



### To Invest or Not to Invest in Thailand? Top 3 Tips on How to Avoid Legal Problems When Investing in Thailand

In this post-Covid era, Foreign Direct Investment (FDI) into Thailand has been on the rise, with FDI inflows and applications for investment promotions increasing 36% from the previous year (approximately 13 billion USD).<sup>1</sup> Accordingly, Thailand's gross domestic product (GDP) is expected to increase from 2.6% in 2022, to a projected high of 3.7% in 2023.<sup>2</sup>

According to the Thai Government, the top sources of foreign investment into Thailand last year were from Japan, Singapore, US, Taiwan, HK and China.<sup>3</sup> The Board of Investment recorded that the electronics, EV and automobile, and digital sectors had the highest growth rates in 2022.

There are many factors that make Thailand an attractive place for foreign investment, including its geographical location in South East Asia, a skilled labour force, Board of Investment incentives, and the introduction of Long-term Resident visas for foreigners. In November 2022, the BOI introduced more incentives to promote investments, such as tax exemptions, new industry categories and special investment zones.<sup>4</sup>

Based on such positive financial trends and government encouragement, things are looking upwards for foreign investors and investments into Thailand. However, where there is further

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<sup>1</sup> Thailand Board of Investment (<https://www.boi.go.th/upload/ejournal/2023/Vol33/Jan/index.html#p=1>)

<sup>2</sup> Thailand Board of Investment (<https://www.boi.go.th/index.php?page=macroeconomics>)

<sup>3</sup> Thailand Board of Investment (<https://www.boi.go.th/upload/ejournal/2023/Vol33/Jan/index.html#p=1>)

<sup>4</sup> Thailand BOI Announces New Incentives for Investor Retention, Relocation, Hydrogen Vehicles ([https://www.boi.go.th/upload/content/PR106\\_2565.pdf](https://www.boi.go.th/upload/content/PR106_2565.pdf))

investment, there is further risk and potential for problems and disputes. This article provides an overview of the top legal and practical problems frequently encountered by foreign investors in Thailand, and how to minimise or avoid such risks.

### Legal Problem 1: Licensing, Corporate Structure, and Contractual Issues

Under Thai law, foreign businesses wishing to invest in Thailand must comply with the Foreign Business Act B.E. 2542 (1999) (FBA) which identifies three categories of businesses that are restricted for foreign investors. The following table provides a brief explanation of the three categories and examples of businesses from each category:

<p><b>List One</b></p>	<ul style="list-style-type: none"> <li>Prohibits foreign<sup>5</sup> ownership.</li> </ul>	<p>Businesses prohibited to be operated by foreigners due to special reasons.</p> <p><u>Examples:</u> Newspapers, Farming, and Land Trading</p>
<p><b>List Two</b></p>	<ul style="list-style-type: none"> <li>At least 40% of shares must be held by Thais.</li> <li>Foreigners may not operate such businesses, unless they have obtained permission from the Ministry of Commerce, along with the approval of the Cabinet.</li> </ul>	<p>Businesses related to national safety or security, or affecting arts and culture, traditions, folk handcraft, or natural resources and the environment.</p> <p><u>Examples:</u> Domestic Airline Businesses, Production of Carved Wood, and Mining.</p>

## About Us

### Foreign Direct Investment Practice Group

We are commercially-minded and solutions-oriented legal advisors whose every move is made with your objectives in mind. We act as trusted legal and business advisors to leading international private and public corporations, start-ups, private equity funds, and foreign individuals on all aspects of their foreign direct investment (FDI) transactions in Thailand.

Our team has extensive experience in providing legal services to international clients on every aspect of investing in or expanding their business in Thailand. We help foreign clients navigate Thailand’s foreign ownership laws to ensure that their businesses are structured and operated in compliance with legal requirements. We also regularly work with US clients on obtaining benefits under the Thai-US Treaty of Amity and Economic Relations.

<sup>5</sup> Defined as a natural person who is not of Thai nationality, a legal entity not registered in Thailand, and a legal entity of which at least 50% of the total issued shares are held by foreigners (Section 4 of the FBA).

<p><b>List Three</b></p>	<ul style="list-style-type: none"> <li>• At least 49% of shares must be held by Thais.</li> <li>• Foreigners may not operate such businesses unless they have obtained permission from the Director-General of the Department of Business Development, along with the approval of the Foreign Business Committee.</li> </ul>	<p>Businesses in industries where Thai entities are not yet ready to compete.</p> <p><u>Examples:</u> Broker or Agent Businesses, Retailing and Wholesaling of Goods, and any Service Business.</p>
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Therefore, in order to conduct business in Thailand, foreign investors must obtain one of the following:

- a foreign business license (FBL); or
- a foreign business certificate (FBC) for promoted activities from the Office of the Board of Investment (BOI); or
- an FBC for approved business from the Industrial Estate Authority of Thailand (IEAT); or
- an FBC under an international treaty such as the US-Thailand Treaty of Amity and Economic Relations (1996).

In addition to the aforementioned restrictions, foreigners are prohibited from land ownership in Thailand<sup>6</sup>, unless they fall within certain exceptions (such as having obtained an investment promotion through the BOI).<sup>7</sup>

In light of these restrictions, it is common for foreign investors wishing to do business in Thailand to establish a joint venture (JV), typically in the form of a Thai private limited company, with a Thai company or Thai nationals.



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<sup>6</sup> Referencing the typical practice of the Land Department, a company is deemed to be foreign if 49% of its registered capital is held by foreign entities, or the number of its foreign shareholders is more than half the total number of shareholders (<https://www.thaigov.go.th/news/contents/details/62246>).

<sup>7</sup> Section 27 of the Investment Promotion Act B.E. 2520 (1977)

When entering into a JV with a Thai company, foreign investors must consider various factors to avoid potential future problems:

- **Contracts**

- As foreign investors are typically the minority shareholder of a JV contract, they should ensure that there are contractual provisions in place to protect their rights. For example, provisions relating to decision-making (such as the quorum needed for the shareholders' or board meetings, number of board seats, and veto rights) and company operations, should be carefully drafted to ensure that foreign investors can maintain a role in the management and operation of the JV company.
- Additionally, it is important to exercise foresight in anticipating future dispute resolution scenarios, with particular attention given to deadlock, termination, and dispute resolution clauses.

- **Governing law and dispute resolution clauses**

- Drafting such clauses requires careful attention. The governing law specified in the contract will determine the legal framework that applies to the contract, encompassing the parties' rights and obligations. For example, provisions regarding share transfer restrictions or shareholders' and directors' meetings will be governed by the governing law. Additionally, the foreign investor should carefully assess whether the chosen governing law adequately safeguards the interests of minority shareholders.
- On the other hand, the dispute resolution clause determines the mechanism for resolving any potential disputes. It is crucial for foreign investors to carefully evaluate which dispute resolution mechanism (such as Court litigation or international arbitration) will effectively serve their interests in the event of a dispute.
- Consistency between the governing law clause and dispute resolution clause should be considered to avoid lengthy and costly legal proceedings. Poorly drafted clauses in these areas can inadvertently lead to expensive and time-consuming disputes.

- **Articles of Association (AoA)**

- In accordance with the Thai Civil and Commercial Code, a company's operations must comply with the provisions outlined in its AoA.<sup>8</sup> Therefore, it is essential to carefully review and align any clauses in the JV Contract with the AoA to prevent future discrepancies and complications.

- **Use of nominees**

- Thai law strictly prohibits the utilisation of Thai nominee shareholders to hold interests on behalf of foreign investors.<sup>9</sup>

- **Tax considerations**

- Establishing a JV in Thailand entails addressing various tax considerations, including VAT registration, withholding tax, specific business tax, and corporate income tax.<sup>10</sup> Additionally, it is crucial to take into account any tax incentives provided by the BOI.

## Legal Problem 2: Employment issues

Thailand is generally known for its pro-employee stance. There are often disputes that arise between employees and employers concerning termination (unfair dismissal), forced resignations, and reduction of salaries. When a foreign investor establishes a JV with a Thai company/individual, the investor should be aware of the following Thai labour laws to avoid future problems with employees:

- **Termination**

- Under Thai labour law, employers have the authority to terminate employees with or without cause,<sup>11</sup> although it is challenging in practice to terminate employees with cause unless there is substantial evidence and valid grounds. The law specifies that employers can terminate the employment agreement without compensation if the employee "willfully disobeys" or "habitually neglect" their duties, or is found to be "guilty of gross misconduct" that justifies termination with cause.<sup>12</sup> Even when there are valid grounds for termination, the law requires that the

## Employment and Benefits Practice

Managing human resource-related matters in an organisation requires empathy but at the same time, proper policies are required to be in place to protect employers from undesirable fallout with employees. Qualified advice on employment laws and trends, labour and human rights, handling demands of labour unions and retaining talents, especially during spinoffs or reorganisation are necessary to maintain business success. Contentious employment law disputes are often a worst-case scenario for all parties involved. In an ideal world, things would

<sup>8</sup> Section 69 of the Civil and Commercial Code

<sup>9</sup> Section 36 of the Foreign Business Act B.E. 2542 (1999)

<sup>10</sup> Chapters 3, 4 and 5 of the Revenue Code

<sup>11</sup> Section 582 of the Civil and Commercial Code and Section 17 of the Labour Protection Act B.E. 2541 (1998) (LPA)

<sup>12</sup> Section 583 of the Civil and Commercial Code, and Section 119 of the LPA

employer clearly state the grounds relied upon in the termination letter and cannot change or add grounds at a later stage.

- There is a significant practical distinction between “with cause” and “without cause” terminations, as the amount owed to the employee upon termination differs. In the case of termination without cause, the employer is required to pay any unpaid wages, payment in lieu of advanced notice, severance pay, unused annual leave, and any other entitled payments under the employment.<sup>13</sup> If the termination is “with cause”, in theory, the employer is not obligated to pay money in lieu of notice or severance pay. However, employers must exercise caution when terminating an employee with cause to avoid the possibility of an “unfair dismissal” claim.
- In practice, it is not uncommon for terminated employees in Thailand to file claims for “unfair dismissal,” even in cases where the termination is without cause, particularly if statutory payments have not been fully made. To avoid prolonged litigation in the Thai Labour Courts, depending on the circumstances, employers should seek legal advice early on and consider the possibility of a mediation or reaching a settlement with the employee.
- **Changes in contract terms**
  - Under Thai Labour law, employers are prohibited from making changes to employment terms that are less favourable to employees without their consent.<sup>14</sup> This includes provisions related to work hours, wages, welfare, annual leave, working conditions, and work location.
- **Language of the contract**
  - While Thai labour law does not require a written employment contract (for open-ended employment contracts) or mandate the use of the Thai language for the contract, it is advisable in practice to have a written agreement. If the employee is Thai and does not fully understand English, it is prudent to have the agreement in Thai (or in a dual-language format, English and Thai). This helps minimise the risk of misunderstanding the terms of

never have reached this stage, but when legal proceedings become necessary to protect yourself and your interests, it's important to have an experienced lawyer by your side to ensure you get the result you deserve.

<sup>13</sup> Section 17, 17/1, 67 and 118 of the LPA. Careful consideration should be given to the scope of “salary” as defined in the LPA.

<sup>14</sup> Section 20 of the Labour Relations Act, B.E. 2518 (1975)

the employment agreement and potential disputes in the future.

- **Remote working**

- Thailand has recently introduced the “Work from Home Bill,” amending its labour laws to establish a framework for remote working arrangements for employers and employees. Employers and employees can now agree in writing for employees to work outside the office using information technology, and remote employees are to be treated equally to those working “in-person.”<sup>15</sup>

In addition, employers must arrange visas and work permits for any foreign employees. To be eligible to apply for work permits for foreign employees, the company must meet the following requirements:

- (1) have a registered capital of at least 2 million Baht per work permit;
- (2) maintain a ratio of 4 Thai employees to 1 foreign employee; and
- (3) demonstrate an investment capital of at least 3 million Baht for the company (if the company is not registered in Thailand).<sup>16</sup>

There are exemptions for foreign companies with the requisite BOI permit or foreign employees falling within specific exemptions, such as diplomats, individuals engaged in temporary business activities in Thailand, or those who hold a Smart Visa.

### **Legal Problem 3: Compliance Issues**

According to a survey conducted by PricewaterhouseCoopers (PwC), approximately one in four Thai companies experienced fraud, corruption and other economic/financial crimes in 2022.<sup>17</sup> Alarming, the survey also revealed that only 37% of Thai companies have established risk management and compliance functions to address fraud risks, which falls below global standards. The

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<sup>15</sup> Section 23/1 LPA

<sup>16</sup> Regulation of the Department of Employment on the Criteria for Consideration of Alien Work Permission B.E. 2552

<sup>17</sup> PwC's Thailand Economic Crime and Fraud Survey 2022

(<https://www.pwc.com/th/en/consulting/forensic/assets/economic-crime-and-fraud-survey-2022.pdf>)

prevalent types of fraud encountered by Thai companies include cybercrime, procurement fraud, and asset misappropriation.

Foreign companies who enter into JVs with Thai counterparts face similar challenges. Foreign investors often encounter issues such as the disclosure of confidential information or trade secrets to competitors, misappropriation of petty cash and embezzlement of company funds by employees, and bribery of public officials.

These problems typically come to light through complaint procedures, document reviews, internal reporting, or whistleblowing hotlines. However, the lack of adequate risk management and compliance functions in many Thai companies implies that the actual occurrences of fraud may be even higher than reported. For foreign investors, particularly large multi-national corporations, these issues within the Thai JV company can have severe business and reputational consequences.

To mitigate the risk of fraud, it is highly advisable for foreign investors to ensure that the Thai JV company establishes robust reporting and compliance procedures and guidelines. These measures will enable the prevention and swift resolution of any issues that may arise. It is essential to clearly communicate these procedures to managers and employees, providing regular training sessions in the Thai language. Additionally, the company should implement accessible reporting channels and whistleblowing hotlines for employees.

Furthermore, the National Anti-Corruption Commission of Thailand (NACC) has issued guidelines for companies to implement proper internal control measures to prevent bribery by the company and its staff.<sup>18</sup> While having a comprehensive compliance program does not absolve liability in the event of a bribe, it can be considered as a mitigating factor by the Courts if an individual associated with the company is involved in bribery.<sup>19</sup>

Once a report is made through the company's established procedures, it is crucial for the company to promptly and transparently address the concern. To ensure an efficient and effective process, it is advisable for the company to have a well-

contentious litigation and arbitration matters.

Our litigation and arbitration lawyers, who are fluent in both Thai and English, are known for their responsiveness and no-nonsense approach to getting things done. We actively pursue all avenues of dispute resolution available and work closely with our clients and with other key practice areas of the firm to ensure that disputes are resolved as efficiently and cost-effectively as possible.

<sup>18</sup> NACC Guidelines on Appropriate Internal Control Measures for Juristic Persons (2017) (<http://www.asean-pac.org/wp-content/uploads/2017/11/Guidelines.pdf>)

<sup>19</sup> Amendment No. 3 (B.E. 2558) to the Act Supplementing the Constitution relating to the Prevention and Suppression of Corruption B.E. 2542 (1999)



defined internal investigation plan in place. This plan should encompass both minor and major incidents of fraud or non-compliance, outlining the assigned investigators, investigation scope, procedural steps, estimated timeline, and circumstances necessitating the engagement of external legal counsel.

In the event that a bribe is discovered as a result of the investigation, the consequences for the company will vary depending on the recipient of the bribe. Thai law<sup>20</sup> defines bribery as an offence involving the act of giving, or promising to give, property or any benefit to a public official to induce such person to wrongfully perform, or not perform, or delay the performance of, their duty. In 2015, the Anti-Corruption Act was amended to include foreign public officials and officials of public international organisations. The penalties for bribery in Thailand are contingent upon the nature of the bribe and the specific laws governing the relevant authority involved in the bribery incident.

Foreign investors should also bear in mind that certain acts such as bid collusion for the purposes of submitting proposals to state agencies are criminal offences in Thailand.<sup>21</sup>

## Conclusion

Thailand presents numerous promising opportunities for investment and the future is looking bright for Thailand. However, it is essential for foreign investors to be mindful of common challenges when conducting business in Thailand, particularly when investing through a Thai JV as outlined above. Thoroughly assessing and proactively addressing these issues in advance will contribute to the successful realisation of investment goals in Thailand.

All information, content, and materials contained in or referred to in this article do not, and are not intended to constitute, legal advice and are purely provided for general informational purposes only. For more information, please contact the authors.

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<sup>20</sup> Section 143 and Section 144 of Thai Penal Code and Organic Act on Anti-Corruption B.E. 2561 (2018)

<sup>21</sup> Section 5 of Act on Submission of Bids B.E. 2542 (1999)