial public offerings (IPOs) and sales to a real estate investment trust (in the case of real estate projects) are becoming more common. JV participants may wish to explore the applicable requirements under the SEC Act, the Trust for Transactions in the Capital Market Act BE 2550 (2007), and other applicable regulations to verify whether any such exit strategy would be a viable and realistic solution.

Recent and Potential Changes in Law

Merger

Previously, the CCC stipulated an amalgamation as the only type of business consolidation between two or more private limited liability companies (apart from a business transfer, which is governed by and based on a contract between the transferor and transferee rather than as a transfer by operation of law). The CCC has recently been amended to allow a merger as an alternative form of business consolidation between two or more private limited liability companies where one of them would survive the consolidation process and acquire all the rights and obligations of the other consolidating companies, as opposed to an amalgamation where all consolidating companies would be merged and form an entirely new entity. This change was introduced with the aim of minimising the processes required for transferring the rights and obligations of the consolidating companies, particularly those related to registration and filing with the relevant authorities (eg, land office and other governing bodies that issue applicable business licences to the consolidating companies) which the business operators undergoing an amalgamation would have to face.

To elaborate, in the case of a merger, the assets and licences held by the surviving company would generally not be affected, unlike an amalgamation which would result in an entirely new entity and would generally require registration and filing to transfer the applicable assets and licences of all consolidating companies. As such, JV participants may wish to consider a merger as another option for transferring the rights and obligations of an existing entity to a JV company, as an alternative to a business transfer or amalgamation.

Minimum number of shareholders

The Thai Civil and Commercial Code previously required a private limited liability company to have a minimum of three shareholders. This could pose a burden for JV participants, as they would have to nominate individuals or affiliates to hold nominal shares in the JV company in order to meet this legal requirement. However, the CCC has recently been amended, and the minimum number of shareholders for a private limited company has been reduced to two shareholders. This helps alleviate the burden of designating a minority shareholder to satisfy such a legal requirement, especially for foreign investors who do not have a presence in Thailand. By introducing an enhanced shareholding structure aimed at eliminating minority shareholders, a JV company can proactively mitigate the potential risks associated with shareholder disputes as well as administrative complexities. This strategic implementation becomes particularly pivotal if the minority shareholder happens to be an individual who eventually disengages from the company.

Electronic meetings

Although a board of directors' or shareholders' meeting can legally be held electronically since 2014, it has not been a preferred method as the previous statutory requirement was that at least one third of the attendees had to physically attend the meeting at the same place. However, following the outbreak of the COVID-19 pandemic and the associated ramifications, a new law was enacted to remove such requirement, and electronic meetings have quickly and widely been adopted by companies in Thailand to hold their board and shareholders' meetings.

The authors have observed an increasing trend of expressly including provisions allowing electronic meetings in JV agreements. This reduces

the need for a lengthy advance meeting notice, alleviates the burden of designating a local director or appointing a proxy to physically attend the shareholders' meeting, and reduces the cost of convening such meetings. Also, JV participants have more freedom to nominate directors who are suitable for the JV based on their capability and expertise, rather than being concerned with their physical location or country of domicile.

Potential change to the merger control regime

Currently, the formation of a JV for investing in a new business is not regulated by the merger control provisions of the Trade Competition Act, although establishing a JV by acquiring an existing business may be deemed an indirect acquisition of shares or assets of the target company and may be subject to the Trade Competition Act. However, the Trade Competition Commission of Thailand is currently undergoing a review and revision of the merger control regime, with the revised scheme anticipated to potentially include JVs.

Future Trends and Prospects

It is expected that JV activities in Thailand will continue to increase as businesses recover from the impact of the COVID-19 pandemic and adjust their investment plans and strategies accordingly, especially after the outcome of the Thai general election and the formation of the new government. The key sectors expected to see increased JV activities aligned with the prevailing trends in M&A include:

- technology;
- telecommunications;
- financial services;
- energy;
- health;
- real estate;

- industrial manufacturing; and
- automotive.

This is partially driven by technological advancements, emerging businesses, and the need to adapt to evolving and constantly shifting markets and consumer demands.

Alongside various economic and business considerations, the long-term growth of JV activities in Thailand will be propelled by technological advancements that facilitate collaboration between local and foreign partners. The foreign ownership restrictions under the current applicable laws, which are expected to remain unchanged, remain significant factors contributing to and reinforcing the popularity of JVs between local and foreign corporations.

The role of JVs in promoting sustainable business development, including environmental conservation, social responsibility, anti-corruption and ethical business practices, is another noteworthy rising trend that is often discussed between JV participants, especially those involving foreign investors or local listed companies or their subsidiaries.

Conclusion

JVs play a vital role in the Thai market as a preferred investment vehicle for both local and foreign business operators. They offer opportunities for collaboration across various sectors and enable foreign investors to overcome existing legal foreign ownership restrictions, thereby allowing market access. Although no drastic or paradigm-shifting changes to the law have been introduced recently, the recent changes – such as the acceptance of mergers as an alternative to amalgamation, a reduction in the minimum number of shareholders, and the adoption of electronic meetings – indicate a progressive

Contributed by: Siregran Sakuliampaiboon and Saran Sajjanukool, **Weerawong C&P**

approach by the Thai legislature and government to facilitate business activities and make doing business easier.

Looking ahead, JV activity is expected to increase, driven by the recovery from the COVID-19 pandemic and the introduction of emerging businesses. JVs will be essential for business operators to gather know-how, resources and expertise in a timely manner and to adapt to the evolving and constantly shifting market and new disruptive technologies. As businesses adapt to changing circumstances and leverage JVs for strategic growth and development, this collaborative approach is expected to remain an essential element in the Thai business landscape for the foreseeable future.

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