

Welcomed changes to Company Law: Mergers without new Company creation or liquidation

On 1 January 1925, the Civil and Commercial Code ('CCC') of Thailand became effective and introduced various rules and procedures concerning for the legal affairs and rights of natural and legal 'persons' covering areas such as family law, inheritance law, contract law, property law, corporate law, commercial law and more.

With respect to companies, the CCC stipulates the legal rights and obligations of a company incorporated under Thai Law, and in particular, provides that where one company wishes to join operations with another company, it must follow the rules of 'amalgamation'. For instance, if Company A wishes to join with Company B, a new company C must be formed to house the combined operations and the 'empty' shell companies A and B must both be then liquidated. Amalgamation is the only form of legal 'merging' provided under the CCC... the only form that is until 7 February 2023.



Through changes introduced by the Civil and Commercial Code Amendment Act (No. 23) B.E. 2565 (2022) ('CCC-A Act'), from 7 February 2023 the CCC will also recognise the concept of 'merger' in addition to amalgamation. Legally, this is a significant step forward for the ease of joining or 'merging' companies in Thailand.

Under the new provisions, Company A and Company B can now legally merge operations i.e., A into B or B into A with one entity (either A or B) becoming the prevailing surviving entity going forward and taking over the absorbed company's assets, rights, and liabilities.

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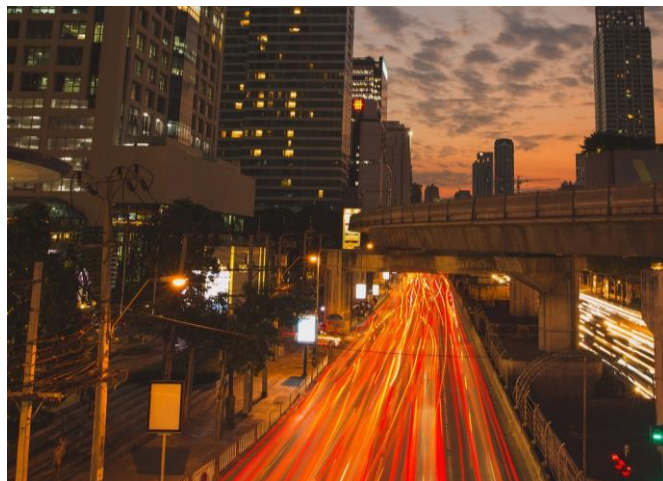
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There is no liquidation process or liquidator required for the non-surviving company left behind and it simply ceases to be a 'juristic person' recognised under the law. Further, in the merger process, unlike amalgamation, there is no requirement to create a third company to 'house' the combined business operations as this absorbed by one of the existing companies (i.e., by the surviving company).

Some salient points are as follows:

- The new Section 1243 states that:

"The combined company will be responsible for all assets, liabilities, rights, duties, and responsibilities of the old (combining) companies that combined."



Interestingly, this is very similar to the old provision of Section 1243, but it adds more detail as to what the 'combined operations' company will take over from the old company.

In terms of taxation, it should be noted that a merger does not protect or shelter the surviving company from the tax liabilities of the non-surviving company i.e., the surviving Company will be responsible for clearing the tax matters of both its existing obligations and those of the non-surviving company left behind. It should further be noted that if one Company pre-merger was facing a Thai Revenue Department tax audit, it may be migrated to cover the combined operations of the surviving Company.

- A change has been made in the treatment of the equity being merged. The old provision of Section 1242 requires that the issued (and paid up) share capital, the retained earnings (or loss) and the legal reserve to be shown separately in the combined Company's Balance Sheet i.e., the issued (and paid up) share capital of new company would be equal to the sum of issued (and paid up) share capital of the old companies, and so on. Notably, this allows for companies with negative shareholder equity to amalgamate



The new provision in CCC No. 23 however does not require the separation and maintenance of the three amounts to be preserved i.e., there is no requirement for the capital, legal reserve, and retained earnings/loss to be presented separately as under the old Section 1242. This is a significant change to the existing practice of business combinations and understandably there are some areas which could benefit from some guidance and further official interpretation by the Ministry of Commerce, for example, with respect to the maintenance of a legal reserve.

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- The new provisions of CCC No 23 allow for a new investor to join the combined company and improve the shareholders' equity position. This is advantageous because if a resulting negative shareholders' equity position would prevent two companies from merging, an injection of capital from an investor could eliminate this and create a positive shareholders' equity position in the surviving company.
- A change has also occurred for companies wishing to increase their share capital. Notably Section 1240/1(4) of the CCC No 23 removes the condition of Section 1222 that requires newly issued shares to first be offered to existing shareholders only

- The current provisions of Thai Revenue Code ('TRC') recognize two forms business combination:
 - Amalgamation (where two or more companies combine and become a new company) under Section 74 (1)(b) TRC; and,
 - An entire business transfer (where a company transfers its entire business to another company, and it is then dissolved in the same accounting period) under Section 74 (1)(c) TRC.

There is no change in the CCC for business combinations in the form of amalgamation and similarly the tax considerations remain the same. With respect to the new merger provisions however there is some uncertainty as it is unclear whether a 'merger' under the new CCC No. 23 will be accepted for tax purposes as satisfying one of the Section 74 TRC provisions.

Under the new 'merger' provisions, where two or more companies merge together into an existing company, the non-surviving company or companies then simply cease to be recognised under the law i.e., there is no liquidation process required. Under Section 74 TRC however there is a condition that the transferor company (or companies) must be liquidated. Therefore, it is not clear whether the provisions of either Section 74(1)(b) or Section 74(1)(c) TRC would apply to a 'merger' business combination under the CCC No. 23 or how this will be interpreted by the Thai Revenue Department.

Whether the shareholder of a 'transferor' company is an individual or a corporate shareholder, subject to meeting certain conditions, where they exchange their shares for shares in the surviving / new company they will be entitled to a personal/corporate income tax exemption.

In summary, the new company merger provisions allow a different combination route for companies and can provide a more efficient process. However, there are still some 'grey areas' where guidance and direction will be sought from the authorities, notably on the application of tax losses in the surviving company, the maintenance of a legal reserve, and whether the merger business combination is covered by one of the tax provisions of Section 74 TRC.