

CHAPTER 3

Legal Surprises in Thailand

Thailand's legal system might seem to largely offer the predictable outcome with previous Supreme Court judgments being perceived as persuasive (not legally binding) precedents. So, a court in a subsequent case is free to follow or utterly disregard a court decision in previous case. An official in the same government department has a high (but not absolute) degree of discretion to interpret the law differently from what was construed in the past. This is where the legal risk may arise as there is no such thing as absolute legal certainty. Any competent attorney probably can tell you a likely outcome from a court or a government department, but it is ultimately a court or a government department that can decide – whether or not to follow any previous precedents.

As an investor in Thailand, one must realize that there is some degree of legal uncertainty out there, which ultimately has caused many legal surprises happening in the past. Whenever there is any legal surprise, you know what will usually immediately follow – foreign investors lose money. Of course, reading the previous legal surprises in Thailand will not address the next important question: Will any of these legal surprises occur again in the near future as such it will badly impact on my investment in Thailand? Nobody knows that answer for sure. Although the history might not necessarily help you spot or predict any future surprise, but at least for the time being it will remind and perhaps convince you that one should never rule out the possibility of any legal surprise. It occurred in the past and it could occur again in the future.

Let's take a look at some past legal surprises to give you a sensible awareness on this matter.

Government to Aggressively Probe Illegal Use of Nominee Shareholder

Before 2006, many foreigners became accustomed to using Thai individuals and Thai companies to hold 51% of the shares in a limited company to be qualified as Thai owned businesses for the purpose of:

- (i) engaging in the restricted activities under the Foreign Business Act, B.E. 2542 (1992) (the "FBA") – often referred to as the foreign business law, or
- (ii) owning a land plot (outside an industrial estate) since a Thai owned company can get around the restriction on foreign land ownership under the Land Code.

Let's take a look first at the foreign business law. The foreign business law prohibits a foreign owned company incorporated in Thailand from engaging in the restricted activities in Schedules attached to the FBA as the government aims to protect locally owned businesses from competing head to head with foreigners. Nonetheless, it is still possible for a foreign owned company to operate certain restricted activities by obtaining a foreign business license from the Department of Business Development, Ministry of Commerce. Section 5 will explain the foreign business law and its restrictions in a greater deal.

Some restricted activities under the FBA cover primitive (less sophisticated) businesses that foreigners are strictly prohibited to operate, such as construction, hotel business (except for hotel management services), selling food or beverage and other categories of service business. Yet if you go outside, almost everywhere you can find many of these restricted businesses existing under the control of foreigners. How could this happen? Certainly you'll have a big doubt if these foreign entrepreneurs/operators actually manage to obtain a foreign business license given their small scale of capital and lack of sophisticated knowhow.

Back then (before 2006), it was widely believed but wrongly assumed that officials did not enforce the FBA aggressively. Many foreign entrepreneurs started to operate those restricted activities by forming a limited company with a Thai nominee shareholder, in which Thai individuals or Thai companies held 51% of shares, with the rest 49% was held by the foreigner. With this deemed