법제교류 연구 14-18-①

A Comparative Study on M&A Laws in Thailand and Korea

Jiyeon Choi · Sakda Thanitcul
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Abstract

Ⅰ. Purpose and Scope of Research

□ With ASEAN Economic Community's full materialization expectation by 2015, attention is drawn to ASEAN market. As a mean to invest into the ASEAN market, buying in an existing company is easier and safer than starting from scratch, given that proper research and due diligence are conducted. Thus, it is not surprising to observe that foreign investment through M&A with a local company is increasing and becoming popular than ever.

□ This research discusses the key aspects of the law relateing to M&A in Thailand and Korea and provides comparative analysis for formulating foundational knowledge on the issue for potential investors.

Ⅱ. Contents

□ M&A Laws in Thailand

○ Introduction of different forms of M&A in Thailand, with pros and cons of each methods explained, is provided.

○ Review on relevant M&A laws in Thailand, focused on laws impacting foreign investors such as Investment Promotion Act, Foreign Business Act, and Competition Act is stated.

○ A case study illustrating details of a M&A procedure in Thailand, along with particularities to heed to is portrayed.

□ M&A Laws in Korea

○ Current major issues of M&A Laws in Korea is introduced, including Triangular and Reverse-Triangualr M&A, Hostile M&A and Defense Strategies.

○ Review on relevant M&A laws in Korea, focused on laws impacting foreign investors such as Commercial Act, Foreign Investment Services and Capital Markets Act, Foreign Investment Promotion Act, and Telecommunications Business Act is stated.

○ A case study showing step-by-step guidance of M&A as well as the SK-Sovereign Dispute is illustrated.

Ⅲ. Expected Effects

□ Through the comparative analysis on M&A Laws in Thailand and Korea, this research aims to provide foundational knowledge on both countries for potential investors.

□ This research report may be utilized as basic information for international investment and foreign M&A research.

Key word : M&A laws, Thailand, Korea, ASEAN, Foreign Investment

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Ⅰ. Introduction

A. Purpose of Research

With the expectation that ASEAN Economic Community (AEC) is to be fully materialized by 2015, the ASEAN market draws attention. The effect of the same anticipation already started to show with increased inflow of foreign investment into ASEAN. It is only natural that the ASEAN market becomes more attractive, as one of the most important objective of ASEAN Economic Community is to make ASEAN a single market and investment base for foreign investors. This trend of considering ASEAN as a whole a very attractive market to invest places the importance of researching and reviewing relevant laws and regulations in many Asian countries to better be equipped with foreign investments.

Foreign investors who wish to enter into a nation's market and invest in the industry may choose to set up their own company from scratch, or they could simply buy in an already existing company in the nation where they wanted to invest. Among these two standard forms of Foreign Direct Investment (FDI), it is obvious that with proper research and due diligence on the target company, the latter is easier and safer as it simply paves a silk road to the target market by using an already established channel, resources, connections, and reputations, than the former. It is not surprising to observe, therefore, that the foreign investment through Mergers and Acquisitions (M&A) with a local company is increasing and becomes popular in ASEAN countries.

Through the comparative analysis on laws related to M&A in Thailand, a major market in ASEAN, and Korea, the exemplary market in the

northeast Asia, this research aims to provide foundational knowledge on the two major countries for potential investors from around the world, including investors from each others country and from other ASEAN countries. It also wishes to provide detailed guidance to investors from the legal point of view by illustrating possible advantages and disadvantages for each possible types of M&A in both countries. This research also includes case studies from both countries, representing and illustrating the procedure of M&A and issues to be considered at each steps to be taken.

B. Scope of Research

This research paper discusses the key aspects of the law relating to M&A in Thailand and South Korea. In both jurisdictions M&A are affected by a variety of laws that affect how companies or other legal entities can merge or purchase/acquire assets of another entity.

In Thailand some of the key laws that foreign investors should be aware of are the Foreign Business Act, the Public Company Act, the Civil and Commercial Code, the Revenue Code and the Competition Act. Section II of this research will examine some of these relevant laws and discuss particularities important when considering to pursue M&A in Thailand. The review of the Foreign Business Act is particularly important for foreign investors given that this legislation limits the participation of foreigners in certain specified sectors of the Thai economy such as newspaper businesses, radio-broadcasting stations or radio/television businesses, farming, horticulture, fisheries and forestry to name but a few of the proscribed activities. With analysis of relevant laws, section II also

examines the various forms of M&A in Thailand in addition to the advantages and disadvantages of each approach.

This research will begin by discussing amalgamation and will then move on to acquisition of assets in a target entity, followed by the purchase of shares. Foreign investors should carefully consider the benefits and potential hurdles posed by each approach lest it later undermine their investment in Thailand. For example, when a foreign majority owned company wishes to purchase assets in Thailand such as real estate it should be wary of the fact that under Thai law foreigners (including foreign majority owned companies) are generally prohibited from owning land in the Kingdom.

This discussion of the pros and cons of each form of M&A in Thailand will also take into account financial considerations such as taxes given its potential impact; indeed, one example which demonstrates this is when a foreign company wishes to acquire a factory in Thailand as it should be mindful of the applicable stamp duty and other taxes which will apply to the transaction at the Land Department.

In moving on, section III of this paper will then shift gears to discuss M&A in South Korea, by introducing current major issues of M&A Laws in Korea, such as Triangular Merger, Reverse Triangular Merger, Hostile Merger and Defense Strategies. Then the structure of the research paper would match with the previous parts in Thailand section and examines the relevant laws of M&A in Korea that are especially important for foreign investors, from Commercial Act, Financial Investment Services and Capital Markets Act, Foreign Investment Promotion Act, through Telecommunications Business Act. Following the introduction and analysis of relevant laws, the research will present a case study in Korea with a

step-by-step procedural explanations and a comprehensive analysis of the SK-Sovereign Hostile M&A. Specifically with the introduction of a real-life scenario of the Hostile M&A by a foreign company of a domestic company in Korea, the research presents strategies taken by the foreign corporation to take full advantage of the Hostile M&A under the Korean law. By reviewing the strategies and intents shown along the procedure, domestic companies may acquire points to heed to when entering into an M&A or facing a Hostile M&A while foreign corporations may benchmark in their cases.

Thorough explanations from each country's side will be compared and summed up at the conclusion with similarities and differences by each country on the overall M&A Laws.

Ⅱ. M&A Laws in Thailand

A. Overview[1)]

Merger refers to a combination of two or more companies resulting a single legal entity. Acquisition refers to an act when a company takes over another. Both mergers and acquisitions can be implemented for public limited companies and private limited companies in Thailand.

As a legal strategy in due course of pursuit of maximization of profit for companies, mergers and acquisitions are considered and completed for many reasons. One company might benefit by combining its management with the management of another company. One company might increase in its market share and improve its product delivery and services by absorbing another company.

The structure of this type of transaction is of great importance because it affects the legal registrations and the liabilities, especially the tax liabilities, of each company involved and also to some extent the protections and the tax liabilities of the company’s shareholders.

The only true merger method in Thailand is an amalgamation of the involved companies into a new company with the dissolution of the existing companies. The predominant acquisition methods in Thailand are a sale and purchase of an involved company’s shares and a sale and purchase of an involved company’s assets.

The sale and purchase of an involved company’s shares will mostly result in the liquidation and dissolution of the involved company that

1) Updated version of Wisoot Karnchanapunyapong ; Dharmniti Law Office Co., Ltd., *Strategy of Merger & Acquisition for Thai Investors,* unpublished report, 2011, pp. 2-5.

sold its shares, but the sale and purchase of an involved company's assets may result in either the continued existence of the involved company that sold its assets or the liquidation and dissolution of the involved company that sold its assets.

Mergers and acquisitions of public limited companies require compliance with the Securities and Exchange Act B.E. 2535 (1992) and the Public Limited Company Act B.E. 2535 (1992). Public limited company that is listed on the Stock Exchange of Thailand (SET) must also comply with the rules and regulations of the regulating authorities such as the Securities and Exchange Commission.

Mergers and acquisitions of private limited companies require compliance with the Civil and Commercial Code of Thailand and any other relatively recent laws that are related to the business activities of the companies involved in the merger or acquisition including the Labor Protection Act; Bankruptcy Court Act; Bankruptcy Amendment Act; Foreclosure Act; Land Code Amendment Act; Property Lease and Rights Act; Trade Competition Act; State Enterprises Corporatization Act; and Accounting Act. And, of course, of great legal significance for mergers and acquisitions of both public limited companies and private limited companies are the Revenue Code; Revenue Code Amendment Act; and the Revenue Department Regulations.

The usual topics to be considered by the involved parties, are especially the attorneys and the entrepreneurs for the involved parties, in a merger or an acquisition are as follows.

1. A preliminary contractual document such as a Memorandum of Understanding (MOU) or Letter of Intent (LOI) must be prepared and

signed by the authorized signatories of the parties. This document should be contingent upon initial shareholder approval of each party; it should state the basic structure and the parameters for specific aspects of the merger and acquisition; and it should contain confidentiality and exclusiveness clauses.

2. Due diligence investigations and studies that should be completed in three subjects – commercial considerations such as market share and demand and supply opportunities by the involved parties; legal considerations by the parties' independent attorneys; and financial considerations by the parties' independent accountants. The legal due diligence involves an investigation of the company's legal status or registration; its directors, executives and shareholders meetings and decisions; its property - immoveable and moveable (tangible property such as machinery, equipment, inventory; vehicles; etc. and intangible property such as intellectual property rights; its licenses, permits and other governmental permissions; its third party contracts; its financial obligations such as mortgages and loans; its employment and other labor matters such as provident funds and unions; and its claims and litigation whether expected or pending.

Regarding the companies' employment and labor matters, especially if the merger or acquisition involves the transfer of a company's employees, which it usually does, all employees must be offered the opportunity to agree to such a transfer, and the transfer may not result in less privileges for the employees who agree to the transfer. For those employees who do not agree to a transfer, at least one month written notice must be given to those employees and each must be duly compensated, at a

minimum, in accordance with statutory severance payments. Also, of importance is if a party has special agreements with its executives.

Regarding the companies' expected and pending claims and litigation, these subjects are often difficult to adequately investigate and study. The expected claims and litigation is usually determined by interviewing the companies' directors and senior executives. And the pending claims and litigation can not easily be definitively determined by an independent investigation of the Courts in Thailand for several reasons. Active litigation searches can only be made by a review of the Courts' records, which are handwritten and depend on a Court officer providing all pertinent documents.

Also, Courts' records do not list all defendants and plaintiffs as only the plaintiff or defendant is named. And, although certain Courts do have computerized search equipment, only the Court's records from approximately 1994 to present are available. In criminal litigation and civil arbitration, most documentation is deemed confidential and not disclosed. Lastly, formal claims and litigation may have been initiated outside of Thailand.

3. Initial shareholders meetings of the shareholders of each company are conducted to approve the merger or acquisition.

4. The primary merger or acquisition contract is prepared and signed by the authorized signatories of the companies. The primary subjects are often: shareholder approvals, governmental regulatory approval if applicable, merger or acquisition structure (shares or assets), consideration or price, employees, conditions and completion schedule, confidentiality, exclusivity

and non-solicitation, warranties including completion of due diligence investigations and no changes in due diligence findings; indemnity when applicable by the parties and by third parties such as a companies' shareholders and possibly its insurers (although this is not common in Thailand); and the expected liquidation/dissolution in conjunction with potential bankruptcy. These contracts should also state in some detail and in chronological order the specific process to effect the merger or acquisition. Dependent upon the method for an acquisition, other contractual documents will be needed.

For an acquisition pursuant to a sale and purchase of a company's shares, a standard Share Sale and Purchase Agreement and standard Share Transfer forms are often sufficient. For an acquisition pursuant to a sale and purchase of a company's assets, the following additional contractual documents may be needed: Assignments of other contracts; transfers of employment agreements; transfers of leases; land sale and purchase agreement; transfers of license agreements; and transfers of intellectual property rights; etc.

As for the warranties and indemnification in the primary merger or acquisition contract, these will depend on the nature of the merger or acquisition. These warranties will provide remedies for what a party cannot be certain is accurate about the other party. For example, in an acquisition of a company's shares, all assets and liabilities of the company whose shares are sold are transferred to the company that purchases those shares, and the selling company is usually required to warrant that it has no outstanding tax liability of any nature. If this is not accurate, the selling company and others, perhaps the primary shareholder(s) of the selling company will be required to indemnify the

purchasing party for all outstanding tax liabilities and related expenses that are ultimately paid by the purchasing party. Another example of what might be a subject for a warranty and indemnification may be future claims and/or litigation against the selling party that were not known or disclosed.

Suffice to say, the most frequent subjects for warranties and indemnification for breach of a warranty are: accounts payable; taxes; financial instruments; immoveable property; regulatory compliance certainly including environmental regulation compliance; commercial contracts; intellectual property rights; employees and labor law compliance; and litigation.

In either a merger or an acquisition, when the remaining company will be majority owned by foreign companies or individuals, which is often referred to in Thailand as “foreign company” although it is registered in Thailand, the remaining party must include in the primary contract the terms and conditions that will state the procedure and sufficient time periods to apply and obtain compliance with the necessary Thai laws that will allow it to be majority foreign owned and engage in certain business activities that dissolving company(s) engaged in. As examples, this compliance may consist of an application for a transfer and the issuance of a transfer of Board of Investment (BOI) privileges or an application for and the issuance of a Foreign Business License (FBL).

5. Once the primary contract is completed and signed, the involved parties then proceed with the necessary registration changes through the appropriate governmental agencies, which is often time consuming and a cumbersome procedural process. This process will also usually require a series of additional shareholder meetings for each of the involved parties.

6. Before a merger is completed, the dissolution of the two or more companies that merged into the new company is automatically done essentially by compliance with the Civil and Commercial Code procedure. And before an acquisition in which the selling company through its shareholders sells its shares is completed, the selling company will be relatively easily liquidated and dissolved as a legal formality. However, before an acquisition in which the selling company sells its assets is completed, the selling company may be liquidated and dissolved either voluntarily or through a voluntary or involuntary bankruptcy. Alternatively, the selling company may continue to exist. Once these different aspects of completing the merger or acquisition are finished, nothing more remains to be done.

B. Forms and Methods of M&A

1. Merger

In the event of a merger between the merged companies into a new company, the rights, duties and liabilities with respect to contracts and juristic acts that these merged companies have executed with third parties will be transferred to the new company by operation of law. To this, these merged companies are in no way required to assign their rights of claim in the interests of their debts or novation so as to change the essence of those contracts.

Action is taken through a merger of at least two companies pursuant to the Civil and Commercial Code. and The Public Limited Company Act (No.2) B.E.2544 (PLCA2) came into force on 4 July 2001.

Section 1238. A limited company may not amalgamate with another limited company except by special resolution.

Section 1239. The special resolution by which an amalgamation is decided must be registered by the company within fourteen days from its date.

Section 1240. The company must publish once at least in a local paper and send to all creditors known to the company a notice of the particulars of the proposed amalgamation requiring the creditors to present within sixty days after the date of notice any objection they may have to it. If no objection is raised during such period, none is deemed to exist. If an objection is raised, the company cannot proceed with the amalgamation unless it has satisfied the claim or given security for it.

Section 1241. When the amalgamation has been made, it must be registered within fourteen days by each amalgamated company and the limited company formed by the amalgamation must be registered as a new company.

Section 1242. The share capital of the new company must be equivalent to the total share capital of the amalgamated companies.

Section 1243. The new company is entitled to the rights and subject to the liabilities of the amalgamated companies.

<Civil and Commercial Code>

Section 146. Two on more companies or a company and a private company may be amalgamated into one company by the meeting of shareholders of each of the companies to be amalgamated passing a resolution therefore with votes not less than three-fourths of the total

number of votes of the shareholder present and qualified to vote and, in the case of emulations with private company, there must be a special resolution as provided in the Civil and Commercial Code.

In the case where there is a resolution to amalgamate companies under paragraph one is passed but some shareholders objects to the amalgamation, the company shall arrange for the shares of said shareholders at the latest purchasing-selling price in the securities exchange prior to the date of amalgamation and, in the case of no purchasing-selling price in the securities exchange, the price used shall be that fixed by the independent assessors appointed by both parties. If such shareholders refuse to sell the shares within fourteen days from the date of receipt of the proposal to buy, the company shall proceed with the amalgamation and said shareholders shall be deemed shareholders of the amalgamated company.f

Section 147. The company shall notify the creditors of the company in writing of the resolution to amalgamate with other company and Section 141 shall apply mutatis mutandis.

Section 148. Having complied with Section 147, the chairman of board of directors of the companies to be amalgamated shall convene a joint meeting of shareholders of such companies to consider matters as follows:

(1) the allotment of shares of the amalgamated company to its shareholders;

(2) the name of the amalgamated company, which may be a new name or the name of any of the companies to be amalgamated;

(3) the objective of the amalgamated company;

(4) the capital of the amalgamated company, which shall not be less than the sum of the paid-up capital of the companies to be amalgamated

and, if the companies to be amalgamated have already sold all their respective registered shares, and increase in at capital may be made the same time;

(5) the memorandum of association of the amalgamated company;

(6) the articles of association of the amalgamated company;

(7) the election of the directors of the amalgamated company;

(8) the election of the auditor of the amalgamated company;

(9) other matters necessary for the amalgamation (if any).

However, such meeting shall be concluded within six months from the date of resolution in favor of the amalgamation of any of the companies, which was the latest, unless the meeting under this Section resolved to extend the period, but the total period shall not be more than one year.

Section 149. At the meeting held for metal consideration of the matters under Section 148, provisions governing such respective matters shall apply mutatis mutandis, except the following provisions:

(1) The place to be used for the meeting shall be in the locality in which the head office of any of the companies to be amalgamated is situated or in a neighboring province;

(2) There shall be shareholders holding shares amounting to not less than one half of the total number of shares sold of the companies to be amalgamated attending the meeting to constitute a quorum;

(3) The shareholders attending the meeting shall elect one shareholder to be the chairman of the meeting;

(4) A decision of the meeting shall be made by a majority of vote of the shareholders attending the meeting under (2).

Section 150. The board of directors of the former companies shall deliver the business, property, accounts, documents, and evidence of

the companies to the board of directors of the amalgamated company within seven days from the date of conclusion of the meeting under Section 148.

Section 151. The board of directors of the amalgamated company shall apply for registration of the amalgamation of companies and at the same time submit the memorandum of association and articles of association under Section 148 already approved to the Registrar within fourteen days from the date of conclusion of the meeting under Section 148, and Section 39 shall apply mutatis mutandis.

Section 152. Upon registration of the amalgamated company by the Registrar, the former companies shall cease to have the status of a juristic person and the Registrar shall note in the register accordingly.

Section 153. The amalgamated company duly registered shall be entitled to all assets, liabilities, rights, duties, and responsibilities of the former companies.

<The Public Limited Company Act>

The result is that these two companies will terminate their status as juristic persons according to the law and that a new company is born. The new company will take over the existing rights and obligations as well as all liabilities of these two companies. The merged companies may retain either merged companies' name or new register a new name.

a. Procedure

A + B = New Company (with the new or same name)

1. Each company that desires to merge must hold a meeting of shareholders in order that the shareholders pass a special resolution to merge the companies.

2. Each company will register the special resolution to merge the companies under 1. before the Partnerships and Companies Registrar within 14 days from the date of the special resolution of the meeting of shareholders to merge the companies.

3. Each company must publish the merger in a local newspaper for at least one time and send a written notice by registered mail to its creditors, informing them of its desire to merge. And if any creditor raises an objection, the objections have to be sent to the company office within 60 days from the date of the notice.

4. If after the expiration of the 60 days' period from the date of the notice or the date of the last publication in the newspaper no creditor of the company raises an objection, further action will be taken to merge the companies.

5. If a creditor objects to the merger, the company must repay the debts or provide security for the debts before proceeding with the merger.

6. To merge the companies after the expiration of the period of time under 4., and after taking action with respect to the opposer(s) under 5., the board of directors of each of the companies to be merged will summon the shareholders meeting together to consider at least the following matters:

(1) Company Name;
(2) Company Head Office Registered Address;
(3) Allotment of the company's shares;
(4) Memorandum of Association of the company;
(5) Articles of Association of the company;
(6) Directors and powers of directors of the company;
(7) Company Objective;
(8) Appointment of the auditor and determination of her/his remuneration; and
(9) Other business (if any)

7. The new board of directors of the new company must take steps to register the merger into a new company within 14 days from the date of the meeting's resolution to merge.

b. Advantages

(1) No corporate income tax, value-added tax, specific business tax and stamp duty burdens on the transfer of the merged companies assets and liabilities to the new company.
(2) The shareholders of the merged companies will be exempt from income tax on benefits derived from the merger and valued as income in excess of their investments.
(3) The new company resulting from the merger of the merged companies will takes over the rights, obligations and liabilities of these two merged companies by operation of law. Therefore, it is not required to assign any rights or effect novations with respect to contracts or juristic acts entered into with third parties.

(4) The merger registration fee is lower than that for the registration of the capital increase plus dissolution pursuant to the transferring of the entire business and the fee of the immovable properties transfer is only 50 bath per unite by Department of Land.

c. Disadvantages

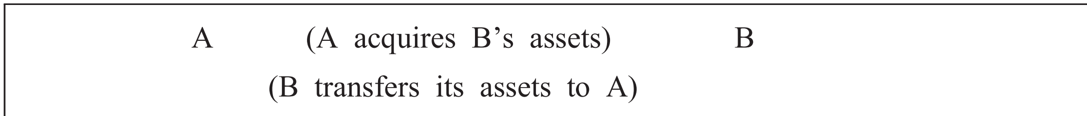
(1) The new company cannot treat the deficits brought forward for five years max under Pho.Ngor.Do. 50 of the merged companies as expenditures in the computation of a net profit or loss for corporate income tax payment.
(2) The new company may be obligated to pay severance pay for employment termination in the event employees of the merged companies do not consent to be transferred to the new company.
(3) The new company must prepare new work rules for submission to the Labour Department.
(4) Tax operations of the merged companies may be inspected because a merger is deemed to constitute dissolution pursuant to the Revenue Code.
(5) The new company must pay expenses for the preparation of commercial documentation and a new tax invoice.
(6) A long period of time (approx. 4-5 months) will be required for the merger.

2. Acquisition of Asset

Sale and Transfer by the transferor of Assets to the transferee, and the transferor continuation as a Company under the CCC.[2)]

2) Section 453. Sale is a contract whereby a person, called the seller, transfers to

The transferee acquires part of transferor's assets or business. Thereupon, the transferor continues to be a limited company, which may cease its business operation for a certain period of time and will then carry on other business or close the company later.



a. Procedure

Steps in brief for a transfer of part of the business are as follows:

1. A business transfer and transfer acceptance agreement is entered into between the transferor and transferee company.

2. The transferor company may notify the cessation of the business it is handling or may carry on other business.

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another person, called the buyer, the ownership of property, and the buyer agrees to pay to the seller a price for it.

Section 456. A sale of immovable property is void unless it is made in writing and registered by the competent official. The same rule applies to ships or vessels of six tons and over, to steam launches or motor boats of five tons and over, to floating houses and to beasts of burden.

An agreement to sell or to buy any of the aforesaid property, or a promise of sale of such property is not enforceable by action unless there is some written evidence signed by the party liable or unless earnest is given, or there is part performance. The provisions of the foregoing paragraph shall apply to a contract of sale of movable property where the agreed price is five hundred baht or upwards.

Section 458. The ownership of the property sold is transferred to the buyer from the moment when the contract of sale is entered into.

Section 1299. Subject to a provision of this Code or other laws, no acquisition by juristic act of immovable or of real right appertaining thereto is complete unless the juristic act is made in writing the acquisition is registered by the competent official.

b. Advantages

(1) The transferor maintains its conditions as a company. It may carry on other trade or business in the event the transferee is unable to do so.
(2) The transferor is still able to treat the deficits brought forward for five years max under its Pho.Ngor.Do. 50 as expenditures in the computation of a net profit or loss for corporate income tax payment.
(3) The shareholders of both transferor and transferee incur no tax burdens.

c. Disadvantages

(1) The transferor still has the duty to prepare financial statements and other documents for submission to the government units concerned.
(2) The transferor must apply the proceeds of the sales of its properties to the computation of a net profit for corporate income tax payment.
(3) The transfer of assets results from a contract or juristic act. Therefore, it may be difficult for the transferee to assume the rights and obligations which the transferor has against third parties. In the event of an assignment of a right of claim or a novation, the debtor's or the other party's consent must be obtained.

3. Acquisition of Shares

a. Procedure

Acquisition of shares in a private company is quite simple. A transfer of shares to an acquirer is valid only if made in writing and signed by

the transferor and the transferee whose signatures are certified by at least one witness.[3] The number of shares to be transferred must be listed in the share transfer documents as well.[4] Such transfer will be considered ineffective against the company and third persons unless the share transfer and the name and address of the transferee are all recorded in the Share Register Book of the company.[5]

If the disputed shares will be newly issued shares, the target company shall increase its capital and issue the new shares to the acquiring company.[6] However, under the CCC, any newly issued shares can be allocated only to existing shareholder in proportion to their shares, a policy referred to as preemptive rights.[7]

> Section 1129. Shares are transferable without the assets of the company unless, in case of shares entered in a name certificate, it is otherwise provided in the regulations of the company.
>
> The transfer of shares entered in a name certificate is void unless made in writing and signed by the transferor and the transferee whose signatures shall be certified by one witness at least. Such transfer is invalid as against the company and third person until the fact of the transfer and the name and address of the transferee are entered in the register of shareholders.

<Civil and Commercial Code>

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3) Baker & McKenzie Ltd., Guide to Mergers & Acquisitions in Thailand (2005/2006), available at http://www.bakermckenzie.com/files/Uploads/Documents/MA_Guide_.pdf p.598

4) *Id.*

5) *Id.*

6) *Id.*

7) *Id.*, p.599

Therefore, in practice, the acquiring company will usually acquire at least one share in the target company from the existing shareholders, so that it becomes a shareholder of the target company prior to the increase of capital.[8] Upon the capital increase and the shares' issuance, the existing shareholders will waive their pre-emptive right and the acquiring company will then subscribe for that portion of share.[9]

Under the Public Limited Company Act (PLCA), a transfer of shares to an acquirer shall be valid upon the transferor's endorsement of the share certificate by stating the name of the transferee and having it signed by both the transferor and the transferee and upon delivery of the share certificate to the transferee.[10] The transfer of shares will be effective against the company upon the company having received a request to register the transfer of the shares but it may be effective against a third party only after the company has registered the transfer of the shares in the Share Register Book.[11]

> Section 57. The company may not prescribe any limitations in share transfer, unless such limitations are for the purpose of preserving right and interests lawfully deserved by the company or for the purpose of maintaining the ratio of shareholding between Thais and foreigners.
>
> The promoters may not transfer shares bought under Section 17(3) before the expiration of two years' period from the date of registration of the company, except with approval of the meeting of shareholders.
>
> Section 58. A transfer of shares shall be complete upon endorsement

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8) *Id.*
9) *Id.*
10) *Id.*
11) *Id.*

of the share certificate by the transferor by specifying name of the transferee and delivery of the share certificate to the transferee. Such transfer of shares may be used as proof to the company when the company has received an application for registration of the transfer of shares, but may be used as proof to outside persons when the company has registered the transfer of the transfer of shares In this connection, if the company is of the opinion that the transfer of shares is in order the company shall register the transfer of shares within fourteen days from the date of receipt of the application or, if the company finds the transfer of shares incomplete, the company shall notify the applicant according within seven days.p

In the case where the transferee wishes to have a new share certificate, he shall make a written request to the company, duly signed by the transferee with at least one witness signing in attestation to the signature of the transferee, and deliver the former share certificate and other evidence back to the company. In this connection, if the company is of the opinion that the transfer of shares is in order, the company shall register the transfer of shares within seven days from the date of receipt of the application and shall issue a new share certificate within one month from the date of receipt of such application.e

<Public Limited Company Act>

b. Advantages

(1) The transferee can run the business of the target company immediately.

(2) The transferee may sell some of the shares and remain the others.

(3) The company continues to carry on its specific license.

c. Disadvantages

(1) The transferee has to keep the employment of the employees.
(2) The transferee may be responsible for any hidden liabilities occurs, even they already conducted on legal and financial due diligence
(3) If the share is purchased from the listed company, it will be complicated, take a long time and have to pay higher service fee.

C. Laws Concerning M&A in Thailand

1. Investment Promotion Act

The Investment Promotion Act B.E.2520 (1977) provides the legal framework for investment incentives granted by the Office of the Board of Investment (BOI).[12] In principle, mergers and acquisitions can take place under various kinds of transactions, such as share purchases, asset purchases and amalgamations. Share purchase and asset purchase come from an agreement between a transferor and a transferee, while amalgamation is required by law to be done pursuant to the Civil and Commercial Code of Thailand (CCC). In the latter case, all rights and liabilities will be transferred by the operation of law, however, this will not happen automatically in respect of BOI privileges as provided under a BOI certificate.

The BOI's position is that any action relating to the merger and acquisition of a BOI project is to be deemed as a transfer of the BOI certificate from the promoted company to the acquiring company.

12) The Board of Investment of Thailand, <www.boi.go.th/>, visited on June 10, 2014.

However, such transfer will not transfer the license by operation of law even in the case of amalgamation under the CCC. Rather section 56 of the Investment Promotion Act provides that if a promoted person/party dissolves their activity, merges it with others, or transfers it to others, the promotion certificate shall be valid for a period not more than three months from the date of such dissolution, merger or transfer. If the operator of a newly merged or transferred activity desires to take the transfer of the promoted activity under the conditions provided in the BOI promotion certificate, they must file an application for promotion with the office of the BOI within the prescribed period (3 months). If after filing such application the Board deems it appropriate to grant a promotion thereto then a promotion certificate will be issued granting them such rights and benefits under this Act in so far as they would remain to the original promoted person. If however the Board determines that it would be inappropriate to grant promotion to the new party then it shall withdraw all rights and benefits.

It is also worth noting that all benefits and privileges mentioned in the transferred BOI promotion certificate remain the same as those granted to the original promoted person. This means that the acquirer needs to follow the procedures within the set timeframe in order to acquire the BOI certificate before it can assume the rights and obtain the privileges thereupon.

2. Foreign Business Act

When undertaking M&A activities in Thailand, a foreign party that is an acquirer should be particularly wary of the Foreign Business Act

(1999) (hereinafter referred to as the “FBA”) which came into force on 3 March 2000. The FBA prohibits foreigners from participation in specified activities in the Thai economy and also provides that licenses be obtained prior to engaging in certain defined businesses. Under the FBA, businesses are divided into three categories. Those activities contained in schedule one are business that foreigners are unable to partake in, moreover for this list of activities there is no basis for obtaining a license to conduct a business of this nature. Schedule Two comprises businesses that relate to national security or safety or which have an impact on Thai art and culture or impact on natural resources or the environment.

Foreigners can engage in a businesses listed in schedule two if they formally obtain permission from the Commerce Minister along with the resolution of the Cabinet. Generally speaking, even if licensed, such foreign juristic person should have Thai nationals or juristic persons that are not foreigners (as defined under the FBA) holding at least 40% of the capital of that foreign juristic person.[13] Moreover, such juristic person must also have at least 2/5 of its board of directors comprised of Thai directors. However, upon reasonable grounds, the Commerce Minister by and with resolution of the Cabinet may, in certain cases, reduce the required Thai shareholding percentage, but under no circumstances can it be less than 25%.[14]

Schedule three of the FBA lists businesses where Thais are not yet ready to compete with foreigners. Foreigners can participate in these businesses in Schedule Three only upon receipt of permission from the Director-General of the Department of Commercial Registration, Ministry

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13) Baker and McKenzie, *supra* note 3, p. 601
14) *Id.*

of Commerce, if they get approval of the Foreign Business Board. such approval will allow 100% foreign ownership of the entity in question.

Under the FBA, a "foreigner" is defined as including:[15]

1. A natural person (an individual) who does not hold Thai nationality;
2. A juristic person (a legal entity) that has not been registered and incorporated inThailand;
3. A juristic person incorporated in Thailand as follows:
   - A Juristic person which has shares of its capital of 50 percent or more held by persons under 1 or 2, or a juristic;
   - A limited partnership or registered ordinary partnership whose managing partner or manager is a person under 1 above;
4. A juristic person incorporated in Thailand which has shares of its capital of 50% or more held by persons under 1, 2 or 3, or a juristic person who has persons under 1, 2 or 3 as investors to a value of 50% or more of its capital.

It is worth noting that bearer (no-name) shares of a limited company shall be considered owned by foreigners, unless otherwise prescribed by a Ministerial Regulation.

Many of the restrictions imposed by the FBA do not apply to Americans since Thailand and the U.S. have entered into the Treaty of

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15) Department of Business Development. <www.dbd.go.th/dbdweb_en/>, visited on June 10, 2014.

Amity and Economic Relations (the "Treaty").[16] The Treaty allows American nationals, and companies incorporated in the United States or Thailand that are majority owned and controlled by American nationals to mainly conduct business in Thailand as would a Thai national.[17] However, the Treaty still prohibits an American (either an individual or an entity) from undertaking six restricted businesses, these are : transportation; communication; fiduciary functions; banking involving depository functions; the exploitation of land or natural resources; and domestic trade in indigenous agricultural products.[18]

Before carrying out a restricted business as specified under the FBA (other than the said six restricted businesses), foreigners (either the individual or entity) must apply with the Director-General of Commercial Registration, the Ministry of commerce, for a certificate permitting the carrying on of such specified restricted business.[19]

3. Competition Act

a. Overview

If a corporate merger or acquisition could result in a monopoly or end in unfair competition then it is legally required to obtain prior authorization from the Trade Competition Board (the Board) according to the Trade Competition Act 1999 (hereinafter referred to as the 'Competition Act').

Section 26 of the Competition Act prohibits any business operator from carrying out a merger, which could result in a monopoly or unfair

16) Baker & McKenzie Ltd., *supra* note 3, at 601
17) *Id.*
18) *Id.*
19) *Id.*, p.602

competition (as prescribed by the Board in the Government Gazette), unless it obtains the Board's permission. The Board may prescribe that the conditions of such mergers that are subject to permission.

Mergers are defined to include, among other things:[20]

a) An acquisition of the whole or part of another business' assets in order to control the businesses management, policy or administration;
b) A merger between 2 or more manufacturers, sellers or service providers, causing one of the businesses to be terminated or causing the two businesses to be merged into a new legal entity; and
c) The acquisition of the whole or a part of another businesses shares in order to control the business policy, administration or management.

Under the Competition Act pre-merger permission may be granted by the Board. To obtain such approval, the applicant must submit an application with the Board in compliance with its procedures, criteria and conditions, which may be published from time to time in the Government Gazette. Currently no criteria, procedures, or other conditions have been publicly announced in the gazette.

b. Criteria for pre-merger permission

It determining whether to grant pre-merger permission, the Board must be satisfied that the application for the merger or acquisition is:

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20) Baker & McKenzie Ltd., *supra* note 3, at 610

a. Conducive to promoting business in Thailand;

b. Not harmful to consumers' material interests (in general);

c. Reasonably commercially necessary; and

d. Not significantly detrimental to Thailand's economy.

c. Penalties

A breach of the prohibited mergers and acquisitions rules under this legislation is subject to a term of imprisonment not exceeding three years and/or a fine of up to 6 million Baht. In the case of the repeated commission of any such violation multiple penalty's may be imposed by the Courts.

A party that violates an order of the Board if found guilty is subject to a term of imprisonment, ranging from one year to three years or a fine ranging from 2 million to 6 million Baht, in addition to a daily fine not exceeding Baht 50,000 during the period of such breach of the Board's order(s).

Moreover, if a violation is committed by a company or other juristic person, then the following persons will also be personally liable to the same penalties:

managing director(s),

managing partner(s); or

the person(s) responsible for the juristic person's business operations.

The only defense available to such person(s) is that they must be able to substantiate that the violation in question was carried out by the juristic person without their personal knowledge or consent, or that such person had undertaken reasonable actions to prevent the commission of the violation.

d. Exemptions from pre-merger permission

Whereas pre-merger permission from the Board is applicable to any business operator whether engaging in agricultural, industrial, financial, insurance or other service businesses, there are several exemptions with regard to pre-merger permission including, mergers of:

Other businesses prescribed from time to time in the Ministerial Regulations;

State-owned enterprises;

Agricultural cooperatives established by law; and

Central, provincial and local government agencies.

e. Merger Review Procedures

There are no precise terms covering merger review procedures in the Competition Act. Therefore, it would appear that the Board has broad discretion to determine the exact criteria used for determining whether to grant permission for such merger/acquisition. However, one should be aware that when exercising this discretion, the Board is required to follow, among other things, its own prescribed conditions relating to mergers/acquisitions that are subject to the pre-merger permission requirements, as published from time to time in the Government Gazette.

If the Board does grant its permission to an applicant and thereafter the Board considers that there is a change in the economic, factual or behavioral circumstances under which the permission was granted, then the Board has the power to amend or revoke the time period or the conditions of the permission.

D. M&A in Thailand: A Case Study

If a party wishes to undertake M&A in Thailand they must be mindful of a number of considerations to ensure that their interests are adequately safeguarded, such matters include checking whether the target company is embroiled in litigation and if so to what extent and what its potential liability is should it be unsuccessful in such case(s). Moreover, it would also be prudent for a party wishing to do M&A in Thailand to conduct due diligence to see what guarantees or warranties the target company has provided to third parties (such as customers or suppliers) as these could pose a major risk to the acquiring party should they be called upon following the completion of the M&A process. As mentioned previously, taxes should also be borne in mind by an acquiring party lest a target company be purchased only to find that it has a significant outstanding tax liability and/or penalties imposed thereon by the Revenue Department, hence it would be prudent to engage the services of an experienced tax lawyer to conduct necessary checks beforehand so that this risk can be avoided. Ensuring that the parties to an M&A deal validly execute the necessary agreements is another key consideration which is important; before signing agreements with a Thai company, one should check to ensure that the signatories are duly authorized to sign such agreement on behalf of the company, this will require checking such documents as the affidavit of Company registration to see if they have the necessary authority to sign on behalf of the company, another approach is to see if such person has a valid and existing power of attorney to sign such documents on behalf of the Company.

Arguably one of the most important aspects of the M&A process which investors fail to adequately consider is transferring or novating parties in key agreements. If a foreign company wishes to purchase the specific assets of a Thai company rather than its shares then it should bear in mind that it may be necessary to have key agreements novated/transferred to it so that it can continue doing the business being conducted by the company that owns the asset. For instance if a Chinese company wishes to buy a factory in Thailand from a Thai company, then it should consider the agreements that the owner has with buyers for the supply of goods and if it intends to take over this business it should ensure that it makes such allowance for this in the M&A deal to ensure that its purchase of the machinery will also enable it to take over the necessary contracts as well.

If a party wishes to purchase an existing Thai company that has employees then Thai labour law is another key issue which should be carefully considered as the law imposes considerable burdens on employers with regard to such things as terminating staff or moving the place of business. For instance, if a company purchases all of the shares of an existing Thai company that has employees and then decides to reduce the workforce, it will be necessary to comply with the severance pay provisions in section 118 of the Labour Protection Act which can be quite expensive if the employees to be terminated have been employed for more than three years. Moreover, if the investor determines to move operations then they should bear in mind section 120 which may require them to pay staff special severance pay if such a move would materially affect the ordinary course of living of the employees or their families.

Along with the employment laws, parties wishing to undertake M&A in Thailand should also bear in mind other key issues such as whether the agreements have been duly registered at the relevant Government office, for instance if a party purchases all of the shares in a target company they must not only execute valid share transfer agreements but must also lodge such agreement (in Thai language) with the Department of Business Development and ensure that the official company share register (which is known as form BorOrJor 5) has been correctly updated to reflect the share purchase.

In addition to the above issues, a further matter which investing parties must be aware of is to check whether the necessary internal company rules have been fully complied with. For instance if a Thai company sells its shares to a foreign investor, one should check to ensure that the selling company has fully complied with its internal rules on share transfers as specified in its articles of association (i.e. resolution of board and/or shareholders) otherwise its shareholders may undermine such transaction and put the M&A deal at risk. Investors embarking on an M&A of a Thai entity should ideally conduct a thorough due diligence study on their target to ensure that the above issues are adequately addressed, such study should be undertaken by professionals such as lawyers and accountants to ensure that a deep analysis is provided, investors should be wary of relying upon representation & warranty clauses in M&A agreements which promise that the company is in good standing and in compliance with the law as these can prove to be expensive if they turn out to be untrue. Depending on the nature of the target company, it is also a sensible idea if the investor checks the

licenses and government permits held by the target entity as some of these will prohibit foreign investors from holding a certain percentage of shares in a company or from having too many directors on the board of the target company, relevant laws include the Tourism Business and Guide Act B.E. 2551.

Before executing an M&A agreement a careful and detailed review of the existing contracts to which the target company is a contractual party is a sensible idea to ensure that such contracts don‘t contain unwelcome surprises, for instance some contracts may contain provisions which provide that the agreement will automatically terminate upon a major change in the ownership of the shares or directorship of the target company.

Arguably one of the most important factors which foreign investors should consider when pursuing a M&A deal in Thailand is the impact of the Foreign Business Act B.E. 2542 as this Act prevents foreigners from participating in certain sectors of the Thai economy and stipulates the need for permission in other sectors; before a foreign entity invests it would sensible to engage a Thai attorney to check whether such business will fall under the scope of this Act. Besides, this foreign investors should also be aware of the Investment Promotion Act B.E. 2542 as this Act provides for the Thai Board of Investment (BOI) to promote foreign investment in the Kingdom and as such it may also be relevant to foreign companies considering on purchasing a Thai registered company/entity.

Finally, it is worth noting that with the coming advent of the ASEAN Economic Community (AEC) in 2015 there will be changes to various

laws in Thailand and some relaxation of certain laws and these should be considered as well in order to take advantage of the new opportunities provided by it.

Ⅲ. M&A Laws in Korea

A. Overview

Merger generally refers to a situation where two or more companies combine into one, while acquisition usually means one company takes control of another company. In legal sense, various sections of law deal with concepts covering mergers and acquisitions between/by/of companies in Korea. Among them, below three laws are representative: Monopoly Regulation and Fair Trade Act, Commercial Act, and Financial Investment Services and Capital Markets Act. The over-arching definition of ‘combination of two or more companies’ is provided under Monopoly Regulation and Fair Trade Act,[21] then the Commercial Act provides

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21) Article 7(1) of Monopoly Regulation and Fair Trade Act:
1. The acquisition or ownership of stocks of other companies;
2. The concurrent holding of an executive's position in another company (hereinafter referred to as "concurrent holding of an executive's position") by an executive or employee (referring to a person who continues to be engaged in the affairs of the company, but is not an executive; hereinafter the same shall apply);
3. A merger with other companies;
4. An acquisition by transfer, lease or acceptance by mandate of the whole or main part of a business of another company, or the acquisition by transfer of the whole or main part of fixed assets used for the business of another company (hereinafter referred to as "acquisition by transfer of business");
5. Participation in the establishment of a new company: Provided, That this shall not apply to any of the following cases:
(a) Where a person, other than persons with special interests (excluding those determined by Presidential Decree) does not participate in the establishment of a new company;
(b) Where a person participates in the establishment of a company by division under Article 530-2 (1) of the Commercial Act.
When two or more companies merge under the Commercial Act, those companies are dissolved and a new company is formed. The new company will take over the existing rights and obligations as well as all liabilities of these two companies.

related information as to what happens with mergers and acquisitions, and the Financial Investment Services and Capital Markets Act states systems related to corporate mergers and acquisitions. As appeared on those three sections of law, although the legal terminology of “Merger” and “Acquisition” may be defined differently, scholars take the viewpoint that those two are intertwined and used interchangeably in Korean law, in as much as the result of those two turns into similar outcome in the corporate environment.

Considering that the line between merger and acquisition is blurred and insignificant, it is adventurous to classify different types of merger and acquisition with a set of criteria – by the status of the target company, by the type of merging companies, by the purpose of the merge, and by the character of the merge. The subcategories of each classification may and will overlap between different criteria.

B. Major Issues of M&A Laws in Korea

1. Triangular and Reverse-Triangular M&A

a. Triangular Merger

Triangular Merger started to be legally authorized in Korea by the amendment made to the Commercial Act in 2011.[22] Triangular merger, by establishing a third company and route the purchase of the target company through the third company that holds the shares of the acquirer company, results in a simpler and more convenient way of merging the target company. For example, the acquirer company may set up a subsidiary and let the subsidiary acquire the target company. For the

22) Commercial Act, Section 523(4), Section 523(2)

acquisition, the subsidiary pays the shares of the acquirer company to the target company. Acquirer company practically owns the target company through the transactions; however, it is structured that the transaction takes place between the subsidiary company and the target company that no shareholder consent is required in the acquirer company level. Also, the acquirer company does not take over legal liabilities or responsibilities but still take advantage of the economic merger. Overall, Triangular Merger is not considered as a form of merger under financial law and thus the acquirer company may benefit in the tax wise for the restructuring of the company that resulted through the transaction.[23)] Not having to go through the meeting of the board and obtaining the board's resolution is another major advantage of this type of merger as it significantly reduces associated costs.

Other meaningful effects that the Triangular Merger draws are attracting direct investment of foreign funds when the acquirer company is a foreign company, and also getting a non-listed company backdoor listed when a listed acquirer company triangular merges a non-listed company.[24)] Increasing foreign direct investment through this Triangular Merger format has its adverse effect while bringing sunshine on the investment side, as it is apparent that foreign investment and foreign capital invasion are just other sides of the same coin. When inflow of foreign capital into the domestic market is made, as much as the market gets added activity, so does the entropy of the market viability on its own. It is reasonable for entrepreneurs and scholars to worry that the domestic market may become dependent on foreign capital and also the doemstic enterprises

23) Jongjoon Song, *Structure of Triangular Merger and Related Legal Issues,* Kiupbup-Yonku Vol. 27 No.3, 2013, at 14.

24) *Id,* p. 142

may not survive on their own. In Japan, when included the Triangular Merger provision in their new Corporations Act, the law did not become effective for one year after its pass due to the resistance arose out of the entrepreneurs, based on their concern on foreign corporations' hunt on domestic companies. After the law became effective, the legislatures are trying to strengthen provisions for the defense mechanism for companies. Previously, Triangular Merger was not allowed under the law in Korea, as was the cash-out merger. The Commercial Act Amendment made in 2011 allowed both the cash-out merger and the Triangular Merger, where assets to be provided to the shareholders of the target company includes the parent company of the surviving company and the surviving company acquires the shares of the parent company for the purpose of paying to the target company.[25] The reasoning behind the ban on the Triangular Merger before the Commercial Act Amendment in 2011 took place was because the payment of the asset for the merger was to be made only with the assets of the acquiring company, and also because acquiring shares of a parent company by its subsidiary was prohibited.[26] By loosening the type of the assets to be used for mergers,[27] the Commercial Act implemented a provision clearly allowing using parent company's shares to pay for the merger by its subsidiary.[28]

b. Reverse Triangular Merger

While Triangular Merger gets attention as a convenient way to acquire a company and dissolve the target company, there are situations where

25) Commercial Act, Section 523-2
26) *Id.*, Section 342-2
27) *Id.,* Section 523 (4)
28) *Id.,* Section 523-2

the need for the existence of the target company is stronger than the mere convenience of the Triangular Merger. When the target company holds a non-assignable franchise, long-term lease, trademarks, non-transferable contract rights without a third-party approval, merging with the target company and dissolving the same means also cancelation of those non-transferable rights. When the target company is a publisher, its copyright permission should be taken into consideration as it is most likely not transferable either. Taken those into consideration, instead of pursuing Triangular Merger, a Reverse Triangular Merger may be a better option.

The method of keeping the target company through merger with a wholly owned subsidiary, known as the Reverse Triangular Merger, currently is not allowed under Korean Commercial Act, as the law only authorizes use of parent company's shares as payments made to the target company by the wholly owned subsidiary, based on the assumption that the subsidiary remains existing and the target company dissolves through the merger. However, as discussed above certain cases urges the use of the Reverse Triangular Merger (especially in the banking, insurance, public interests, and highly regulated industries), although the Reverse Triangular Merger is not commonly used, it is utilized when needed. In the United States, paying shares for shares, paying shares for assets (or vice versa) are liberally allowed and thus issuance of parent company's shares by its wholly owned subsidiary is authorized; this leads to the vitalizations of various forms of Triangular Reorganizations.

2. Hostile M&A and Defense

Hostile takeover happens when an acquirer company takes over management rights of the target company against the will of the target

company's shareholders. As the negative connotation associated with this form of the M&A indicates, hostile takeover tends to shrink overall business activities on both acquirer and target sides, as the takeover attempts and the defense against them takes longer with high costs.[29)] Hostile merger by foreign capital is considered problematic as it may lead to the weakening of the industrial independence. On the other hand, hostile M&A places spotlights on the target company in the market and thereupon stimulates the rise of the stock prices, and it also makes it possible to remove incompetent management and increase efficiency.

Various forms, types, and methods of M&A may and are interwoven in practice and it is important to review details of each path before ultimate decisions for the M&A are made. One very important condition that needs to be investigated when foreign company wishes to enter into the Korean market through M&A is the relevant laws restricting foreigner's investment. Financial Investment Services and Capital Markets Act, Foreign Investment Promotion Act, Act on Prevention of Divulgence and Protection of Industrial Technology, Telecommunication Business Act, Broadcasting Act, and Act on the Improvement of Managerial Structure and Privitization of Public Enterprises are the ones that potentially have impact on making business decisions when considering M&A and entering into Korean market for foreign investors, as all of those laws have several provisions putting restrictions in many different ways.

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29) Because a strong defense mechanism is not provided under the Commercial Act in Korea against the hostile takeover, companies mostly respond and defend against this type of merger by buying in each company's own shares, resulted in approximately 7billion dollars spent for buying in companies‘ own shares in 2006, having business cross the board shrunk. M&A Bupkwa Siljae, Jaesoon Lee, Yuro, 2009, at p.10.

a. Protocol for Acquirer to Ensure Fair Competition

As the nature of the Hostile M&A implies, there is no agreement on the merger and acquisition involved; rather, competition and takeover against one party's will inherently exist in the process. When such takeover is planned and executed, although a resolution that induces agreement by both parties are not achievable, at least the procedural fairness must be secured. Such protection and guideline on fair competition is essential for the development of the economy and business as a whole in a society as without such safety net, entrepreneurs will be too focused on defending its business to the excessive level and it would eventually lead to the shrink of the economy.

1) Market Sweep

There is no specific restrictions designed for Market Sweet in the Hostile M&A context under Korean law, however, the Securities Exchange Act (before the Financial Investment Services and Capital Markets Act was enacted) introduced the "5% Rule" specifying that acquisition of a certain company's shares for more than 5% requires the acquirer to notify. By restricting the acquirer's voting rights when such requirements are violated, this provision was designed to fulfill its original purpose of regulate sudden purchase of shares and to provide fair opportunities for minority owners to defend against takeover before it is too late.

2) Tender Offer

Similarly to the 5% Rule applied for Market Sweep, for the Tender Offers, the 5% also affects and forces the acquirer to purchase shares

publicly when such purchase is made out of market. It brings the effect of secretely dealing shares behind minority owners' back.

3) Proxy Contest

Another way to take over a company is to buy its voting rights even without buying its shares by persuading shareholders to use proxy votes to install new management that favors takeover by the acquirer company. Persuading shareholders to use their proxy votes itself is not prohibited, but the method of such persuasion and the contents are regulated to prevent any distortion of information to the shareholders.

b. Defenses

1) Preventative Defenses

Even before any attempt for a Hostile M&A was made, when a company is prepared for such attempts will make it hard to become a target and also even if it became a target it would suffer less in the overall procedure. Representative ways for such preventative defenses are so called Golden Parachutes Strategy[30], Poison Pill,[31] Dual Class Shares,[32] just to name a few.

2) Responsive Defenses

As compared to the Preventative Defenses, Responsive Defenses are those when actual attempts for a Hostile M&A was initiated and the

30) Supra note 10, Section 388

31) Also known as the shareholder rights plan, this poison pill strategy has not been legally impelemnted in Korea, although heated arguments in favor of its adaptation to Korean law has been made among many legal scholars.

32) Although widely used in EU countries and also in the USA, allowing voting rights to the controlling shareholders allotted more than what the invested capital's worth was not made part of the Amended Commercial Act in Korea.

target company wishes to keep its voting rights against the acquirer company. Green Mail,[33] White Knight,[34] Leveraged Buy-Outs[35] are some of the examples for such defenses allowed under the law.

C. Laws Concerning M&A in Korea

1. Commercial Act

After the economic crisis at the end of 1997, a series of amendment on the Commercial Act has been made, especially in the Company Part and the Stock Company Part to promote mergers and restructuring of companies and also to improve governing structure of companies. By the amendment in 1998, the Commercial Act simplified the merger process to encourage mergers and acquisitions. In the same vein, the scope of application for the simplified merger has been expanded[36], and the small-scale merger process has been newly adopted.[37] Amendment of the Commercial Act in 1999 loosened the required steps to follow by allowing application of simplified merger process for companies otherwise not allowed, if such companies merge after division.[38]

The Commercial Act has undergone another round of amendment in 2011 which is notable in many aspects. It provided legal basis for establishment of complete parent company based on all-inclusive share

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33) As a form of a repurchase of treasury stock, such transaction is under restrictions and regulations through the securities market in accordance to Section 189-2(a) of Commercial Act

34) Commercial Act 513(3), 516-2(4)

35) Jongjoon Song, *Constitution of Breach for LBO in Corporate Law and Legislative Task*, Kungkwonbup-Yonku Vol.10, No.2, 2009, p.321

36) *Supra* Note 10, Section 527-2

37) *Id.*, Section 527-3

38) *Id.*, Section 530-11(2)

transfer or swap.[39] 2011 amendment further introduced cash-out merger,[40] triangular merger,[41] and the controlling shareholders' rights to request sale.[42]

2. Financial Investment Services and Capital Markets Act

Article 168 of the Financial Investment Services and Capital Markets Act places restrictions on foreigner's trading of securities and exchange-traded derivatives. The provision allows Korean government to be able to restrict, in accordance with the guidelines and methods prescribed by Presidential Decree, foreigner (either natural[43] or legal person[44])'s trading of securities, exchange-traded derivatives, or any other sales. Details of this provisions are laid out in the Enforcement Decree of the Financial Investment Services and Capital Markets Act Article 187, prohibiting any foreigner or foreign companies from acquiring shares of public corporations over certain limites prescribed under the law, except when explicitly authorized by the Financial Services Commission through public notification.[45] Specific restrictions are as follows:

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39) *Id.,* Section 360-2, 360-15

40) *Id.,* Section 523(4)

41) *Id.,* Section 523(2)

42) *Id.,* Section 360-24, 260-26

43) Individuals with no address or residence for at least six months in Korea

44) Financial Investment Services and Capital Markets Act Article 9 Section 16: Foreign governments, foreign municipalities, foreign public interest organizations, foreign company organized under foreign law, international organizations as specified by Presidential Decree, or any overseas legal person

45) Enforcement Decree of the Financial Investment Services and Capital Markets Act, Section 187

The limit on acquisition by a foreigner, a foreign corporation, etc. per issue per person: The limit stipulated in the articles of incorporation of the relevant public-purpose corporation; and The overall limit on acquisition by foreigners, foreign corporations, etc. per issue: 40/100 of the total number of equity securities of the relevant issue.

It also provides that when deemed necessary to stabilize the securities exchange or the derivative market or to protect investors, the Financial Services Commission may place limitation on acquisition of securities or exchange-traded derivatives by type of business, by type or issue, and by item of securities and exchange traded derivatives.[46] The same Act also provides sanctions for violating such protection-oriented restrictions on security acquisition that violators shall not exercise voting rights and shall take corrective measures.[47] Violators who did not follow orders made by the Financial Services Commission may be subject to imprisonment or fine as well.[48] Through this law and the Enforcement Decree, it is clear that the government wishes to place shield on public corporations by placing limitation on acquisition of securities of such corporations.

3. Foreign Investment Promotion Act

As much as the title of the law, Foreign Investment Promotion Act, implies and stresses on the promotion side of the foreign investment, the provisions and the contents of the law rather restricts foreigners from merging with Korean companies through investments for certain circumstances concerning core technologies or national security. The Foreign Investment

46) *Id.*
47) Financial Investment Services and Capital Marekts Act Section 168(3)
48) *Id.,* Section 446)

Promotion Act starts and declares liberal investment of foreigners as its underlying principle, while clearly drawing lines where such freedom of investment shall be limited when it is against (1) national security and public order, (2) public hygiene, environmental preservation, morals and customs, or (3) the Korean law.[49] Similarly to the case of the Financial Investment Services and Capital Markets Act, the Foreign Investment Promotion Act also provide detailed restrictions through its Enforcement Decree by specifying categories of business such restrictions are applied. While it is clear that the law and the enforcement decree is more about the restrictions side than on the promotion side, the law at the same time states thorough examples of exceptions to such limitations on investments. For instance, when the turnover ratio of a category of restricted business is no more than 1% of the total turnover, investment by foreigner is falling under the exception to the restrictions and thus is legally allowed.[50]

4. Telecommunications Business Act

Ownership of common telecommunications business by foreigners are restricted by the Telecommunications Business Act. Such restrictions are first placed when the company applies for licensure to Korea Communications Commission as the Telecommunications Business Act states that foreign governments or foreign corporations are automatically disqualified for such licenses.[51] It also provide specific proportional guidelines as to the foreign ownership of the company,[52] as compared to

49) *Id.,* Section 4
50) Enforcement Decree of Foreign Investment Promotion Act Section 5
51) Telecommunications Business Act Section 7
52) 15% or more of a company's share by a foreign governemnt or a foreigner who is the majority shareholder makes the company a foreign company.

the maximum ownership proportion allowed for foreigners aggregate.[53] Such restrictions on the Telecommunications Business, along with similar limitations on acquisition of shares on Broadcasting business,[54] demonstrates where the Korean government places need for protection. It is understandable that both Telecommunications Business and Broadcasting Services are integral part of keeping one society's democratic values and also of promotion improvements of community culture and public benefits that limitations and restrictions on acquisition of shares to control such core businesses are in place for foreigners. The Telecommunications Business Act also provides mechanism to prevent violators from controlling by building in a provision prohibiting exercise of voting rights for shares over the limitations in violation of the same law.[55]

D. M&A in Korea: A Case Study

1. Step-by-Step Guidance

a. Preparations

The first step to be taken when considering M&A is to review the need for the M&A to make sure such M&A is needed and will be beneficial. The acquirer company's shareholders must clearly identify the reason for the proposed M&A, set up and hire an expert group to conduct due diligence on the target company, and secure funds for the M&A. At this stage, with the suggestions and advice from the expert group, the acquirer company must explore options of various method of

53) No more than 49% of the voting shares may be held by foreign governments or foreigners aggregate.
54) Broadcasting Act, Section 14
55) Telecommunications Business Act Section 7(1)

M&A such as whether to take the Stock Deal, a Business Transfer, or to have an Asset Transfer. Each method will have its own strengths and weaknesses.[56] All relevant circumstances will need to be considered when selecting the form of M&A.

b. Merger & Acquisition

Contacts through legal representatives of the acquirer company to the target company may be made to deliver its intention for the M&A, unless Hostile M&A is pursued. MOU, Confidential Agreement, or Letter of Intent are executed at this stage and classified information is shared. With the information, due diligence on the business activities, accounting, legalities, intellectual property issues, contracts, environmental and safety concerns, insurance and taxation obligations, lawsuits are thoroughly reviewed and searched. Then contracts are drawn. Legal documents for payments and shares are prepared and exchanged, the shareholders' meetings and other legal obligations specified on the contracts are performed at this stage.

c. Wrap-up

Registration and public notification in accordance to the law needs to be completed within time allotted, and the internal procedures such as reports at the shareholders' meeting needs to be taken.

56) For example, a Stock Deal will result in absorbing the target company, and may be performed by issuing new shares, by acquiring shares, or combination of both. A Business Transfer would transfer general rights and liabilities related to business that the acquirer company may benefit by succession of the business while may facing liabilities in relation with taxation and employment. This Business Transfer model may be utilized by making selective transfer and not succeeding debts and liabilities. An Asset Trasnfer only transfers asset, no other liabilities includig employment, thus this may be the best to choose when deliberately avoid succession of employment.

2. Hostile M&A Case: *SK-Sovereign Dispute*

Sovereign Asset Management bought up 8.64% of the SK Corporation in April 3, 2003. The next biggest shareholder of the SK Corporation was SK C&C, which held only 8.49% at that time. Through this hostile M&A attempt, Sovereign Asset Management tried to reform SK Corporation, which linked to series of shareholder votes and lawsuits to defend SK C&C's management rights. Eventually Sovereign sold its shares, quadrupled its seed funds only in two years and left. In reviewing Sovereign's Hostile M&A strategies, deliberate moves designed to fit in relevant Korean laws that were explained previously are observed:

a. Financial Investment Services and Capital Markets Act

Under the Financial Investment Services and Capital Markets Act, anyone who holds shares of a listed company for more than 5% of the total shares shall report such acquisition within five days from the day on which the person becomes a holder of the stocks in such a quantity.[57)] This protective gear was designed to prevent any takeover of a company by buying the shares indiscretely in large sum so that not to provide any opportunity for the current shareholders to defend their management rights. It is clear from the intent of the insert of this provision that the legislatures viewed that the acquirer and the target company should have equal opportunities to take over and also to defend against such take over in the market.[58)]

57) Financial Investment Services and Capital Markets Act, Section 147

58) Hoshin Song, *M&A Laws on buyout under Commercial Act,* Buphan-Yonku Vol. *17*, No. 1, Kyongsang University Law Institute, 2009, p.181

The key to this report requirement in this case is the 5 days of period where the acquirer of the share may prolong its acquisition. Sovereign Asset Management in fact took advantage of this 5 days and continued purchasing additional shares before such reporting for over 5% ownership is being made, thus by the time such report was finally made, Sovereign Asset Management already held almost 10% of the shares.[59] Through this loophole under the law, Sovereign Asset Management obtained shares in a short period of time.

b. Foreign Investment Promotion Act

Foreign Investment Promotion Act provides that investment made by foreigners in the form of share acquisition must be reported to the Ministry of Knowledge Economy.[60] When acquiring stocks of SK Corporations, Sovereign Asset Management failed to report to the Ministry, and the Ministry reported such failure to the Prosecutor's office for possible sanctions. The Prosecutor's office, however, acknowledged Sovereign Asset Management's failure to report before such acquisition took place, decided not to pursue sanctions against Sovereign Asset Management because the Prosecutor's office considered such failure a harmless error based on the fact that Sovereign did report the asset acquisition two days after the deal simply because it was unfamiliar with Korean law.[61]

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59) *Supra* Note 14, p.364
60) Foreign Investment Promotion Act, Section 6
61) *Supra* Note 14, p.366

c. Telecommunications Business Act

Ownership of common telecommunications business by foreigners are strictly limited that no foreigners aggregate may have more than 49%, and that a company with a foreigner with 15% or more shares be considered as a foreign corporations.[62] SK Corporations is not itself a Telecommunications Business, but one of its subsidiary, SK Telecom, is. As a telecommunications business, SK Telecom was controlled by the Telecommunications Business Act. Had Sovereign Asset Management purchased 15% or more of SK Corporations' shares, SK Corporations would have been automatically considered as a foreign corporation, which was the majority shareholder of a telecommunications business, SK Telecom. A foreign majority shareholder with more than 15% of the share of a telecommunications business may face limitations on its exercise of the voting rights under the Telecommunications Business Act. Thus, the voting rights of SK Corporations as the majority shareholder for SK Telecom was at risk when the Sovereign Asset Management acquired 14.99% of SK Corporations, and it indirectly pressed SK Corporations.[63]

d. Monopoly Regulation and Fair Trade Act

When not less than 15% of the total number of stocks issued by another company is held through combination of companies, such transaction shall be reported to the Fair Trade Commission.[64] If acquired 15% or more of SK Corporations' shares, the combination should have gone through the

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62) Telecommunications Business Act, Section 7
63) *Supra* Note 14, p. 365, 366
64) Monopoly Regulation and Fair Trade Act, Section 12

Fair Trade Commission and been reviewed, which would have lead to the exposure of its own asset management and the parental-subsidiary relationships of Sovereign Asset Management. It is assumed that Sovereign deliberately acquired 14.99% of the share to avoid such reporting and review requirements.

Ⅳ. Conclusion: Comparison of Laws in Thailand and Korea

A. Definition of M&A

Under Thai law there is no overarching definition of M&A however, under South Korean law there is such a definition and it can be found under article 7(1) of the Korean Monopoly Regulation and Fair Trade Act. Moreover, one of the types of M&A provided under this definition is not provided under Thai law, this type of M&A relates to the concurrent holding of an executive's position in another company by an executive or employee (referring to a person who continues to be engaged in the affairs of the company, but is not an executive; hereinafter the same shall apply).

B. Foreign Investment Limitations & Promotion

One difference between M&A in Thailand and South Korea relates to limitations on foreign investment and participation in the economy by foreigners. In the case of Thailand, the Foreign Business Act B.E. 2542(1999) (otherwise known as the “FBA”) is arguably the key piece of legislation governing foreign investment limitations as it restricts foreigners from operating businesses in several sectors of the Thai economy and limits participation in other sectors subject to the investors first obtaining a foreign business license from the Ministry of Commerce before being able to operate such a business. In the case of Korea and its limitations on foreign investment, The Financial Investment Services and Capital

Markets Act provides legal basis for limitations placed on foreign investment, especially in the form of stock purchase. Under the law, securities or exchange-traded derivatives transactions, or stock acquisitions of a public purpose corporation by foreigners or foreign corporations are subject to restrictions. Such restrictions are to be set in accordance with the guidelines and methods prescribed by Presidential Decree, which are specified under the Enforcement Decree of the Financial Investment Services and Capital Markets Act Article 187 as the limit stipulated in the articles of incorporation of the relevant public purpose corporation and the overall limit on acquisition by foreigner as 40% of the total number of equity securities of the relevant issue.

In addition to limitation on foreign investment, when examining M&A it is also worth comparing the way the two countries promote foreign investment. In the case of Thailand, the Investment Promotion Act B.E.2520 (1977) (the “BOI”) provides a legal framework of investment incentives granted by the Office of the Board of Investment. The BOI promotes a range of commercial activities across several parts of the Thai economy including mining, ceramics, chemical, paper and plastics production, light industry and agriculture to name but a few. It promotes these approved activities through a variety of means including exemptions and reductions on customs rates, reduced corporate tax rates, reduced import duties, and other benefits. It is also worth noting that the BOI is easier to utilize than obtaining a FBL from the MoC. However, in relation to South Korea it promotes foreign investment in different way as explained below. The Foreign Investment Promotion Act as the title of the Act claims to promote and encourage investment by foreigners; however, while setting forth its foundational scheme of liberal investment

by foreigners, the law further elaborates situations when foreign investments are restricted, such as when they may infringe upon national security or public policy, public health and environment, or when they may be against any Korean law. The enforcement decree of the same law further provides categories of business that may be subject to the restrictions on the foreign investment, rendering the restrictions on foreign investment elaborate and fine.

Besides the aforementioned Financial Investment Services and Capital Markets Act and Foreign Investment Promotion Act, there are a couple more laws that rather place restrictions on foreign investment Act on Prevention of Divulgence and Protection of Industrial Technology, Telecommunications Business Act, Broadcasting Act, and Act on the Improvement of Managerial Structure and Privitization of Public Enterprises. Not like the two law listed previously that are specifically geared towards promoting and restricting foreign investments, those four Acts do not have foreign investments as their main purpose or regulation target. Rather, in realizing their respective general goal, they inadvertently write constraints on foreign investments and those are the situations where investors should not miss heeding to when considering putting their funds into Korean market for investment.

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