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Get it in writing

BUSINESS: *When close friends or relatives start a business, the thought of drafting a formal written agreement might seem like a sign of mistrust. It shouldn't be*

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In a business world filled with heated rivalries, with rivals constantly seeking to gain an edge on each other, an entrepreneur learns to watch his back. But sometimes – and few businesspeople want to admit it – the biggest threat can come from one's own partners.

Without the written protection of a shareholders' agreement or contract, a venture that begins with smiles can end in tears.

Many ventures founded on close ties among family members, classmates or office colleagues collapse in bitterness because management responsibility, as well as sharing of financial gains or losses, were never spelled out.

Most such businesses are typically carried out in the form of registered or non-registered partnerships, with nothing more than a gentleman's agreement as a foundation.

Sometimes things don't turn out the way the partners imagined, thought, heard, planned, agreed or said at the outset. One party breaks its word, breaks the (unwritten) rules or refuses to comply with an earlier oral agreement. Sometimes failure is simply a matter of miscommunication.

Such unfortunate outcomes can easily be avoided by getting everything down on paper in the very first place, says Thawat Damsa-ard, a partner in the law firm Tilleke & Gibbins International Ltd.

"But the shareholders, who have close relationship with one another tend to ignore it or consider it a sign of mistrust if they come up with the idea of having a written contract," he said. "So they eventually decide not to make one, which leads to the risk of misunderstanding, severe disputes, unsolved problems, and business failure, eventually.

"Those who call themselves 'gentlemen' may not be gentlemen. And having everything down on paper doesn't mean that you distrust your friends. One should look at it as something essential in doing any business, including small enterprises, from very simple to very complicated ventures, and from only a few to a large group of shareholders."

Family-run enterprises are no exception when it comes to the need to protect everyone's interests, he said.

"Don't forget that one can become a totally different person when it comes to matters of money. We have heard of so many cases where members of a family even kill one another just because of money."

In more than a decade of legal practice, Mr Thawat says he has witnessed a number of businesses that were set up and run without the necessary written documents.

Under the law, oral agreements are legitimate if it can be proved that they had the consent of the majority of shareholders, according to Mr Thawat. However, there have been cases when partners intentionally break oral agreements with fraudulent intent.

"And unfortunately, most of these cases won't be brought into the court as there are no sufficient proofs or any written evidence at all. And so, it's very hard for the court to prove which party is right and which is wrong."

In such cases, he said, most lawyers would advise against clients suing their adversaries. "This is because we won't recommend that our clients take up a lawsuit in cases they are likely to lose."

Before commencing any businesses, particularly a partnership, a written contract must be drafted, signed and kept by the shareholders.

The contents will depend on the nature of the business. "I have seen some contracts having as many as a thousand pages as there are many sensitive areas that should be covered to avoid possible conflict in the future," said Mr Thawat.

Basically, he said, the contract (see chart) should include all agreements made among the parties and possible means of solving any future problems or disputes.

But even after all agreements have been put in writing and signed by all concerned, it's no guarantee against future problems or conflicts.

"But, the thing is, at least the partners know how to solve things and make better decisions if they have a reference to go back and look at," said Mr Thawat.

Spelling it out

Main elements to be covered in a written business partnership agreement:

- Total amount of capital investment, price per share, total number of shares
- Names of all shareholders and number of shares each holds. Can also include exact dates for initial capital to be paid up
- Persons in charge of operations and management, with roles and responsibilities spelled out clearly. Lines of authority must also be unambiguously stated: areas in which they are automatically authorised to make decisions and those in which they must first seek majority consent
- Rights, authorisation and roles of remaining or silent partners
- Clear concept of the business and its direction: how operational and management systems are to be executed
- Procedures for periodic examinations and assessments of business performance and executives responsible. Steps to be taken when performance does not meet expectations should be spelled out
- Number of meetings to be held and when
- Number of shares or votes required for approval of resolutions
- How accounting and auditing are to be carried out

- Distribution of profits and sharing of losses among partners. Agreements on loss-sharing must be especially clear as these are a frequent source of conflict when a business is wound up
- Agreement when there is a change in the business's objectives, direction and structure, including changes in partnership or shareholdings, purchase and sale of existing shares or withdrawal of shareholders
- Expansion or reinvestment in the business
- Resolutions covering the termination or dissolution of business
- Any other rules and regulations the partners deem appropriate

Source: ***Thawat Damsa-ard****, Tilleke & Gibbins International Ltd*