



**COUNTRY
COMPARATIVE
GUIDES 2024**

The Legal 500 Country Comparative Guides

Thailand PRIVATE EQUITY

Contributor

PDLegal LLC

PDLEGAL

Papon Charoenpao (Paul)

Partner | paponc@pdlegal.com.sg

This country-specific Q&A provides an overview of private equity laws and regulations applicable in Thailand.

For a full list of jurisdictional Q&As visit legal500.com/guides

THAILAND PRIVATE EQUITY



1. What proportion of transactions have involved a financial sponsor as a buyer or seller in the jurisdiction over the last 24 months?

Whilst the number of private transactions that are not made public may be difficult to ascertain, there is an increase in the number of transactions and IPOs that involve a financial sponsor as a buyer or a seller.

This is true across all sectors, however we see a clear preference for F&B, Hospitality, Healthcare, and Tech industries where there are increasing volume and size of deals, perhaps due to the maturity of existing funds and new regional and local funds being set up.

2. What are the main differences in M&A transaction terms between acquiring a business from a trade seller and financial sponsor backed company in your jurisdiction?

Financial sponsors are more sensitive to post-exit / post-sale risks.

This can be seen through the preferred use of W&I insurance, limitations to representations and warranties (fundamental vs. extended warranties), limitations to claims and time limitations on potential liabilities, as well as overall limitations on indemnification terms.

Additionally, financial sponsors are more sensitive to any non-compete or non-solicitation provisions that may be imposed on exit transactions, whereas trade sellers are more willing to accept.

3. On an acquisition of shares, what is the process for effecting the transfer of the shares and are transfer taxes payable?

A transfer of shares for a private company in Thailand will require (assuming no restrictions or notice

obligations in the company's Articles of Association):

1. Buyer and Seller to execute relevant share transfer instrument forms, thereafter affixing stamp duties based on the value of the shares being transferred.
2. Once (1) is executed, a copy of the share transfer instrument will need to be delivered to the company so that the transfer is recorded in the share register book of the company.
3. Additionally, if share certificates are issued, the old share certificate(s) of the Seller will need to be cancelled, and new share certificate(s) will need to be issued to the Buyer.
4. Lastly, the company shall update their list of shareholders (Bor.Or.Jor.5 Form) with the Department of Business Development (commercial registrar).

Stamp duties will be applicable to share transfers at a rate of 0.1% of the total value of the shares being transferred.

In Thailand, capital gains from share sales are not subject to any special taxes, but the Seller shall disclose and file the gains received from any share sale as part of their annual personal income tax filing.

4. How do financial sponsors provide comfort to sellers where the purchasing entity is a special purpose vehicle?

Financial Sponsors who use SPVs may usually be asked to have their parent company provide certain guarantees or be legally tied to certain closing obligations directly with the sellers, especially in respect of their payment obligations if they do not carry an existing reputation in Thailand. In Thailand, if the financial sponsors have a good reputation, so they may not be requested of additional guarantees or legal obligations.

Additionally, bank commitment letters are typically requested if SPVs are used.

5. How prevalent is the use of locked box pricing mechanisms in your jurisdiction and in what circumstances are these ordinarily seen?

We typically see adjustments / earn-outs mechanisms more than locked box. Almost all of the deals done in Thailand are based on completion / audited accounts with a price adjustment mechanism. It is rare to see a locked box mechanism unless the transaction involves a US or EU based fund or sponsor and they have a strong preference for the locked box mechanism use.

6. What are the typical methods and constructs of how risk is allocated between a buyer and seller?

The typical methods and constructs of how risk can be allocated between a Buyer and Seller is generally more or less consistent with those in other jurisdictions (i.e. representations and warranties, restrictive covenants, MAC clauses, CPs, CSs, indemnification, price adjustments, etc.).

Note that there is an increase in the use of W&I insurance in M&A transactions in Thailand by both local and regional sponsors.

7. How prevalent is the use of W&I insurance in your transactions?

Larger deals and transactions are now increasingly utilizing W&I insurance as local insurers are generally decreasing their premiums for such products. Note though usually deals with some international element (i.e. certain assets are offshore, certain contracting parties have offshore presence, etc.) will include W&I insurance, whereas more local or smaller domestic deals may not typically involve W&I insurance.

8. How active have financial sponsors been in acquiring publicly listed companies?

Not very common in Thailand as Thailand's stock exchange usually has higher trading volume than their counterparts in the region; this may tie in to the PE Ratio or overall valuation of listed companies that may be higher than financial sponsor's acceptable pricing.

However, there are usually 1-2 deals a year that may

involve a listed company being acquired, especially back-door listing or more dormant listed companies being taken over by new companies looking to 'list' on the stock exchange.

There are also some efforts over the past few years where financial sponsors have tried to take over listed companies to take private, but this is rare for Thailand, mostly out of valuation concerns.

9. Outside of anti-trust and heavily regulated sectors, are there any foreign investment controls or other governmental consents which are typically required to be made by financial sponsors?

Foreign shareholding in Thai companies may be limited, depending on the sector or industry or business of the target. Generally, for services business, foreign shareholders cannot hold a majority of shares without the company receiving specific licenses such as a Foreign Business License or a Foreign Business Certificate.

However, manufacturing or trading businesses have the option to rely on other statutory exemptions such as setting up in a designated special economic zone, or relying on minimum registered capital exemptions, etc.

10. How is the risk of merger clearance normally dealt with where a financial sponsor is the acquirer?

Whilst Thailand's merger clearance regime is relatively new compared to other jurisdictions, merger clearance have been increasingly playing a bigger factor for larger M&A deals in Thailand, especially in sectors where there are only a few large players.

Usually merger clearance will be made as a conditions precedent (CP) to deal closing, whilst sometimes an initial preliminary analysis and consultation may be undertaken by the buyer as part of their due diligence process.

11. Have you seen an increase in (A) the number of minority investments undertaken by financial sponsors and are they typically structured as equity investments with certain minority protections or as debt-like investments

with rights to participate in the equity upside; and (B) 'continuation fund' transactions where a financial sponsor divests one or more portfolio companies to funds managed by the same sponsor?

Yes, minority investments by financial sponsors are extremely common in Thailand, especially with the presence of corporate VC funds.

A number of deals with minority positions will be structured with VC elements such as preference shares, minority protection such as reserved matters, share transfer restrictions and obligations (lock up, ROFR, Tag and/or Drag Along rights, etc.).

Whilst the majority of deals are equity deals, convertible debt or similar structures are increasingly common.

In terms of continuation funds, this is becoming more common as Thai GPs will capitalize on their prior performance and reputation to structure new collective investment schemes and vehicles which the new funds may invest in existing portfolio assets of existing fund managers. This may also be due to the timing – Thai funds and sponsors popped up around early to mid-2010's, whereas their exit horizon is during this period and the continuation funds will support their early fund exits; this has become much more popular due to COVID-19 and its affect on the growth timeline of portfolio companies and the fund life cycle.

12. How are management incentive schemes typically structured?

Management incentive schemes in Thailand are usually structured as cash compensation (i.e. exit or valuation bonus, severance pay etc.), but employee stock option pool (ESOP) schemes have become more popular, especially in the tech sector, although ESOP schemes in Thailand may have certain legal and tax limitations when compared to international counterparts. This is why cash compensation is usually more popular for Thai corporates due to the low legal risks and low complexity involved in designing the remuneration scheme.

Earnouts are also popular for deals where there are potential management exits.

13. Are there any specific tax rules which commonly feature in the structuring of management's incentive schemes?

It is recommended to consult tax and legal advisors on

the potential implications of setting up an incentive scheme, and to consider potential alternatives or structuring options.

14. Are senior managers subject to non-compete and if so what is the general duration?

Usually senior personnel will be subject to non-compete provisions as an on-going basis, typically 3-6 months after departure. However, note that in practice, this is rarely enforced as cost of legal actions may not be worth pursuing. Additionally, Thai courts have typically been wary of non-compete, and have the authority to decrease the length of the non-compete if it deems it excessive.

In a typical exit deal, non-compete may be imposed on the sellers for a period of 2-5 years post exit, depending on the industry and overall deal structure.

15. How does a financial sponsor typically ensure it has control over material business decisions made by the portfolio company and what are the typical documents used to regulate the governance of the portfolio company?

Financial sponsors with a minority position will typically request certain reserved matters or veto rights for important or material undertakings by their portfolio company.

Additionally, minimum meeting frequency or reporting obligations will be imposed on the portfolio company in order for the financial sponsors to be able to monitor their investments.

Lastly, financial sponsors may also impose their own internal governance requirements or practice on their portfolio companies to ensure they are operating under the same standard as they would expect (i.e. AML or ESG policies or accounting standard requirements, etc.).

16. Is it common to use management pooling vehicles where there are a large number of employee shareholders?

Usually the number of employees who are participating in incentive schemes for Thai private companies are relatively low, so SPVs are not common; however for listed or public companies with higher participants in their incentive schemes, these can be done on reliance

of existing securities laws and companies do not typically set up SPVs due to the cost and complexity involved in setting up one.

17. What are the most commonly used debt finance capital structures across small, medium and large financings?

For smaller companies, usually straight term loans are common involving some sort of personal guarantees from senior management / shareholders if there are no company assets as collateral. Crowdfunding and convertible debt financing structures are increasingly popular among technology based businesses with high growth potential.

For medium to larger sized deals, if there is a sponsor involved usually guarantees may not be required. Interest is usually structured to be a mix of PIK and Cash interest involving syndicate lenders.

Corporate bonds are also a popular choice among large corporations in light of the robust and high volume of the Thai public markets.

18. Is financial assistance legislation applicable to debt financing arrangements? If so, how is that normally dealt with?

There are generally no special legislation with respect to debt financing arrangements; however senior management or shareholders may typically provide their own guarantees or use their own assets as collateral in support of their company's debt financing if such company is not asset heavy.

In an acquisition, the buyer would typically provide the shares in the target company as collateral to its acquisition financing without involving the sellers.

19. For a typical financing, is there a standard form of credit agreement used which is then negotiated and typically how material is the level of negotiation?

Whilst there is no standard or fixed form of credit agreement used in Thailand, parties usually prefer the forms published by the Loan Market Association and the Asia Pacific Loan Market Association when negotiating financing documents, and sometimes financial institutions will have their own similar / adapted form.

In terms of negotiations, we have seen cases where terms are barely negotiated (for smaller and friendly deals), and deals where negotiations drag on for a prolonged period of time. This would depend on a variety of factors, including the parties involved, and the complexity and size of the transaction, but typical terms that may be negotiated include collateral requirements, events of default provisions, MAC provisions, prepayment provisions, negative covenants, etc.

20. What have been the key areas of negotiation between borrowers and lenders in the last two years?

All of the key terms listed above, but additionally some other heavily negotiated terms include:

- mandatory prepayment obligations
- covenants
- repayment terms
- collateral / guarantees
- potential convertible structure for mezzanine financing with upside for the lender
- in more recent years, repayment schedule adjustment and interest rate adjustment in light of COVID-19

21. Have you seen an increase or use of private equity credit funds as sources of debt capital?

Thailand's overall cost of debt is still relatively lower compared to regional peers, including lower than PE credit fund pricing, thus PE credit funds are not so typical in Thailand unless it is an existing portfolio company of a specific fund and are looking to utilize a large amount of capital for its strategy or investment objectives.

Contributors

Papon Charoenpao (Paul)
Partner

paponc@pdlegal.com.sg

