FOREIGN-INVESTED JOINT VENTURES:

A COMPARATIVE LEGAL STUDY BETWEEN CHINA AND THAILAND

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ABSTRACT

Both local and foreign businesses in many parts of the world, including China and Thailand, often seek to enter into foreign-invested joint ventures as a means of accomplishing their business goals. This article compares two Chinese laws on foreign-invested joint ventures, including Law on Sino-Foreign Cooperative Joint Ventures and Law on Sino-Foreign Equity Joint Ventures, with Thai Law. It found that the legal flow of foreigners deciding to set up joint ventures in China is that they decide between EJVs and CJVs, and then they found and manage their joint ventures according to their selection. In contrast, the legal flow of foreigners deciding to set up joint ventures in Thailand is that they need to make a joint venture contract under the Civil and Commercial Code of Thailand and pay more attention to the Foreign Business Laws of Thailand in which it will affect the ownership and control power of foreign parties in the joint venture contract.

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INTRODUCTION

A joint venture is the main type of strategic alliance between two or more corporations undertaking to carry on the business. The designable time period of the joint venture is convenient and flexible, allowing the parties to determine how long the joint venture period term. It is generally used on a global scale as a business form to seek profits in many countries between foreigners and local partners. For instance, some locals wish to create new or expand existing business projects but do not have the necessary technology or experience. In contrast, some foreigners seek to do business in the potential market of other countries. Therefore, they need to involve each other in their business expansion. Both local and foreign businesses, then, often seek to enter into joint ventures as a means of accomplishing their goals.

In theory, a foreign-invested joint venture can be the ideal form for a business entity, helping mitigate risk and maximizing partner synergies in the international stage.\(^1\) In contrast, in reality, the relationship between partners often turns sour and become a nightmare in the end. There are many problems with collaborating local-foreign joint ventures, such as business operations, the difficulties of double parenting, and collision between dominant parent and shared Management.\(^2\) Also, the breakdown of the joint venture is generally attributed to the cultural gap between partners, local market issues, and partners’ failure to deliver what they initially promised.\(^3\)

Despite the great potential for conflict with local partners, many corporations regularly choose the joint venture form to do business in foreign countries.\(^4\) Global joint ventures still play a crucial role in the world economy. In the business world, we can see joint ventures in


\(^3\) See Dume & Frank, supra note 1.

\(^4\) See Killing, supra note 2.
various fields and activities, such as manufacturing and construction industry, production and distribution sectors, and infrastructure projects.

China is one of the favorite countries where foreigners eagerly to do business because of the most critical domestic markets and the highest population in the world, which might be highly-potential customers for them. Joint ventures have become common business entities among foreign investors. Historically, the laws on joint ventures were an attempt to accommodate Western.\(^5\) Therefore, it is interesting to know about laws and regulations regarding foreign-invested joint ventures in China.

This article aims to research into the general theory and practice, laws and regulations on foreign-invested joint ventures in China, focusing on the old laws: the Law of the People’s Republic of China on Sino-foreign Equity Joint Ventures and the Law of the People’s Republic of China on Sino-foreign Cooperative Joint Ventures. Therefore, this article examines two laws on Sino-foreign Joint Ventures rather than the new law enacted in 2019, China’s Foreign Investment Law. Thailand’s law and regulations on the same issues also be studied in order to provide the benefits of a comparative approach. Part I explains the general legal concept of Chinese foreign-invested joint ventures. Part II finds out the laws and regulations in Thai foreign-invested joint ventures. Part III analyzes and compares laws and regulations on China’s foreign-invested joint ventures with Thailand’s counterparts, and the conclusion discusses the implication of this study.

I. FOREIGN-INVESTED JOINT VENTURE LAW IN CHINA

Foreign-invested joint ventures in China can be divided into two types based on the specified laws governing them: one is the equity joint ventures (hereinafter EJVs), and another

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is the cooperative joint ventures (hereinafter CJVs). The first type is the foreign-invested joint venture created by the Law of the People’s Republic of China on Sino-Foreign Equity Joint Ventures (hereinafter Law on Sino-Foreign Equity Joint Ventures).\(^6\) This law is the first foreign investment law and the first law on business organizations in China.\(^7\) The latter is under the Law of the People’s Republic of China on Sino-Foreign Cooperative Joint Ventures (hereinafter Law on Sino-Foreign Cooperative Joint Ventures).\(^8\)

The commercial purposes of two kinds of foreign-invested joint ventures are found in some articles of those laws. While EJVs may market their products inside China when necessary, and they are encouraged to market their products outside China,\(^9\) CJVs are encouraged to be productively export-oriented or technologically advanced.\(^10\)

Both EJVs and CJVs must follow and abide by Chinese laws and regulations. For example, EJVs must follow the provisions of the Chinese laws and regulations in all activities,\(^11\) and CJVs must comply with Chinese laws and regulations and must not injure the public interests of China.\(^12\) Equally, the state must protect the investment of EJVs, the profits due to them and their other lawful rights and interests and does not practice nationalization and expropriation of a joint venture, excepting special circumstances with compensations.\(^13\) Also, the state shall protect the lawful rights and interests of the CJVs and the parties.\(^14\)

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\(^7\) See Yongmin Bian, A Revisit to China’s Foreign Investment Law: With Special Reference to Foreign Investment Protection, 8 J. E. ASIA & INTL L. 447, 449 (2015).


\(^9\) See Law on Sino-Foreign Equity Joint Ventures, art. 10.

\(^10\) See Law on Sino-Foreign Cooperative Joint Ventures, art. 4.

\(^11\) See Law on Sino-Foreign Equity Joint Ventures, art. 2 para 2.

\(^12\) See Law on Sino-Foreign Cooperative Joint Ventures, art. 3.

\(^13\) See Law on Sino-Foreign Equity Joint Ventures, art. 2 para 3.

\(^14\) See Law on Sino-Foreign Cooperative Joint Ventures, art. 3.
A. Sino-foreign Equity Joint Ventures

EJVs are the joint ventures established by foreign parties and Chinese parties under “the principle of equality and mutual benefit” and must be subject to approval by the Chinese Government. EJVs are relatively rigid and inflexible structure because the formal documents and amount of equity investment will affect the long-term relationship, the participation in the profits and liabilities.

Both Chinese and foreign parties need to satisfy three steps to create Sino-foreign Equity joint ventures. First is to make the joint venture agreement, contract, and articles of association signed by the parties. Second is to apply to the competent authorities of foreign economic relations and trade in order to receive the approval. After approval, then, the joint venture parties shall register with the competent state authorities of administration for industry and commerce to obtain a license to do business and start operations. However, EJVs provide the benefits of risk allocation in China. From the Chinese government perspective, EJVs bring foreign capital to the state and provide access to technology as well as professional management experience from outside.

The parties can only establish a limited liability company as a compulsory form of a business vehicle for the joint venture. This is the main benefit of choosing EJVs for foreign investors. EJVs joint venturers shall contribute capital in various forms, for example, in cash, in-kind, industrial property rights, obtaining an equity interest in the limited liability company (EVJs business vehicle) in return. The proportion of investment contributed to the EJVs is

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15 See Law on Sino-Foreign Equity Joint Ventures, art. 1.
17 See Law on Sino-Foreign Equity Joint Ventures, art. 3.
19 See Bian, supra note 7, at 449.
20 See Law on Sino-Foreign Equity Joint Ventures, art. 4.
21 See Law on Sino-Foreign Equity Joint Ventures, art. 5.
important for the parties because the parties shall share the profits and risks in proportion to their respective contributions to the registered capital.\textsuperscript{22} The foreign parties, however, must comply with the minimum required investment in EJVs in which the proportion of the investment invested by the foreign parties shall generally not be less than 25\% of the registered capital.\textsuperscript{23} After discharging legally required payment, the net profits can be distributed to the parties in proportion to their contributions to the registered capital.\textsuperscript{24}

The board of directors, indeed, plays an important role in handle major problems in EJVs. The size and composition of it shall be stipulated in the contract and the articles of association, and the board of directors shall make a decision involving major business problems, especially operating and budgeting, through consultation by the parties to the venture, following the principle of equality and mutual benefit.\textsuperscript{25} Upon managing production and operation, EJVs may purchase the materials under the principle of fairness and reasonableness.\textsuperscript{26} Furthermore, EJVs need to open a foreign exchange account at the approved banks and buy insurance from domestic insurance companies in compliance with the law.\textsuperscript{27}

Concerning sending-abroad remittance, the money likes net profit that EJVs’ parties receive after fulfilling its obligations under the relevant laws, the agreement, and the contract may be remitted abroad by virtue of the foreign exchange regulations and the currency specified in the contract.\textsuperscript{28} Similarly, the foreign staff and workers of EJVs may remit the wages, salaries, and other legitimate income earned after paying taxes and meeting the requirement of foreign exchange regulations.\textsuperscript{29}

\textsuperscript{22} See Law on Sino-Foreign Equity Joint Ventures, art. 4.
\textsuperscript{23} See Law on Sino-Foreign Equity Joint Ventures, art. 4.
\textsuperscript{24} See Law on Sino-Foreign Equity Joint Ventures, art. 8.
\textsuperscript{25} See Law on Sino-Foreign Equity Joint Ventures, art. 6.
\textsuperscript{26} See Law on Sino-Foreign Equity Joint Ventures, art. 10.
\textsuperscript{27} See Law on Sino-Foreign Equity Joint Ventures, art. 9.
\textsuperscript{28} See Law on Sino-Foreign Equity Joint Ventures, art. 11.
\textsuperscript{29} See Law on Sino-Foreign Equity Joint Ventures, art. 12.
The parties can terminate the EJVs in three ways. Firstly, they can conclude the period of EJVs contract based on the line of business and circumstance, but before the expiration of the period, they can mutually agree to extend the contract period. Secondly, under some circumstances, such as heavy losses or failure of a party to fulfill the obligations delineated by the contract and the articles of association, the parties can terminate the contract through consultation and agreement by the parties, subject to approval by the approval authorities and registration with the relevant authorities. Also, the party who violated the contract shall have the financial responsibility for losses caused by a breach of contract.

Disputes arising between the EJVs parties that the board of directors cannot settle through consultation may be settled in two methods: one is bringing a lawsuit with the People’s Court, and another is the arbitration. The parties can settle the dispute through mediation or arbitration by a Chinese arbitration agency or another arbitration agency agreed upon on a written arbitration agreement which has been reached after a dispute arises by the parties.

**B. Sino-foreign Cooperative Joint Ventures**

CJVs are the joint ventures established by foreign parties and Chinese parties following the principle of equality and mutual benefit. They provide foreign investors with greater flexibility concerning the distribution of the profits, risks, and other business matters of the business entity. Indeed, a big advantage of CJVs is that many important matters in CJVs are left to the discretion of the parties. They also feature special flexibility in terms of formation and capitalization. From a business perspective, CJVs are appropriate for types of projects

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30 See Law on Sino-Foreign Equity Joint Ventures, art. 13.
31 See Law on Sino-Foreign Equity Joint Ventures, art. 14.
32 See Law on Sino-Foreign Equity Joint Ventures, art. 16.
33 See Law on Sino-Foreign Cooperative Joint Ventures, art. 1.
34 See MAHONY, supra note 16, at 188.
that have relatively high upfront investment capital and fixed economically-productive lifetime, especially infrastructure.\textsuperscript{37}

The parties must establish a cooperative joint venture by a contract, specifying important investment matters as the conditions for cooperation, the distribution of earnings or products, the sharing of profits, risks and losses, operation and management matters, and the ownership of the property at the time of the termination of CJVs.\textsuperscript{38} The parties in CJVs shall share earnings or products, undertake risks and losses under the agreements prescribed in the Cooperative joint venture contract.\textsuperscript{39}

Moreover, the parties must apply for establishing CJVs to the foreign economic relations and trade authority under the State Council or the department or local government authorized by the State Council.\textsuperscript{40} When such an application is approved, the parties, then, must apply to the administrative authorities for industry and commerce for registration and business license, as well as carrying out tax registration.\textsuperscript{41} It is worthwhile to note that CJVs shall become eligible to have legal person status by meeting the conditions for being considered a legal person under Chinese law.\textsuperscript{42}

CJVs joint venturers shall contribute the investment or conditions for cooperation, for example, in cash, in kind, or may include valuable property rights, such as the land use rights, industrial property rights, non-patent technology or other property rights.\textsuperscript{43} Also, the investments or conditions for cooperation shall be verified by an accountant registered in China or the relevant authorities.\textsuperscript{44} If a Chinese or foreign joint party which wishes to make an

\textsuperscript{37} See MAHONY, \textit{supra} note 16, at 189.
\textsuperscript{38} See Law on Sino-Foreign Cooperative Joint Ventures, art. 2.
\textsuperscript{39} See Law on Sino-Foreign Cooperative Joint Ventures, art. 21.
\textsuperscript{40} See Law on Sino-Foreign Cooperative Joint Ventures, art. 5.
\textsuperscript{41} See Law on Sino-Foreign Cooperative Joint Ventures, art. 6.
\textsuperscript{42} See Law on Sino-Foreign Cooperative Joint Ventures, art. 2 para 2.
\textsuperscript{43} See Law on Sino-Foreign Cooperative Joint Ventures, art. 8.
\textsuperscript{44} See Law on Sino-Foreign Cooperative Joint Ventures, art. 9 para 2.
assignment of all or part of its rights and obligations, must obtain the consent of the other parties and obtain an examination and approval from the authority.\textsuperscript{45} Also, CJVs shall conduct its operational and managerial activities following their approved contract and articles of association.\textsuperscript{46}

CJVs shall establish and empower a board of directors or a joint managerial institution, according to the contract and the articles of association, to decide on the major business issues.\textsuperscript{47} The board of directors or the managerial institution can determine the appointment or employment of a general manager. Such general manager shall take charge of the daily operation and management and is accountable to the directors’ board or the joint managerial institution.\textsuperscript{48}

CJVs may choose to entrust a third party with its operation and management by unanimous consent and register the change with the administrative organs for industry and commerce.\textsuperscript{49} They must establish their account books, file its accounting statements according to relevant provisions, and accept supervision by the financial and tax authorities.\textsuperscript{50} Besides, CJVs may import materials it needs and export products it produces and purchases the raw and processed materials needed within the approved scope of operation, according to the principles of fairness and reasonableness.\textsuperscript{51}

Upon financial matters, CJVs shall open a foreign exchange account with any approved financial institution and manage its foreign exchange transactions following the provisions of the state on foreign exchange control.\textsuperscript{52} CJVs can obtain loans from financial institutions

\textsuperscript{45} See Law on Sino-Foreign Cooperative Joint Ventures, art. 10. 
\textsuperscript{46} See Law on Sino-Foreign Cooperative Joint Ventures, art. 11. 
\textsuperscript{47} See Law on Sino-Foreign Cooperative Joint Ventures, art. 12. 
\textsuperscript{48} See Law on Sino-Foreign Cooperative Joint Ventures, art. 12. 
\textsuperscript{49} See Law on Sino-Foreign Cooperative Joint Ventures, art. 12. 
\textsuperscript{50} See Law on Sino-Foreign Cooperative Joint Ventures, art. 15. 
\textsuperscript{51} See Law on Sino-Foreign Cooperative Joint Ventures, art. 19. 
\textsuperscript{52} See Law on Sino-Foreign Cooperative Joint Ventures, art. 16.
whether they are inside or outside the territory of China, whereas they can buy insurance only from the insurance institutions within the territory of China.\(^{53}\) Moreover, loans to be used as investment or conditions and their guarantees shall be provided by each party on its own.\(^{54}\)

If upon the expiration date, all the fixed assets of the CJVs, as agreed upon by the parties, are to belong to the Chinese party, the parties may prescribe in the contract the methods for the foreign party to recover its investment ahead of time during the venture's operation period.\(^{55}\) If the foreign party is to recover its investment ahead of time during venture's operation period, the Chinese and foreign parties shall, under the relevant laws and agreements in the contract, be liable for the debts of the venture.\(^{56}\) Also, after the foreign party has met its obligations under the law and the contract, the profits, other legitimate income, and money the from termination may be remitted abroad.\(^{57}\) Further, the wages, salaries or other legitimate income earned by the foreign staff and workers of CJVs, after paying taxes, may be remitted abroad.\(^{58}\)

The period of operation of CJVs shall be determined through consultation by parties, clearly specifying in the Cooperative joint venture contract, but the parties can extend the period of operation, applying to the relevant authority 180 days before the expired date stipulated in the contract.\(^{59}\)

Upon the expiration or termination in advance, CJVs’ assets, claims, and debts shall be liquidated according to legal procedures. The Chinese and foreign parties shall, under the agreement specified in the contract, determine the ownership of the CJVs’ property.\(^{60}\) Also,

\(^{53}\) See Law on Sino-Foreign Cooperative Joint Ventures, art. 18.
\(^{54}\) See Law on Sino-Foreign Cooperative Joint Ventures, art. 17.
\(^{55}\) See Law on Sino-Foreign Cooperative Joint Ventures, art. 21 para 2.
\(^{56}\) See Law on Sino-Foreign Cooperative Joint Ventures, art. 21 para 3.
\(^{57}\) See Law on Sino-Foreign Cooperative Joint Ventures, art. 21.
\(^{58}\) See Law on Sino-Foreign Cooperative Joint Ventures, art. 21 para 2.
\(^{59}\) See Law on Sino-Foreign Cooperative Joint Ventures, art. 24.
\(^{60}\) See Law on Sino-Foreign Cooperative Joint Ventures, art. 23.
CJVs shall cancel its registration with the administrative authorities for industry and commerce and the tax authorities.61

Disputes arising between the EJVs parties that the board of directors cannot settle through consultation may be settled in two methods: one is bringing a lawsuit with the People’s Court, and another is the arbitration. The parties can settle the dispute through mediation or arbitration by a Chinese arbitration agency or another arbitration agency agreed upon on a written arbitration agreement which has been reached after a dispute arises by the parties.62

C. Overview of Chinese Foreign-Invested Joint Ventures in China’s Market

There are many foreign corporations doing business in China in the form of joint ventures. For instance, many automobile companies, including BMW, Ford, and GM, operates several joint ventures in China with local Chinese automakers.63 Sony established two joint ventures with a Chinese partner (Shanghai Oriental Pearl) in order to make and market the game consoles.64

However, they have faced many problems with Chinese-foreign joint ventures. We can see their tough challenges through examples. Firstly, foreign investors often encounter the problem of intellectual property rights. One of U.S. Trade representatives criticized joint-venture requirements as “a cornerstone of China’s technology transfer regime.”65 Secondly, joint ventures are not flexible about the exit. Pre-emptive rights in EJVs and CJVs make joint venturers difficult to exit, arising the extortion, hardball negotiating, and business failure.66

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61 See Law on Sino-Foreign Cooperative Joint Ventures, art. 24 para 2.
65 See Moss, supra note 63.
66 See MAHONY, supra note 16, at 183.
Foreign automakers locked into long-term joint-venture contracts, and do not plan to adjust or dissolve their Chinese joint ventures because breaking away from the partnerships would be too complex. 67

II. THAILAND’S FOREIGN-INVESTED JOINT VENTURES

A. Legal Status of Joint Venture in Thailand

A joint venture refers to one kind of business form between two or more parties, which is not a partnership and a company. 68 In other words, it is a contract between two or more parties agreeing to undertake business, together with investment, co-management jointly, and sharing products/revenues between parties. 69 Therefore, a joint venture will exist when two or more parties combine forces with business goals and product/revenue sharing.

Surprisingly, the Civil and Commercial Code of Thailand (hereinafter CCC) 70, which stipulates and governs all civil and commercial conduct like founding a company and a partnership, does not have any provision having a word or a term of the joint venture. Only two laws have a word joint venture: Thailand’s Revenue Code, and the Accounting Act. Thailand’s Revenue Code has the word “joint venture” in the Section 39, prescribing that a joint venture, operating commercially or profitably, between a company or juristic partnership on one hand and companies, juristic partnerships, individuals, non-juridic body of persons, ordinary partnerships, on the other hand, must submit and pay taxes. 71 According to this Section, all

67 See Moss, supra note 63.
69 See Id.
70 There is no official translated English version of the Civil and Commercial Code of Thailand provided by the highest organs of the government, but the English version is always in demand, thereby some authorities, such as the Department of Business Development (DBD), made unofficially translated version of some parts of the Code, see CIVIL AND COMMERCIAL CODEBOOK IIISPECIFIC CONTRACTS TITLE XXII PARTNERSHIPS AND COMPANIES, https://www.dbd.go.th/dbdweb_en/download/pdf_law/act_civil_contact%20title_xxii.pdf.
parties in joint ventures can be legal person entities, or between the legal person and a natural person, but joint ventures must have at least one legal person as a partner or a party. However, this Section only mentions the joint venture to collect taxes. It does not prescribe any rights, duties, and liabilities of the joint venture and its parties. Also, the Section 8 of the Accounting Act stipulate that the joint venture under the Revenue Code shall be the person having the duty to keep accounts, and must provide the bookkeeping for its business operations in accordance with this Act.72

The Supreme Court of Thailand ruled in many cases that joint ventures are under the CCC, Title XXII Partnerships and Companies.73 The legitimate reason is that joint ventures characteristics are within the scope of Section 1012 in the CCC. Such Section states that a contract for the organization of a partnership or company is a contract whereby two or more persons agree to unite for a common undertaking, with the view of sharing the profits.74 According to this article, it means that the joint venture parties are able to conclude a joint venture contract, stating that the joint venture entity is a partnership, the company. Thai legal community generally takes this view that most joint venture contracts constitute partnerships or companies.75 However, it is feasible to design other legally strategic contractual forms of sharing profits.76

The contract format plays a pivotal role in the joint venture because the parties must create a joint venture by making a contract. The contract, which can be a written or oral form, will bind the parties and all activities of the joint venture. Joint ventures are managed under the

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73 For instance, the Supreme Court Decision Number 3848/1988, 3199/2000.
74 See Civil and Commercial Code of Thailand, § 1012.
75 However, some scholars have contrary opinion that the joint venture should not be partnerships and companies because if it is a partnership or company, it must not be the joint venture, see RATANAKORN, supra note 68, at 49.
76 See Id.
joint venture contract and its agreement between the parties. The parties do not need to register the contract in any government body.

There are two types of joint ventures in CCC: one is an unregistered joint venture, and another is a registered joint venture. Concerning the tax purpose, the registered joint venture is separated entities from the parties and is separate from tax submissions (each should submit the tax form separately). The un-registered joint venture requires that the parties file for a tax number for tax submissions. However, joint ventures can be categorized according to the business forms, namely ordinary partnerships, companies, and contractual forms of sharing profits.

1. Joint Ventures as Ordinary Partnerships

The ordinary partnership consists of two or more persons who join together for a business purpose. The partnership contract does not have to be in writing and is not publicly registered. Partners in an ordinary partnership may include a legal person or a company. However, joint venture parties who want to establish an ordinary partnership should realize that the un-registered ordinary partnership does not have a legal person status.

All partners are unlimitedly and jointly liable for all the obligations, without limitation for any acts done by any partner in the course of operating the partnership. Creditors may claim against the assets of any partner, without first claiming against the assets of the partnership.

Ordinary partnerships can be divided into two types: unregistered ordinary and registered ordinary partnership. The parties can decide to register ordinary partnership in order

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77 See Civil and Commercial Code of Thailand, § 1025.
to create the legal person status of the ordinary partnership, which distinct from the partners and subject to corporate income tax, which will be called as a registered ordinary partnership.

However, it should be noted that unregistered joint ventures are most likely to constitute an un-registered ordinary partnership, but it can be considered as not-ordinary-partnership joint venture contract (jointly common contract), depending on the contents and agreements in the joint venture contract.\(^78\)

2. Joint Ventures as Companies

The joint venture parties can choose the private company, which has a legal person status, as the form of the business organization according to the agreement in the joint venture contract. The parties can establish a private limited company or a limited public company.\(^79\)

The company is that kind of which is formed with a capital divided into equal shares, and the liability of the shareholders is limited to the amount, if any, unpaid on the share respectively held by them. Every company shall be managed by a director or directors under the control of the general meeting of shareholders and according to the regulations of the company.

3. Joint Ventures as Contractual Forms of Sharing Profits

Joint ventures are the contract which the parties agree to undertake business, having the freedom of designing legally strategic contractual forms of sharing profits. Therefore, the joint venture parties can mutually create agreements, stipulating what kind of business the joint venture will do, how the revenues, profits, and losses, will be shared between parties, how to divide properties and rights, and the period term and termination clauses of the joint venture. If a dispute arises, and no agreement in joint venture contract and no direct provision in law

\(^{78}\) See สาระ รัตนภักดี(SAHATHON RATTANAPHAICHIT), ค่าข้อมูลกฎหมายทั่วถึงหุ้นส่วนบริษัท [COMMENTARY ON LAWS ON PARTNERSHIPS AND COMPANIES] 24 (5th ed. 2019).

\(^{79}\) At least three persons are able to form the private limited company, but forming the public company requires fifteen or more persons.
governing such dispute, the courts may apply the Sections of partnerships in CCC as an analogy with the provisions most nearly applicable.\textsuperscript{80}

\textbf{B. Having Foreign-Invested Joint Venture Status}

Joint ventures in Thailand are most commonly found between Thai nationals and foreigners. It should be noted that if the joint venture is intended to be a majority of foreigners\textsuperscript{81}, such as foreigners holding more than 50 percent of shares in companies, its status needs to change and must comply with and registered under the Foreign Business Laws of Thailand 1999 (hereinafter FBL Act). The FBL Act will govern it, or it may also have a board of investment privileges from the Board of Investment of Thailand (BOI).\textsuperscript{82} Where the BOI promotes joint ventures, it may be essential to show to the BOI agreements providing for the transfer of know-how and technology to the promoted company. Also, it can fall under the Amity Treaty.

Both foreign and Thai parties must negotiate as to who will own and control the joint venture and how profits will be shared. A foreign-invested joint venture contract should contain agreements of associated contract to be entered into, business entities, the scope of a business, sharing profits proportions, technical assistance, intellectual property licensing, the supply of materials, or shareholders’ loans to the joint venture. As described above, the resulting joint venture contract is regarded as the constitution between the parties. The foreign-invested joint venture contract is regarded as a private matter, and it is usually not necessary to be filed with any governmental authority.

\textsuperscript{80} See RATANAKORN, supra note 68, at 50.

\textsuperscript{81} Briefly, according to the Section 4 of the FBL Act, the foreigner means: (1) a natural person who is not of Thai nationality; (2) a juristic person not registered in Thailand; (3) a juristic person registered in Thailand, but persons under (1) or (2) hold shares or place investment more than one half; and (4) a juristic person registered in Thailand, but persons under (1) or (2) or (3) holds shares or places investment more than one half.

\textsuperscript{82} BOI is a Thailand’s government agency under the Office of the Prime Minister. Its core roles and responsibilities are to promote valuable inbound and outbound investment.
Foreign-invested joint ventures need to have the articles of association, which describes how the company will be managed and the relationship between the shareholder and the directors, in order to reduce the management and business risks. Importantly, if the foreign-invested joint venture is foreign majority-owned, the relevant authorities may require the company to delete some business objects that are not allowed to foreigners under the FBL Act or other pertinent law. Moreover, because of legal restriction contained in the FBL Act or other legislation limiting foreign business ownership, or conditions attached to a BOI’s promotional certificate, foreign parties may be required to limit their equity interest and investment in the foreign-invested joint venture to 49% or less.

Foreign and Thai parties can determine the business forms of the foreign-invested joint venture when concluding the joint venture contract. Apart from foreign-invested joint venture contract, they can choose three forms of foreign-invested entities by their joint venture contract: the foreign-invested ordinary partnership, the foreign-invested company, and the contractual forms of sharing profits

1. Foreign-Invested Joint Venture Ordinary Partnership

The foreign-invested joint venture ordinary partnership is under the CCC. Foreign investors should realize that the unregistered ordinary partnership does not have a legal person status. All partners are unlimitedly and jointly liable for all the obligations, without limitation for any acts done by any partner in the course of operating the partnership. Creditors may claim against the assets of any partner, without first claiming against the assets of the partnership. The parties can decide to register ordinary partnership in order to create the legal person status of the foreign-invested joint venture ordinary partnership.

Foreign investors must bring a contribution to the partnership, and such contribution may consist of money or other properties or services. The share of foreign partners in the profits or losses is in proportion to their contribution. If nothing has been agreed between the parties, foreign parties are able to manage the business. Besides, foreign parties cannot introduce any person as a new partner without the consent of all the partners, unless there be an agreement providing otherwise.

Foreign-invested ordinary partnerships are dissolved: (1) in the case, if any, provided by the contract of partnership; (2) if made for a definite period of time, by the expiration of such period; (3) if made for a single undertaking, by the termination of such undertaking; (4) by any of the partners giving to the other partners due notice of intention to terminate any indefinite period partnership; and (5) by the death of any partner or by any partner becoming bankrupt or incapacitate.

2. Foreign-Invested Joint Venture Company

The foreign-invested joint venture parties can choose the private company, which has a legal person status, as the form of the business organization according to the agreement in the joint venture contract. The parties can establish a private limited company or a limited public company. Foreign parties are able to appoint directors under the control of the general meeting of shareholders, according to the regulations of the company and relevant laws. Foreign parties’ percentage of the shares determine the important aspects of the company, such as ownership, control power, and proportion of profits and dividends.

3. Foreign-Invested Joint Venture Contractual Forms of Sharing Profits

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84 See Civil and Commercial Code of Thailand, § 1026.
85 See Civil and Commercial Code of Thailand, § 1044.
86 See Civil and Commercial Code of Thailand, § 1040.
Foreign-invested joint venture parties can mutually create agreements, stipulating what kind of business the joint venture will do, how the revenues, profits, and losses, will be shared between parties, managing responsibilities, how to divide properties and rights, and the period term and termination clauses of the joint venture. Therefore, it is feasible for foreign investors to conduct the business in Thailand without establishing ordinary partnerships and companies by using foreign-invested joint venture contractual forms of sharing profits.

III. COMPARATIVE ANALYSIS

This part compares the Law on Sino-Foreign Cooperative Joint Ventures and Law on Sino-Foreign Equity Joint Ventures with Thai Law.

A. Sources of Laws on Foreign-Invested Joint Ventures

China’s laws on foreign-invested joint ventures are significantly different from Thailand’s laws. The first difference is that China has laws on directly governing the foreign-invested joint ventures: Law on Sino-Foreign Cooperative Joint Ventures and Law on Sino-Foreign Equity Joint Ventures. These laws provide the foreign investors clearly and easily understand what the laws they should know first are and reduce the time spent on searching the law involving foreign-invested joint ventures. Foreign investors can rely on two mentioned laws on foreign investment when deciding to set up the foreign-invested joint ventures because most legal matters are prescribed in such laws.

By contrast, Thailand does not have an integrated law involving foreign-invested joint ventures. Foreigners have to spend more time on searching a piece of legal information because there are many laws on foreign-invested joint ventures which they need to know, such as the CCC and the FBL Act. As a result, Thai laws regarding foreign-invested joint ventures are opaque and vague about the rights, liabilities, and the legal structures of foreign-invested joint ventures because of scattered applicable and relevant laws. On the one hand, the legal matters
for the foreign-invested joint ventures and parties’ relationship are governed by the CCC, especially the effectiveness of the joint venture contract. On the other hand, rights, duties, and liabilities of the parties made by the contract shall be governed by the laws relating to contact and business entities in the CCC. On the other hand, foreign-related matters are regulated by the FBL Act, such as the foreign status, the scope of business foreigners can do, and other issues for foreign-related activities.

The legal flow of foreigners deciding to set up joint ventures in China is that they decide between EJVs and CJVs, and then they found and manage their joint ventures according to their selection. The first laws governing their foreign-invested joint ventures are Law on Sino-Foreign Cooperative Joint Ventures or Law on Sino-Foreign Equity Joint Ventures. In contrast, the legal flow of foreigners deciding to set up joint ventures in Thailand is that they need to make a joint venture contract under the CCC and pay more attention to the FBL Act in which it will affect the ownership and control power of foreign parties in the joint venture contract.

Another different matter is the specific legal principles of foreign-invested joint ventures. Because China’s laws concerning foreign-invested joint ventures have particular principles such as the principle of equality and mutual benefit, which requires the foreign and Chinese parties act as cooperation and promote fairness. Also, Chinese laws regarding foreign-invested joint ventures and the state entrust foreign investors with the principle of protection in the foreign parties’ lawful rights, interest, investment, and reasonable nationalization and expropriation. Thai laws are contrast with Chinese laws on this issue because Thailand does not have laws on directly governing the foreign-invested joint ventures.

Because of lacking laws directly governing the foreign-invested joint ventures and relying heavily on general legal concepts, both commercial and contract laws in the CCC, Thailand’s foreign-invested joint venture contract is free to designed strategic and business
matters. While China’s law on foreign-invested joint ventures need to comply the rules on a board of directors, which affect the business discretion of both parties, and preemptive rights, which cause the problems of difficult exit to the joint ventures, such matters are left to the discretion of both local and foreign parties to negotiate and conclude them in the contract. However, intense negotiations and unfair terms are likely to occur because of no specific law governs directly.

The historical reason why China has the laws directly governing the foreign-invested joint ventures and Thailand has none is related to the development of the economy and foreign investment of their own countries as well as the series of law’s enactment period. The CCC, which primarily govern the civil and commercial activities in Thailand’s legal system, including the partnerships and companies, was promulgated in 1925. The FBL Act, which stipulates the definition of foreigners, foreign legal status, and the limit of foreign business activity carried out in Thailand, was promulgated in 1999. In this way, perhaps, the lawmakers thought the CCC that prescribe for the commercial entities and activities was fully functional, and the FBL Act must delineate only the foreign legal matters and aspects of the constraint on foreigners doing business in Thailand.

Furthermore, first of Thailand’s’ laws and regulations that stipulate the word ‘joint venture’ is the Section 39 of the Thailand’s Revenue Code for taxation purpose, which was amended and added the word joint venture by the Emergency Decree on Amending the Thailand’s Revenue Code (No. 5) B.E. 2521 (1978). It is noticeable that Thai laws regarding the business entities, especially the joint venture, came before the FBL Act. Therefore, from the legal efficiency viewpoint, the FBL Act, which governs foreign nationals conducting

business in Thailand, does not have the intention to prescribe and bring in any rule on business entities to prevent the repeated same stipulations on business forms overlapping with the CCC and other commercial laws.

China, by contrast, enacted the Law on Sino-Foreign Equity Joint Ventures in 1997, and it is the first foreign investment law as well as the first business organization law in mainland China, before the enactment of the Company Law. This explains why foreign-invested joint ventures and companies have operated on overlapping areas and a different track from Chinese domestic companies. This implies that the first business forms of Chinese Foreign-invested joint ventures, EJVs, happened before the company because of the high demand for foreign investment from the Chinese government and the protection in rights and interests from the foreign nationals.

Thailand’s and China’s experience show us that the timeline of laws affect the way foreign-invested joint ventures has their legal characteristics. Thailand has laws on commercial activities and business entities before the laws on foreign business matters, while China has laws on foreign business matters before the laws on business entities. The difference between both countries’ legal timeline of enactment has major impact on the foreign-invested joint ventures in several ways, including what is the primary laws governing them, the flow on understanding the legal structure of them, and even the way to handle them in the future.

**B. Legal Forms of Foreign-Invested Joint Ventures**

China vividly demonstrates that there are two primary forms of foreign-invested joint ventures: equity joint venture and cooperative joint venture. EJVs joint venturers must contribute capital, which will be relatively rigid and inflexible structure because the formal documents and amount of equity investment will affect the long-term relationship, the

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89 See Bian, *supra* note 7, at 449.
participation in the profits and liabilities. CJVs joint venturers, by contrast, must contribute investment matters or conditions for cooperation, and the most important things are the agreements prescribed in the Cooperative joint venture contract, which will affect the sharing of earnings or products, the distribution of profits and risks, operating management, and the property ownership at the time of the termination of CJVs.

By contrast, Thailand does not have specific laws on foreign-invested joint ventures. Therefore, foreign-invested joint venture forms of business are derived from the laws on joint ventures. Joint ventures in Thai law are made by the contract. The contract is the most important because it will bind the parties and all activities of the joint venture. Important aspects, both legal and business matters, are made at the discretion of the parties. Joint ventures must be managed following the joint venture contract and its agreement. In other words, it means that the foreign-invested joint venture parties must firstly establish a joint venture by a contract, specifying matters as the investment or conditions for cooperation and other necessary matters like the distribution of earnings or products, the sharing of risks and profits, operation and management manners, and the ownership of the property at the time of the termination. The legal concept of Thai foreign-invested joint ventures is precisely the same as China’s laws on Sino-Foreign Cooperative Joint Ventures.

CONCLUSION

A joint venture is the main type of strategic alliance between two or more corporations undertaking to carry on the business and is generally used in a global scale as a business form to seek profits in many countries. Both local and foreign businesses in many parts of the world, including China and Thailand, often seek to enter into foreign-invested joint ventures as a means of accomplishing their business goals. Apart from the new law, China’s Foreign Investment Law, China has two laws on directly governing the foreign-invested joint ventures:
Law on Sino-Foreign Cooperative Joint Ventures, Law Sino-Foreign Equity Joint Ventures. By contrast, Thailand does not have integrated law directly governing foreign-invested joint ventures. Foreign-invested joint ventures are established based on contract law and business law under the Civil and Commercial Code of Thailand, concurrently with the Foreign Business Laws of Thailand, which governs the legal aspects of foreign parties.

NOTE

China has reviewed and amended the laws concerning foreign investment, clearly a response to the rapid change in the political and economic environment. All existing laws on foreign investment are difficult to meet the needs of the modern and complicated era. The new version, China’s Foreign Investment Law (hereinafter FIL), was passed on March 15, 2019, and will come into effect from January 1, 2020.90 The FIL intends to bring new better business environment for foreign investors, such as broader market access, more protection on intellectual property, prohibition on forced technology transfer.91

Article 2 of the FIL stipulates that foreign investment means the investing activities within mainland China directly or indirectly conducted by foreign investors, including circumstances in which: (1) a foreign investor forms a foreign-funded enterprise within China alone or jointly with others; (2) a foreign investor acquires any shares, equities, portion of property, or other similar interest in an enterprise within mainland China; (3) a foreign investor invests in any new construction project alone or jointly with any other investor; and (4) investment in any other manner as specified by a law or administrative regulation or the State

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Council. Therefore, this article will include investment types of equity and cooperative joint ventures.

Also, importantly, the FIL will replace the Law on Sino-Foreign Cooperative Joint Ventures and the Law on Sino-Foreign Equity Joint Ventures. Consequently, the FIL integrates all existing laws on foreign investment into it. It will provide the convenience of doing business in China for foreign investors in the future. However, Article 42 states that foreign-invested enterprises that are established under the Law on Sino-Foreign Cooperative Joint Ventures and Law on Sino-Foreign Equity Joint Ventures before the FIL takes effect may retain their original corporate organizational forms for five years after the implementation of this Law. The major reason is that the government want to help the existing foreign-invested joint ventures, and other business entities adopt the FIL.

Therefore, given the new law, China’s Foreign Investment Law, which comes into effect on January 1, 2020, China and Thailand will use the same structure on regulating foreign-invested joint ventures. Chinese foreign-invested joint ventures will be established based on laws related to companies, partnerships, and so forth, concurrently with the China’s Foreign Investment Law, which governs the legal aspects of foreign parties and investments.