KOREA

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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Published by Meritas, Inc. • 800 Hennepin Avenue, Suite 600
Minneapolis, Minnesota 55403 USA
+1.612.339.8680 | +1.612.337.5783 fax | www.meritas.org

Cover design by Elizabeth Ansell, Meyer Unkovic & Scott LLP

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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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 Dông
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 Korea play in approving and regulating foreign direct investment?

The Korean government takes an active, investor-friendly role in approving and regulating foreign direct investment. A prospective foreign investor seeking to make an investment in Korea is subject to, depending on the type of business, different registrations and/or approvals by the Ministry of Strategy and Finance (MSF), the Financial Supervisory Services (FSS) and the Ministry of Knowledge and Economy (MKE).

The foreign investor is required to file a report of the foreign investment to the MKE pursuant to the Foreign Investment Promotion Act (FIPA). However, in practice, such reporting can be made to one of the foreign exchange banks designated by the MSF or to the Korea Trade Investment Promotion Agency (KOTRA). Such foreign investment reports are normally processed within one day. If the foreign investment amount is less than KRW100 million or 10% shareholding of a company, then reporting requirements under the Foreign Exchange Transactions Act (FETA) will be triggered instead of the reporting requirements under the FIPA.

Furthermore, under the Monopoly Regulation and Fair Trade Act (MRFTA), a business combination report must be filed with the Korea Fair Trade Commission (KFTC) if the assets or turnover of the entity resulting from foreign investment meets certain reporting thresholds. The purpose of the MRFTA is to prohibit certain types of "business combinations" (mergers and other "business combinations" as defined under the MRFTA) that may substantially restrict competition in the relevant market. In addition, there are certain industry sectors that are restricted or precluded from investment under the FIPA.

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

Foreign investors may conduct business in Korea without a local partner unless otherwise limited or restricted by relevant regulations with regard to the subject matter of foreign investment. A foreign investor can choose from these common forms of business enterprises in establishing operations in Korea:

- Branch office
- Subsidiary
- Representative office
- Joint venture company

In addition to the difference in tax treatment, the main difference between a branch office and a representative office is that a branch office conducts business while a representative office only engages in liaison matters. A subsidiary and a joint venture company is a separate legal entity from the parent or the investment company.

The forms of incorporation in Korea include:

- Stock company (*chusik hoesa*)
- Limited company (*yuhan hoesa*)
- Partnership company (*hapmyong hoesa*)
- Limited partnership company (*hapja hoesa*)
- Limited liability company (*yuhan chaekim hoesa*)

The Korean Commercial Code (KCC) classifies different types of companies according to the scope or the type of liabilities borne by the shareholders or members. The stock company (chusik hoesa) is the most commonly used form of corporate structure by foreign investors.

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

The basic law covering foreign investments in Korea is the FIPA. Under the FIPA, a foreign investment must have:

i) a minimum foreign investment amount of KRW100 million; and

ii) investment ratio by the foreign investor of at least 10% of the shares or units in the Korean corporation.

When equity participation by the foreign partner meets these requirements, the investor is required to file a foreign investment report and the invested company is required to register as a foreign-invested company via a designated foreign exchange bank or KOTRA.

The FIPA also provides that if the foreign investor acquires shares or units of a Korean company and engages in any of the following types of contracts with the Korean company, such contracts will also be considered foreign investment even though requirement (ii) above is not met:

- A contract under which a (foreign) officer is dispatched or appointed to the Korean company.
- A contract which stipulates the supply or the purchase of raw materials or products for at least one year.
- A contract which allows for the provision or introduction of technologies, or joint research and development.

Furthermore, the foreign investor's acquisition of existing or newly issued shares of an already established company or the newly issued shares of a newly established company will all be considered as a type of foreign investment under the FIPA. In addition, a foreign investor wishing to establish a new company in Korea for investment purposes would be subject to certain reporting and procedural requirements as set forth under the applicable laws and regulations and other governmental bodies.

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

The relationship between local agent and distributor and foreign company is mainly governed by the Korean Civil Code and the KCC. More specifically, the rights and obligations of the local agents acting as an intermediary or representative of the foreign company are set forth in the KCC. For example, the KCC has provisions protecting local agents in the event the local agents are not rightfully compensated by the principal for their efforts to bring in new business for the principal. In contrast to local agents, the relationship between the foreign company and the distributors that sell, under its own name, the products imported from a foreign company and retain the proceeds from such sale, will generally be governed by the Korean Civil Code, and depending on the circumstances, may also be subject to the agency laws under the KCC.

With respect to termination of an agency contract, the agent may claim compensation against the principal after termination of the agency agreement if the following conditions are met:

- The agency agreement must not have been terminated for reasons attributable to the agent.
- The principal continues to enjoy significant profit from the new customers and businesses procured by the agent.
- The agent must have foregone the remuneration that it could have received had the agency agreement not been terminated.
- The amount of compensations must be fair and equitable (the upper limit is the average yearly compensation for the five years prior to the termination of the contract).

It is not settled whether the same principles also apply to distributorship contracts. However, the general view is that the above requirements should not apply to distributorship contracts.

In addition, if the trade practices between local agents and distributors and foreign companies are deemed to constitute unfair trade practices under the MRFTA, then the KFTC, as enforcing authority of the MRFTA, may employ, as may be appropriate, measures such as imposing penalties, ordering the cessation of unfair trade practices, ordering the removal of the relevant provisions in the contract, disclosing the issuance of corrective order, and other measures. Representative types of unfair trade practices are sales territory restrictions, transaction counterparty restrictions, transaction volume restrictions and restrictions on handling competitive products; the judicial effect of acts of unfair trade practices are determined on a case-by-case basis.

5. How does the Korean 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)?

The FIPA is the main law that regulates investment by foreign investors in national companies and other key sectors. According to the FIPA, foreign investors may freely invest and carry on business activities in Korea as long as it does not:

- Result in an impediment to national security or public order;
- Damage public welfare or environmental preservation or is contrary to public morals and decency; or
- Violate any laws and regulations of Korea.

The industry sectors that are restricted or precluded from investment are provided for on an annual basis by the MKE through the Regulations on Foreign Investment and Technology Introduction and the Integrated Public Notice of Foreign Investment. According to the current Statistics Service Notice issued by the Korean Standard Industry Classification, 60 industry sectors (which include national defense, public administration, foreign affairs, education and others) out of the 1,145 different industry sectors are on the list of excluded types of business activities and 25 industry sectors are on the list of partially opened types of business activities by foreign investors (which include electric power generation, broadcasting service, key telecommunications service and others). Furthermore, there are other industry-specific laws and regulations other than the FIPA that may impose certain restrictions to foreign investment.

Also, under the MRFTA, a merger between foreign companies must also be reported to the KFTC if certain reporting thresholds are triggered.

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

The Labor Standards Act (LSA) is the basic law that governs individual employment matters in Korea. The LSA sets out the minimum employment standards, and any employment terms and conditions that do not meet the minimum standards set out in the LSA are void. Of course, employers are free to provide terms and conditions that are better than the minimum standards set out in the LSA. Most of the provisions of the LSA apply to workplaces with five or more employees, though some provisions of the LSA apply to all workplaces regardless of the number of employees therein.

Unlike in the common law system, Korea does not recognize the concept of termination at will. Thus, an employee, including a probationary employee, may be terminated only for "just cause." The termination provisions of the LSA dealing with just cause for termination apply to a workplace with five or more employees. Although just cause is not defined in the LSA, its definition may be inferred from court precedents, where the term has been defined as "a cause that is attributable to the employee to a point where the employment contract may not be continued under socially accepted principles." Whether a particular cause falls within the purview of just cause is, in most cases, a difficult issue to determine, and employers are advised to consult with a legal counsel.

Also, an employee who is employed by a foreign company and is providing services temporarily in Korea (expatriate workers) is protected by the LSA and other labor-related laws of Korea, if his/her primary workplace is in Korea.

Other labor-related laws include the following:

- Framework Act on Labor Welfare
- Act on the Protection, etc. of Fixed-term and Part-time Employees
- Act on the Protection, etc. of Dispatched Workers
- Act on Equal Employment and Support for Work-Family Reconciliation
- Industrial Accident Compensation Insurance Act
- Occupational Safety and Health Act
- Minimum Wage Act
- Employee Retirement Benefit Security Act
- Trade Union and Labor Relations Adjustment Act
- Employment Security Act
- Employment Insurance Act
- Act on Employment Promotion and Vocational Rehabilitation for the Disabled Persons
- Act on Prohibition of Age Discrimination in Employment and Aged Employment Promotion
- Act on Foreign Workers' Employment, etc.
- Act on the Promotion of Workers Participation and Cooperation

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?

Treatment and Conversion of Local Currency. Only those financial institutions that satisfy certain requirements and are registered with the MSF may engage in foreign exchange business. All commercial banks in Korea are registered with MSF and thus, would be able to deal with foreign currency conversion transactions. Such registered banks are referred to as the Foreign Exchange Banks.

Treatment of Local Currency. If a non-Korean resident desires to borrow money in local currency (Korean Won) from a Korean bank, such nonresident may need to file a report to a Foreign Exchange Bank or the Bank of Korea (BOK) depending on the amount of the proposed borrowing.

Conversion of Currency. In principle, there is no limitation on the conversion of foreign currency into Korean Won and vice versa. Any resident or nonresident may, at their option, sell or buy local currency at any of the Foreign Exchange Banks. However, if the amount of the conversion exceeds the threshold as provided under the FETA, such conversion would need to be reported to the National Tax Service (NTS) by the relevant Foreign Exchange Bank.

Repatriation and Remittance Privileges. Foreign investors are afforded repatriation and remittance privileges upon presentation of supporting documentation to the Foreign Exchange Banks.

Letters of Credit. Letters of credit are used as an import finance tool for the benefit of the Korean resident importer, and as a payment guarantee for the benefit of the non-Korean resident exporter.

- Import finance tool. Letters of credit are frequently used for financing international trade in Korea. Letters of credit provide import financing for the benefit of the importer.
- Payment guarantee for non-Korean residents. Letters of credit are a form of payment guarantee. Under the FETA, a payment guarantee involving the flow of currency from and into Korea that is issued for the benefit of a non-Korean resident exporter must be reported to either a designated Foreign Exchange Bank or the BOK. However, Foreign Exchange Banks issuing a letter of credit are exempted from such reporting obligation under the FETA.

No foreign exchange approval is required to open or amend a letter of credit in Korea. In general terms, if the payment overseas under a letter of credit must be made more than one year prior to shipping, then a report must be filed at the BOK.

Other Basic Financial Transactions. A nonresident may open a deposit account or trust account at a Foreign Exchange Bank for the purposes of depositing foreign currency or Korean Won. The types of deposits are determined by the BOK from time to time. In addition, residents or nonresidents may enter into foreign exchange derivative transactions with Foreign Exchange Banks and may actually transfer the whole or part of the relevant transaction amount. However, any transaction which involves a conversion of amounts exceeding the threshold as provided under the FETA would need to be reported to the NTS by the relevant Foreign Exchange Bank.

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

Domestic and foreign companies alike are subject to income taxes and other taxes on income derived from Korea. The types of taxes, duties, and levies imposed on foreign investment in Korea are dependent upon factors such as the way the corporate vehicle for the foreign investment or the branch office is established in Korea. Some of the taxes are as follows.

Corporate Tax. A foreign corporation that has a Permanent Establishment (PE) in Korea would be liable for corporate tax on income attributable to the PE in Korea that is derived from sources within Korea. The corporate tax rate would be 10% for income KRW200 million or less, 20% for income KRW200 million to KRW20 billion or less, and 22% for income more than KRW20 billion. Such taxes are due within three months from the end of the fiscal year.

Value Added Tax (VAT). VAT is imposed on the sale of goods or services. Currently, the VAT rate is 10%.

Local Tax. The local government imposes local taxes such as the following:

- Acquisition tax
- Registration tax
- Property tax
- Local income tax (10% of the corporate or individual income tax is surtax)
- Local consumption tax

- Automobile tax
- City planning tax
- License tax
- Education tax

Withholdings Tax on Dividends. The dividends the foreign investor receives from its investment in a Korean corporation would be subject to withholdings tax at the rate of 22% (including surtax). However, such withholdings tax may be reduced or exempt if there is a tax treaty between the home country of the foreign investor and Korea.

Some of the tax issues that foreign investors should be aware of are as follows:

Thin Capitalization. Where a foreign controlling shareholder provides a loan to the domestic company or guarantees a loan by a third party for the domestic company, and if the sum of such loan or guarantee is more than three times the shareholder's equity of the domestic company invested by the foreign company, then the interest on the loan or guarantee amount exceeding three times the shareholder's equity may not be deemed as a deductible expense of the domestic company.

Transfer Pricing Tax. When the taxable income of the corporation decreases due to import at a price higher than the normal price or export at a price lower than the normal price in the course of international transactions between a corporation and foreign special related party, the government may reassess the taxable income according to the normal price for taxing purposes. Special relations are established when one party directly or indirectly holds more than 50% of the shares with voting rights of the other party or has actual control over the other through decisions in business management and appointment and dismissal of officers and employees.

Foreign Investor Tax Benefits. The corporate tax and/or local taxes, as well as withholding tax on dividend income, may be exempted or reduced for a period of five to seven years if certain requirements are met. The corporate tax and income tax in relation to the introduction of high technology may be exempted under certain conditions.

Expatriates. In principle, expatriates are treated the same as Korean nationals and taxed accordingly if an address is maintained in Korea or the expatriate has resided for one or more years in Korea. However, if a tax treaty exists between Korea and the home country of the expatriate, then the expatriate will be taxed in accordance with such tax treaty.

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

The laws of Korea provide for the protection of patents, utility models, designs, copyrights, trademarks, service marks, trade secrets, etc. The following are some of the Korean IP laws that protect IP rights.

Patent Act. Patents are granted by the Korean Intellectual Property Office (KIPO) to new and industrially applicable inventions.

Utility Model Act. Inventions falling short of qualifying for a patent may be afforded protection under the Utility Model Act.

Design Act. The Design Act provides protection to shapes, pattern, color, or combination thereof of an article, in whole or in part, and letter font that create an aesthetic visual impression.

Copyright Act. The Copyright Act protects literary, scientific, artistic works and computer software.

Trademark Act. The Trademark Act protects any sign, character, figure or any combination thereof and also, any combination of colors thereof.

Unfair Competition Prevention Act. The Unfair Competition Prevention Act protects confidential information and trade secrets with economic value that are generally considered to be confidential and proprietary as well as well-known status of marks.

Semiconductor Layout Design Act. The Semiconductor Layout Design Act protects layout designs such as a plane or cubic design of the circuit elements and wires which connect the elements, which could be used in manufacturing a semiconductor integrated circuit.

Seed Industry Act. The Seed Industry Act provides protection to any person who invents a new and distinct variety of plant that reproduces itself asexually.

Korea is a party to a great majority of international treaties and conventions relating to protection of IP rights, and IP rights are objectively enforced in Korea regardless of the nationality of holder of such rights.

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

As is the case in many jurisdictions, litigation and arbitration have their respective pros and cons. Depending on the unique characteristics of the dispute, the foreign investor would need to carefully choose whether to litigate or arbitrate the disputed matter.

In general, the parties are free to resort to any court of competent jurisdiction within or outside Korea to settle the disputes. In relation to dispute resolution involving the Korean courts, foreign investors should be aware of some of the basic aspects as follows.

The Korean Legal System and Civil Trial Procedures. In Korea, all trials are before the court, which generally consists of a panel of three judges. There is no formal, sanctioned, pretrial discovery procedure. Korea does not have a jury system.

Remedies. Possible legal remedies include monetary compensation for harm or loss, related provisional attachments, and equitable remedies of specific performance, and temporary and permanent injunction.

Enforcement of Foreign Judgments. In the event that it becomes necessary or prudent to attempt to enforce a judgment of a foreign court in the courts of Korea, the foreign judgment will be given effect only if certain legal requirements are satisfied.

In terms of arbitration, arbitration is a common form of dispute resolution. The Korean Arbitration Act sanctions international commercial arbitration in Korea. The most commonly used standing arbitration organization in Korea is the Korea Commercial Arbitration Board (KCAB). The KCAB will recognize an arbitration agreement between the parties, and if there is no specific agreement such as the agreement on how to appoint the arbitral tribunal in the arbitration agreement, then the KCAB is authorized to make decisions to aid in the facilitation of the arbitration (i.e., appointment of the arbitrators, etc.). Rules for hearings and other procedures are otherwise similar to rules promulgated by other internationally recognized arbitration bodies and offer a fair and efficient method of dispute resolution. The prescribed KCAB arbitration fees are generally significantly lower than other international arbitration forums. In addition, arbitration in Korea may also be conducted pursuant to other rules such as the Rules of Arbitration of the International Chamber of Commerce.

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

As the laws and regulations of Korea have been fined tuned to comport with the global standards and the domestic companies have acquired significant experience dealing with companies from around the globe, the general population of Korea have become familiar with the diverse foreign cultures, with most employees being fluent in English. Thus, conducting business or negotiations in Korea would not entail particular difficulties.

In terms of the differences in culture, it may be helpful for the foreign company to have an understanding of the Korean lifestyle and ways of business. For example, Korean companies have a rather strict hierarchy, so the decision maker may not grant the complete decision making authority to the agent attending the negotiation. Moreover, since verbal discussions may be interpreted differently based on different cultures, it is advised that the parties record the contents of any agreement in writing.

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

As is the case with other countries, it is best to build up an amicable working relationship with the other party. It is also important to note that etiquette and formality is considered an essential virtue, which may cause such Korean contacts to appear rather distant and/or stubborn. However, once a relationship is formed through frequent meetings and informal discussions most will discover that Korean employees are friendly and cooperative. Thus, scheduling informal meetings and dinner gatherings may be an effective business tool.

Furthermore, since Korea is equipped with advanced telecommunication networks, foreign companies are encouraged to utilize these and other infrastructures available in Korea, such as the systems offered by the Korean government to support foreign companies in Korea (e.g., the Korea Trade-Investment Promotion Agency, available at www.kotra.or.kr).

GLOSSARY

BOK	Bank of Korea
FETA	Foreign Exchange Transactions Act
FIPA	Foreign Investment Promotion Act
FSS	Financial Supervisory Services
KCAB	Korea Commercial Arbitration Board
KCC	Korean Commercial Code
KFTC	Korea Fair Trade Commission
KIPO	Korean Intellectual Property Office
KOTRA	Korea Trade Investment Promotion Agency
LSA	Labor Standards Act
MKE	Ministry of Knowledge and Economy
MSF	Ministry of Strategy and Finance
MRFTA	Monopoly Regulation and Fair Trade Act
NTS	National Tax Service
PE	Permanent Establishment
VAT	Value Added Tax

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As an international law firm fully equipped with resources and expertise to provide the best possible services to clients conducting business in Korea, Lee & Ko eagerly awaits the opportunity to be of service to you.

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