



# THE ASEAN STATES

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The Association of South East Asian Nations (ASEAN), comprising the member states Malaysia, Philippines, Singapore, Thailand, Brunei, Cambodia, Laos, Myanmar and Vietnam) is becoming increasingly more important for European industry. From 2015 there are plans to establish the ASEAN Economic Community (AEC) which will result in a single domestic market of over 600 million inhabitants. Along with the already largely introduced introduction of preferential customs duties for most product groups, the free movement of capital and services and freedom to work in the zone is to be strengthened.

The extent to which an integrated economic zone can actually be achieved by 2015 remains questionable. Problems include economic disparity between the individual member states, partly strongly divergent national interests and foreign policy connections which will complicate efficient negotiations. The movement of goods is relatively well developed. The ASEAN Trade in Goods Agreement (ATIGA) came into effect already on May 17, 2010. ASEAN has also agreed a series of further free trade agreements, for example with China. The EU is currently negotiating a bilateral agreement with individual member states and in 2014 the agreement is likely to be ratified with Singapore.

Foreign investors from Germany and Europe will still have to deal with numerous pitfalls in the ASEAN business world. Provided a local content of 40 % is generated companies can indeed benefit from preferential customs duties, but this does not alter the fact that companies remain confronted with numerous non-tariff barriers of the individual states. Regarding a planned investment there, the extent to which the respective market is already open for the intended business activity should be exactly clarified in advance. This is because in many areas the national investment laws still include investment restrictions so that it is not necessarily possible to found 100 % foreign-owned enterprises. The most liberal is the business environment in Singapore where in comparison to the rest of the region there are only very few market entry restrictions.

In order to address these types of market entry problems, at Rödl & Partner local and German professionals in the area of investment and tax structuring and international commercial law work closely together. The practice-oriented and detailed planning under consideration of the legal and tax specialities of the respective country is a decisive factor for foreign investments in Asian projects. Speedy reactions to changes of the dynamic legal and tax systems in the region are absolutely essential to secure the medium-term and long-term potential for success of foreign business activities in the target countries of Southeast Asia.

Rödl & Partner offers clients customised solutions for their respective business project which along with joint venture structures also include the founding of 100 % foreign-owned enterprises by means of special licences or special forms of investment incentives. We can offer commercial and tax expertise at our locations and have extensive experience with the registration procedures and licence agreements. Since the end of the nineties Rödl & Partner has had its own locations with multi-disciplinary professionals in Singapore and Jakarta. In addition, own offices were opened in Thailand (Bangkok, 2006), Vietnam (Saigon [Ho Chi Minh City], 2007) and Malaysia (Kuala Lumpur, 2013). In parallel we have been working for many years together with local professional firms in the Philippines.

# Practical examples

## Auditing

### Background facts:

A German company has a subsidiary in Malaysia. The subsidiary produces for the Asian market and also for the German parent company. The auditing firm was only assigned to audit the annual financial statement. The local commercial manager is the only local worker in the ERP system and has good knowledge of accounting issues and bookkeeping matters. He used this knowledge and lack of control by the German parent company for his own personal gain.

### What can be done now?

The execution of an internal audit to clear up the resulting damage is appropriate. In addition, a more effective control system must be installed. Where the control should take place depends largely on the size of the subsidiary. If the subsidiary can or should not control the managing local personnel, then more control is called for by the parent company. This includes inspection of monthly reporting of individual orders and accounts and regular visits to the subsidiary. Furthermore, the function of the internal audit must be carried out regularly. The auditor can carry out this function as far as it is not a local company.

### What should one have done differently from the beginning?

The qualified managing director/commercial manager at the subsidiary, who often becomes the main contact person for the German parent company, should also have been checked.

## Tax

### Background facts:

The commercial manager of a German company with the legal form of a GmbH would like to found a branch office in Singapore. The office will distribute machinery. He is happy that a private limited company can be founded for as little capital as one euro. A plan to optimise tax is not required. In the first two years the company makes a loss. The financing is made through long-term loans. As the father is 'fed up to the back teeth with the foreign adventure', he hands over the reins to a 'younger pair of hands' and shortly afterward transfers his shareholding over to his son. Then after the transfer has been made one opts for a repayment of waived loans with future profits. One is surprised to learn that in Singapore the reclassification of the loan is subject to payment. In the first year after the transfer a profit of one million euros is generated, which the son immediately has distributed. Later he is annoyed that in Germany he has to pay tax on this.

### What can be done now?

In retrospect it is difficult to do something here. Taxes arise through actual facts which have been realised. Many companies exhibit naivety when they start a venture abroad without consideration of a mechanism for cross-border taxation. At the same time it is overlooked that the facts in a foreign country could be assessed differently than in Germany. German tax law is no role model for many countries, which can be often advantageous, but also can be disadvantageous. In this case one could consider not distributing the profits in Singapore. Before you do this you should restructure the company in Germany. With tax savings of possibly more than 200,000 euros the effort will be worthwhile.

### What should one have done differently from the beginning?

First of all the accounts of the company in Singapore should have been cleaned up, i.e. the debt waiver should have been carried out before the transfer of the shares. As soon as the loss carried forward of the Singapore company had been used up – possibly after retention periods to be taken into account – the shares could have been transferred.

In Germany it should be documented that the debt waiver was made at customary market conditions. In particular, also the tax-related consequences of a gift should be taken into account as due to the removal of the debts the company in Singapore has risen in value. Finally, a check should be made whether the agreement to repay the waived loans with future profits is recognised by corporate law in Singapore or whether Singapore does not

permit such arrangements. Secondly, one should have considered beforehand whether the tax burden in Germany can be fine-tuned. For example, this could be achieved through a business partnership model. A commonly used form here is the GmbH & Co. KG because here, just as with the GmbH, the liability risk for shareholders is lower. But also here it is necessary to exactly check the local and German tax and legal arrangements as not every business partnership abroad is recognised as such in Germany and in the foreign country it will be partly necessary to enter the new legal ground of business partnerships.

## Law

### Background facts:

The German company U produces and distributes industrial adhesives worldwide and enters into negotiations with distributors to supply the market in Vietnam. However, U has considerable reservations with regard to jurisdiction in Vietnam and would prefer his foreign related contracts to be subject to German law. Therefore he changes his standard contract only slightly and declares that Germany is the legal domicile for all legal disputes. Later he is unable to enforce his rights against a defaulting contract partner.

### What can be done now?

In particular with cross-border business relations procedural pitfalls have to be taken into account. There is no convention between Germany and Vietnam for the reciprocal recognition and enforcement of court rulings. The same is true for numerous other ASEAN states such as Indonesia or Thailand. This means that in principle German court decisions are not enforceable in Vietnam. It would only be conceivable to access the assets in Germany of the contract partner from Vietnam, but these generally do not exist. Therefore an international arbitration clause would be advisable for U.

### What should one have done differently from the beginning?

When drawing up contracts to do business in Vietnam (as is true for almost all of the other ASEAN states) an international arbitration clause should be included in the contract. Like Germany, Vietnam is a member state of the New York convention on the recognition and enforcement of foreign arbitral awards of June 10, 1958. Consequently, decisions of an arbitration court can be enforced locally. In addition to the Vietnamese international arbitration centre (VIAC) which is based in Ho Chi Minh City, for contracts with reference to ASEAN in practice in particular the arbitration court in Singapore (Singapore International Arbitration Center, SIAC) is selected.