

SOUTH-EAST ASIA IPR SME HELPDESK

Transfer of Technology to South-East Asia



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1. Technology Transfer

Many European companies traditionally came to South-East Asia to take advantage of low-cost manufacturing for export, but, more recently, they have come to enter the local domestic markets, establish R&D, engage in cooperative development, avail of a skilled work force, establish suppliers, and develop long-term partnerships in key markets across the region. In order to achieve this, they are often willing to 'transfer' some of their technologies and designs to local subsidiaries of European firms, joint-venture (JV) partners, or local manufacturing and service companies.

One of the challenges facing European companies coming to South-East Asia is devising creative solutions to minimise the risk to their intellectual property (IP) associated with technology transfers. A technology transfer can happen in a number of different ways. 'Technology' shall be here considered in a broad sense to include not only and strictly production technology, but also management expertise, marketing skills and general intangible corporate assets. European companies most commonly transfer their technology by licensing their patents, designs, software, trade secrets, and know-how. Ownership of the technology may also be transferred, but this type of transfer is less common. A common misconception is that a technology transfer is limited to transfers of high technology. However, many European companies using contract manufacturing to manufacture low technology, consumer, or industrial products, such as those based on product designs, must deal with the same risks to their IP as their high technology counterparts.

It is not uncommon that some companies in South-East Asian countries seeking to acquire foreign technology often obtain it from European companies either through inadvertent leakage of IP, or in breach of agreements or law.

The level of protection of IP through courts and other avenues remains varied as the legal systems across the region continue to develop. As a result, European companies who do not think carefully about how to guard against IP risk when transferring technology to South-East Asia may unwillingly suffer a loss of competitiveness and market share as a result of losing their IP to local competitors.

When considering your technology transfer strategy for South-East Asia, it is important not to narrow your focus solely on the current operation in hand. In such a rapidly growing region, where internal borders are gradually being opened, a broader, more insightful strategy must be developed to ensure that Small and Medium-sized Enterprises (SMEs) maximise their investments in the region.

2. Regional Attraction: Why South-East Asia?

South-East Asia is currently enjoying a shift in interest, from within and from outside, with respect to innovative investment. While the last 30 to 40 years have seen Taiwan and China receive the benefit of innovative investment by way of technology transfers, companies are now looking to the Association of South-East Asian Nations (ASEAN) to be a key player in the investment and development of several different types of technologies across a multitude of industries.

In the recent decades, the Asian region has experienced rapid economic growth characterized by rapid industrialization. Many Association of South-East Asian Nations (ASEAN) countries and China have shown a substantial rise in the manufacturing sector as a percentage share of GDP or total exports. Generally speaking, the majority of ASEAN countries have been major recipients of foreign direct investments. Foreign Direct Investment policies throughout much of ASEAN have formed an integral part of overall development strategies.

Foreign investors oriented towards the domestic market frequently have closer links with local companies, and, as the world's most competitive firms in these sectors, they can provide useful know-how and other basic technology for local firms. Because these foreign firms produce goods and services for the local market which meet world standards, they can indirectly help domestic firms to become more competitive in world markets, thereby enhancing the export potential of indigenous entrepreneurs.

There are several factors that are contributing to this. Some are push factors, with the likes of China becoming more expensive and regulated, and European SMEs and Multinational Corporations (MNCs) looking for new investment opportunities beyond their local markets. In terms of pull factors, there are many that combine to present a very real and attractive opportunity, such as:

- i) Ten countries all gradually moving to operate as one region across all sectors from 2015 onwards (although in practice this harmonisation will still require several years to become fully implemented, and for now SMEs should still take a country-by-country approach);
- (ii) Diversity in the level of development across the region enabling ASEAN to attract a range of technologies;
- (iii) Development of certain specialist skills and industry types, such as semi-conductors in Singapore and auto assembly- and parts- manufacturing in Thailand;
- (iv) Relatively low labour costs, but high skill levels (with differences between the countries);
- (v) Ease of doing business in some countries of South-East Asia is often a deciding factor over other regional competitors;
- (vi) A young and rapidly growing South-East Asian marketplace;
- (vii) A developing legal landscape to ensure intellectual property (IP) is fully protected.

In order to maximise the value that technology transfer in South-East Asia can bring, there are certain issues that must be examined prior to making such an investment. The most enduring potential benefit to developing countries from inward direct investment is the transfer of technology.

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3. Technology Transfer - A Step by Step Guide in South-East Asia

First Step - Secure your IP through Registration

a. The Regional Challenge

South-East Asia is a ready made regional market, which is made up of ten rapidly-developing economies. It cannot, however, be directly compared to Europe, which has (to a degree) a common currency and common laws, and regulations. Nor can it be compared to China, its most obvious regional competitor. It is a piecemeal or patchwork region, with each country presenting a different set of obstacles and opportunities. There are several ways that owners of technology should deal with the region as a whole, in terms of strategy.

Nine countries in ASEAN are signatories to the Paris Convention (except for Myanmar). Therefore, in theory, they should be compliant with the recognised international standard of law in relation to intellectual property. By 2015, the ASEAN Charter required all ten countries to have legislation in place to ensure this. To a large extent, this has already been done, with the exception of Myanmar, which had plans to enact such legislation in the past two years, but, as of today, still does not have specific legislation in this respect. It is recommended for SMEs to develop their IP strategy in relation to each country of their interest.

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b. Protecting your IP - By Region or Country?

Aside from copyright, IP is generally territorial and so it must be registered accordingly. There is no centralised system, like in Europe, through which you can protect your IP regionally across ASEAN. Therefore, it is necessary to file for patents, designs, and trade marks in each separate country. For some, this may mean that you prioritise your key markets first (e.g. your manufacturing base and countries you are currently distributing and selling into) to register your IP. However, care should be taken with such a strategy. Goods already move relatively freely across borders in South-East Asia. From 2015 onwards, goods will move with fewer tariff and non-tariff barriers, in an effort to promote the 'free movement of goods.' This means that your own goods—or worse, infringements thereof - could appear in Laos, Cambodia, or Vietnam, when, in fact, your own business only sells into Thailand, or has a manufacturing base in Malaysia.

Given this, if budget allows, it may be sensible to file your patents, trade marks, and designs in as many countries in the region as possible. You may wish to adopt a strategy whereby you file in all countries from the outset, but this is a strategy more commonly adopted by MNCs, which have larger budgets dedicated to IP protection. A more realistic approach for an SME is to have a 'dynamic' strategy that is both pro-active and reactive. It must be pro-active by selecting the country(ies) in which you will manufacture

or trade. It is highly advisable to file in these territories. It is then advisable to file in countries in which there is a likelihood of trading in, or in which you believe there could be a high chance of a third party trading, or worse, infringing your rights. In this regard, it must be remembered that you do not have such rights unless you file for protection.

c. When Should I Apply to Register my IP?

IP protection must be at the forefront of all SME's strategy when looking to invest in South-East Asia in relation to technology transfer. In short, it cannot be done soon enough. A solid filing strategy, whether you are a medium or small business, should be the first step when investing in the region. Then, one can look at partners, business models, and the drafting of agreements. Having the filing (even the mere application) in place before opening talks with a partner strengthens your position and reduces the risk that a failed discussion with a potential partner could end up with the theft of your IP.

d. What IP can I Register?

If you have not already drawn up a list of your IP, then this must be done. It is essential that you identify your trade marks, designs, inventions, copyright works, domain names, websites, and trade secrets. It is strongly advised that you obtain legal advice from an experienced IP lawyer to assist in the identification of your IP. Not all IP can be registered and local laws will vary. If a country is a member of the Paris Convention, then it will be possible to register trade marks, patents and designs. However, it may also be possible to register copyright and trade secrets in certain jurisdictions.

In regard to trade marks, you may also wish to consider registering local language marks, if such trade marks will be in use in each separate ASEAN country.



4. Assess the Legal, Tax, and Regulatory Landscape in Each South-East Asia Country

Once these preliminary IP protection steps have been taken, an SME should also be concerned with the broader legal and tax landscape. In this regard, once an SME has identified the countries in which it wishes to trade in, it should obtain both legal and accounting advice on regulatory issues and liabilities in respect of the business it operates. For example, if the SME is involved in the manufacturing and distribution of controlled goods, such as medical devices, food, cosmetics, pharmaceuticals, agro-chemicals, etc., then great care must be taken when planning how import licenses are obtained and by whom. ASEAN countries are presently seeking to harmonise their regulations on such products, and so it is worthwhile spending some time getting local advice on how best to clear these hurdles so as to enter your targeted markets in the most efficient way.

5. Finding your Partner, Due Diligence, and Type of Investment

a. Choose your Partner carefully

It is important to recognize at the outset that part of the motivation for the local company in a technology transfer is obtaining foreign technology and know-how. Consequently, as a first step to protecting your IP in a technology transfer, it is important to make sure you choose the right partners. Essentially, the ideal partner will be complementary, but not well-positioned to directly compete with your business. A good way of testing your potential partner is to ask to sign Non-Disclosure Agreement (NDA) with the partner while entering in initial negotiations. This will help you to detect the intentions and reliability of the partner.

The IP risk associated with a particular technology transfer will vary depending on whether you are licensing, setting up a Joint-Venture, or establishing your own company.

b. Practical First Steps – Control Disclosure

SMEs may not be familiar with using formal Non-Disclosure Agreements (NDA), but it is worthwhile considering using such documents prior to entering into talks with a partner, particularly where you can identify specific IP or confidential information that will be disclosed during the course of discussions. Such agreements are concise, clear, and generally of standard form and easy to draft. Furthermore, business partners in South-East Asia are becoming very familiar with agreeing to such terms. It is advisable to use a Non-Disclosure Agreement (NDA) if you are unsure of the integrity of your partner, or if you are in a country in which you do not have great confidence in the relevant IP enforcement agencies and courts. In South-East Asia, with each member having different laws and legal systems, you should seek to obtain a different NDA for each relevant country. Obtaining an NDA by no means provides a 'watertight' case, but it certainly assists in protecting intangible assets, in particular those that cannot be registered or easily protected under local IP legislation (e.g. trade secrets such as certain technologies, formulas, production methods etc.). In general, it is also advisable to reveal as little critical information as possible to potential (and current) partners.

c. Due Diligence

This may involve reviewing all of the assets including the registered IP rights of a partner, any litigation in which a partner has been involved, or any issues which could be raised once the deal is done. Once a partner's IP rights have been identified, performing IP due diligence is strongly recommended for both parties to ensure that their value can be properly assessed. The summary of identified IP rights, including any relevant third-party IP rights, is a useful tool for the IP owner/IP seller/licensee/franchisee/etc., in furthering negotiation with the IP buyer/licensor/franchisor, etc. Unwanted IP may even be offered, despite it having no real value to the existing or planned business. Your partner should identify the IP to a degree that is sufficient to confirm that it fits the needs of your business. Do the patents cover what you hope for them to achieve? Are the trade marks in the appropriate classes for the goods/services you will use them with, and are they still valid? Full searches are ideal, but not always practical for the time available, and/or if costs are limited, in which case prioritisation is crucial.

Furthermore, IP rights' due diligence gives the licensee comfort that (i) the agreement fee and royalties to be paid are reasonable and worthwhile and (ii) should there be an infringing act in the future, the licensee's market will be protected under the related intellectual property rights law. Patent, design, trade mark, and to a certain extent, copyright, are registered rights; even a minimal amount of due diligence will reveal the relevant details of important information such as (i) ownership; (ii) validity; (iii) expiration dates; (iv) disputes over the rights; and (v) other encumbrances.

It is important to get as full a disclosure statement as possible from your prospective partner and do not be afraid of going back to the partner with comprehensive questions.

d. Your Investment –

Assessing and Choosing your Business Model

This can be a critically important step for an SME when investing in ASEAN. Different countries have different rules in relation to the setting up and ownership of limited companies. Joint ventures can be governed by different laws, particularly in certain industries or when dealing with government agencies. Local legal advice is essential for this step of the technology transfer procedure. However, often, an SME's investment and its mechanism for technology transfer will operate by way of a license to a third-party company, regardless of whether the relationship is one of franchising or manufacturing for example. Therefore the emphasis here must be on due diligence and negotiating a strong written contract.

6. The Contract

It cannot be stressed enough that a written contract is infinitely preferable to a casual arrangement or an oral agreement. If you are operating in a jurisdiction with which you are not familiar, the need to have a written agreement becomes even more important. An SME doing business in more than one ASEAN country must not be put off by the requirement to have a written agreement for each country (often, the agreement can be essentially the same, with only some small local amendments required). Local legal advice is recommended to ensure a strong network of agreements is put into place. It is also highly important to ensure that the translation of the contract into the local language of the jurisdiction is accurate, many courts will use this rather than an English or other European language contract when considering evidence.

After a suitable partner has been found, the second important step is to ensure that the agreement will be enforceable in the country where the contract will be executed. Often, small local entrepreneurs that are eager to use and obtain such technology face an imbalance in power when negotiating contracts with foreign innovators. It should also be noted that some inexperienced local entrepreneurs get locked into a contractual relationship without having first gained proper legal advice. The sooner that both parties can identify the elements of IP involved in the deal, the better positioned they will be in negotiations. The licensee can then determine whether the licensor intends to authorise the licensee to fully utilise all relevant IP.

The types of license available and the considerations thereon are covered in a separate South-East Asia IPR SME Helpdesk Guide 'Using Contracts to Protect your IP in South-East Asia', but it should be noted here that having the ability to obtain direct relief (including preliminary injunctive relief) in a local court should be a clause that is built into all licenses. This can sit alongside an arbitration clause, but in instances of trade secret theft by an employee or third party, you will want to have direct recourse to the local courts to obtain an emergency injunction, or to carry out search and seize orders, or asset freezing orders.

7. Your Own Internal IP Strategy and Practical Considerations

SMEs, as owners of IP, will no doubt be concerned about how their partners in South-East Asia use their IP. Therefore, it is important to (i) have your own internal IP management strategy and (ii) ensure that you have protected the ownership and control of the IP as much as possible. The following are examples of best practices to consider:

- 1) Ensuring your partner undertakes to use confidentiality agreements/clauses in its contracts with third parties and their employees. Non-solicit and non-compete clauses in employment contracts should also be considered. Such undertakings can be in the contract between you and your partner. Regarding employees, it is important to ensure that copyright created by the employee is assigned to the employer (and thereafter assigned to the licensor under the terms of the license agreement), since most South-East Asia countries have laws providing that employees own the copyright to their work (notably, this is not the case for other types of IP).
- 2) Spreading the risk you may wish to consider having certain components of your product manufactured/assembled in separate countries or by different parties to help reduce the risk of your IP being misappropriated.
- 3) It is common for licensees to attempt to reverse-engineer products. Under IP laws, there is little you can actually do about this process, other than to ensure that the contract tries to prevent such activities from taking place. This also underlines the need to register all of your IP, so that if such reverse-engineering does take place, it may be possible to prevent third party use thereof through enforcement of patents, etc.
- 4) Having formal training documentation protected through your own NDA/confidentiality agreements or where necessary ensuring your partner uses NDA/confidentiality agreements. Such undertakings can be included in the contract between you and your partner.
- 5) Valuing your IP can be difficult in licensing situations. Do consider minimum royalty payment clauses to protect yourself from undervaluing.
- 6) Having formal procedures in place to deal with the identification of your existing and future IP. It is essential that the license of IP includes clauses that deal with the ownership of improvements and possibly licensing of those improvements (which may require different terms to the IP originally contemplated).
- 7) Ensure that you are entitled to physically visit the partner's premises, witness their activities, and perform quality control. This will assist you in your review of the IP and improvements.
- 8) Taking legal action against infringements and breaches of contract. This will ensure that you maximise the monopoly rights of your IP and increase its license value.

8. Checklist

- (i) Register your IP first
- (ii) Conduct due diligence on your business partner
- (iii) Manufacturing/licensing/distribution/franchising agreement:
 - Complies with the laws of the country in which you are operating
 - Terms to ensure proper use of IP, monitoring process, and quality control
 - Terms to ensure IP is registered and owned by rights holder and not by a third party (or their employees)
 - Terms to get out safely and ensure that the IP is not used beyond the contract term (this happens frequently with Original Equipment Manufacturer (OEM))
 - Terms to ensure continuation of business after ending of agreement
- (iv) Auditing of partner constant review (you or your authorised representative) of process to ensure no unauthorised use is being made
- (v) Recordal of license agreements (even if only a small part of the OEM/distribution/franchise agreement), as some countries require it for the IP terms to be enforceable
- (vi) Watch for infringements of third parties and have a framework in agreement for the licensee's cooperation and assistance
- (vii) Ensure that the contract allows for local enforcement to stop the source of the IP violation, rather than first reverting to EU laws or arbitration. Also, note that Singapore is a major transshipment (unloading/reloading) point for the whole of Asia, and containers can be stopped.
- (viii) Consider arbitration (e.g. in Singapore) as a secondary means of resolving issues. Singapore has a WIPO dispute resolution office that is ready to deal with such issues.

Reverse engineering:

In addition to dealing with the issues related to improvements to the technology, European companies must also think about reverse engineering, which is the acquisition of technology by taking apart and studying an existing product in the market. Reverse engineering is permitted in few sectors whereas with limitations, in some countries in South-East Asia (such as Indonesia and Malaysia) and not considered a theft of trade secrets. As a result, well drafted technology transfer contracts should include a provision limiting or prohibiting the local party from engaging in reverse engineering.

9. Conclusion

Given the rapidly evolving economic environment with varying levels and rates of development in ASEAN, it is important to have tailored strategies when it comes to technology transfer. While it is advantageous to begin viewing the region as a single area in which to trade, it should be borne in mind that each country has its own peculiarities in terms of procedures and laws, and that each country presents its own set of risks and challenges. To ensure that SMEs are as prepared as possible, they should firstly take on a review of their own IP. Then, obtaining local

legal advice is recommended, whether it is wide in scope, such as full due diligence and ASEAN-wide negotiations of a contract, or simply reviewing existing agreements to ensure local compliance. Finally, if there is one thing that must not be overlooked, it is the registration of your IP. If you do not have a written contract or if you use several partners in one jurisdiction, the fall back and underlying principles on which to enforce your IP will be your collective IP registrations. Without such, the value of your IP is substantially reduced.

10. SME Case Studies

CASE STUDY 1: Franchising in South-East Asia from Europe

Background

A well-established European language school wishes to set up its first business in two to three South-East Asian countries, and it has chosen the franchising model as a mechanism to accomplish this. The school obtains advice from its lawyers in Europe, who draft a long, detailed franchise agreement for this purpose. The agreement identifies Thailand as a priority market, and goes on to brand Malaysia and Vietnam as secondary targets, if the Thailand franchising operation does well. The business registers its trade mark in Thailand only. It performs due diligence on its Thai partners and is satisfied with the result.

Outcome

The Thai business partner requests that the school is opened first and a trial period used to measure the viability of full

franchising. Therefore, no written agreement is signed before the school in Thailand is opened. The school is successful by the end of its first year and at that point, the Thai partner stops paying the informal license fees to the European school. Six months later, the European language school discovers that the Thai partner has opened a business in Vietnam using the same name and curriculum.

Lessons Learned

- Remember to register your IP in markets that you believe you will trade in the foreseeable future.
- Always insist on a written agreement from the start. It will make things much clearer and will enable you to control the geographical area in which your partner operates/will operate.
- Local legal advice is more important than home country legal advice.

CASE STUDY 2: On-going Employee Due Diligence and Practical Measures to Secure IP

Background

A European craft beer company wishes to open a bar in Singapore. It decides that it will simply license the Singaporean partner to use its trade marks and sign up to a written one-year exclusive distribution deal. However, it allows the partner to register a local company which incorporates its business name and trade marks, to register its trade marks in Singapore, and to register a local domain name. After one year, the agreement expires and the Singaporean company wishes to renew the agreement.

Actions Taken

While the European company is content for the bar to continue using its trade mark as the name of the bar, it demands that the Singapore company's name is changed to something different and that the trade marks and domain name are handed over to the European company before an extension can be signed.

Outcome

In reaction to this perceived setback, the manager of the bar leaves and sets up a competing establishment in a busy part of Singapore, taking all of the confidential

business information with him, including supplier info and key training manuals. The original bar rapidly loses money and is declared bankrupt within the following year.

Lessons Learned

- Your IP is extremely valuable; it should always remain under your ownership and should only be licensed out under strong written agreements.
- The relationship and the written agreement must ensure that there are on-going duties and mechanisms that guard against employee theft. Management of confidential information is very important. Consider requiring your partner to ensure specific confidentiality clauses are included in employee agreements. Consider getting employees to sign training forms and upon ending of employment, acknowledgement of IP ownership, to try to reduce the risk of employee theft.
- Do not be scared of litigating in a foreign jurisdiction. It may be possible for you to recover your business before things fail. There may also be possible to resolve the matter through Alternative Dispute Resolution such as mediation or arbitration, which can be quicker and less costly than litigating in the courts.

CASE STUDY 3: Contribution of know-how in Vietnam

Background

An European company is willing to establish a Joint Venture with a local partner in Vietnam where the investment in the capital will be composed of cash from the Vietnamese partner and know-how and cash from the European company. The European company has developed a specific know-how in treating and cleaning systems which enable to minimise the use of water and detergents. The parties enter into negotiations in relation to the Joint Venture Agreement and have reached a point in which it became difficult to assess the exact value of the contribution of know-how since the process was and could not be patented in Europe nor in Vietnam. The parties could not find an agreement on the contribution and the European company was worried of disclosing further information at this stage.

Actions Taken

The parties were advised by a local lawyer to enter into a Non-Disclosure Agreement (NDA) in relation to the technology process in question, however, the local partner refused to sign a binding NDA and was pressing the European company to close the Joint-Venture deal with a very low value of the know-how. The European company had calculated the actual costs borne to develop the know-how and wanted the value to

be reflected into the capital contribution. The European company engaged an IP evaluation company to provide an official evaluation report on the value of the know-how which shall be contributed to the capital of the JV.

Outcome

the European company started to rethink the intentions of the local partner due to the refusal of signing the NDA during the negotiations and the scarce value that the local partner would attach to the contribution of know-how. As result, the European company decided not to proceed with that partner and started to look for a more reliable partner.

Lessons Learned

- Be aware of the value of your IP and seek the advice of professional evaluation companies to assess the value
- Perform a due diligence on your partner especially if you intend to co-invest with the partner into a corporate structure
- Submit NDAs to your partners to understand how they value your IP and detect their attitude and intentions towards IP value and protection
- Do not be scared to walk away from partners that seem to be mainly after your technology and look for options when you believe that you might risk IP loss.

11. Glossary of Terms

- **Paris Convention:** The Paris Convention for the Protection of Industrial Property applies to industrial property in the widest sense, including patents, trade marks, industrial designs, utility models, trade names, geographical indications and the repression of unfair competition. The substantive provisions of the Convention fall into three main categories: national treatment, right of priority and common rules. There are currently 175 contracting parties to the Paris Convention. Of the ten ASEAN countries, only Myanmar is not a contracting state of the Convention. For more information on the Paris Convention, visit the official website of the World Intellectual Property Organization (WIPO) http://www.wipo.int/treaties/en/ip/paris/summary_paris.html.
- **ASEAN Economic Community (AEC):** The Association of South-East Asian Nations (ASEAN) is scheduled to establish the ASEAN Economic Community (AEC) by 2015. The AEC will be comprised of all ten ASEAN countries with a common goal of regional economic integration and envisages ASEAN as a single market and production base, a highly competitive economic region with equitable economic development, and fully integrated into the global economy. In short, the AEC will transform ASEAN into a region with freer movement of goods, services, investment, skilled labour and a freer flow of capital. The AEC blueprint was adopted by ASEAN leaders in Singapore in 2007.
- **ASEAN Charter:** The ASEAN Charter is a constitution for the Association of South-East Asian Nations. It was adopted in 2007 and serves as a legally binding agreement among the ten ASEAN Member States as they establish new organs to boost the community-building process.
- **Non-Disclosure Agreement (NDA):** A non-disclosure agreement (NDA) is a legally binding contract establishing the conditions under which one party discloses information in confidence to another party. Depending on the number of parties disclosing information, NDAs may be 'one-way' or 'two-way'. It is also possible to have a multilateral NDA.
- **OEM:** Original Equipment Manufacturer (OEM) is a company whose products are used as components in the production of products by other companies.

Free South-East Asia IP advice for European SMEs

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