



# **Private Equity Investments in Thailand**

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Private equity investments aim at reviving or expanding a potential business, and selling it when the time is right. To limit its liabilities and avoid being subject to Thailand's foreign investment restrictions, private equity firms typically form a Special Purpose Vehicle ("SPV") in Thailand to be its investment entity in a Thai portfolio company.

To achieve the business outcome, the SPV may acquire majority shares in the portfolio company as well as the board seat and the right to nominate key managing members in the portfolio company, so as to gain control over the management of the portfolio company. Once the expected rate of investment return reaches or exceeds a defined minimum amount, the SPV will divest its investment by exiting the portfolio company in order to realize its returns, either through reselling the shares to another firm or proceeding with the listing process in order to cash-out via an IPO. The investment horizon of the private equity is typically three to seven years.

In this article, we will discuss the investment horizon of the private equity investment in a private company registered in Thailand from the perspective of Thai law and Thai market practice, from setting up the investment structure to exiting the investment.

### 1 Setting-up Entities in the Investment Structure

Most of the private equity transactions in Thai market are cross-border whereby the funds, which are formed outside Thailand, invest in portfolio companies in Thailand through the SPV, which are incorporated under Thai laws. This investment structure is driven mainly by Thailand's foreign investment restrictions, especially those prescribed in the Foreign Business Act of Thailand (the "FBA"), which restrict foreigners from engaging in certain business activities such as domestic transportation, retail, wholesale and provision of certain services, and the Land Code, which prohibits a foreigner from owning land in Thailand.

To avoid these foreign investment restrictions under the FBA and the Land Code, the SPVs are typically set up as a "Thai" company and offshore investments shall not result in the shareholding of the portfolio companies exceeding the following requirement: i) (at least 51% of their total shares being held by Thai shareholders; and ii) (the number of their foreign shareholders being not more than half of their total number of shareholders).

It should be noted that under Section 36 of the FBA, a Thai national or juristic person who holds shares in a company with a view to enable a foreigner to operate the business in circumvention or violation of the foreign business restriction under the FBA, together with the foreigner who allows such Thai national or juristic person to be its nominee, could be liable to imprisonment and/or a fine.<sup>1</sup>

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<sup>1</sup> Section 36 of the FBA provides that,

a Thai national or juristic person who assists in or aids or participates in the operation of a foreigner's FBA-restricted business where such foreigner is not permitted to operate such business, or who jointly operates the business with a foreigner in the manner holding it out as the former's sole business, or who acts as a foreigner's nominee in holding shares in a company or any juristic person with a view to enable the foreigner to operate the business in circumvention or violation of the provisions of the FBA, as well as a foreigner who allows such act to be committed by a Thai national or juristic person, could be liable to imprisonment for a term not exceeding 3 years and/or a fine from Baht 100,000 to Baht 1,000,000, and the court may order the cessation of the assistance or the aiding, or order the cessation of the joint operation of the business, or order the cessation of shareholding or partnership, as the case may be. In the

At present, there is no clear written guideline of the Ministry of Commerce (the “MOC”) on what would constitute a nominee arrangement under the FBA. However, if the Thai and foreign shareholders of a company has implemented an arrangement to circumvent the shareholding-percentage restriction in such a way that the Thai shareholder holds the majority shares in the company but has inferior right to vote (i.e. the foreign shareholder holds preferential shares with more voting right per share), such arrangement which renders the foreign shareholder *de facto* control over the company may be a contributing factor to be viewed as a nominee arrangement which is prohibited under Section 36 of the FBA.

As for the foreign-ownership restriction under the Land Code, the Department of Land, together with the Ministry of Interior, has laid out a guideline that there is a reason to believe that a company has implemented a nominee arrangement if a foreigner is an authorized director or a promoter of that company, a foreigner holds preferential shares with more voting right per share, an occupation of a major Thai shareholder is not an investor or a businessman but rather a lawyer or broker, among others.

## **2 Financing**

The SPV typically provides financing to the portfolio company in the form of equity, debt or hybrid of debt and equity. Concerns from the Thai law perspective are discussed below.

### **2.1 Equity Financing**

To determine the percentage of shares in the portfolio company that the SPV should acquire and/or subscribe for, private equity firm should take into account not only the foreign shareholding restrictions as discussed above, but also the shareholding threshold that will enable it to have an appropriate control over the management of the portfolio company.

In general, ordinary matters proposed to the shareholders’ meeting could be resolved by a simple majority vote of the shareholders. However, for significant matters, the Civil and Commercial Code of Thailand )the “CCC”( requires a special resolution of the shareholders’ meeting which shall be passed by at least 75% of the total voting rights of the shareholders attending the meeting and having the right to vote. For example, a resolution for an amendment to the company’s memorandum or articles of association, and a capital increase or decrease.

In light of this, in order for the SPV to have near-absolute control over the portfolio company, the SPV should hold at least 75% of the total shares in the portfolio company so as to prevent the minority shareholders from having a statutory veto right over the matters requiring ordinary and special resolutions. On the other hand, in the case where the aim is to be a minority shareholder, the SPV should, among others, hold more than 25% of the total shares in the portfolio company (e.g. 25% plus 1 share) so as to prevent the majority shareholders from having an absolute control over the matters requiring special resolution which are important to protect their investment )e.g. increase of capital(.

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case of violation of the order of the court, the violator could be liable to a fine at the daily rate of Baht 10,000 to Baht 50,000 throughout the period of the violation.

## **2.2 Debt Financing**

The private equity firm needs to be mindful of the formality requirement of a loan agreement. That is, a loan of more than Baht 2,000 needs to be made in writing and signed by the borrower; otherwise, it will not be enforceable by action. In addition, a lender which is not a financial institution shall be prohibited from imposing a loan interest of exceeding 15% per annum; otherwise, the loan interest will be void and the lender will be subject to an imprisonment not exceeding 2 years and/or a fine not exceeding Baht 200,000.

It is typical for the loan or credit facilities agreement to stipulate that repayment of debt is mandatory once the portfolio company earns profits, and early redemption is triggered by the event of default.

## **2.3 Hybrid Financing**

For hybrid financing, the underlying agreement typically provides for a term that debt is exchangeable into equity. As such, the legal requirements for the debt financing as discussed in Paragraph 2.2 will apply to the hybrid financing as well.

In this regard, it is worth noting that it is not legally possible for a private company in Thailand to issue a convertible bond, as it cannot have authorized but unissued shares. In order to achieve the same economic result, a private company may opt to employ different legal forms and issue a synthetic convertible bond to the private equity firm.

## **3 Participation in the Management of the Portfolio Company**

In the case where private equity firm wishes to increase the portfolio company's operation efficiencies and thereby earnings and financial status, it may need to acquire as many board seats in the portfolio company as possible. In addition, the private equity firm or the SPV may also strive to be appointed to the steering committee, and nominate the key managing members, such as CEO, CFO or COO of the portfolio company.

## **4 Exit from the Portfolio Company**

Exiting is an essential step of private equity investment. It requires determination of the exit strategies and identification of timing for divestment. The most common exit strategies are trade sales and IPO.

### **4.1 Trade Sale**

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 which may provide for the right of first refusal, drag-along and tag-along provisions, among others.

### **4.2 IPO**

Exiting from the portfolio company by taking it public through an IPO may generate the highest returns for the private equity investors and firm, depending on stock market condition. However, major disadvantages of exiting via an IPO are the high transaction costs as well as the lengthy and time-

consuming process. In addition, given the lock-up period under the Stock Exchange of Thailand's listing rules, the private equity firm may not be able to make a clean exit right after the IPO.

*This is intended merely to provide a regulatory overview and not to be comprehensive, nor to provide a legal advice. Should you have any questions on this or on other areas of law, please contact any of the authors.*

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