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Third Edition



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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 third revised edition of *Successful Strategies for Doing Business in Asia* which was first published in 2006. Prepared by lawyers from 12 leading Asian Meritas firms, this book offers practical insights and targets foreign investors and business people who want to pursue opportunities throughout Asia. Each chapter contains general information and guidelines, not legal advice. Do not rely on these materials without first consulting with legal advisors who are familiar with your particular areas of interest.

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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 Dong
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 given, nor the application and execution of laws as stated.

Five years have passed since the worst financial crisis in 70 years erupted. Today many countries and economic regions are still suffering, but there is one bright spot – Asia. Home to 3.8 billion people, Asia continues to take a leading role in driving the world economy back to healthier times. China rebounded quickly to high single-figure annual growth following the 2008-09 downturn, and in 2013-14 is expected to have a rise of 8% in GDP. India too is exhibiting signs of long-term growth potential, as are Singapore, Malaysia and others in Asia.

For 30 years I have worked closely with multinational companies as they explore investment and business opportunities throughout Asia. I have discovered that countries in the Asian region can at the same time appear similar yet be remarkably different. While specific legal systems and local government regulations will vary, there are universal issues in every country that foreign investors will face. This book was designed to provide practical and useful insights into the 12 most common questions that potential investors in Asia need to address:

1. What role does the government play in approving and regulating foreign direct investment?
2. Can foreign investors conduct business in a particular country without a local partner? If so, what corporate structure is most commonly used by foreign investors?
3. How do governments regulate commercial joint ventures between foreign investors and local companies?
4. What laws influence the relationship between local agents and distributors and foreign companies?
5. How does the government regulate proposed merger and acquisition activities by foreign investors? Are there any prohibited areas for foreign investors in the economy (e.g., natural resources, telecommunications or energy)?
6. How do labor statutes regulate the treatment of local employees and expatriate workers?
7. How do local banks and government regulators deal with 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?
9. How comprehensive are the country's intellectual property laws? Do local courts and tribunals enforce IP laws uniformly regardless of the nationality of the parties?

10. If a commercial dispute arises, do local courts or international arbitration offer a more beneficial forum for dispute resolution for foreign investors?
11. What advice can you offer for how best to negotiate and conduct business in your country?
12. What other practical lessons can you share with those who want to do business in your country?

Leading law firms within the Meritas alliance in Asia have contributed to this book. These firms are comprised of local lawyers who possess extensive experience in advising international clients on how best to conduct business in their respective countries. The law firms were 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, the 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 patiently waiting for Asia to become more predictable before pursuing business or investment opportunities, do not wait too long. Most non-Asian multinationals are already there. Those who delay will find themselves missing out on the greatest economic expansion in history. There are risks, certainly, but also great rewards for the savvy – and educated – investor.

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1. What role does the government of Indonesia play in approving and regulating foreign direct investment?

The existing Indonesian Investment Act is Law No. 25 of 2007 passed by the Indonesian House of Representatives (DPR) in March 2007. This Investment Act gives the Capital Investment Coordinating Board (BKPM) broader authority and powers to regulate matters concerning investment in Indonesia. A primary feature of the law is the creation of integrated service centers to assist investors in obtaining licenses and fiscal facilities, without the long process of going through the relevant ministries. This structure is intended to reduce the number of bureaucratic difficulties often experienced by investors and expedite the process of investing in Indonesia by having a “one-stop shop” for investors. BKPM also plays a role in the issuance of what is called the Negative List, a list issued under a Presidential Regulation defining which sectors within the Indonesian economy are open or closed to foreign direct investment, and determines whether investment in those sectors that are open require a local Indonesian partner or other conditions are applicable. The prevailing Investment Negative List can be found in Presidential Regulation No.36 of 2010 concerning List of Business Fields Closed to Investments and Business Fields Conditionally Open to Investment.

Other than BKPM the following government ministries and regulatory agencies play roles in the business activities of a foreign investor.

Ministry of Finance. Any direct foreign investment in either the finance or financial institutions sector requires the prior approval of the Ministry of Finance.

Ministry of Trade. In coordination with BKPM, this ministry issues non-fiscal facilities in the form of the issuance of Producer-Importer Identification Numbers (API-P) for imports of machinery, goods and/or materials needed by investors in conducting business in Indonesia.

Ministry of Manpower. This ministry establishes labor regulations and approves company manpower plans for the use of expatriate workers. Companies seeking to employ expatriates will need to obtain the approval of their Foreign Labor Utilization Plan (RPTKA) from this ministry.

Central Bank of Indonesia (BI). The Central Bank of Indonesia supervises and issues regulations concerning the banking sector and is responsible for the approval of all changes to the ownership, management, or shareholding structure of Indonesian banks in Indonesia.

Special Economic Zones (SEZ). They are not actual governmental bodies. Strategic areas within Indonesia are designated as SEZs with special incentives to promote trade and economic development.

Financial Services Authority (OJK). This is a newly established body which has the function of administering the integrated regulatory and supervisory system for all activities in the financial sector, which has the task of regulating and supervising financial services in the banking, capital markets, and the non-bank financial industry sectors.

This body was previously known as BAPEPAM-LK (Indonesian Capital Markets and Financial Institutions Supervisory Agency) which consolidated together with the bank financial institution supervisory held by BI (Central Bank of Indonesia).

2. Can foreign investors conduct business in Indonesia without a local partner? If so, what corporate structure is most commonly used by foreign investors?

In general, investors may conduct business without a local partner in Indonesia if the prevailing Investment Negative List (the present Investment Negative List was issued under Presidential Regulation No. 36 of 2010) allows the business to be wholly owned by foreign investors. Some businesses are closed or partly closed for foreign investors depending on the prevailing Negative List.

Foreign investors seeking to establish a corporate presence in Indonesia through direct ownership are required to form a foreign investment limited liability company, called a PMA Company (foreign investment company). Non-Indonesian citizens may constitute all members of the board of directors and board of commissioners of the company, as long as they are not personnel directors. If there is an Indonesian shareholder in the PMA company, the BKPM might suggest that at least one director be an Indonesian citizen.

Foreign investors may also set up the following representative offices in Indonesia:

Foreign Company Representative Office. Established to manage the interests of the foreign company or its affiliate Indonesian companies or to prepare and develop a foreign investment company in Indonesia.

Foreign Bank Company Representative Office. Allows a bank domiciled abroad which is acting purely as an intermediary between the bank concerned and its customers to open a representative office in Indonesia.

Foreign Construction Services Company Representative Office. Allows foreign construction companies to participate in joint venture operations with Indonesian partners.

3. How does the Indonesian government regulate commercial joint ventures between foreign investors and local firms?

Under the prevailing Negative List, i.e., Presidential Regulation No. 36 of 2010, certain business sectors are closed for foreign investors. Those sectors include the alcohol beverage industry, gambling/casinos, marijuana cultivation, telecommunication/supporting facility of shipping navigation and vessel traffic information system (VTIS), and management and implementation of radio frequency and satellite orbit spectrum monitoring stations. The presidential regulation also governs which industries are open to investment under condition of a joint venture between foreign and domestic capital, such as: the telecommunications sector, the building and operation of seaports, power plants and commercial airlines.

The prevailing Investment Negative List also partly accommodates the implementation of the commitment of the Indonesian government in relation to the Association of South East Asia Nations (ASEAN) Economic Community (AEC) by determining benefits for a foreign party coming from ASEAN countries willing to set up a joint venture with a local Indonesian party. The benefits given are, among others, higher share ownership limits and the ability to conduct business in certain areas within the Indonesian region, and apply for certain business fields such as motel and lodging services, overseas sea transportation for passengers and cargo (excluding cabotage), maritime cargo handling services, and nursing services.

Current regulations do not set minimum capital requirements for a PMA company. The law only requires what is “reasonable” for the business to be undertaken. However, to be in line with the provision under the prevailing Indonesian Micro-Small-Medium Enterprises Act (Law No.20 of 2008)

which states that a PMA company is categorized as a large-scale company with net assets of more than IDR10 billion, BKPM will, in practice, not usually approve applications with a minimum paid-up capital for a PMA company in businesses with a single line of business or single location of investment of less than IDR10 billion or currently in the approximate amount of USD1 million (subject to the prevailing currency exchange rate).

4. What laws influence the relationship between local agents and distributors and foreign companies?

Regulation of the Minister of Trade No. 11/M-DAG/PER/3/2006 allows agencies or distributorships of foreign products and services in Indonesia. It makes a differentiation between agents and distributors. The former are those acting on behalf and in the name of the principal, while the latter act in their own name and capacity, in marketing and selling the products or services of the principal. The ministerial regulation accommodates the possibility of a foreign principal to appointing an Indonesian agent or distributor, and requires that the agent or distributor be registered at the Indonesian Ministry of Trade. Among the documents required to be included in the registration application are the agency or distributorship agreement legalized by a public notary and a letter from the Indonesian Trade Attache at the local Indonesian embassy/consulate confirming the legality of existence of the principal.

This registration is an important feature introduced by the Ministerial Regulation as a way to protect the local agent/distributor. In the event of early termination, the new agent/distributor will be given a registration by the ministry only if the principal achieves a clean break with the previous agent/distributor.

5. How does the Indonesian government regulate proposed merger and acquisition activities by foreign investors? Are there any prohibited areas for foreign investors in the economy (e.g., natural resources, telecommunications or energy)?

Mergers and/or acquisition by foreign investors are mainly subject to:

- The Investment Act (the present Act is Law No.25 of 2007);
- The Investment Negative List as described above (the present one is Presidential Regulation No.36 of 2010);

- The Indonesian Company Act (the present Act is Law No.40 of 2007 concerning Limited Liability Companies);
- The Banking Act (the present Act is Law No.7 of 1992 as amended by Law No.10 of 1998) and its implementing regulations, if the target company is a bank;
- The Capital Markets Act (the present Act is Law No.8 of 1995) and its implementing regulations, if the target company is a public company;
- Regulations on Mergers, Consolidations, and/or Acquisitions. The present regulations are Government Regulation (GR) No.27 of 1998 concerning Mergers, Consolidations and Acquisitions of Limited Liability Companies, GR No.28 of 1998 concerning Mergers, Consolidations and Acquisitions of Banks;
- Regulations on Mergers, Consolidations, and/or Acquisitions from the perspective of business competition. The present regulations are GR No.57 of 2010 concerning Mergers or Consolidations of Business Entities and Company Share Acquisitions Resulting in the Possibility of Monopolistic Practices and Unfair Business Competition, Regulation of Head of the Commission for the Supervision of Business Competition (KPPU Regulation) No.10 of 2010 concerning Notification Form for Mergers and Consolidations of Business Entities and Company Shares Acquisitions, KPPU Regulation No.11 of 2011 concerning Consultation for Mergers and Consolidations of Business Entities and Company Share Acquisitions, and KPPU Regulation No.3 of 2012 concerning Guidelines for the Implementation of Mergers and Consolidations of Business Entities and Company Share Acquisitions Resulting in the Possibility of Monopolistic Practices and Unfair Business Competition.

There is no prohibition on areas of the economy in conducting a proposed merger or acquisition in Indonesia so long as the proposed merger or acquisition does not breach the limits of foreign ownership set for companies with certain line of businesses in the prevailing Investment Negative List.

In addition to the above, a merger between an Indonesian company and a foreign company is not yet possible, unless the surviving company of the merger is the Indonesian company.

6. How do labor statutes regulate the treatment of local employees and expatriate workers?

Local Employees. General labor regulations are contained in the Manpower Act (the present Act is Law No. 13/2003 concerning Manpower), and implemented by the central government through the Ministry of Manpower.

Indonesia has a minimum wage set by each provincial government, usually by regulation on an annual basis. The Regional House of Representatives (DPRD) must approve the rate before it receives final approval from the governor of the province.

When disputes between employees and their employers arise, disputes which cannot be settled through arbitration or mediation between the parties may be brought before the Industrial Relations Court. Decisions by the Industrial Relations Court are final and binding on both parties and under Indonesian law no appeal against the decision will be allowed, not even to the Supreme Court.

Foreign companies engaged in business in Indonesia should follow closely all labor regulations, including maintaining detailed employee records throughout the employment of each individual within the company. A company's best defense in a labor dispute is accurate, contemporary records of an employee's performance.

Expatriate Workers. As in other countries, expatriates in Indonesia are required to have a number of permits approving their stays and employment in Indonesia. Expatriates may only be employed for specific positions and for a specific period of time. Employment visas of expatriate employees may be renewed, usually without the employee having to leave the country of Indonesia.

Foreign investors who wish to hire expatriate workers for their operations in Indonesia must ensure that the hiring company has fulfilled all manpower requirements, including the approval of the company's Foreign Labor Utilization Plan (RPTKA) by the Ministry of Manpower. The ratio between the number of expatriate workers and local workers in a company is set based on the industry by BKPM and the Ministry of Manpower, and is subject to change.

7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit and other basic financial transactions?

The Indonesian government issued the Currency Act (Law No.7 of 2011 concerning Currency) that obliges the use of Indonesian local currency (IDR/Rupiah) in every transaction aimed at making a payment, settling other obligations which must be fulfilled using money, and/or other financial transactions conducted in the territory of the Unitary State of the Republic of Indonesia, with the exception that the above obligations do not apply to: certain transactions in respect to the implementation of the state budget, the receipt or giving of donations from and to overseas, international trade transactions, bank deposits in foreign currencies, or international financing transactions.

Repatriation by foreign investors of certain funds from business ventures is specifically permitted under the new Indonesian investment laws. The types of funds eligible for repatriation as stated in this investment law include capital, profits, dividends, bank interest, other income, funds necessary for the purchase of raw and auxiliary materials, semi-processed goods, or processed goods or the replacement of capital goods in order to protect the survival of the investment, additional funds necessary for financing capital investment, funds for repayment of loans, royalties or fees payable, income of an individual foreign citizen working in the capital investment company, proceeds from the sale or liquidation of the capital investment, compensation for losses, compensation for expropriation, payments made for technical aid, fees payable for technical and management services, payments made under project contracts, and intellectual property payments, and proceeds from the sale of the investor's assets. The Bank of Indonesia (BI) requires a report on any transfer of funds in excess of IDR100 million or USD10,000 or the equivalent of that amount.

Letters of credit and other instruments of surety are issued by Indonesian banks, subject to the regulations of the Central Bank of Indonesia (BI). Prior approval from the Central Bank of Indonesia for the issuance of an individual instrument of surety is not required. Nearly all basic financial transactions in Indonesia are also governed by regulations of the Central Bank of Indonesia (BI).

8. What types of taxes, duties, and levies should a foreign investor in Indonesia expect to encounter?

Since the enactment of laws regarding Regional Autonomy (the present Act is Law No.32 of 2004 as amended by Law No.8 of 2005 and lastly amended by Law No.12 of 2008), there have been two classes of taxes in Indonesia: taxes that are collected by the central government and taxes collected by the provincial government. The taxes collected by the central government include: Income Tax, Value Added Tax (VAT) and Sales Tax on Luxury Goods (STLG), Tax on Land and Building, Duty on the Acquisition of Rights on Land and/or Building and Stamp Duty.

The provincial governments collect taxes, which include among others: Taxes on Motor Vehicle, Transfer of Title Tax, Taxes on Motor Vehicle Gasoline, Taxes on Hotels and Restaurants, Taxes on Entertainment, Taxes on Advertisements, Taxes on Street Lighting, and Taxes on Utilization of Ground and Surface Water.

There are also tax treaties between Indonesia and 61 other countries to avoid double taxation and prevent fiscal evasion.

While import duties exist for goods and equipment brought into Indonesia, business conducted in Special Economic Zones (SEZ) is afforded special dispensation from many of these duties. Additionally, industrial equipment imported for use in certain sectors may be eligible to receive a specific exemption from excise duties.

9. How comprehensive are the intellectual property laws of Indonesia? Do local courts and tribunals enforce IP laws uniformly regardless of the nationality of the parties?

Indonesia has comprehensive laws on intellectual property. As a member of the World Trade Organization (WTO), Indonesia's intellectual property laws are in accordance with provisions of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Enforcement actions that are brought to court in Indonesia do receive a fair judicial hearing based upon the merits of the case. It can be safely stated that Indonesian intellectual property laws are followed and enforced by the Indonesian judicial system. The nationality of the parties is not a major issue in the enforcement, as long as the parties provide supporting documentation that may be required or necessary to uphold their interests.

One concern with intellectual property enforcement in Indonesia is the lack of self-initiated enforcement. However, when the intellectual property right owners initiate enforcement actions, they tend to be quite successful, subject to their having supporting evidence available in their favor. Foreign companies can engage local law firms to enforce their property rights in cooperation with the Indonesian police force.

Indonesian law not only recognizes copyrights protecting a company's work product, but also the registered trademarks/service marks and trade secrets associated with the company's business and business activities. In addition, industrial designs, integrated circuits layout designs, and plant variety protection rights are also afforded protection under Indonesian law as required under the TRIPS Agreement.

In the field of patent law, Indonesia is a party to the Patent Cooperation Treaty, which has procedures for filing patent applications to protect inventions in each of its member states.

10. If a commercial dispute arises, do local courts or international arbitration offer a more beneficial forum for dispute resolution to foreign investors?

As in most countries, dispute resolution in Indonesia is most often handled through contractual clauses agreed to in advance by the parties. This principle applies to both local and foreign businesses and business ventures located in Indonesia.

The three most common methods of dispute resolution in Indonesia are

- Local Indonesian Courts
- Indonesian National Arbitration Agency (BANI), and
- Singapore International Arbitration Center (SIAC)

Indonesia is a party to the New York Convention of 1958 recognizing Foreign Arbitral Awards. As a signatory to this treaty foreign arbitration awards are to be recognized by Indonesian courts without rehearing the merits of the case. Furthermore, since Singapore is only a very short distance from Indonesia, many foreign companies choose to resolve disputes through arbitration with SIAC.

However, just results, fairly decided, based upon the merits of the case, can be obtained in any of the three dispute resolution forums mentioned above, and companies will choose the forum that will bring them the most

comfort. In reality, if the dispute involves foreign parties, international arbitration would be more advisable because of the language concern. Arbitration also offers more confidentiality in the proceedings, which is particularly beneficial for foreign parties who don't want to have unfavorable public exposure of their arbitration proceeding.

11. What advice can you offer for how best to negotiate and conduct business in Indonesia?

When considering investing in Indonesia, foreign investors and/or enterprises may take, among others, the following as preliminary guidance:

- The importance of good quality advice, particularly on the prevailing laws and regulations as the basis of their investment existence in Indonesia, delivered by qualified parties such as legal and strategic business advisors;
 - Visiting the official websites of Indonesian governments engaged in the investment sector to know better the trends, policies, and current market opportunities;
 - Studying the destination area of the investment to learn more about the community, including their habits and traditions compared to the corporate culture that will be brought in by the investors/enterprises, some of which can be obtained from online newspapers/magazines;
 - Investment procedures in Indonesia.
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12. What other practical lessons can you share with those who want to do business in Indonesia?

In addition to complying with the prevailing laws and regulations, maintaining good relationships with the relevant Indonesian government institutions/agencies will have positive implications for the foreign investors' business in Indonesia. Recognizing and studying the culture and practical habits of the community surrounding the foreign investors' businesses and of the work force will minimize the risk of conflict.

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