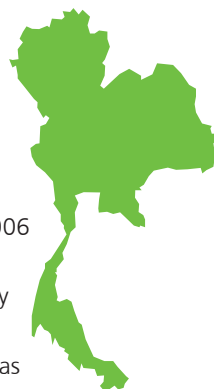




THAILAND

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Due to its regional location and attractive investment conditions, the Kingdom of Thailand is an interesting location for foreign companies. Thailand has been a constitutional monarchy with a parliamentary system since 1932. Despite internal political disputes which have occurred since 2006 and in particular in 2010 lead to unrest in the capital city of Bangkok for a short period of time, Thai economic policy has remained stable and friendly to investors. The Thai currency is the Baht which in recent years has been very stable and in comparison to the euro has risen in value. The country has one of the strongest growing economies in south-east Asia. The system of the country is based on democracy and law, offers a domestic market of over 67 million consumers and has a strategic position with regard to the opening up of markets with dynamic growth in the Asia-Pacific region. An important role here is played by the membership of Thailand in the Association of Southeast Asian Nations (ASEAN), which continually pursues the objective of a uniform domestic market, the ASEAN Economic Community (AEC). This foresees the dismantling of customs and other trade barriers between the states of south-east Asia and the building up of a regional market with more than 500 million consumers. In this respect since 2010 the 6 ASEAN states (Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand) have removed nearly all customs duties.

Thailand has been negotiating an extensive free trade agreement with the EU since March 2013. The planned extensive agreement should serve to dismantle customs duties and non tariff trade barriers for goods and also cover other trading aspects such as services, investments, public procurement, competition and sustainable development and as a result in future the business prospects for German enterprises will continue to improve.

Legal forms of business und founding

Thai corporate law is based on German law. The legal forms which exist are comparable with the legal forms to be found in Germany. As a joint stock company Thai law recognises the private limited company and the public limited company and as business partnerships the unregistered ordinary partnership, the registered ordinary partnership and the limited partnership

Joint stock companies

Private Limited Company (Co., Ltd.)

The majority of foreign investors choose the Co., Ltd. which is a joint stock company comparable to the German GmbH. As such it can enter into binding contracts on its own

account, own property, acquire rights, and be a party to legal proceedings. Personal liability of the shareholders only exists to the extent that their share of the capital has not been fully paid in and is limited to the unpaid amount. Furthermore, the personal liability for financial obligations of the company is excluded. The company acts as a legal entity through its bodies (managing director and shareholders' meeting). The operative business is managed by one or more managing directors, who also represent the company externally.

There are a number of differences to German law in the founding phase. The Co., Ltd. has to be founded by at least three natural persons (so-called promoters), who respectively each sign for one share. Later on three shareholders must also always hold shares, whereby after the founding phase these can also be legal entities. In contrast to German law, a company with only one shareholder is not possible. In the foundation document, the promoters define at least the company, the address of the company in Thailand, the distribution of the company shares, the amount of the share capital and the exact company purpose.

The registration process begins with the reservation of a company name and the submission of the foundation document with the ministry of commerce. In principle, a minimum share capital is not required by law. However, the registration checks whether the registered capital is sufficient and appropriate for the intended economic activity. In addition, it should be observed that also with the application for investment grants, special business licences or work permits for foreigners the amount of the registered capital is relevant.

Public limited company (PLC)

In contrast, the PLC is designed for a wider distribution of shares. It is comparable to the German joint stock company (AG) and has its legal basis in the Public Limited Companies Act. The transactions of the PLC are managed by an executive board which must consist of at least five natural persons. At least half of the executive board members must be resident in Thailand. It is not relevant, on the other hand, whether the executive board members are themselves shareholders of the company. The executive board members represent the company internally and externally. The founding of the PLC must be made by 15 natural persons of which half must be resident in the Kingdom and who subscribe to at least 5 % of the capital. The company acquires legal relevance with the conclusion of the registration process. In the time thereafter the company must always have at least 15 shareholders. Provided the legal conditions are met, the PLC can be listed on the stock exchange. In comparison to the Co., Ltd., there are increased requirements with regard to financial accounting.

Business partnerships

Ordinary partnership

With an ordinary partnership at least two partners bind themselves by contract to achieve a certain purpose and for the promotion of this they make contributions in the form of money, non-cash benefits or services. Unless otherwise defined in the articles of association, all the contributions are deemed in principle to be equal. The shareholders have to be natural persons. The company purpose is not subject to further legal requirements and also for the founding there are hardly any formalities and no obligations regarding disclosure. In particular a registration is not required. Only the articles of association are required, whereby the scope and content is left to the partners. As a result the articles of association already exist when the partners mutually agree to take up the business activity, without the fixing of details beforehand in writing. The ordinary partnership is treated by the tax system as a unit. As a union of persons it is subject to its own form of income tax which is modified with regard to the possibilities of deduction compared to the income tax of natural persons, but is not subject to corporation tax.

Under company law, the ordinary partnership, comparable to the German partnership under the civil code (GmbH), as a basic form of business partnership is a legal personality which is not different to its shareholders. Accordingly, all partners assume unlimited liability as joint debtors with their personal assets for company debts.

Registered ordinary partnership

The legal form of an existing ordinary partnership can be retrospectively changed through registration. With the registration a registered ordinary partnership is formed which itself is a legal entity, i.e. it can also be a party of a contract or a party of a legal dispute under its own name. It is therefore seen apart from its partners and becomes a legally independent unit. It mainly corresponds to the concept of the German open trading company (OHG). Concerning company management and external representation by the shareholders, the registration does not change the situation as defined by the non-registered ordinary partnership. However, the registration has an effect on the liability for company obligations. Although the partners continue to be subject to joint personal unlimited liability, the liability, in contrast to the ordinary partnership, is not primary. In fact there is only likely to be recourse to the partners if the company is in default.

Limited partnership

The limited partnership is a separate legal identity from its shareholders and acquires this status through registration. It is marked by the unique characteristic that the personal liability of shareholders can be limited to the amount of their contribution to the share capital. There must, however, in contrast to the Co., Ltd., always remain at least one shareholder with unlimited liability. The result is that there are two groups of shareholders, whereby one group is subject to unlimited personal liability and a second group is subject to limited liability. The structure is similar to the limited partnership (KG) under German law with its general partners and limited partners. The company management is exclusively reserved for shareholders with unlimited liability. However, if a shareholder with limited liability participates in the company management, then he loses his privilege of limited liability and his status changes to that of a shareholder with unlimited personal liability.

Joint ventures

According to the Thai Foreign Business Act (FBA), legal entities are considered to be foreign if at least half of the company capital is held by foreigners. Therefore, provided no promotion through the Board of Investment (BOI) is achieved or sought, a company form with a 51 % Thai interest is usually chosen in order to ensure that the company is assessed to be a domestic company and is not subject to restrictions. If the foreign partner, however, is to control the company, a preferential participation with differently weighted voting rights can be agreed.

Foreign exchange law

Foreign exchange trading is regulated by the bank of Thailand and may only be carried out by approved banks. Transfers to and from Thailand are not restricted with regard to value. Natural persons and legal entities may hold foreign exchange accounts at the approved banks.

Liquidation of the company

The private limited company is dissolved through the attainment of the company purpose, after a period which is fixed in the contract, through the determination of bankruptcy or through a corresponding shareholders' resolution. Furthermore, liquidation can be ordered by court if the registration authorities in formal proceedings cannot establish business activity of the company or the number of shareholders is below the legal minimum of three shareholders.

The public limited company is dissolved through a corresponding shareholders' resolution, a court order or the opening of insolvency proceedings. It remains, however, in the same way

as the private limited company in existence and able to act for the duration of the liquidation phase under the control of a liquidator.

The ordinary partnership is dissolved if the agreed duration or the company purpose is reached, or if a corresponding court order is served. Due to the character of the ordinary partnership as a partnership reasons for dissolving the company are also ordinary notice of termination, a legal incapacity, insolvency or death of a partner.

Regarding the liquidation of a registered ordinary partnership and of a limited partnership, the same applies as was already described for the ordinary partnership. A further reason for liquidation here is constituted by the insolvency of the registered ordinary partnership itself.

Real estate and acquisition of land

According to Thai law, it is in principle not possible for foreigners in the form of natural persons and legal entities to acquire property in Thailand. There are, however, a number of exceptions to this principle. For example, for foreign natural persons there is the possibility in connection with an investment in Thailand to acquire property for residential purposes. Under certain conditions, foreign companies can also acquire land. If a company is founded in an industrial estate or investment funds are granted by the board of investment, it is not possible to acquire land for the location of the enterprise.

Labour law and dismissal protection

The Thai labour market is able to provide an adequate range of workers in all industries and fields also including technical and management personnel. In comparison to the European standard, personnel costs can be described as remaining very low. According to the regulations of the labour code, the regular working time may not exceed 8 hours per day and 48 hours per week. In addition to Thai public holidays, the employee is released from the duty of working one day in the week. The claim to holidays for the purpose of recuperation depends on the duration of company service, but amounts to at least 6 days per year. Overtime hours on normal working days are remunerated with a factor of 1.5 times the normal wage, working on public holidays with a factor of 2 and overtime hours on public holidays with a factor of 3.

The taking on of employees who are not Thai nationals in principle depends on the issue of a work permit. Exceptions here are the requirement for a work permit for certain groups of persons (e.g. for activities in the area of education or art). The applicant must be in possession of a non-immigrant visa or of an unlimited residence permit. A decisive criterion for the issue of work permits is the capital resources of the company. According to the current reference

values, for each issued work permit a capital amount of two million baht is required. The relationship of foreign to Thai employees in companies should be at least 1 to 4. This is only a minimum requirement in addition to which depending on the industry and circumstances of the individual case further conditions will have to be fulfilled.

The notice of termination of an employment contract must be made in the written form and a notice period of at least one month complied with relating to the next salary payment. The minimum amount for a settlement payment is determined by Thai labour law depending on the duration of the employment, whereby:

- › for a minimum of 120 days the payment is 30 days' pay,
- › for at least one year 90 days' pay,
- › for at least three years 180 days' pay,
- › for at least six years 240 days' pay,
- › for at least ten years 300 days' pay.

Practical examples

Auditing

Background facts:

A German production company with international operations maintains subsidiaries in a number of countries, and also in Thailand. In the course of time there is increasing evidence that the local managing director is alleged to have misappropriated money or goods. The accusations are made anonymously in a very polemic manner, but do contain a number of points which seem to appear believable.

What can be done now?

In principle, there is the possibility of reacting to these accusations with specific investigations undertaken by an auditing firm. An embezzlement audit would have to be carried out in the local subsidiary. However, this usually leads to the undermining or even shattering of the trust relationship with the local responsible persons. An alternative is offered by the possibility of reacting to the specific accusations in the course of a standard audit of the financial statement and to carry out selective investigative actions under the cover of a regular audit of the financial statement. After the appropriate knowledge could be established with corresponding usable evidence which confirms the anonymous accusations, there would be the possibility of expanding the investigations with regard to an actual embezzlement audit.

What should one have done differently from the beginning?

It is basically difficult to avoid such situations in a company with subsidiaries some distance away, as in particular anonymous tips due to bad feelings in the company may occur. Nevertheless it is conceivable that in countries where such accusations due to established structures are often not ill-founded, the above-mentioned assignment to audit the financial statement can always be extended to include specific investigative actions. As a result, one is continually in a position to react to such situations. The approach becomes the norm in the company in the company group and to a certain extent also has a preventive effect. Rödl & Partner offers such extensions to the usual audit within the framework of the international financial & performance audit.

Taxes

Background facts:

The German beverages company G would like to offer a new type of soft drink in Thailand for which it holds industrial property rights (patents, trademarks). However, it does not have its own distribution organisation in Thailand. Therefore G plans to produce and distribute the lemonade under licence from a Thai company. G also wishes to actively support the Thai partner through appropriate marketing measures and a local presence with the most important wholesalers.

After G has started to implement its plan, the company receives a tax assessment from the German tax office which also takes into account its business activities in Thailand. Furthermore, the financial accounting personnel establish that licence fees have not been transferred in full to the German bank account. After enquiries are made, G finds out that the co-operation partner has retained a withholding tax to the amount of 15 % of the payment.

What can be done now?

Rödl & Partner is assigned to examine how the business model can be improved. A number of aspects should be taken into account in the course of the analysis. First of all, all withholding tax statements from the past should be obtained from the Thai partner and then these possibly used for a modified tax return in Germany.

What should one have done differently from the beginning?

In future, a check should be made regarding the possibility of indeed founding a subsidiary in Thailand. In addition to the legal barriers to investments in Thailand, however, this check should also take into account that due to the low tax rate in Thailand German companies who pursue a so called passive activity abroad are subject to add-back taxation in Germany. In the present case in this respect it would be important to observe how high the shareholding of G is and the extent to which G participates in the activities abroad.

An business commitment abroad should be thoroughly planned and prepared in advance. The business plan must also consider the total tax burden in order to ensure that double taxation does not occur. Careful tax planning which takes into account the tax system of the respective destination country and also the German tax regulations can substantially reduce the tax costs.

Law

Background facts:

The German A-GmbH plans to found a distribution company in Thailand. The object of the business should be the retailing of electronic components. The German A-GmbH would like to maintain control of the company and therefore submits constitutional documents for the founding of a 100 % foreign invested limited company with the appropriate investment authorities. The application is rejected.

What can be done now?

In the structuring of a foreign investment, the restrictions with regard to the allowed ownership structure should be observed. This is true for Thailand, whose Foreign Business Act (FBA) foresees a majority interest for a non-foreigner for the named retailing activities, and is also true for most of the other countries in the ASEAN region. The application documents therefore have to be adjusted to fulfil the legal requirements for investments. This is possible through the placing of an application for an exception licence which in particular can be granted in connection with the distribution of high technology, or the payment of a certain minimum share capital which is required for exemptions to investment law. In practice, companies are frequently founded with a local majority shareholder whose voting rights are limited through the issue of preference shares. The rights to dividends can also be arranged using the same method. In this process, care should be taken to ensure that the local shareholder does not only take on the position of a trustee, which would be a violation of the FBA. As a result in this respect certain recognised threshold values in administration practice should be observed in order to acquire the business certificate which will allow the company to operate.

What should one have done differently from the beginning?

The issue of the distribution licence in Thailand depends on different points of the investment law, whereby it is important that they are taken into account before market launch. An exact examination of the ownership structure and other aspects such as the cost and duration to apply for a business licence for the relevant product groups therefore have to be included in the business planning.

Law / Administration

Background facts:

The German X GmbH offers service and consulting abroad. The company sends its employee A to Mexico for a limited project and the employee takes his own private second hand car to Mexico for the duration of the project. After the end of the project in Mexico the employee is sent to Thailand for a different project. The employee then hands over his personal items and the private car to a forwarding agent in Mexico, but does not declare the car.

After the Thai customs have received all the goods, they clear the car only on the condition that confirmation is provided that the car is exempt from duty. Otherwise the car will be sold by auction and could be repurchased by the original owner. There are no other options. The customs accordingly twice sets a deadline which expires to submit the documentation. If the deadline expires, after a total of three more months the forced auction will be carried out.

What can be done now?

Car imports, whether for new cars or for second hand cars, are frequently a problem in Thailand. The import duties are usually considerably higher than the new price of the car. Second hand cars are also taxed according to engine capacity and current market value using corresponding lists from the customs department. While for new cars in the case of a missing declaration it is a simple case of subsequent payment of the tax, this option is not possible for second hand cars.

Due to the fact that for the employee himself and also for his employer in this case there is no special agreement allowing exemption from duty, there remains only one possibility. He must wait for the notification of the official date of the forced auction and buy back the car at the auction with a corresponding bid. In addition, there would be further costs of storage and the administration fees from the customs. The meaningfulness of this action is decisively defined by the car type, age and equipment level, e.g. left-hand drive, the predicted demand for such a type of car in Thailand and the personal interest of the affected person in his specific car. An alternative would be to send the car back to the country it came from. This procedure, however, is often not practical because the logistics, customs and storage charges and the import taxes in the country of origin are uneconomic.

What should one have done differently from the beginning?

In connection with imports to Thailand, it is recommendable to declare all goods as accurately as possible and at the same time to present all the required documents. This is the only way to at least reduce risks and long delays and demand of high charges by the customs authorities. In the end, also with a forced auction there is the risk that the car cannot be bought back or only bought back for an excessive price which means that the preventive measures would appear to be more attractive.

Fraud

Background facts:

German A GmbH owns a subsidiary in Thailand which it uses to distribute its products. The local managing director has the sole power of representation for the Thai company. In his contract of employment there are no regulations for restrictions. He is able to make transactions to an unlimited amount. At the end of a year and at the cost of the company he purchases electronic communication devices in significant quantities and later declares to have used these objects as promotional gifts for customers at Christmas time. Furthermore, he also makes the company pay for substantial travel costs. The latter, however, is made without the presentation of external documents, but merely with claims for travel expenses he himself has drawn up. Further proof is not provided by him. The company management of the parent company in Germany is certain that these actions constitute fraudulent or disloyal behaviour of the managing director according to the Thai criminal code and possibly also according to the German penal code. They would therefore like to dismiss their managing director as soon as possible, demand repayment of the lost money and introduce criminal proceedings.

What can be done now?

It is theoretically possible to start civil or criminal proceedings against the managing director. However, at least for civil claims definite evidence and documentation is required. Criminal proceedings may provide the opportunity to collect the corresponding evidence. If this is not successful and it is not possible to find other evidence, the civil proceedings against the managing director have no chance of success. In fact it is more likely to be the case that it will be necessary to pay the managing director a settlement to which he is in principle entitled. The shareholders' meeting which is called can essentially only decide to dismiss the managing director.

What should one have done differently from the beginning?

As far as it is economically viable, the contract of employment of a managing director should include a restriction of the power of representation. This regulation will not have an external legal effect, but in the event of inappropriate behaviour of the managing director it will enable action to be taken. Furthermore, in the case of serious misconduct a settlement would also not have to be paid. The stipulation of behaviour rules such as the obligation to provide proof of company costs and travel expenses is a suitable tool to enable the quick handling of any potential differences in an uncomplicated manner. Furthermore, a reliable controlling mechanism within the company should exist in order to discover such irregularities at an early stage.

Corporate (white-collar) crime

Background facts:

The company X GmbH would like to found a subsidiary in Thailand. In order to avoid coming under the scope of the Foreign Business Act and the associated complex licencing procedures for foreign companies, a Thai shareholder holds 51 % of the shares. A trust agreement is concluded between the Thai shareholder and the parent company. Later on there are irregularities with the Thai majority shareholder. He commits a breach of trust and without consultation carries out considerable structural changes in the company. Due to the fact that the German parent company only has 49 % of the shares and therefore in the shareholders' meeting can be outvoted on important decisions, it decisively loses influence on the subsidiary company. Now the initiation of legal action is considered against the Thai trustee.

What can be done now?

It is theoretically possible to start civil or criminal proceedings against the offending managing director. However, that will result in problems in connection with the trustee agreement concluded with the Thai shareholder due to the fact that this is not tolerated by Thai law and represents an attempt to circumvent the Foreign Business Act. As an alternative there is the possibility of an out of court settlement with the shareholder. In addition, liquidation by court order is to be considered, which, however, could have adverse consequences for the trustee as well as for the company itself.

What should one have done differently from the beginning?

In the planning phase to enter the Thai market, foreign investors should intensively consider the possibility of an authorisation procedure for a foreign business licence. This enables more freedom to structure the company shares including the foreign majority holding. If the procedure proves to be too lengthy or pointless, there is the possibility of founding a Thai company, whereby a Thai owner must have the majority of the shares. A trustee relationship is not permissible here under any circumstances. In order to avoid later conflicts, in such a constellation a call option can be assigned against the Thai majority shareholder. This allows the transfer of the shares at any time. In addition, the issue of preference shares can be used to arrange for voting rights and dividend distributions in a way which is acceptable for the German parent company but which weakens the position of the Thai majority shareholder without contravening the local regulations. A clear company structure according to the regulations in Thailand absolutely essential for a long-term business perspective where it is still possible to assert claims even if there is a dispute.