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Chapter 65

THAILAND

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I OVERVIEW OF M&A ACTIVITY

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

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

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

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

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Schedule 3 of the FBA sets out three 'lists' of business categories in which the participation of foreigners is either prohibited or restricted. Foreigners are prohibited from participating in the businesses specified in List 1, which includes antiques trading, broadcasting, farming and forestry. Foreigners are restricted from participating in businesses specified in List 2 unless they obtain a foreign business licence (FBL) from the Ministry of Commerce and approval from the Thai Cabinet. List 2 includes activities that are concerned with national safety, agriculture, arts and culture, and natural resources and the environment. Finally, foreigners are restricted from participating in the businesses specified in List 3 unless they obtain an FBL from the Director-General of the Department of Business Development with the approval of the Foreign Business Committee. List 3 contains a total of 21 categories of restricted businesses, including fisheries, forestry, accountancy, engineering, construction (with certain exceptions), retailing and wholesaling (with certain exceptions), advertising, hotel operation (excluding hotel management), tourism, sale of food and beverages, and the catch-all category known simply as 'other services'.

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

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

Incentives offered by the BOI to eligible foreign investors include majority shareholding by foreigners, acquisition of land for industrial use by foreign corporations, exemptions from or reductions of import duties on machinery and raw or essential materials, exemptions from or reduction of corporate income tax up to a maximum of eight years, and financial assistance in the installation of electrical power and water utilities (See further discussion on BOI incentives in Section V, *infra*).

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

In late 2012, the BOI announced sweeping changes to its investment incentive programme.

Rationale for change

In setting forth the rationale for revising Thailand's investment promotion strategies, the BOI cited the need for Thailand to become more competitive in key industries prior to the commencement of the ASEAN Economic Community (AEC), which is slated for

2015, as well to eradicate a number of key problems facing the country – including low competitiveness, low research and development expenditure, growing labour shortages, increasing geographical restrictions on heavy industry, as well as the country's limited energy resources. The new incentive scheme also takes into consideration the reduced rates of corporate income tax (from 30 per cent to 23 per cent in 2012, and to 20 per cent in 2013) as well as the reduction in import duties resulting from the introduction of several free trade agreements.

Focused and prioritised investment promotion

Currently, there are 240 activities that are eligible for BOI promotion. Under the new rules, 80 of these activities will no longer be eligible for BOI promotion – although projects currently undertaking these 'exit activities' will likely be grandfathered and able to retain existing privileges. The BOI has indicated that the 80 exit activities include those activities that employ low technology, non-complex production processes, are labour intensive, require intense energy consumption, are environmentally unfriendly, or are sufficiently developed that they no longer require promotion.

The new scheme will focus on industries rather than on individual activities. The 10 industries that will be promoted under the new scheme are basic infrastructure and logistics, basic industry, medical devices and scientific equipment, alternative energy and environmental services, services that support the industrial sector, advanced core technologies, food and agricultural processing, hospitality and wellness, automotive and other transport equipment, and electrical and electrical appliances.

Merit-based incentives

Incentives under the new scheme will comprise two elements – basic incentives for eligible projects and additional merit-based incentives. These additional merit-based incentives, which will be given to those projects that contain a research and development component, to those that promote environmentally friendly processes, and to those that are based in certain key industrial clusters, are aimed at encouraging investors to improve their capabilities and to facilitate a general upgrade of Thailand's industrial sector. Such merit-based incentives will include an increase in the number of years for which a particular project is eligible to receive exemptions from corporate income tax and other benefits.

New regional clusters

Under the current BOI investment programme, geographic zones determine the level of entitlement to incentives. Although this approach has been successful, it has resulted in a concentration of projects in certain areas, particularly in the east of Thailand and the areas surrounding Bangkok, such as Rayong, Chonburi, Ayutthaya, Pathumthani and Samutprakan. Under the new scheme, the BOI plans to promote industrial clusters in newly designated regions and in border areas in order to facilitate the development of infrastructure and human resources, reduce public utility costs and promote the economy in these new areas.

Inbound and outbound investment

The BOI has traditionally focused on inbound investment only. Under the new scheme, and having regard to the fact that outbound investment by Thai companies is necessary to enhance industrial competitiveness, to overcome domestic resource limitations and to seek new business opportunities, the BOI will now focus on both inbound and outbound investment. The BOI is expected to be the primary body to formulate national strategies and target industries, and to develop supporting measures and incentives for Thai companies to invest overseas.

Timing and implementation

The BOI has indicated that the new investment regime will come into effect at the beginning of 2015. In addition, the BOI has confirmed that investment applications submitted until the end of 2014 will continue to receive the incentives available under the current geographical zone-based investment policies.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Thailand, with one of the largest economies in South East Asia, has attracted foreign investors for many years. When looking at M&A deals in Thailand people tend to focus on foreign investors acquiring Thai businesses or investing in manufacturing or similar facilities. In 2012, cash-rich Thai businesses started looking overseas to invest and to diversify their business footprints. Given this recent development, we focus our initial discussion below on the outbound transactions that dominated the M&A market in 2012 and early 2013. According to Thomson Reuters, Thailand M&A deals in 2012 were valued at approximately US$18.7 billion.

i Outbound transactions

In 2012 and early 2013, large Thai conglomerates have actively sought to expand their presence outside of Thailand, with a particular emphasis on counties in Southeast Asia and the People's Republic of China. These Thai conglomerates have been party to a number of high-profile M&A transactions in which strategic acquisitions are, in most cases, selected for the synergistic opportunities that are created with their current businesses. Several examples of outbound M&A transactions are as follows.

Thai Beverage Public Company Limited/Fraser and Neave Limited

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

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

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

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

PTT Exploration and Production Public Company Limited/Cove Energy Plc

PTT Exploration and Production Public Company Limited (PTT), Thailand's largest oil and gas company by market capitalisation, won a bidding war against Royal Dutch Shell for the rights to acquire Cove Energy Plc. The bidding took place over several months and, similarly to what occurred in the Singapore acquisition of Fraser and Neave, the UK Takeover Panel ordered the launch of a formal takeover auction to remove uncertainty on the acquisition of Cove. PTT's offer of approximately US$1.91 billion led Shell to drop out of the running for the acquisition and negated the need for the auction process to occur. Cove Energy owns an 8.5 per cent stake in the Rovuma Area 1 natural gas field located in Mozambique with estimates that the Rovuma Area 1 field contains upwards of 30 trillion cubic feet of natural gas.

Berli Jucker Public Company Limited/Thai An Vietnam Joint Stock Company

BJC International Company Limited, a wholly-owned subsidiary of Berli Jucker Public Company Limited acquired a 65 per cent interest in Thai An Vietnam Joint Stock Company, which in turn holds 100 per cent of Phu Thai Group Joint Stock Company, one of Vietnam's leading companies engaged in distribution, import and export and wholesale and retail of consumer products. As a consequence of the transaction, Berli Jucker was also able to obtain a significant number of convenience stores across Vietnam that were previously part of a joint venture with a Japanese convenience store operator and Phu Thai Group. The strategic acquisition enables Berli Jucker to expand its sales and distribution channels in Vietnam.

ii Inbound transactions

Thailand has long been a favoured destination for foreign investors and 2012 was no exception. After a slowdown in 2011, due mostly to catastrophic floods affecting Thailand's capital city Bangkok and the surrounding provinces, where M&A activity bottomed out at approximately US$5 billion, Thailand came back strongly with a busy 2012. One of the most prominent inbound M&A deals is described below.

Prudential Plc/Thanachart Bank Public Company Limited

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

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

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Alternative energy sources, particularly solar power, and the investment that follows the implantation of an alternative energy project, continue to be a hot industry in Thailand. Thailand has traditionally had to, and continues to rely on, imported energy to meet the demands of domestic consumption. For example, in June 2013, the Electricity Generating Authority of Thailand (EGAT) entered into a memorandum of understanding with a state-owned Chinese power company to supply electricity to Thailand. The electricity will be supplied from hydroelectric power plants in China. The dependence on imported energy has led to disruptions in supply as demand has increased an average of four percent per year.

A senior official at EGAT predicts that Thailand's energy needs will almost triple from 27,600MW to 70,000MW in only the next 15 years.

The Ministry of Energy, Department of Alternative Energy Development and Efficiency (DEDE) issued a development plan for renewable and alternative energy in which the DEDE maps out strategies for the development and promotion of renewable and alternative energy. The key issues include: creating investment incentives for the private sector to invest in renewable and alternative energy; improving the energy infrastructure system to accommodate renewable and alternative energy sources; and educating the Thai population on the benefits of developing renewable and alternative energy sources. There are a number of established Thai companies, both public and private, that may prove to be attractive acquisition targets as Thailand moves forward in the renewable and alternative energy field.

Part of DEDE's plan is to promote solar energy at the community level through the establishment of rooftop solar PV systems that could generate at least 1,000MW of power. The plan would include installing solar panels on office buildings, housing projects and government buildings, reducing the need to rely on imported energy.

The BOI, as the government agency charged with promoting both domestic and foreign investment in various industries, including manufacturing, introduced a series of special tax incentives under its Investment Policy for Sustainable Development programme. The purpose of the programme is to encourage Thailand's competitiveness in science and technology and to improve manufacturing quality and reduce the environmental impact of manufacturing operations. This policy continues to give special incentives to activities related to energy conservation and alternative energy, as well as activities related to eco-friendly materials and products.

According to the BOI, incentives under this policy include offerings of an import duty exemption on machinery, an eight-year exemption on corporate income tax, a 50 per cent reduction of corporate income tax for five years after the expiry of tax holiday and deductions for transportation, electricity, water and infrastructure installation costs. The BOI further introduced additional measures to promote energy conservation, alternative energy utilisation or reduction of environmental impact for existing projects by offering exemption of import duty for machinery brought in for existing production lines to help save energy, to change from fossil energy to alternative energy, or to reduce the negative impact on the environment.

With the Thai government taking steps necessary to facilitate renewable and alternative energy, we expect this sector to remain active and open to investment from abroad as investment opportunities become more financially viable.

VI EMPLOYMENT LAW

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

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

Despite dismissing the fears of Thai businesses, however, the Thai government introduced several measures to offset any real or perceived impact of the minimum wage increase. These included a significant reduction in corporate income tax from 30 per cent in 2011, to 23 per cent in 2012 and 20 per cent in 2013 and 2014.

VII TAX LAW

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

Interestingly, this reduction in withholding tax under the Taiwan DTA will also have an impact on Thailand's DTA's with Mauritius and the UAE – both of which contain provisions stating that the applicable withholding tax on dividends shall be equal to the rate stated in the DTA (which in both cases is 15 per cent) or any lower rate of withholding tax agreed by Thailand in any subsequent DTA with any other country. Therefore, the rates of withholding tax applicable to Mauritius and the UAE will also now be reduced from their current rates of 15 per cent to 5 per cent.

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

IX COMPETITION LAW

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

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

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

However, on 6 June 2013, the TCC approved certain pre-merger notification requirements in respect of the following:

a the merger of businesses that have an aggregate market share in any market for any goods or services before or after merger of 30 per cent or more, and had total sales (turnover) or income in the preceding year of 2 billion baht or more; and

b the acquisition of shares with voting rights accounting for at least 25 per cent of the total shares of a public company, or 50 per cent of a limited company, and the acquisition resulting in the business of a company or both companies having an aggregate market share of 30 per cent or more in any market of any goods or services before or after the acquisition, and a total sales volume (turnover) or income in the previous year of at least 2 billion baht.

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

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

It is not possible to predict when these notifications will be drafted, approved by the TCC and published in the Government Gazette. However, there is cautious anticipation that Section 26 will be able to be enforced either this year or in 2014.

IX OUTLOOK

Thailand has experienced unprecedented M&A activity over the past 18 months – both inbound and outbound. This activity has been propelled by numerous factors including a stable political environment after years of turmoil, an attractive stock market, and inexpensive financing support from local and international banks.

Foreign direct investment in Thailand is at record levels. The BOI reported that in 2012 there were 1,584 investment applications by foreign capitalised companies with a total aggregate investment of 648 billion baht, up 64 per cent compared to 2011. And it appears that 2013 will be another record year. For the period between January and April 2013 there were 407 investment applications by foreign-capitalised companies with a total aggregate investment of 224.3 billion baht, up 42 per cent compared to the same period in 2011.

There are a number of other factors that have contributed to Thailand's M&A success over the past 12 months. In June 2012, the World Bank ranked Thailand 18th in the world in its Ease of Doing Business Index. The Index ranks a total of 185 countries with reference to 10 topics important to foreign investors, namely starting a business, dealing with construction permits, registering property, getting credit, protecting investors' rights, paying taxes, trading across borders, enforcing contracts, resolving insolvency and getting electricity. It is also important to note that Thailand ranked 13th in the world in the category of protecting investors' rights – an issue of critical importance to foreign investors.

In addition, Thailand is adept at meeting the basic needs of the foreign investment community. Apart from having a strong economy, a legal system that is fully functioning and transparent, and a government that is highly supportive of foreign investment, the investment incentives granted by the BOI are generous, labour is cost-efficient, and Thailand's infrastructure is world-class.

As the most recent statistics clearly show, there is every reason to believe that the upswing in M&A activity will continue into the second half of 2013 and into 2014.

Appendix 1

ABOUT THE AUTHORS

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Mr Troy Schooneman is a partner of Weerawong C&P, and primary contact for the firm's international practice. He has extensive experience in general corporate, mergers and acquisitions, financing and development, and project and corporate financings. Previously, Troy was a partner of White & Case (Thailand) Limited, and specialises in advising a broad spectrum of Thai and international clients on transactions in Thailand. He obtained a BA and an LLB degree from Monash University, Australia, and is qualified in Australia, Hong Kong and England. He is also fluent in Thai.

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