

THE PHILIPPINES

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 the Philippines play in approving and regulating foreign direct investment?

The following Philippine government agencies are involved in approving and/or regulating foreign direct investments into the Philippines:

The **Securities and Exchange Commission (SEC)** exercises jurisdiction and supervision over all corporations, partnerships, or associations doing business in the Philippines. Foreign investors desiring to invest in the Philippines may establish various business enterprises (such as a domestic corporation or subsidiary, a branch, or a representative office) by registering under the Foreign Investments Act of 1991 (FIA) and obtaining the appropriate license from the SEC. The SEC is also vested with the power to regulate and formulate policies and recommendations on issues affecting the securities market in the Philippines.

The **Board of Investments (BOI)** regulates and promotes investments in the Philippines through the grant of fiscal and non-fiscal incentives. The BOI annually prepares and recommends to the President of the Philippines an Investment Priorities Plan (IPP), which specifies the preferred areas of investment in the Philippines. Enterprises engaging in preferred areas of investment may register with the BOI and qualify for fiscal incentives (e.g., income tax holiday and exemption from certain taxes) and non-fiscal incentives (e.g., employment of foreign nationals and a simplified customs procedure).

The **Philippine Economic Zone Authority (PEZA)** regulates investments in special economic zones and industrial estates and promotes such investments through the grant of fiscal and non-fiscal incentives. Export producers or information technology (IT) service exporters may locate in PEZA-supervised and regulated economic zones and IT parks or buildings, which are treated as separate customs territories and, upon registration with the PEZA, enjoy such fiscal and non-fiscal incentives.

The **Bangko Sentral ng Pilipinas (BSP)** supervises and regulates banks and non-bank financial institutions exercising quasi-banking functions. Its functions include the registration of foreign equity investments and qualified foreign currency loans to enable business enterprises to source their foreign exchange requirements from the Philippine banking system.

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

As a general rule, foreign investors may engage in any business activity in the Philippines without a local partner, provided that such business activity is not required under the Philippine Constitution or the laws of the Philippines to be owned wholly or partially by Philippine nationals. The Foreign Investment Negative List (FINL) issued by the President of the Philippines from time to time lists the areas of investments reserved for Philippine citizens or entities that are wholly or partially owned by Philippine nationals.

The corporate structure most commonly used by foreign investors is a Philippine branch office or a Philippine subsidiary. However, some foreign investors choose to establish a representative office, regional headquarters, or regional operating headquarters, depending upon the foreign investor's requirements.

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

The Philippine government will require commercial joint ventures between foreign investors and local firms to comply with the ownership restrictions prescribed under the Philippine Constitution and statutes, which restrictions are listed in the FINL.

The FINL lists ownership restrictions which apply to all enterprises in general, such as the ownership of private lands and domestic market enterprises. There are also ownership restrictions listed in the FINL based on the business activity proposed to be undertaken by the business enterprise, such as telecommunications, advertising, public utilities, etc.

Under the Constitution and the Public Land Act, as amended, only Philippine citizens or a corporation whose outstanding capital stock is at least 60% owned by Philippine nationals may acquire and maintain ownership of private lands.

Under the FIA (as reflected in the FINL), foreign investors may generally not invest in more than 40% of the outstanding capital stock of a **domestic market enterprise** (i.e., an enterprise which produces goods for sale or renders services to the domestic market entirely or, if exporting goods or

services, does not consistently export more than 60% of its total output), unless such enterprise has a minimum paid-up capital equivalent to at least USD200,000 (in which case, foreigners may invest in up to 100% of the enterprise's outstanding capital stock). Moreover, if the enterprise involves advanced technologies, as determined by the government, or employs at least 50 direct employees, foreigners may invest in excess of 40% of such enterprise's outstanding capital stock, provided its paid-up capital is equivalent to at least USD100,000.

In contrast, foreign investors may own, pursuant to the FIA, up to 100% of the outstanding capital stock of an **export enterprise** (i.e., an enterprise that exports at least 60% of its output, whether as manufacturer, processor, service provider, or trader), provided that the foreign investor is not subject to any other restriction imposed by the Constitution or statutes, such as the ownership of private lands or operation of a public utility.

It is well to note that the Anti-Dummy Law of the Philippines, as amended, punishes acts of evasion of Philippine nationalization laws and provides for penal sanctions, including imprisonment of up to 15 years, plus a fine, against the relevant foreigner, as well as the Philippine "dummy" who allows his name or citizenship to be used for the purpose of evading the nationalization laws.

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

The relationship between a foreign company and a local agent is primarily governed by the Philippine Civil Code provisions on agency. An agent is a person who has bound himself to render some service, or to do something, in representation or on behalf of another, with the consent and authority of the latter.

A distributor generally transacts business in his/its own name and for his/its own account, and not in the name of another (e.g., for a foreign company). The relationship between a foreign company and its distributor is governed by the Philippine Civil Code provisions on contracts.

The Retail Trade Liberalization Act of 2000 (RTLA) may affect the decision of foreign companies engaged in retail trade as to whether to appoint a local agent or a distributor. The RTLA reserves retail trade enterprises with a paid-up capital of the Philippine Peso-equivalent of less than USD2.5 million to Philippine citizens or to corporations wholly owned by Philippine

citizens. Full foreign participation is allowed (subject to certain conditions) in case the paid-up capital of the retail trade enterprise is at least the Philippine Peso-equivalent of USD2.5 million and the investment in establishing each branch or store is at least the Philippine Peso-equivalent of USD830,000. Since the relationship between a foreign company and a local agent is one of agency, the foreign company may only engage in retail trade through an agent if it complies with the above requirements of the RTLA. Foreign companies oftentimes choose to appoint distributors to sell and market their products in the Philippines, instead of agents, if they cannot, or choose not to, comply with the requirements of the RTLA.

Under the FIA, it should be noted that a foreign company is deemed to be doing business in the Philippines if it appoints representatives or agents domiciled in the Philippines or who, in any calendar year, stay in the country for a period or periods totaling 180 days or more. However, the appointment of a distributor domiciled in the Philippines, which transacts business in its own name and for its own account, is not considered doing business in the Philippines.

5. How does the Philippine 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)?

Proposed mergers and acquisition activities are regulated by the Philippine government by requiring foreign investors to comply with the ownership restrictions under the Philippine Constitution and statutes, which are listed in the FINL.

Under the FINL, certain business activities, such as: mass media (except recording); retail trade enterprises with a paid-up capital of less than the Philippine Peso equivalent of USD2.5 million; private security agencies; small-scale mining; utilization of marine resources in archipelagic waters, territorial seas, and exclusive economic zones, as well as small-scale utilization of natural resources in rivers, lakes, bays, and lagoons; ownership, operation and management of cockpits; manufacture, repair, stockpiling and/or distribution of nuclear weapons or biological, chemical and radiological weapons and anti-personnel mines; and manufacture of firecrackers and other pyrotechnic devices, are reserved for Philippine nationals.

On the other hand, certain enterprises, such as: those engaged in the exploration, development and utilization of natural resources; ownership of private lands; and operation and management of public utilities, are allowed to have a maximum of 40% of its outstanding capital stock to be owned by foreign investors.

Presently, there are bills filed with the Philippine Congress proposing to enact an Antitrust Law, which is intended to consolidate and codify all antitrust provisions under Philippine law.

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

CONSTITUTION AND THE LABOR CODE

The Philippine Constitution and the Labor Code mandate the State to “afford full protection to labor, local and overseas, organized and unorganized...” They ordain the rights to self-organization, collective bargaining and negotiations, peaceful concerted activities, security of tenure, humane conditions of work, and a living wage.

These constitutional and statutory rights regulate and prescribe requirements for:

- Pre-employment, recruitment and placement of workers, and employment of nonresident aliens;
- Human resources/manpower development, and training and employment of special workers;
- Conditions of employment, including minimum labor standards and wages;
- Health, safety, and social welfare benefits;
- Labor relations, and arbitration of labor disputes and employee complaints;
- Union organization, collective bargaining, concerted activities, and unfair labor practices; and
- Termination of employment and retirement from service.

In the implementation and interpretation of labor laws, any doubt is usually resolved in favor of labor.

REGULATION OF WAGES AND LABOR STANDARDS

Upon employment, employees are entitled to the applicable minimum wage and labor standards, such as normal hours of work and overtime pay. In each geographical region, the Regional Tripartite Wages and Productivity Board sets the applicable floor or minimum wage. Private employers are also required to contribute to the Social Security System (SSS), Home Development Mutual Fund (known as the Pag-Ibig Fund), and the Philippine Health Insurance Corporation in behalf of their employees. Rank-and-file employees are likewise entitled to 13th month pay.

RESOLUTION OF LABOR CASES

The Department of Labor and Employment (DOLE), through its visitatorial and enforcement powers, is the government agency tasked with ensuring compliance by all business enterprise with all labor standards.

Disputes involving termination of employment, unfair labor practices, money claims, and damages arising from employer-employee relations may be brought before a labor arbiter, whose decisions are appealable to the National Labor Relations Commission (NLRC), an attached government agency of the DOLE. Decisions of the NLRC are, in turn, appealable to the Court of Appeals and the Supreme Court.

ALIEN EMPLOYMENT PERMITS AND WORKING VISAS OF NONRESIDENT ALIENS

Under the Labor Code, any alien seeking admission to the Philippines for employment purposes, and any domestic or foreign employer who desires to engage an alien for employment in the Philippines, must obtain an alien employment permit (AEP) from the DOLE and a working visa from the Bureau of Immigration (BI).

The AEP may be issued to a nonresident alien or to the applicant employer after a determination of the non-availability of a person in the Philippines who is competent, able, and willing, at the time of the application, to perform the services for which the alien is desired.

Exempted from obtaining an AEP are resident foreign nationals and elected members of governing boards who do not occupy any other position in a corporation or business enterprise.

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?

CONVERSION OF LOCAL CURRENCY AND REGISTRATION OF FOREIGN INVESTMENT

Foreign investors may remit their equity investments into the Philippines in foreign currency. If they intend to source foreign exchange from the Philippine banking system to service remittance of dividends or repatriation of investments, foreign investors should register their investments with the BSP.

A foreign equity investment registered with the BSP is covered by a Bangko Sentral Registration Document (BSRD) issued by the BSP.

DISPOSITION OF FOREIGN EXCHANGE RECEIPTS

Foreign exchange receipts, acquisitions, or earnings of residents from non-trade sources may be used for any purpose and may, at their option, be sold for Philippine Pesos, or retained or deposited in foreign currency accounts, whether in the Philippines or abroad.

PURCHASING FOREIGN CURRENCY

Provided that the required supporting documents, including the BSRD, are presented to an Authorized Agent Bank (AAB) in the Philippines, any person can purchase foreign exchange with Philippine Pesos from AABs for outward remittances to pay for such person's foreign exchange obligations abroad.

REPATRIATION AND REMITTANCE PRIVILEGES

Repatriation of sales or divestment proceeds, and remittance of dividends, profits or earnings accruing to a BSP-registered foreign equity investment, may be effected by AABs without prior BSP approval upon presentation of the original copy of the relevant BSRD, together with other supporting documents.

For an unregistered foreign equity investment, profit remittance and capital repatriation may be serviced using foreign exchange sourced from outside the AABs of the Philippine banking system (e.g., money changers).

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

Taxes in the Philippines are classified either as national or local.

National taxes are payable to the national government, as provided in the National Internal Revenue Code and the Tariff and Customs Code. These include, but are not limited to, the following:

Corporate Income Tax is imposed on taxable income (i.e., gross income less allowable deductions and exemptions). The maximum income tax rate for corporations is 30%.

Capital Gains Tax is imposed on the sale, barter, exchange, or onerous disposition of: (i) real properties considered capital assets; and (ii) shares of stock in a domestic corporation, not traded or sold through the local stock exchange.

Branch Profits Remittance Tax is imposed on profits, including interests, dividends, rents, royalties, remunerations for technical services or other gains, profits or income effectively connected with the conduct of trade or business in the Philippines remitted abroad by a local branch office to its head office.

Fringe Benefits Tax is imposed on the grossed-up monetary value of fringe benefits granted to certain employees, which tax is required to be withheld and remitted to the BIR by the employer.

Value-Added Tax (VAT) is imposed on the sale or lease of goods or properties and on services rendered in the course of trade or business, when the corporation's gross annual sales and/or receipts exceed PHP 1.5 million. Currently, the VAT rate is 12%.

Percentage Tax is imposed on persons whose sales or receipts are exempt from VAT, and on domestic and international carriers, persons/entities providing certain communication services, banks and non-bank financial intermediaries, finance companies, insurance companies, and persons/entities selling shares of stock listed and traded through a local stock exchange, among others.

Excise Tax is imposed on imported goods and certain goods manufactured or produced in the Philippines for domestic sale/consumption or for any other disposition (e.g., alcohol and tobacco).

Documentary Stamp Tax is imposed on the execution of documents, instruments, loan agreements, and acceptances, assignments, sales and transfers of obligations, rights or properties.

Tariff and Customs Duties are imposed on imported articles.

Local taxes are imposed by, and are payable to, the local government unit where the pertinent property, person, or business is located, consistent with the provisions of the Local Government Code. These include, but are not limited to, the following:

Local Business Tax is an annual tax on the privilege of engaging in business in a particular jurisdiction, which is based on gross receipts or earnings.

Real Property Tax is an annual tax levied on real properties (e.g., land, building, machinery and other improvements).

Community Tax is an annual tax on resident individuals and juridical persons engaged in business in the Philippines.

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

Intellectual property rights (IPR) are recognized as valuable collections of proprietary rights capable of commercial exploitation and entitled to protection.

The Philippine Constitution states: “The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.”

The following International Treaties governing IPR have been ratified:

- Berne Convention for the Protection of Literary and Artistic Works
- Paris Convention for the Protection of Industrial Property
- Agreement on the Trade-Related Aspects of Intellectual Property Rights
- Patent Cooperation Treaty
- World Intellectual Property Office (WIPO) Copyright Treaty
- WIPO Performances and Phonograms Treaty
- Madrid Protocol System for the International Registration of Trademarks

The following national laws affect IPR:

- The **Philippine Intellectual Property Code** (IP Code) consolidates and codifies all IP-related laws and provides the legal framework for protecting intellectual achievements.
- The **Protection of Layout-Designs (Topographies) of Integrated Circuits Act** protects layout-designs of integrated circuits.
- The **Indigenous Peoples' Rights Act** protects indigenous cultural communities, their cultural sites, ceremonies, indigenous knowledge, practices and biological resources.
- The **Plant Variety Protection Act** protects plant varieties and defines rights of breeders over new plant varieties.
- The **Optical Media Act** regulates optical media and addresses violations of IPR by focusing on the source, e.g., raw materials and equipment used in the commission of the crime.

Applying the “principle of reciprocity,” protection of IPR extends to Filipinos, as well as any person who is a national or is domiciled or has a real and effective industrial establishment in a country party to any convention, treaty or agreement relating to IPR or the repression of unfair competition which the Philippines is a party of or which extends reciprocal rights to Philippine nationals by law.

A foreign national or juridical entity to whom an IPR has been granted may bring an action for infringement, or a civil action or administrative action for opposition, cancellation, unfair competition, false designation of origin and false description, provided such person complies with the reciprocity rule. If such person is not licensed to do business in the Philippines, it may bring such action only if it is not engaged in business in the Philippines.

For IP administrative registrations, a nonresident foreign applicant will have to appoint and maintain a resident agent or representative in the Philippines upon whom notices or processes for judicial or administrative procedures relating to the application or registration of the relevant IP right(s) may be served.

The IP Code also follows the “reverse reciprocity principle” whereby any condition, restriction, limitation, diminution, requirement, penalty, or any similar burden imposed by the law of a foreign country on a Philippine national seeking protection of IPR in that country shall reciprocally be enforceable upon its nationals within the Philippines.

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

In the Philippines, litigation and arbitration have their respective benefits and drawbacks. In the event of international commercial disputes, arbitration provides five major benefits that litigation does not, namely:

- **Competence.** Parties are free to choose arbitrators with the requisite expertise on the subject matter of the dispute. Accordingly, decision-makers in Philippine arbitration will have applicable specialized commercial and/or legal expertise and, thus, are expected to render awards more competently than courts.
- **Privacy.** Most foreign investors are prime targets for publicity. In arbitration, open hearings or public filings are not the norm. Confidentiality of records is well protected. Thus, arbitration affords the privacy not available in proceedings before local courts (as judicial proceedings and all records are considered public).
- **Speed.** Disputes are resolved with greater speed in arbitration than in court litigation because of the liberality of evidentiary rules and procedural restrictions. Judicial proceedings related to arbitration are conducted in a summary manner and resolved within shorter time frames than normal court cases. This feature diminishes the disruption of the ongoing business of the disputants.
- **Finality.** There is relatively little risk that an arbitral award will be set aside or altered by the Philippine judiciary, which espouses the “pro-arbitration bias” and has a severely limited power of review.
- **Neutrality.** International traders from diverse legal cultures may feel that a local court will not treat them with equal fairness, giving the domestic party the “home-court” advantage. Although Philippine judges are required to be impartial, arbitration comforts foreign investors insofar as neutrality of the decision-makers is concerned. The parties participate in the selection of arbitrators and may choose arbitrators who they feel are impartial.

Aside from litigation and arbitration, the parties may choose to resolve their dispute through an amicable settlement or through negotiations, pursue administrative remedies, or undergo a multitiered or hybrid dispute resolution process.

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

Business should be conducted in the Philippines always in accordance and in compliance with all legal requirements. In this connection, it would be important and useful to engage the services of competent lawyers and advisers who will be able to advise and assist accordingly. Also, it would be helpful to be aware of and to observe, to the extent practicable, local customs and practices in doing business in the Philippines.

12. What other practical lessons can you share with those who want to do business in the Philippines?

In case of a doubt or question as to the interpretation or applicability of a particular law, rule, and/or regulation, it is always advisable to request the interpretation of the relevant government agency tasked to enforce and apply such law, rule, and/or regulation, for guidance. It would be preferable to first ask an informal opinion from the government agency concerned and, only if such informal opinion is favorable, to request the government agency concerned to issue a formal written opinion on the matter. Nevertheless, such opinions of government agencies tasked to enforce particular laws, rules, and/or regulations are always subject to the final determination of the courts as to the proper or correct interpretation and application of such laws, rules, and/or regulations.

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ACCRAALAW, established in 1972, is today one of the Philippines' top-tier full service law firms with a cohesive multidisciplinary team of legal professionals who possess in-depth knowledge of specialized fields of law backed by extensive experience of forty years in the practice of law in the Philippines. The firm has a track record in handling diverse significant and complex business projects and joint ventures involving multinational clients and has successfully handled a great number of landmark litigation cases. ACCRAALAW's clientele represents the full spectrum of business and industry, and includes professional organizations, individuals, and foreign embassies. Servicing the firm's clients are the following seven practice departments offering timely, creative, and strategic legal solutions matched with cost-efficient administration and expert handling of clients' requirements:

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- Corporate & Special Projects Department
- Labor & Employment Department
- Litigation & Dispute Resolution Department
- Tax Department
- Immigration Department.

ACCRAALAW has its head offices at the newly developed Bonifacio Global City in Taguig, Metro Manila. It has branches in two thriving business and commercial centers to the south of Metro Manila: Cebu City and Davao City. The firm is linked to a global network of correspondent lawyers, law firms, and bar associations. ACCRAALAW's managing partner is Eusebio V. Tan, and its co-managing partner is Francisco Ed. Lim.

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