

THAILAND

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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA





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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

PREPARED BY MERITAS LAWYERS IN ASIA

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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

This is the fourth revised edition of Successful Strategies for Doing Business in Asia, which was first published in 2006. Prepared by lawyers from 13 leading Meritas member law firms in the Asia region, this book targets foreign investors and business people looking to pursue investment opportunities throughout Asia. Each chapter contains general information and guidelines and offers practical insights as opposed to specific legal advice.

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The following currency notations are used throughout this book.

RMB	Chinese Renminbi	PHP	Philippine Peso
HKD	Hong Kong Dollar	SGD	Singapore Dollar
INR	Indian Rupee	TWD	New Taiwan Dollar
IDR	Indonesian Rupiah	THB	Thai Baht
JPY	Japanese Yen	USD	United States Dollar
KRW	Korean Won	VND	Vietnamese Đông
MYR	Malaysian Ringgit		

Please be aware that the information on legal, tax and other matters contained in this book is merely descriptive and therefore not exhaustive. As a result of frequent changes in legislation and regulations from country to country, the situations as described throughout this book do not remain the same. Meritas cannot and does not guarantee the accuracy or the completeness of information provided, nor the application and execution of laws as stated. Please do not rely solely on these materials without consulting with qualified legal advisors who are familiar with your particular areas of interest and geographic locations.

In 2008, the world experienced its worst financial crisis in 70 years. Today, while many countries and economic regions are still suffering, Asia continues to be a bright spot. Home to 3.8 billion people, Asia is playing a major role in driving the global economy back to healthier times. At first, China rebounded quickly, though this momentum has slowed somewhat recently. India exhibits signs of long-term growth potential, as do Singapore, Malaysia and others in Asia, but serious challenges remain.

For over 30 years I have worked on behalf of multinational companies in their pursuit of investment and business opportunities throughout Asia. What I have learned is that countries in the Asian region can appear similar and at the same time be remarkably different. While local legal systems and government regulations will vary, every country has universal opportunities and challenges that foreign investors will face. This book is designed to provide both practical and timely insights into the 12 most frequently-asked questions that potential investors in Asia should consider:

1. What role will the government play in approving and regulating opportunities for foreign direct investment?
 2. Is it possible for foreign investors to conduct business without involving a local partner? What corporate structure is most commonly used and best for foreign investors?
 3. How does the government regulate commercial joint ventures composed of foreign investors and local companies or individuals?
 4. What specific laws will influence the commercial relationship between local agents/distributors and foreign companies?
 5. In what manner does the government regulate merger and acquisition activities by foreign investors? Are there any specific areas or industries that are heavily restricted or completely prohibited to foreign investors?
 6. How do local labor statutes regulate the treatment of employees and expatriate workers?
 7. What role do local banks and government agencies play in regulating the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
 8. What types of taxes, duties and levies should a foreign investor expect to encounter in negotiating an inbound investment?
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9. Do comprehensive intellectual property laws exist, and do they provide the same levels of protection for foreign investors as local companies? Will local courts and tribunals enforce IP laws uniformly, regardless of the nationality of the parties?
10. If a commercial dispute arises, given the choice between local courts or an international arbitration venue, which would offer a more beneficial forum for fair dispute resolution for foreign investors?
11. What recommendations can you offer for how best to negotiate and conduct business in your country?
12. What practical advice can you share with investors who decide to do business in your country?

Thirteen Asian law firms within the Meritas alliance have generously contributed to this book. These firms are comprised of leading local lawyers who possess broad practical experience in advising international clients on how best to conduct business in their respective countries. Each law firm was presented with these “Twelve Questions” and invited to write a chapter providing an overview of the laws in their jurisdiction along with timely insights and advice. In a concise manner, this book hopes to provide readers with a clear understanding of the similarities and differences, strengths and weaknesses of countries in the Asian region.

One final thought: For those who are waiting for Asia to become more predictable or financially stable before pursuing business or investment opportunities, do not wait too long. Most successful multinationals are already actively conducting business throughout Asia. Those who delay will find themselves missing out on one of the greatest economic expansions in history. There are risks, certainly, but also great rewards for the savvy – and educated – investor.

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I. WHAT ROLE WILL THE GOVERNMENT OF THAILAND PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

The Thai government regulates foreign direct investment by requiring foreign investors to obtain approval from the Department of Business Development (which is under the Ministry of Commerce) in the form of a license to conduct certain businesses in Thailand that are restricted pursuant to the Foreign Business Act (FBA), though most manufacturing businesses do not require an FBA license. Also, securities, derivatives or trustee businesses are exempt from foreign ownership restrictions under the FBA and so do not require an FBA license. The FBA lists the businesses that foreigners are prohibited from engaging in, those which can only be engaged in under certain conditions, or those which can operate with permission. However, the Thai government offers incentives for certain foreign direct investments that are deemed desirable to Thailand, thereby exempting the licensing requirements if the criteria set by the Board of Investment are met.

BOARD OF INVESTMENT

The Investment Promotion Act of 1977 governs the Board of Investment (BOI), which is the government agency responsible for providing incentives to stimulate investments in Thailand and conducting extensive investment promotion activities both domestically and internationally. The BOI promotes investment projects that strengthen Thailand's industrial and technological capabilities, make use of domestic resources, create employment opportunities, develop core industries, earn foreign exchange, contribute to the economic growth of regions outside Bangkok, develop infrastructure, conserve natural resources, and reduce environmental problems.

The BOI is empowered to grant a wide range of tax and non-tax incentives and various guarantees to investment projects which meet national economic development goals, such as the right to own land, permit non-Thai nationals to be a majority shareholder (thus overcoming the foreign ownership limitations under the provisions of the FBA), remit profits freely, hire foreign employees as required, and receive exemptions from import duties and exemptions from tax. Additionally, the BOI provides incentives to companies that set up regional offices in Thailand.

Eligible regional offices opening in Thailand will be provided with investment promotion, which exempts them from the restrictions of the FBA, allowing them to function more freely in the country.

The BOI maintains a list of activities eligible for promotion but also considers additional activities based on the benefits of the proposed investment. The BOI may also impose conditions on the investment as it deems fit.

2. IS IT POSSIBLE FOR FOREIGN INVESTORS TO CONDUCT BUSINESS IN THAILAND WITHOUT A LOCAL PARTNER? WHAT CORPORATE STRUCTURE IS MOST COMMONLY USED AND BEST FOR FOREIGN INVESTORS?

It is possible for foreign investors to conduct business in Thailand without a local partner. However, it is to be noted that any forms of business in Thailand that do not include a Thai majority co-investor (other than certain manufacturing activities) will be subject to restrictions under the FBA, which may prohibit the business from operating, impose conditions on the business or require the business to obtain a license, unless the business is promoted under the BOI. The following corporate structures are commonly used.

REPRESENTATIVE OFFICES

A representative office is an office of a foreign company that is located in Thailand and is engaged in the business of trading internationally. Trading representative offices may carry out activities such as finding suppliers of goods or services in Thailand for the overseas head office, checking and controlling the quality and quantity of goods purchased by the head office for manufacturing purposes in Thailand, providing advice on goods sold by its head office to agents, distributors and/or customers in Thailand, providing information to people in Thailand concerning goods or services of the head office, and reporting to the head office on business in Thailand. A representative office in Thailand is considered a liaison office and may not engage in any profit-seeking or profit-making enterprise. A representative office does not generate or receive income and therefore pays no tax unless it exceeds the scope of the above activities, in which case it may be regarded as doing business in Thailand and become subject to taxation on income generated or received in Thailand.

REGIONAL OFFICES

A regional office coordinates and supervises the company's branches and affiliates in the region on behalf of the head office. The regional office may provide branches and affiliates with advisory and management services, financial management services, training and personnel development services, marketing control and sales promotion plans, product development, and research and development services, but it must not derive income.

BRANCH OFFICES

Foreign companies may establish branch offices in Thailand without a local partner. However, most business activities of the branch office are likely to fall within the scope of the FBA and other laws that limit the activities in which the branch office can legally engage without a license. Therefore, a license to operate such business must be obtained.

In addition, the Revenue Department may consider revenue directly earned by the foreign head office from sources within Thailand as subject to Thai taxes.

OTHER BUSINESS ORGANIZATIONS

Foreign investments may also be made in the various entities such as partnerships, private limited companies, and public limited companies. However, without a majority Thai co-investor, the entity will be considered a foreign entity and will be limited in the scope of business in which it can legally engage pursuant to the FBA as well as other laws.

3. HOW DOES THE THAI GOVERNMENT REGULATE COMMERCIAL JOINT VENTURES COMPOSED OF FOREIGN INVESTORS AND LOCAL COMPANIES OR INDIVIDUALS?

There are no specific restrictions on joint ventures. However, if the joint venture is not a mere contractual joint venture and results in the incorporation of a new company and the resulting new company is foreign-owned, such joint venture will be treated as a foreign company for purposes of the FBA and may fall under the applicable restrictions and approval requirements.

Under an Order of the Central Partnership and Company Registration Office, which came into effect on 2 January 2013, if a limited liability partnership or limited liability company has the following:

- foreign partner(s) or foreign shareholder(s) in a limited liability partnership or limited liability company investing in or holding less than 50%* of its investment or share capital; or
- no foreign shareholders BUT foreign director(s) acting as the authorized director(s) to sign to bind a limited company,

then a confirmation letter issued by a bank to certify or show the financial status of the Thai partners or the Thai shareholder(s) is required to be filed with the Registrar of the Companies as one of the supporting documents submitted with the application for incorporation of a limited liability partnership or limited liability company. In addition, the said bank confirmation letter must show the Thai partners/Thai shareholders have sufficient funds deposited with the bank that is not less than the amount of money which is to be invested or paid as the subscription price for the shares that are to be paid by such Thai partner(s) or Thai shareholder(s).

The reason for this Order is that it had become a practice that foreign investors would improperly make use of nominees to become shareholders/partners in name only in order to side step the foreign ownership restrictions under the FBA.

* Special permission must be sought in most cases if a foreign partner or a foreign shareholder holds 50% or more of the investment capital or shares of a limited liability partnership or a limited liability company that undertakes business activities in Thailand.

BOARD OF INVESTMENT INCENTIVES FOR JOINT VENTURES

If the joint venture is incorporated, it may be eligible to receive promotional incentives from the BOI and can be exempted from restrictions that would be imposed on a “foreign” venture. For investment projects in agriculture, animal husbandry, fisheries, mineral exploration and mining, or service sectors, Thai participation must not be less than the majority of the registered capital of the joint venture. For manufacturing activities, majority or total foreign ownership of projects is permitted on condition that the manufacturing must be carried out in one of the three Investment Zones.

4. WHAT SPECIFIC LAWS WILL INFLUENCE THE COMMERCIAL RELATIONSHIP BETWEEN LOCAL AGENTS/DISTRIBUTORS AND FOREIGN COMPANIES?

Thailand does not impose any restrictions or conditions on agency/distribution agreements between foreigners and Thai citizens. Such agreements may be made and terminated freely at the discretion of the parties involved.

Nevertheless, the relationship between local agents and distributors in Thailand and foreign companies located overseas may be governed by the provisions of the Civil and Commercial Code of Thailand (the CCC) regarding contracts and agency. Generally, the relationship between an agent/distributor, such as the scope of authority of the agent, remuneration, territory, and other terms and conditions will be according to the agency or distributorship agreement executed between the manufacturer and the agent/distributor. Provided the agreement does not contain any provisions that are contrary to Thai law, sole and exclusive distributorship agreements are recognized under the general provisions of contract law under the CCC and are not uncommon in transactions where the overseas manufacturer grants exclusive rights for a distributor in Thailand to act as distributor for Thailand or Southeast Asia for certain products.

One of the essential issues that foreign investors should be aware of is that in order to obtain the protection of Thai intellectual property laws, the trademark or trade name for the product(s) to be distributed in Thailand should be registered with the Department of Intellectual Property under the name of the owner thereof, with a license to utilize the trademark/trade name being given to the distributor for use according to the terms of the distributor agreement.

5. IN WHAT MANNER DOES THE THAI GOVERNMENT REGULATE PROPOSED MERGER AND ACQUISITION ACTIVITIES BY FOREIGN INVESTORS? ARE THERE ANY SPECIFIC AREAS OR INDUSTRIES THAT ARE HEAVILY RESTRICTED OR COMPLETELY PROHIBITED TO FOREIGN INVESTORS?

The Thai government regulates foreign business primarily through the Foreign Business Act (FBA) which short lists businesses that foreigners are prohibited from engaging in or can only engage in under certain conditions or with permission from the Thai government. In addition to the FBA, restrictions on foreign share ownership in commercial banks, insurance companies, air and commercial transportation services, commodity export, and mining are also restricted under various acts, ministerial notifications, and cabinet policies. Businesses falling outside those listed in the FBA may (subject to restrictions under other laws) be operated freely by foreigners, provided that the minimum capital at the commencement of the business operation is at least THB2 million.

Pursuant to the FBA, foreign participation is restricted according to the types of business and the strategic role of that business in the Thai economy or society.

Businesses falling under Category 1 are categorically closed to foreign participation. These include key national businesses and national resources such as radio and television broadcasting, press, farming, forestry and wood fabrication, fishing in Thai waters and Thailand's special economic zones, trading in Thai antiques or national historic artifacts and, most importantly, trading in land.

The businesses under Category 2 are restricted for reasons of national security or for reasons related to their effect on national art and culture or natural resources and the environment. These businesses may only be operated with permission from the Minister of Commerce and the Cabinet. These businesses include production and sale of weapons, all transportation services, manufacturing of sugar, salt, mining, and production of precious metalwork.

Category 3 restricts certain businesses that the Thai government deems the economy is still not ready to compete with foreign businesses, such as legal services, accounting services, agricultural and engineering services, construction, advertising, hotels (not including hotel management), and other businesses in the service sector specified by the government in ministerial regulations.

TRADE COMPETITION ACT

The Trade Competition Act prohibits distributors, manufacturers, and importers who distribute goods having market dominance from unfairly fixing the price of goods. Business operators are also prohibited from consolidating their businesses in a manner that may create a monopoly or create unfair competition and from monopolizing, reducing, or restricting competition in a certain market for goods or services.

6. HOW DO LOCAL LABOR STATUTES REGULATE THE TREATMENT OF EMPLOYEES AND EXPATRIATE WORKERS?

The essential laws that govern labor and the treatment of employees and expatriate workers are as follows.

CIVIL AND COMMERCIAL CODE (CCC)

The CCC provides the general definition for contracts of employment, duties and liabilities of the employer and employee, and general conditions required in the hire of work and hire of labor.

LABOR PROTECTION ACT 1998

This Act is the law that provides essential regulations regarding the conditions of work such as wages, payment of wages, overtime and overtime wages, work hours, leave, women and child labor, welfare, termination and notice of termination, severance pay and liability thereof, and reengineering and relocation. It provides exceptions for certain categories of employees.

LABOR RELATIONS ACT 1975

This Act contains provisions that relate to the promotion of good understanding and good relations between employers and employees as well as procedures for presenting labor demands, employer-employee negotiations, mediation by the Ministry of Labor, strikes, lock-outs, labor unions and employer associations and employee committees, as well as provisions concerning unfair practices and unfair dismissal and workmen's compensation criteria and rates.

ACT ON ESTABLISHMENT OF LABOR COURT AND LABOR COURT PROCEDURE 1979

All cases that involve, *inter alia*, employment contracts, termination of employment, claims for unfair dismissal, severance pay and damages must

be submitted to the Central Labor Court (or the Labor Court outside of Bangkok).

SOCIAL SECURITY ACT 1990

This Act applies to every employer but does not apply to certain limited categories of employees. The Social Security Fund has been established by virtue of this Act to provide an employer's liability compulsory insurance system. The government, the employer, and the employee are required to contribute to the fund at the specified rates. The fund pays out benefits to employees, covering non-work-related injury or sickness, maternity expenses, disability, death, child and elderly welfare, and unemployment.

COMPENSATION FUND ACT 1994

Under this Act, employers are required to pay compensation to employees if they suffer injury, sickness or death in the course of employment. The Act does not apply to certain limited categories of employers. The Compensation Fund is established under this Act to provide an employer's liability compulsory insurance system.

Employers are required to contribute to this fund annually at the specified rates depending on the type of business and nature of the work performed. Once the employer has paid the compensation, the employer can seek reimbursement from the fund.

FOREIGN EMPLOYMENT ACT 2008

This Act requires non-Thai nationals to obtain a work permit prior to working in Thailand and provides the procedures and criteria for the issue and maintenance of work permits, as well as designating certain occupations in which non-Thai nationals are prohibited from engaging, e.g., engineering, architecture and law. The Act also provides exemptions to the work permit requirements for members of diplomatic corps, the UN, foreign nationals that enter Thailand for educational or cultural purposes, or for art or sports.

Once non-Thai nationals obtain a valid work permit they are subject to the same labor law provisions as Thai employees.

SKILL DEVELOPMENT PROMOTION ACT 2002

A business operator engaging in industrial, commercial or other businesses with 100 or more employees must contribute to the Skill Development Fund at the prescribed rate. Certain businesses (e.g., agricultural, private school businesses and nonprofit organizations) are exempt from the requirement. However, the contribution is not required in the case where

such operator provides skill training to no less than 50% of its employees per calendar year. The training course shall be approved by the registrar of the Department of Skill Development, Ministry of Labor.

A business operator who provides training under this Act to its employees will be granted certain benefits such as an income tax exemption amounting to a prescribed percentage of the training expenses, an exemption on import duty and value added tax on tools and equipment imported for training purposes, a double tax deduction on electricity and water charges, etc.

7. WHAT ROLE DO LOCAL BANKS AND GOVERNMENT AGENCIES PLAY IN REGULATING THE TREATMENT AND CONVERSION OF LOCAL CURRENCY, REPATRIATION OF FUNDS OVERSEAS, LETTERS OF CREDIT, AND OTHER BASIC FINANCIAL TRANSACTIONS?

Thailand's exchange controls are established by the Exchange Control Act 1942 and administered by the Bank of Thailand under Ministerial Regulations and Bank of Thailand's Notifications. All foreign currency transactions must be made through an authorized commercial bank or authorized company or authorized person.

CONVERSION OF LOCAL CURRENCY

Inward remittances of foreign currencies may be made freely for all purposes and in unlimited amounts. There is no requirement for registration of foreign investment. However, such inward amount has to be sold to an authorized agent or deposited in a foreign currency bank account within 360 days from the date of acquisition or importation, as the case may be.

REPATRIATION OF FUNDS OVERSEAS

Foreign investors can without permission remit funds to invest in Thailand, whether it is by direct investment, financial transactions or share purchases, subject to the requirement that it be sold to an authorized agent or deposited in a foreign currency bank account within 360 days. The repatriation of such funds or loan payment can be made only by submitting the documents related to the funds (such as share transfer instruments, share purchase agreements, loan agreements, etc.).

LETTERS OF CREDIT

Letters of credit issued for payment for purchase of goods and services pursuant to sale contracts may be purchased, amended, and negotiated without prior permission.

OTHER BASIC FINANCIAL TRANSACTIONS

Securities, share certificates, bonds, deposit certificates, bills of exchange and promissory notes may be carried or sent out of Thailand without prior permission, subject to reporting regulations.

CAPITAL TRANSFERS BY THAI RESIDENTS

Direct Investment and Lending Abroad

A Thai company is allowed to invest in an overseas business entity whose shares are held by the Thai company by not less than 10%, or to invest or lend to affiliated business entities abroad as necessary.

A Thai company is allowed to lend to nonaffiliated business entities abroad up to USD50 million per year.

A Thai natural person is allowed to invest in an overseas business entity whose shares are held by that person by not less than 10% in an amount not exceeding USD100 million per year.

Fund transfers for such investment or lending to business entities abroad must be in foreign currencies only, whereas fund transfers for investment or lending to business entities in Vietnam or Thailand's neighboring countries for trade and investment in Thailand or those countries can be in foreign currencies or in Thai baht.

Portfolio Investment Abroad

Institutional investors, namely the Government Pension Fund, the Social Security Fund, provident funds, mutual funds (excluding private funds), securities companies, insurance companies, specialized financial institutions and Thai juristic persons with assets of at least THB5 billion, are allowed to invest in securities issued abroad by Thai juristic persons without limit and to invest in foreign securities up to the outstanding balance of USD50 million, provided that such investment shall not exceed the limit set by the supervisory authority, directors or managements of each institutional investor. Investments exceeding such limit require approval from the Bank of Thailand.

Individuals are allowed to purchase shares of related companies abroad under employee benefit plans up to USD1 million per person per year.

Individual or corporate investors can invest in securities abroad, other than those under employee benefit plans, through private funds or securities companies subject to the Securities and Exchange Commission's guidelines and approval from the Bank of Thailand.

Transfers for Other Purposes

Outward remittances to Thai emigrants who are permanent residents abroad provided that funds are derived from their own assets, from their families or relatives, or from their inheritances, are allowed up to USD 1 million per recipient per year for each purpose. Fund transfers to the public for donation are allowed up to USD 1 million per person per year.

Purchase of immovable properties abroad is allowed up to USD 10 million per person per year.

8. WHAT TYPES OF TAXES, DUTIES, AND LEVIES SHOULD A FOREIGN INVESTOR EXPECT TO ENCOUNTER IN NEGOTIATING AN INBOUND INVESTMENT IN THAILAND?

The Revenue Code (Code) is Thailand's principal taxation law and imposes taxes and stamp duty on the execution of certain transactions. The Code provides for five classes of taxation on income and consumption, i.e., Personal Income Tax, Corporate Income Tax (CIT), Value Added Tax (VAT), Special Business Tax, and Stamp Duty.

PERSONAL INCOME TAX

Any person who derives assessable income from Thailand shall be taxed in Thailand. A resident of Thailand who derives assessable income from overseas shall be taxed in Thailand if the income has been brought into Thailand in the same tax year (calendar year). "Thai resident" means any person who stays in Thailand for a period or periods totaling 180 days or more in a tax year.

Personal income tax rates are progressive ranging from 5% to 35%. The expenses and allowances can be deducted from gross revenue, subject to certain conditions.

CORPORATE INCOME TAX (CIT)

All companies and partnerships registered under Thai law or foreign law but that carry on business in Thailand are subject to CIT. Companies registered in Thailand pay corporate income tax based on worldwide income at the rate of 15% to 30%* of net profits. Foreign registered

companies carrying on business in Thailand are taxed on their net profits arising from business carried on in Thailand.

*N.B. For the year 2015, there is in place a special reduction of the corporate income tax rate to 20% applied to net profits of small companies.

WITHHOLDING TAX

Foreign companies not carrying on business in Thailand but receiving certain types of assessable income such as interest, dividends, and service fees are subject to withholding tax at the rate of 10% to 15% on payments. However, this withholding tax might be exempted under the provisions of a Double Tax Treaty between Thailand and the country of the recipients.

VALUE ADDED TAX (VAT)

VAT is charged on the sale of goods, rendering of services, export sales and import of goods at the rate prescribed by the Code, currently 7%, and 0% for export. VAT is a consumption tax added to the sale price of the goods or services charged to consumers. However, transportation service charges are exempted from VAT.

SPECIFIC BUSINESS TAX (SBT)

Certain types of businesses are subject to SBT based on their gross receipts. The rate of SBT is 3.3% of the gross payment, and SBT is for the types of businesses that fall outside the VAT regime. Commercial banking, finance and securities business, life insurance, businesses that engage in commercial banking activities (such as loans, currency exchange, sale of negotiable instruments and money transfer) and sale of immovable property and securities under the Stock Exchange of Thailand are subject to SBT.

STAMP DUTY

The Code requires certain instruments, e.g., rental agreements, transfers of shares, hire-purchase agreements, etc., to be subject to stamp duty at various rates, depending on the types of instruments.

9. DO COMPREHENSIVE INTELLECTUAL PROPERTY LAWS EXIST IN THAILAND AND DO THEY PROVIDE THE SAME LEVELS OF PROTECTION FOR FOREIGN INVESTORS AS LOCAL COMPANIES? WILL LOCAL COURTS AND TRIBUNALS ENFORCE IP LAWS UNIFORMLY, REGARDLESS OF THE NATIONALITY OF THE PARTIES?

Thailand is a party to the Convention Establishing the World Intellectual Property Organization (WIPO) and also has acceded to the Berne Convention, the Paris Convention for the Protection of Industrial Property, the Patent Cooperation Treaty, and the Agreement on Trade Related Aspects of Intellectual Property (TRIPs). Thailand has recognized intellectual property rights under its legal system and has accordingly enacted a broad range of intellectual property legislation. The laws that regulate the various aspects of Intellectual Property in Thailand are as follows:

- Copyright Act 1994
- Patent Act 1979 (as amended 1992 and 1999)
- Trademark Act 1991 (as amended 2000)
- Plant Varieties Protection Act 1999
- Act for the Protection of Layout-Designs of Integrated Circuits 2000
- Geographical Indicators Act 2003
- Trade Secrets Act 2002
- Optical Disc Protection Act 2005
- Act for the Establishment of and Procedure for Intellectual Property and International Trade Court 1996

In endeavoring to secure internationally recognized and nondiscriminatory judgments, Thailand has established a specialized court called the Central Intellectual Property and International Trade Court to hear and adjudicate both civil and criminal cases that are related to intellectual property. The court also offers mediation procedures in pursuing a settlement between parties that are in dispute to seek a quick solution before going to trial. The law provides that the Court is to be staffed with high-caliber professional judges and associate judges who are proficient in matters of intellectual property. The efforts of the Thai government to ensure that Thai intellectual property laws are comprehensive and enforced by the courts in an objective and nondiscriminatory manner are declared in the court's

mission statement, which states that the court shall "...hold steadfast to the principle of adjudication on an effective and international basis ... to provide the public with swift, easily accessible and nondiscriminatory services..."

Registration of intellectual property rights with the Department of Intellectual Property by foreign nationals should be made through a local representative or agent domiciled in Thailand or reachable by the Registrar. Priority claims are recognized. Once intellectual property rights are registered, Thai law also recognizes principals of licensing and sublicensing and provides for criminal penalties for violations of intellectual property rights.

10. IF A COMMERCIAL DISPUTE ARISES, GIVEN THE CHOICE BETWEEN LOCAL COURTS OR AN INTERNATIONAL ARBITRATION VENUE, WHICH WOULD OFFER A MORE BENEFICIAL FORUM FOR FAIR DISPUTE RESOLUTION FOR FOREIGN INVESTORS?

For complex commercial disputes of a highly technical nature, arbitration provides a more efficient method of dispute resolution for foreign investors.

LANGUAGE

Pursuant to the provisions of the Thai Civil Procedure Code, all court proceedings must be conducted in the Thai language. Testimony by non-Thai-speaking witnesses must be translated spontaneously in court and all documents must be translated into Thai prior to being submitted to court. In addition to increased costs that are associated with this and the burden on both client and attorney, there is always the possibility that the true essence of the issues in dispute in the case will be "lost in translation."

However, in arbitration proceedings, the parties in the contract may agree to the language of the proceedings, alleviating much of the burden caused by language barriers.

PROCEDURE

Trial procedure in Thai courts, as with the majority of courts all over the world, is complex and intricate. On the other hand, arbitration proceedings tend to be more flexible in terms of procedure, allowing the proceedings to focus more on the issues in dispute.

TIME

Thai trial courts have a significant backlog of cases awaiting trial. Hearing dates can often be scheduled up to nine months from the date of filing an action. The entire court process can take up to five years (or longer) if the case is appealed to the courts of appeal and the Supreme Court. On the other hand, arbitration proceedings emphasize adherence to a strict timetable, and hearing dates can be controlled more easily than court cases in which judges hear several cases per day.

FORUM

Without an arbitration clause, commercial disputes must be submitted to the court having jurisdiction of the case, i.e., a civil court in Bangkok or the provinces. However, with an arbitration clause, the parties can select the forum for the proceedings beforehand.

JUDICIAL PANEL vs. ARBITRAL PANEL

Many arbitration clauses used commercially in Thailand provide that each party shall select one arbitrator with the chairman of the arbitral panel to be selected by the two elected arbitrators. This allows the parties to choose arbitrators who have specific knowledge of the issue in dispute, whether construction, trans-border investment, turnkey finance, securitization or natural resources.

However, it should be noted that arbitral awards may have to be enforced in Thai courts if the award is not adhered to, since the arbitral panel has no authority to enforce the award and the court must be requested to issue a judgment pursuant to the award in order for it to be enforced by the Legal Execution Department under the Ministry of Justice.

The advantage that an arbitral award has over a court judgment is that an arbitral award can be enforced in any country that is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (of which most of Thailand's treaty partners are members) whereas there is no treaty or convention for foreign court judgments to be enforced in Thailand.

Enforcement of an arbitration award can take about 12 to 18 months to obtain a lower court's judgment. If the lower court's judgment is appealed, this will increase the period by an additional one to two years. A court may refuse enforcement of an arbitration award on the following limited grounds:

- One of the parties lacked capacity
- One of the parties was not given proper notice

- The arbitration award was beyond the scope of the arbitration agreement between the parties
- The arbitral tribunal or arbitration procedure was inconsistent with the arbitration agreement

A party can apply to a court to have an arbitral award set aside if:

- One of the parties lacked capacity
- One of the parties was not given proper notice
- The arbitration award was beyond the scope of the arbitration agreement between the parties
- The arbitral tribunal or arbitration procedure was inconsistent with the arbitration agreement
- The award deals with a dispute which shall not be settled by arbitration under law
- The enforcement of the award is contrary to public or good morals

To enforce a court's judgment, a writ of execution is issued which is enforced by the Legal Execution Department. A court may also issue orders upon a judgment debtor to:

- Pay the judgment debt
- Deliver property
- Perform a certain act

II. WHAT RECOMMENDATIONS CAN YOU OFFER FOR HOW BEST TO NEGOTIATE AND CONDUCT BUSINESS IN THAILAND?

Many foreigners coming to Thailand for the first time, especially those from outside the Southeast Asia region, may have an impression that Thailand takes a carefree approach to doing business. In fact, negotiating deals and conducting business in Thailand is carried out in a conservative manner and following business protocols. Giving the proper level of respect to your business partner/potential business partner is a very important element of successfully concluding a deal and conducting a business in Thailand. Outwardly displaying anger or being otherwise highly emotive is considered inappropriate and may result in an adverse outcome.

Setting the stage by creating a good personal relationship with a new potential business partner can greatly assist in ensuring a successful negotiation and a successful joint business.

12. WHAT PRACTICAL ADVICE CAN YOU SHARE WITH INVESTORS WHO DECIDE TO DO BUSINESS IN THAILAND?

There have been instances where a foreign national and a Thai national have turned a pre-existing personal relationship into a business relationship but fail to fully and properly document that new aspect of their relationship (e.g., fail to have a comprehensive joint venture agreement or a shareholders agreement). As a result, this has almost always led to misunderstandings, disputes and in a number of cases a failure of the business venture.

Failure to set up procedures for how one party can exit from a business smoothly and fairly has, in many cases, resulted in serious disputes.

As all dealings with government agencies must be conducted in the Thai language, it is important that non-Thai speakers obtain translations of documents that have been done by experienced and senior translators. A foreign investor who seeks to save expenses by not getting documents properly translated, or only partially translated or by using a nonprofessional translator, may find that they have a completely incorrect understanding of their obligations and entitlements.

There are many examples of foreign nationals using improper and/or flawed mechanisms to circumvent foreign ownership restrictions that apply to business ventures and the ownership of land. These mechanisms often backfire, leaving the foreign national to suffer losses and damages.

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