Private Equity

Contributing editor
Bill Curbow

2019

GETTING THE DEAL THROUGH

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Private Equity 2019

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Fifteenth edition

Getting the Deal Through is delighted to publish the fifteenth edition of *Private Equity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the British Virgin Islands, Canada, Colombia, Egypt and Thailand. The report is divided into two sections: the first deals with fund formation in 22 jurisdictions and the second deals with transactions in 23 jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Bill Curbow of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume

GETTING THE DEAL THROUGH

London
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Thailand

Jirapong Sriwat and Apinya Sarntikasem

Nishimura & Asahi (Thailand) Co, Ltd

1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

We have seen various types of private equity transactions in the Thai market, ranging from venture capital, distressed funding, seed capital, growth capital, mezzanine financing to leveraged buyouts. However, unlike in other jurisdictions, going-private transactions are not common in Thai market practice, owing to the stringent requirements for delisting a listed company from the Stock Exchange of Thailand (SET) and the fact that Thai corporate law does not provide for the squeeze-out rule. In addition, even after delisting, the delisted company will retain its legal status as a non-listed public limited company, which cannot be converted into a private limited company. Thereby, the delisted company would still be subject to the obligations under Chapter 3/1 of the Securities and Exchange Act of Thailand (eg, corporate governance requirements), unless after the delisting tender offer, the percentage of shares held by the remaining shareholders (other than the tender offeror, its concert parties and related parties of the foregoing) does not exceed 5 per cent of the total number of the issued shares of the delisted company. As such, even after the delisting, the delisted company may still be subject to the regulatory requirements on a related-party transaction and class transaction (see below). Furthermore, with no squeeze-out rule, certain numbers of minority shareholders may remain in the delisted company. Thereby, the acquirer may not be able to fully manage the delisted portfolio company as it wishes.

For private equity investments and acquisitions, private equity funds typically set up a special purpose vehicle (SPV). This SPV will provide funding to the portfolio company in the form of equity, debt or hybrid of debt and equity whereby the debt is exchangeable into equity. Nonetheless, funding by means of debt may not be common in Thai market practice. In this regard, offshore private equity funds need to be extra mindful of the shareholding structure of the SPV, as it may trigger the foreign business restriction under the Foreign Business Act of Thailand (FBA), both in the SPV's level and the portfolio company's level. That is, if the SPV is deemed to be a foreign entity under the FBA, its acquisition of shares in the portfolio company may render such portfolio company a foreign entity under the FBA, which will be restricted from engaging in certain businesses in Thailand. Further information on the foreign business restriction is discussed in question 18.

For the purpose of this chapter, we focus only on funding in the form of equity that is commonly found in Thai market practice.

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

The Securities and Exchange Act of Thailand has set out corporate governance rules for companies listed on the SET mainly in the following six aspects:

- roles and responsibilities of executives and directors: executives and directors are obliged to discharge their duties with due care. Their decisions shall be made with their honest belief and reasonable ground that it is in the best interest of the company, in reliance of information honestly believed to be sufficient, and without their own interest, whether directly or indirectly, in such matter;
- report on the interest of executives and directors as well as related persons in the management of the listed company: executives and directors are obliged to report their interest in relation to the management of the company to the Thai Securities and Exchange Commission (SEC) on Form 56-1 or 56-2;
- related-party transaction: related-party transaction refers to a transaction entered into between a listed company or its subsidiary and the listed company's 'related party' (eg, directors, executives, major shareholders and controlling person of the listed company). If the related-party transaction is of significant volume, the listed company may be required to obtain prior approval of its board of directors and shareholders' meeting and disclose the information thereof to the SET;
- acquisition or disposal of assets (ie, class transaction): a listed company has the duty to disclose information about the acquisition or disposal of an asset of significant size to the SET and may be required to obtain prior approval of its shareholders' meeting if such a transaction is of high value or of significant size that could affect the company's financial position and operational performance;
- independent director: at least one-third of the board of directors of the listed company shall be independent directors, which in any case shall be no less than three persons, and the listed company is required to have at least three audit committees; and
- board remuneration: to ensure good corporate governance, the listed company should appoint a remuneration committee who will appraise the remuneration for each director based on the level of his or her responsibilities, experience, contributions and performance, among other things.

3 Issues facing public company boards

What are some of the issues facing boards of directors of public companies considering entering into a going-private or other private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

Directors of a listed company are deemed to be 'related persons' of such company. Any transaction entered into between the listed company and its director is, therefore, considered a related-party transaction, which may require prior approval of the board of directors and the shareholders' meeting, and may need to be reported to the SET. For example, a related-party transaction that is a normal business transaction without general trading conditions with a transaction value of more than 1 million baht but less than 20 million baht or more than 0.3 per cent but less than 3 per cent of the net tangible asset value (whichever is higher) requires prior approval of the board of directors and disclosure to the SET. On the other hand, the same type of transaction with a transaction

value of 20 million baht or more or 3 per cent or more of the net tangible asset value (whichever is higher) requires not only prior approval of the board of directors and disclosure to the SET, but also prior approval of the shareholders' meeting.

To ensure compliance with the regulations of the SEC and the SET including regulations on related-party transactions and directors' conflicts of interest, a listed company is required to appoint at least three audit committees, who shall be independent directors.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

If private equity transactions involve acquisition or disposal of shares in the company listed on the SET, the acquirer or disposer may be obliged to file a report to the SEC on Form 246-2 if such acquisition or disposal increases or decreases the aggregate number of listed shares held by the acquirer or disposer, together with its related persons and concert parties, by a multiple of 5 per cent of the total number of voting rights of the listed company. Under the Thai securities regulations, 'related persons' include a spouse, minor child and person who holds more than 30 per cent of the voting rights in the acquirer or disposer. On the other hand, 'concert parties' refers to those who have a mutual intention to exercise their voting rights in the same direction, which may be evidenced from their agreement in relation to an exercise of their voting rights and an agreement to restrict the right to sell securities in the case of a tender offer, among others. In general, the SEC is empowered to exercise its wide discretion to consider if any entities would be deemed concert parties.

The requirement for mandatory tender offer, which shall be reported or submitted to the SEC on Form 247-4, is triggered when any person, together with its related persons and concert parties, acquires voting rights at or in excess of 25, 50 or 75 per cent of all voting rights in a listed company, provided that the acquisition may be direct, through the acquirer's ownership of the target company's securities, indirect (by application of the 'chain principle') or a combination of direct and indirect acquisition. Nonetheless, there are a number of exemptions from the mandatory tender offer requirement, including:

- the trigger point was reached as a result of a target company securities repurchase;
- the trigger point was reached through inheritance of securities, stock dividends, rights offerings, tender offers or certain types of business restructuring;
- the acquirer reduces its shareholding or controlling interest to below the relevant trigger point within seven business days; and
- a waiver is granted by the SEC or a specially convened takeover panel. Accordingly, the SEC may grant a waiver on a number of grounds, including where the acquisition does not result in a change of control, the acquisition is made for purposes of providing support to or rehabilitating a business, or the acquisition is made pursuant to the shareholders' resolution of the target (ie, whitewash).

A tender offer is also mandatory in the event of delisting in order to provide a final opportunity for the minority shareholders, whose shares will finally become illiquid, to sell their shares to the offeror. The offeror is obliged to submit the report on the preliminary result of the tender offer (Form 247-6-Khor) within 21 business days from the tender offering date, and the report on the result of the tender offer (Form 256-2) within five business days from the end of the tender offer.

After the tender offer, an offeror who has passed through any of the mandatory offer trigger points will be subject to the following lock-ups:

- for a period of six months from the closing date of the offer period, the offeror shall be prohibited from acquiring securities of the target company at a price higher than the tender offer price, except in the case of a newly issued securities or securities from an approved tender offer; and
- for a period of one year from the closing date of the offer period, the offeror shall be prohibited from taking any action materially different from that specified in the tender offer document, unless approved by the shareholders of the target company.

In addition, the offeror will be prohibited from making any subsequent tender offer for a period of one year following the closing date of the previous offer period, other than a tender offer to complete the delisting of the target company. In the case of a partial tender offer, the offeror may not acquire securities in the target company for a period of six months following the closing date of the offer period, unless such acquisition falls under one of the automatic exemptions from making a mandatory tender offer, is for newly issued shares or is approved by the SEC.

The mandatory tender offer requirement does not apply to an acquisition of shares in a private limited company. Additionally, financial statements of private and public limited companies in Thailand are publicly available, among others, through the online databases of the Ministry of Commerce and the SET, as the case may be, as well as paid-online databases such as Corpus.

5 Timing considerations

What are the timing considerations for negotiating and completing a going-private or other private equity transaction?

To complete the going-private transaction, the acquirer and the portfolio company may need to go through the tender offer process at least twice. The first tender offer process may be the mandatory tender offer in order to gain sufficient voting for the delisting shareholder resolution, which may be triggered when the acquirer tries to acquire sufficient voting rights from some existing major shareholders for taking control over the portfolio company as well as to ensure that their voting rights would be sufficient for fulfilling the minimum shareholders' approval requirement for the delist (ie, at least three-quarters of the total issued shares of the company with no more than 10 per cent objection of the total issued shares). In general, the process from negotiating with the sellers until completion of the first mandatory tender offer would take approximately three to four months.

The second tender offer will be launched for delisting the portfolio company, as discussed in question 4. Typically, the process from obtaining the board of directors' approval for delisting, which will then be proposed to the shareholders' meeting, until completion of the delisting tender offer would take approximately 6.5 months.

In sum, the process for completing a going-private transaction may take approximately one year.

A merger control regime has recently been enacted and has become effective under the Thai Anti-competition Act. Therefore, if the merger approval requirement is triggered, the going-private transaction may require additional three to four months to complete, depending on the discretion of the Office of Trade Competition Commission (OTCC) on a case-by-case basis.

6 Dissenting shareholders' rights

What rights do shareholders of a target have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

To delist a listed company from the SET, the company needs to obtain a resolution of the shareholders' meeting passed by the shareholders holding at least three-quarters of the total issued shares of the company, provided that there shall be no more than 10 per cent objection of the total issued shares. Therefore, in the absence of the squeeze-out rule under Thai corporate and securities law, the minority shareholders may prevent a listed company from going private if their objecting votes are composed of more than 10 per cent of the total issued shares.

7 Purchase agreements

What notable purchase agreement provisions are specific to private equity transactions?

In merger and acquisition transactions, most purchasers of shares in a private limited company or listed or non-listed public company would try to insist on comprehensive representations and warranties in the purchase agreements. Typical representations and warranties include organisation and standing, authority, capital structure, title to the sale shares or securities, assets and business of the target company, litigation, taxes, financial matters, intellectual property, contracts and commitments and legal compliance.

Representations and warranties in the purchase agreements in private equity transactions do not significantly differ from those in M&A transactions from the perspective of the purchasers. However, from the sellers' perspective, considering the transaction structure as discussed in question 1, it is common in Thai market practice for the sellers to request the private equity purchasers to give representations and warranties that the purchasers have sufficient fund to complete the share sale and purchase transaction.

8 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity acquirer should discuss management participation following the completion of a going-private transaction?

Similar to typical M&A transactions, some of the management and employees of the portfolio companies may be offered an opportunity to continue their duties and may be granted an equity stake in the portfolio companies (generally through issuing an employee stock option plan) to align their interests with the private equity funds.

Nomination of the management is typically set as one of the closing or post-closing actions of the share purchase agreement. After acquiring the portfolio company, if continuing shareholders remain, the shareholders are generally entered into a shareholders' agreement to set out their rights and duties, including their rights to nominate the company's directors. These provisions of the shareholders' agreement would need to be reflected in the company's articles of association so that they would be binding not only upon the contracting parties, but also any third parties. However, in the case of a listed company, if the terms and conditions of the shareholders' agreement require certain shareholders to cast their votes in the same direction, these shareholders may be deemed to be concert parties whose acquisition or disposition of listed shares may be considered in aggregate and trigger the 5 per cent report or mandatory tender offer requirement, as discussed in question 4.

9 Tax issues

What are some of the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

In order to stimulate private equity investment in the portfolio companies operating businesses in Thailand's s-curved industries, the Ministry of Finance has issued a decree exempting the investors from income tax on dividends received from the private equity funds as well as income from transferring shares or trust units in the investment vehicles. In addition, private equity funds are also exempted from income tax on dividends received from portfolio companies as well as income from transferring shares in portfolio companies, provided that, among others, the portfolio companies are not listed in the SET and operate businesses in target industries such as food, agriculture, renewable energy, biotechnology, medical and tourism.

If the private equity transactions involve the sale and purchase of shares, a stamp duty of 1 baht for every 1,000 baht or fraction thereof of the paid-up value of shares or the nominal value of the share transfer instrument, whichever is greater, will generally be payable and it is the obligation of the seller to pay such stamp duty under the applicable law, but the purchaser and the seller can agree otherwise. Nonetheless, in the case of an acquisition of shares having Thailand Securities Depository Company Limited as a registrar (ie, shares of listed companies), no stamp duty will be payable.

10 Debt financing structures

What types of debt financing are typically used to fund going-private or other private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

The Thai market has seen increasing private equity transactions in which a hybrid of debt and equity funding is provided to the portfolio company. This can be evidenced from the recent practice of venture capital firms that has shifted their interest in providing simple equity financing through share acquisition to using mezzanine financing as a means to invest in Series A preferred shares of the portfolio company.

From the legal perspective, the private equity firm needs to be mindful of the formality requirement of a loan agreement. That is, a loan of more than 2,000 baht needs to be made in writing and signed by the borrower; otherwise, it will not be enforceable by action. In addition, a lender that is not a financial institution shall be prohibited from imposing a loan interest of exceeding 15 per cent per annum; otherwise, the loan interest will be void and the lender will be subject to imprisonment not exceeding two years, a fine not exceeding 200,000 baht, or both. On the other hand, Thai law does not impose maximum rates for loan default interest. The lender and the borrower can freely agree to any rate of loan default interest, provided that in the absence of such agreement, the default interest rate of 7.5 per cent per annum as prescribed under the Thai Civil and Commercial Code will apply. However, the amount of loan default interest may be deemed a penalty that may be reduced to an amount that the court deems to be reasonable on a case-by-case basis.

It is not legally possible for a private limited company in Thailand to issue a convertible bond, as it cannot have authorised but unissued shares. In order to achieve the same economic result, a private limited company may opt to issue a synthetic convertible bond to the private equity firm.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements for private equity transactions? What other documents typically set out the financing arrangements?

If the SPV's equity financing triggers the mandatory tender offer requirement, the underlying agreement needs to ensure that the SPV has sufficient funds to complete the tender offer (see also question 14).

In terms of debt financing, the underlying agreement typically provides for a term that debt is exchangeable into equity – constituting a hybrid of debt and equity financing. Also, it typically stipulates that repayment is mandatory once the portfolio company earns profits, and early redemption is triggered by the event of default.

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving debt financing raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

If a company is adjudicated bankrupt, an official receiver will be assigned to assume the responsibility of managing its property as well as collecting and receiving money or property that will devolve upon it, among other things. Under the Thai Civil and Commercial Code and the Bankruptcy Act of Thailand, the official receiver has the power to clawback the bankrupt company's property by filing a motion to the court for an order cancelling the bankrupt company's fraudulent conveyance if it knew that such conveyance would prejudice its creditors and the person enriched thereby did not know of such prejudice. In this regard, if the fraudulent conveyance was done within one year before the application for adjudication for bankruptcy and thereafter, was a gratuitous act or resulted in the bankrupt company receiving unreasonably low compensation, it shall be presumed that the bankrupt company and the person enriched thereby knew that such conveyance would prejudice the bankrupt company's creditors. Thereby, the official receiver will have the power to file a motion to the court for an order to cancel such fraudulent transfer.

If any property conveyance or any act done or permitted to be done by the bankrupt company occurs within a period of three months before the application for adjudication of bankruptcy and thereafter, with the intention to allow a specific creditor to have an advantage over other creditors, the official receiver may file a motion to the court for an order to cancel such fraudulent transfer or act.

If the portfolio company's provision of any guarantees, indemnities or other types of security interests, among others, in return for debt financing occurs during the above-mentioned respective period with the knowledge that it will prejudice other creditors or with the intention to allow the private equity sponsor or the SPV to have advantage over other creditors, such provision may constitute fraudulent transfer or act if the portfolio company were to become bankrupt, which may be subject to cancellation order by the court.

13 Shareholders' agreements and shareholder rights

What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms or other equity co-investors? Are there any statutory or other legal protections for minority shareholders?

In general, ordinary matters proposed to the shareholders' meeting of a private and public limited company can be resolved by a simple majority vote of the shareholders. However, in the case of a private limited company, the Thai Civil and Commercial Code requires a special resolution of the shareholders' meeting, which shall be passed by at least 75 per cent of the total voting rights of the shareholders attending the meeting and having the right to vote for the following matters:

(i) amendment to the company's memorandum or articles of association;
(ii) any decrease or increase of the registered capital of the company;
(iii) allotment of new shares as fully or partly paid up otherwise than by money;
(iv) amalgamation with any other company; and
(v) dissolution of the company.

In the case of a public limited company, the Public Limited Company Act of Thailand requires a special resolution passed by at least 75 per cent of the total voting rights for the following matters:

- matters in items (i) to (v) above;
- issuance of debentures for offer for sale to the public;
- the sale or transfer of the entire or important parts of the company;
- the purchase or acceptance of transfer of the business of other companies or private companies;
- the execution, amendment or termination of contracts with respect to the granting of a lease of the entire or important parts of the business of the company;
- the entrustment of the management of the business of the company to any other person; and
- the amalgamation of the business with other persons with the purpose of profit and loss sharing.

To remove any director of a public limited company prior to the expiration of his or her term of office, the shareholders' meeting shall pass a resolution by at least 75 per cent of the number of shareholders attending the meeting and having the right to vote, whose shares shall constitute no less than 50 per cent of the total shares held by shareholders attending the meeting and having the right to vote. In addition, changing of the order of the meeting agendas from those prescribed in the meeting notice requires a resolution passed by at least two-thirds of the number of shareholders attending the meeting.

In order to protect the rights of minority shareholders, the minority shareholders should hold more than 25 per cent of the total shares of the company (eg, 25 per cent plus one share) so as to block the matters requiring a special resolution, and be equipped with a statutory veto right. In addition, it is typical for a shareholders' agreement to provide for the right of first refusal, pre-emptive right, drag-along, tag-along and information right provisions. The provisions of the shareholders' agreement would need to be reflected in the company's articles of association as much as possible, so that they would be binding not only upon the contracting parties, but also any third parties. However, in the case of a public company, it is relatively difficult in practice to reflect terms of the shareholders' agreement in the articles of association owing to the more stringent interpretation of the Public Limited Company Act of Thailand by the relevant Thai authority.

Update and trends

In December 2018, Thailand finally enacted a bundle of secondary laws to effect merger control regulation. Merger transactions that are subject to the merger filing requirement include:

- an acquisition of shares or other convertible securities resulting in the acquirer holding up to 25 per cent or more of the total voting rights in a listed company;
- an acquisition of more than 50 per cent of the total voting shares in a non-listed company; and
- an asset acquisition of more than 50 per cent of the total operating assets used in the ordinary course of business in the previous fiscal year of another business operator.

The acquirer may be subject to pre-merger approval or post-merger filing as follows:

- obligation to seek pre-approval from the OTCC for a merger that may lead to monopoly or dominance in a relevant market; or
- obligation to notify the OTCC within seven days after the merger that may substantially reduce competition in a specific market, but does not lead to monopoly or dominance in such a market.

In both cases, the minimum threshold is having a total sales revenue of 1 billion baht or more.

14 Acquisitions of controlling stakes

Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

In the case where the mandatory tender offer requirement is triggered, the acquirer would be required to have sufficient funds to complete the tender offer whereby the source of funds may be from the acquirer's working capital or credit facilities or loans provided by financial institutions. In practice, it would be sufficient for the acquirer to merely submit a certification letter from the financial institution indicating the loan amount to be granted to the acquirer or the credit facilities for the acquisition committed by the financial institution.

15 Exit strategies

What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity acquirer?

The private equity firm's ability to sell its stake in a portfolio company largely depends on the share transfer restriction under the portfolio company's articles of association as well as any existing shareholders' agreement that may provide for the right of first refusal, drag-along and tag-along provisions, among other things. If the private equity firm chooses to exit by taking the portfolio company public through an IPO, it may be subject to the silent period during which it, as a major shareholder, will be restricted from selling its shares in the portfolio company for one year after the IPO.

While most purchasers will try to insist on comprehensive representations and warranties in the share purchase agreements, the private equity firm, as the seller, will try to resist providing post-closing indemnification for breach of these provisions and aim to limit the period for such indemnification as much as possible.

16 Portfolio company IPOs

What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

In Thai market practice, a shareholders' agreement generally survives the IPO. However, it may raise some concerns on concert party issues. If the shareholders' agreement requires certain shareholders to cast their votes in the same direction, these shareholders may be deemed to be concert parties whose acquisition or disposition of listed shares may be considered in aggregate and trigger the 5 per cent report or mandatory tender offer requirement, as discussed in question 4.

Under the SET's listing rules, the following persons (ie, strategic investors) holding shares in aggregate of 55 per cent of the listed company's paid-up capital will be subject to a lock-up period of one year after listing, during which they will be prohibited from selling their shares after the completion of the IPO, as well as other securities which can be converted into shares in proportion to the shares of those persons who are subject to such lock-up period:

- persons taking part in the management, for example, directors, managers or the first four persons in the management level below the manager, including related persons, spouses, parents and children of the foregoing; and
- shareholders holding shares in the listed company in excess of 5 per cent of the paid-up capital, which shall be inclusive of shares held by its 'related persons', except in the case where such shareholders are securities companies, life insurance companies, mutual funds or provident funds, among others.

Nonetheless, after six months from the listing, the strategic investors are generally permitted to sell a maximum of 25 per cent of the locked-up shares.

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in industry focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

In recent years, the target industries of private equity transactions in Thailand have been relatively scattered. However, as the Thai economy becomes more mature, private equity transactions in the Thai market have become more focused on industries such as renewable energy, branded consumer goods, real estate and healthcare.

18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or other private equity transaction?

In general, a foreign entity (eg, a company registered under foreign laws or a company having at least 50 per cent of its share capital held by foreign entities) is restricted from engaging in certain businesses in Thailand, unless a foreign business licence is granted; for example, service business of loan provision, wholesale and retail business and advertising business. In addition, under the Land Code of Thailand, a foreigner shall be prohibited from owning land in Thailand, provided that a company will be considered as a foreigner under the Land Code if any of the following conditions is met:

- more than 49 per cent of the company's registered capital is held by foreign entities (ie, shareholding percentage); or
- the number of its foreign shareholders is more than half of its total number of shareholders (ie, headcount).

As such, to invest in and operate a business in Thailand, it is common for foreign investors to partner with Thai investors and set up the SPV with more than 50 per cent of its shares held by Thai investors in order to avoid being subject to such foreign business restriction. Furthermore, if such SPV is to hold land in Thailand, at least half of the total number of its shareholders must be of Thai nationality and the Thai aggregate shareholding must be at least 51 per cent.

Apart from the above general foreign restrictions, some specific laws may impose even stricter foreign restriction on certain businesses. For example, in the case of a Thai financial institution and life insurance company, persons of Thai nationality must hold at least 75 per cent of the total number of voting shares sold, and at least 75 per cent of the total number of directors must be of Thai nationality, unless any applicable approval is granted.

19 Club and group deals

What are some of the key considerations when more than one private equity firm, or one or more private equity firms and a strategic partner or other equity co-investor is participating in a deal?

For the purpose of centralising contractual management and negotiating with the portfolio company, other shareholders in the portfolio company and the government authority regulating the portfolio company's business (if any), the several private equity firms, strategic partners and equity co-investors may consider investing in the same SPV, which would act as the sole purchaser.

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20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity acquirer related to certainty of closing? How are these issues typically resolved?

To cope with the uncertainty of closing, it is common in Thai market practice to include no material adverse change in the target company's financial position, business and property, among others, as one of the condition to closing. Furthermore, the underlying agreement may provide for a walk-away clause that allows the private equity acquirer to walk away from the deal without penalty should there be the occurrence of any triggering event.

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