

Doing Business in Thailand: 12 Things to Keep in Mind

Written By: Doug Mancill

1. Foreign Ownership of Companies and Land:

This is often a surprise for business people and lawyers operating in more open economies, but foreign majority owned businesses are prohibited from engaging in a wide variety of businesses in Thailand, absent issuance of an Alien Business License, which is difficult to obtain in practice. For example, the business of providing 'services' (which is defined very broadly), is subject to the Foreign Business Act (FBA) and majority foreign owned businesses may not provide 'services' unless they have an Alien Business License. Other laws prohibit foreign companies and individuals owning land in Thailand, subject to certain exceptions. Nominee shareholding structures designed to circumvent these laws are illegal and scrutiny of businesses for violation of these laws has increased.

2. Choice of Law Provisions: In theory, choice of law provisions are enforceable, unless against public policy or morals. In practice, the situation is much more complicated. In many cases, a choice of law provision is simply unenforceable because of the unique nature of Thailand's legal system.

3. Legal System: Unlike many of its neighbors, Thailand was never colonized and Thailand therefore did not directly inherit the common law or a civil system of law from Europe. Thailand has a codified system of law inspired by civil law jurisdictions and influenced by the common law, but traditional Thai laws, practices and customs remain particularly important.

4. Freedom of Contract: In theory, freedom of contract is recognized in Thailand and there are many instances where it is also recognized in practice. But there are significant restrictions on freedom of contract in Thailand that foreign practitioners unfamiliar with the Thai legal terrain often find surprising and counterintuitive – sometimes, to their dismay, after the contract is signed and the subject of contentious proceedings.

5. Work Permits: Work permits are required whenever a foreigner engages in any work, no matter how brief, in Thailand. A business class visa is not a work permit; for short-term work, an "urgent work permit" is required. The term "work" is defined very broadly and even includes attendance at business meetings and presentations to prospective clients and business partners. The maximum penalty for working in Thailand without a work permit was recently increased from three months imprisonment to five years imprisonment.

6. Permanent Establishment: When a foreign company conducts business in Thailand without a proper structure it risks establishing a permanent establishment in Thailand, which means that the "profits" generated from that business activity are subject to Thai tax.

7. Royalties: Royalties remitted abroad are subject to 15% withholding tax (unless a double tax treaty provides otherwise). Thai revenue authorities take a broad view of what constitutes a royalty that is often counterintuitive to foreign businesspersons and practitioners.

8. Registration of Trademarks: Foreign marks should be registered in Thailand before putting products into the Thai market. Although foreign mark owners often do not recognize the practical importance of registration, local distributors and companies do understand importance of registration.

9. Forum Selection Clauses: Thai courts will usually ignore the selection of a foreign court system for dispute resolution. In addition, foreign judgments are not enforceable; they are, at best, evidence in Thai legal proceedings. Arbitration clauses are enforceable, but practical implementation of such provisions can be problematic if the clause is not properly drafted to meet various issues relevant to the Thai legal landscape.

10. Laws Stated in Broad Terms: Thai statutes tend to state legal rules in very general terms. Precedent as a source of law has a unique Thai definition, lying somewhere between

the common law and continental civil law traditions. A significant amount of discretion is vested in officials and those officials are sometimes operating according to unpublished internal rules or established, but unwritten, practices and customs. The results often vary from what a businessperson seated in a more developed economy might expect.

11. Red Tape: Thailand does not have a monopoly on bureaucratic red tape, but it seems to have more than its fair share. Activities that may take a day or two in Hong Kong, Singapore or San Francisco, can take a week or two in Thailand, or longer.

12. Language and Cultural Differences: The relatively high level of English fluency among Thais involved in international business might lead one to mistakenly believe the level of fluency is equally high in the legal community and bureaucratic officialdom. On the surface Bangkok can appear to be very westernized and in many ways it is. But there are significant differences that should not be discounted. Hierarchy and status based on age, family, position in society, etc., really matter. Historically, Thailand has been an enormously complex hierarchical society where the place and position of every individual was carefully delineated. A saktina system was developed where every person was ranked on a scale of 1 to 100,000 based on symbolically represented rice fields; although saktina was officially abolished, status remains very important. "Constructive criticism," a difficult enough feat in many more developed economies, is doubly difficult in Thailand. Greeting often complicates candor and transparency. ■

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This note does not constitute legal advice.

Douglas Mancill is a partner at PriceSanond. He can be reached at: dmancill@pricesanond.com.