Regional Guide to Franchising Law in Southeast Asia

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INTRODUCTION

The popularity of the franchise business model has grown rapidly in mainland Southeast Asia in recent years, with some of the world's top brands becoming common sights in the commercial districts and shopping malls of major regional cities in Cambodia, Laos, Myanmar, Thailand, and Vietnam.

Although these countries have not yet enacted franchising-specific laws, certain features of each country's regulatory regime impact franchising. As such, well prepared franchise business operations have comfortably adapted to each country's regulatory framework, and the growth is poised to continue even as the global retail sector redesigns and redoubles its efforts in the wake of the COVID-19 pandemic. In fact, the franchise business model, which is both global and local at the same time, may offer retail entrepreneurs a solution in their quest to meet the challenges of the new retail economic realities.

This article explains the legal frameworks that impact the franchise business model in Cambodia, Laos, Myanmar, Thailand, and Vietnam. For each country, this article discusses relevant regulatory considerations for franchise agreements, how to protect intellectual property rights, and judicial and arbitral procedures for resolving disputes that might arise between a franchisor and a franchisee.

CAMBODIA

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Cambodia's steady, robust economic growth continues to draw foreign direct investment (FDI), in addition to increasing the purchasing power of the country's population. The World Bank puts the growth rate of Cambodia's economy at 8% between 1995 and 2018, and during that time, Cambodia transitioned from being classified as a low-income country to a lower-middle-income country. Along with economic growth, and a welcoming investment framework, Cambodia has witnessed the entrance of a number of international franchise brands, especially in the food and consumer goods sectors.

Domestic franchising typically consists of direct franchising, often involving home businesses such as laundry services, whereby the franchisee is given training and provided with systems to operate successfully and economically. Most international franchising in the country takes place through master franchise agreements. Master franchising can save a franchisor the expense and uncertainty of establishing its own local infrastructure.

Cambodia has not yet enacted a comprehensive franchising regulatory scheme similar to what one might see in the United States. Franchising is governed primarily by the Civil Code, the Law Concerning Marks, Trade Names, and Acts of Unfair Competition, dated February 7, 2002 (Trademark Law); the Sub-Decree on the Implementation of the Law Concerning Marks, Trade Names, and Acts of Unfair Competition, dated July 12, 2006 (Trademark Implementation Law); the Notification on the Recordal of License Contracts and Franchise Contracts, dated March 12, 2015; and the Prakas on the Recordal of License Contract Over Mark and Franchise Contract, dated 13 January 2020.

Franchising in Cambodia

An overseas franchisor is not required to use a separate entity to enter into a franchise agreement with a franchisee in Cambodia, but they are permitted to do so if they desire.

For franchise agreements originally prepared in a foreign jurisdiction and according to the law of a country other than Cambodia, franchisors should focus on adapting the following provisions in the franchise agreement to ensure they are enforceable in Cambodia: predisclosure and guaranty provisions; noncompete obligations; fees and tax-related clauses; termination and damages; intellectual property provisions; dispute resolution clauses; and real estate provisions.

We address a few of the important aspects of these provisions below, but franchisors should work with local counsel to ensure that their full agreement is sufficiently adapted to the Cambodian context.

Predisclosure & Guaranty

While Cambodian law does not provide any requirements on precontract disclosure, all information provided in the franchise agreement must be accurate. If a party enters into a contract on the basis of another party's misrepresentation, the Civil Code stipulates that they are entitled to rescind the contract and claim for damages from the party who made the misrepresentation.

Further, under the same legislation, a personal guaranty is invalid if the guarantor was not fully informed of all material information on the guaranteed obligation at the time the guarantee was provided. Accordingly, franchisor must ensure that the proper material information is provided at the time of the signing of the guaranty and should ensure that the guaranty contains an agreement that all material information was provided.

Noncompete Obligations

The 2021 Competition Law and its implementing regulations prohibit vertical agreements that may significantly prevent, restrict, or distort competition in a market "by requiring a purchaser to purchase all or nearly all of its requirements for particular goods or services exclusively from the seller" or "requiring a purchaser to resell purchased goods or services only within a defined geographic area," among other criteria. This could potentially impact franchises operating in Cambodia. as nearly all franchises could be deemed as a vertical arrangement. However, as the Competition Commission of Cambodia and the Competition Law's implementing regulations are new, there has not yet been any indication of the competition authority targeting franchises.

Additionally, it is common for foreign companies to insert noncompetition provisions in their franchise agreements to restrict franchisees from engaging in any activities that compete with the franchisor. In Cambodia, employees may not be restricted by their former employers in any way, effectively prohibiting noncompete provisions in employment relationships. The franchise agreement should take into consideration these limitations when drafting noncompete provisions, especially if the franchise could significantly distort market competition or affect the mobility of employees following employment with the franchisee.

Fees and Taxes

Initial fees, continuing fees (management charges), advertising contributions, required advertising spend, and other customary franchisee fees are common in franchise agreements in Cambodia. There is no restriction on the amount that can be charged for initial fees, continuing fees or charges, advertising contributions, or required advertising spend. However, for tax purposes, advertising contributions and required advertising spend paid directly to the franchisor will generally be treated as royalties payable to the franchisor, according to the current practice of the General Department of Taxation.

Interest on overdue payments is allowed under the Civil Code, with a default interest rate of 5% per year unless specified otherwise. There is no maximum interest rate that can be charged on overdue payments, except in the context of a loan. If interest accrues unpaid for over one year despite payment being demanded of the franchisee, the franchisor can add the overdue interest to the principal amount.

Termination and Damages

There are no specific statutory limitations on the right of a franchisor to terminate a franchise agreement. Termination rights (including compensation for early termination) are governed by the terms of the agreement, and breach of a contractual provision concerning termination may be subject to a civil action for damages. Any contractual provision that purports to limit a defaulting party's liability for intentional nonperformance, or nonperformance resulting from gross negligence, is deemed to be void and unenforceable. In addition, a contractual provision providing for the payment of liquidated damages does not preclude a claim for additional damages arising from a breach or termination of the contract.

Typically, liquidated damages clauses are enforceable in Cambodia as long as the damages amount reasonably correlates to the anticipated losses resulting from a breach. Liquidated damages fixed by the parties that are deemed punitive or grossly higher than the amount of damages actually suffered may be lowered by the court. The court is likewise authorized to award additional damages if the actual damages exceed the liquidated damages provided under the contract.

Intellectual Property

Intellectual property is another key part of franchise agreements, with franchisors typically granting franchisees the right to use trademarks, systems, logos, advertisements, patents and industrial designs, and know-how in connection with the franchised business.

Trademark owners need to register their trademarks with the Department of Intellectual Property (DIP) to receive protection under local law for a renewable term of 10 years. Since Cambodia is a member of the Paris Convention for the Protection of Industrial Property, a trademark priority claim period of six months is applicable. To maintain registration and avoid cancellation, the owner of the trademark must file an affidavit of use/non-use for the mark within one year following the fifth anniversary of the date of registration (or of the renewal date). In 2015, Cambodia became a member of the Madrid System; thus, trademark registration applications initiated at a national or regional IP office of another party to the system can also be designated for filing in Cambodia.

Under the Trademark Law, any license agreement for trademarks, including a franchise agreement with provisions on trademark licenses, must impose the obligation on the licensor to effectively control the quality of the goods or services in connection with the mark used; otherwise, the contract will not be valid.

In theory, trademark license agreements cannot be enforced against third parties if they have not been registered with the DIPR. That means, in practice, it is only necessary to register a trademark license agreement, or a franchise agreement that contains trademark license provisions, if the licensor wants to allow the licensee the right to enforce the agreement against third parties (e.g., persons in Cambodia infringing on the licensor's trademarks). The official fee to record a franchise agreement is KHR 400,000 (approximately USD 100) per trademark.

Similarly, patent and industrial design licenses should be registered with the Ministry of Industry, Science, Technology, and Innovation (MISTI). Cambodia is a member of the Paris Convention for the Protection of Industrial Property, a contracting state of the Patent Cooperation Treaty (PCT), and a contracting party to the Hague Agreement on the International Registration of Industrial Design. Although Cambodia lacks the infrastructure to examine patent applications, the MIH has made it possible to obtain patent protection in Cambodia through a number of agreements with other governments that set out an accelerated process that can be completed in months, not years. These agreements have been made with the Intellectual Property Office of Singapore, the Japan Patent Office, the European Patent Office, the China National Intellectual Property Administration, the Korean Intellectual Property Office, and the United States Patent and Trademark Office.

Cambodia ratified the Berne Convention in 2020, and the Convention entered into force in Cambodia on March 9, 2022. Moving forward, various legislative or regulatory updates may be introduced to bring the country's copyright law in line with the Berne Convention, including provisions relating to the automatic protection of foreign copyrights. Now that Cambodia has officially acceded to the Berne Convention, foreign copyrights may be eligible for automatic protection. This means that franchisors' manuals and other similar materials may be protected in Cambodia through copyrights besides other means of protection (e.g., by keeping it as a trade secret or through the patent process).

Cambodia does not currently have any law governing trade secrets. Mostly, franchisors use nondisclosure clauses in their franchise agreements to secure and protect their know-how from third parties.

Dispute Resolution

Choosing a foreign country's law as the governing law for a franchise agreement does not contravene Cambodian law. However, in the authors' experience, local courts may be unwilling to apply foreign law to disputes before them. In addition, certain subject matter (such as advertisement approval requirements for certain services, such as healthcare, or the owning of land) can only be governed by Cambodian law.

Foreign franchisors should carefully consider the dispute resolution mechanism provided in their franchise agreements. Under Cambodian law, foreign court judgments are not enforceable in Cambodia, unless, among other requirements, there is a guarantee of reciprocity between Cambodia and the country in which the court is based. Cambodia has only entered into such an agreement with Vietnam.

Cambodia is, however, a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, so foreign arbitration awards are enforceable in Cambodia. Further, Cambodia has its own domestic arbitration institution called the National Commercial Arbitration Center. Foreign parties almost always include arbitration clauses in their franchise agreements, and they usually require arbitration to be conducted under the rules of an established foreign arbitration body such as the Singapore International Arbitration Centre (SIAC). Nevertheless, most foreign parties tend to conclude their disputes by arriving at a settlement.

Real Estate

In Cambodia, land ownership is limited to Cambodian nationals and entities of Cambodian nationality, meaning at least 51% of the company's shares are held by Cambodian nationals or other companies of Cambodian nationality. Foreign nationals may, however, own up to 70% of the floor space on co-owned buildings (such as condos and mixed-use developments). Any real estate-related provisions in a franchise agreement should adhere to these limitations, and care should be taken to ensure there are mechanisms in place for any real estate that is related to the franchise.

In 2019, Cambodia enacted the Trust Law, which creates a mechanism for foreign nationals to own land indirectly through a trust. This may impact franchise operations in Cambodia, since foreign franchisors and franchisees may own land in Cambodia through a trust structure.

Trusts are registered with the Trust Regulator. The validity of the trust commences from the date of its official registration with the Trust Regulator and is limited by statute to an existence of up to 100 years.

For a legal entity or an individual to be registered as a trustee, they must obtain a license from the Non-Banking Financial Services Authority. The trustee will manage the trust pursuant to an agreement between the trustee and the trustor. Under the trust agreement, the trustor will transfer the property to a trustee, and the trustee will hold, manage, and administer the property of the trustor for the benefit of the trustor or beneficiaries based on the terms and conditions set out in the trust agreement. The trust agreement will also set out the rights and obligations of the trustor and trustee, the purpose of trust, and conditions for trust termination and amendment.

However, trust structures are still rather new in Cambodia and few trust companies have a solid track record, so there is still some uncertainty as to how various trust companies and trustees will manage a trust.

INDONESIA

Rina Sinaga

Rules for franchising in Indonesia were first published in 1997 through a government regulation and a ministerial decree, which was subsequently amended several times. The franchising regulations currently in effect are Government Regulation No. 42 of 2007 concerning Franchises and Regulation issued by the Minister of Trade No. 71 of 2019 concerning the Implementation of Franchising (MOT No. 71 of 2019).

Franchise Agreements

Franchises in Indonesia must meet certain criteria that distinguish them from other types of businesses, and franchising must be based on a franchise agreement governed by Indonesian law. Prior to entering into a franchise agreement, a franchisor must provide a prospectus (disclosure document) to the prospective franchisee at least two weeks before the execution of the franchise agreement so that the prospective franchisee has sufficient time to review the reputation and goodwill of the franchisor through the prospectus. The prospectus must contain various details about the franchise business, its management, its operations, and other relevant aspects.

Both local and foreign franchisors must obtain a franchise registration certificate—referred to as an STPW—from the Ministry of Trade before offering their franchises to prospective franchisees. The franchisee is also required to obtain an STPW. The STPW for the franchisor is the proof of prospectus registration, while the STPW for the franchisee is the proof of registration of the franchise agreement. Franchisors and franchisees who have STPWs are required to submit reports on franchise business activities to the Ministry of Trade's director of business development and distribution by the end of June each year.

Up to three written warnings will be served on a franchisor or franchisee who does not comply with the registration requirements. A fine of up to IDR 100 million (approx. USD 6,400) will be imposed if the franchisor or franchisee fails to respond to the warnings.

MOT No. 71 of 2019 on franchising was a step forward for the industry, as it streamlined some steps and relaxed some of the more onerous requirements regarding franchising arrangements and the SPTW. For example, under the current rules, the validity of the STPW is now tied to the duration of the franchise agreement itself. Also, direct control between the franchisor and franchisee is no longer regulated, allowing more flexibility in the management structure, and a general emphasis on the prioritization of domestic materials (without specific quotas) has replaced a previous, less flexible requirement to use 80% domestic materials.

Intellectual Property

Sound management of intellectual property is an essential element in running a franchise business in Indonesia. For trademarks, patents, and industrial designs, proof of intellectual property registration is a requirement for obtaining a license to run a franchise business (called an "STPW").

Although regulations do not require copyrights to be registered for protection, registration is recommended to show proof of ownership—useful as evidence in case of a violation or dispute. Trade secrets also do not require registration in order to be protected. Rather, the recordation of trade secrets and copyrights is important in assignment and licensing.

Under current practice, prospective franchisees can apply for an STPW even if their intellectual property registration is still pending. However, if the registration is ultimately rejected, the STPW will be considered invalid. An STPW will also be declared invalid if intellectual property registration has expired. Thus, the validity of a franchise license is affected by IP validation, so prospective franchisees need to confirm the validity of the IP registration before entering into a franchise agreement.

Dispute Resolution

Indonesia's franchise regulations are silent on franchise-related dispute settlement procedures, and there is no specific agency assigned to handle franchise disputes. The regulation only stipulates that franchise agreements must be made based on Indonesian law, so franchisors and franchisees are then restricted to using Indonesian law as the governing law for franchise agreements. Likewise, the parties are free to choose a dispute resolution forum but must use Indonesian law.

Disputes related to intellectual property are typically addressed in the Commercial Court, but disputes related to franchise agreements can be settled in other venues. Like any business contract, a franchise agreement allows the parties to agree to resolve disputes through court or arbitration.

International arbitration awards from countries party to an agreement with Indonesia on arbitration award recognition and enforcement are recognized and can be enforced in Indonesia provided they fulfill the conditions determined by law. The dispute must also be related to a trade issue, and the arbitration award is required to be registered at the Central Jakarta District Court.

LAOS

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In recent years, Laos has experienced a notable increase in franchise operations in various sectors, including food and beverage, car rentals, and retail clothing, contributing to a more varied economic landscape. This growth is largely driven by the government's efforts to ease foreign direct investment (FDI) restrictions and diversify the economy beyond natural resources.

Although Laos lacks specific franchising laws and regulations, the following legislative measures govern franchise operations in Laos:

- The Law Intellectual Property No. 50/NA, dated November 20, 2023
- The Decision on Trademarks No. 0436/MOIC, dated March 30, 2023
- The Civil Code No. 55/NA, dated December 6, 2018
- The Decision on Wholesale and Retail Businesses No. 1005/MOIC.ITD, dated May 22, 2015
- The Law on Enterprise No. 33/NA, dated December 29, 2022
- The Law on Notary No. 24/NA, dated December 29, 2022
- The Law on Business Competition No. 60/NA, dated July 14, 2015
- The Law on Income Tax No. 67/NA dated June 18, 2019
- The Law on Value Added Tax No. 67/NA dated June 20, 2018

When negotiating the terms of a franchise agreement, it is crucial for the parties to be fully aware of all relevant local regulations.

Franchise Agreements

The Decision on Wholesale and Retail Businesses officially recognizes franchises as a business type, allowing for general wholesale and retail activities under this model. While foreign investment in franchises is allowed, particular FDI requirements and restrictions must be adhered to. The minimum registered capital required from foreign investors in the retail and wholesale sector depends on their share equity held in the franchise. Additionally, certain business activities may impose further restrictions on the share ratio between foreigners and Lao nationals. In practice, the franchise agreement must be submitted together with the application for incorporation.

The Notary Law requires notarization of contacts of a certain value. As a result, it is recommended to have contracts notarized by the Notary Office of the Ministry of Justice or one of its related departments.

This notarization served as proof that the contract is valid under existing Lao laws and thus fully enforceable against third parties. Notably, there are no statutory precontract disclosure requirements in Laos.

Intellectual Property

Protection of intellectual property is crucial in franchisor-franchisee relationships and is largely governed by the Law on Intellectual Property and the Decision on Trademarks in Laos.

Although Lao law does not require trademarks to be registered before circulating goods or services in the country, registering a trademark offers significant advantages, particularly because Laos follows a first-to-file system, granting exclusive rights to the first person to register a mark. A registered trademark provides the owner with legal protection against infringement and enables the franchisor or franchisee to seek assistance from authorities in conducting seizures of counterfeit goods. Franchise agreements involving trademarks are governed by the Decision on Trademarks, which requires the notification of any authorization to use a trademark to the Lao Department of Intellectual Property (DIP) using the provided template. This notification, submitted either through the Provincial or Capital Department of Industry and Commerce or electronically, allows the licensee to use the trademark and take legal action on behalf of the trademark owner. The DIP will notify the licensee of the acknowledgment of such authorization in writing and publish it in the official gazette. If the licensee is the person who made the notification regarding the trademark use authorization, a copy of the acknowledgment notification must be sent to the licensor. While the Decision on Trademarks does not impose sanctions for failing to register such agreements, doing so can serve as proof of the licensee's rights in any legal matters.

Copyrights do not need to be registered in order to be protected by law, as the rights arise automatically when a work is created. However, an official notification claiming copyright ownership can be recorded with the Ministry of Industry and Commerce, and may be useful as evidence in case of a violation or dispute.

Trade secrets are expressly mentioned under the law on intellectual property and also do not require registration in order to be protected. They will remain protected as long as the information (1) remains confidential, (2) has trade value, and (3) is not easily accessible. However, it would be prudent to set out contract provisions regarding the relationship of the franchisor and franchisee regarding trade secrets and their protection.

Similarly, it can also be beneficial to ensure that franchise employees (including third-party contractors) are contractually informed of IP issues—for instance, through standard confidentiality, IP acknowledgment and assignment, and contingency clauses in employment contracts.

Good Faith and Competition

The Civil Code requires good faith in the performance of contracts. Though "good faith" is not legally defined or described, it can generally be construed as performing a contract without the intention to defraud the other party, or to act without malice.

Clauses that could be deemed anti-competitive also need to be treated with caution. For instance, imposing different prices or terms for transactions involving the same goods or services is prohibited by the Law on Business Competition. Similarly, Laos prohibits the imposition of terms and conditions through a sale or purchase agreement, as well as the act of forcing the performance of obligations that are not required by contract. This provision aims to protect franchisees from franchisors who may attempt to abuse their power during negotiations or during the performance of the contract. Finally, the Law on Business Competition expressly prohibits price fixing for operators in a position of market dominance. Franchisors are thus not permitted to impose a price related to their goods or services upon franchisees, except in very particular circumstances.

Noncompete clauses that amount to an absolute or excessive restraint of trade are not permitted. Typically, a reasonable restraint, narrow in scope and specific to the circumstances, is permitted. Despite the absence of case law defining a reasonable scope for a noncompete provision, provisions with a very narrow scope relating to specific circumstances would likely be enforceable. For these reasons, post-contractual noncompete clauses should be drafted carefully, identifying a reasonable and clearly defined scope.

Taxation

Under the Law on Income Tax No. 67/NA, dated June 18, 2019, a ten percent withholding tax applies to payments made with respect to dividends, and a five percent withholding tax applies to intellectual property royalty fees.

Taxation rates may differ from those prescribed in the law if the recipient of the payment is from a country that has signed a double taxation agreement with Laos. Currently, Laos has double taxation agreements with Belarus, Brunei, China, Indonesia, Luxembourg, Kuwait, Malaysia, Myanmar, North Korea, Russia, Singapore, South Korea, Thailand, and Vietnam.

Dispute Resolution

In Laos, there is no dispute resolution body with specific responsibility for handling franchise disputes. Generally, franchise operators in Laos prefer to remedy disputes by filing complaints with the relevant administrative bodies (determined by the nature of the dispute), instead of filing complaints with the Lao People's Court. Mediation is often considered a prerequisite to filing a complaint with the Lao People's Court, which is an option if the administrative remedy of the mediation process fails.

Laos is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Accordingly, foreign arbitral awards are recognized and enforceable in Laos, as long as they do not affect the sovereignty of Laos, contradict the country's laws, or affect the "peace and orderliness" of Lao society.

MYANMAR

Khin Myo Myo Aye ● Khin Yadanar Htay

Although there has been a dramatic change on foreign investment projects during the post-COVID-19 period and the country's states of emergency, the development of Myanmar's landscape for intellectual property—particularly the enforcement of Trademark Law—has encouraged new players to enter the franchising industry. Previously, both Western and Asian franchises in Myanmar predominantly operated in the food and beverage industry; however, in the last few years, the country has witnessed a growth spurt of franchise operations in the services and education sectors. Domestic franchising is still relatively uncommon. International franchise brands typically enter the Myanmar market by appointing a local master franchisee, which helps in dealing with legal and regulatory restrictions applicable to foreign investors as well as the challenges of understanding local business frameworks and infrastructure.

Myanmar does not currently have any specific legislation regulating franchise relationships, and there are no statutory, presale disclosure requirements. Nevertheless, franchise relations are subject to other relevant legislation on contracts and business operations, such as the Competition Law 2015, the Consumer Protection Law 2019, the Contract Act 1872, the Myanmar Companies Law 2017, and the Trademark Law 2019.

Franchise Agreements and Fees

In drafting, negotiating, and executing franchise agreements, a franchisor should be careful to observe the existing laws. Abusing bargaining power or imposing conditions that interfere in the franchisee's business operations may violate provisions of local law. For instance, charging different franchise fees to different franchisees may raise anti-competitive concerns, while requiring franchisees to buy products and services only from nominated suppliers may also be deemed a violation of the Competition Law 2015 in certain cases. In addition, restrictive covenants prohibiting franchisees from engaging in a similar business upon the expiration or termination of a franchise relationship need to contain carefully drafted limitations on the applicable term and geographical area.

Parties are free to set the fee and payment requirements in a franchise agreement. Typically, franchisees pay the initial and continuing fees (or management charges), as well as advertising contributions, required advertising spend, training fees, and other customary franchisee fees.

Initial fees and ongoing royalty fees are subject to a withholding tax payable by a nonresident foreign franchisor at a rate of fifteen percent and by a resident foreign or local franchisor at a rate of ten percent. For goods sold or services rendered as part of a franchise transaction by the franchisor, such as operational equipment and training fees, a withholding tax of 2.5 percent is applicable for a nonresident foreign franchisor; for a resident foreign or local franchisor, no withholding tax is payable. If there are existing double-taxation agreements in place, the withholding tax amount payable by nonresident foreigners may be reduced or exempted, subject to the discretion of the Ministry of Planning and Finance and the Internal Revenue Department. To date, Myanmar has entered into double-taxation agreements with India, Laos, Malaysia, Singapore, South Korea, Thailand, the United Kingdom, and Vietnam. Double-taxation agreements with Bangladesh and Indonesia have also been concluded but have yet to be ratified.

Intellectual Property

As in any jurisdiction, intellectual property should be a central concern in a franchise relationship in Myanmar. Many franchisors are rightly concerned that a former franchisee will utilize the knowledge and experience gained from running a franchise operation to open a competing business. To prevent this, it is vital for franchisors to protect themselves by using clear and comprehensive language in their franchise agreements. As part of this, franchise agreements should contain robust provisions prohibiting the disclosure and use of information, knowledge, and trade secrets obtained from the operation of the franchise. Disclosure of trade secrets is punishable under the Competition Law 2015 by imprisonment for up to two years, a fine of up to MMK 10 million, or both.

In 2019, Myanmar enacted a suite of intellectual property legislation, comprising the Trademark Law, Industrial Designs Law, Patent Law, and Copyright Law. Under the new intellectual property system, trademarks, industrial designs, and patent licenses must be recorded with the Department of Intellectual Property to be deemed enforceable in Myanmar. The Trademark Law came into effect on April 1, 2023, followed by the Industrial Design Law and Copyright Law on October 31, 2023. The Patent Law was brought into force on May 31, 2024. However, the possibility of enforcing a license via recordation in Myanmar is still pending unless the relevant IP is registered under the applicable IP law. Similarly, under the Science, Technology, and Innovation Law 2018, all agreements on technology transfers must comply with the terms set by the National Council for Science, Technology, and Innovation Development and must be registered with the designated registrar to be deemed enforceable.

Dispute Resolution

It is common for foreign franchisors in Myanmar to opt for the franchise agreement to be governed by foreign laws, and for disputes to be settled via arbitration outside of Myanmar, such as in Singapore under the Singapore International Arbitration Centre rules. Under the Arbitration Law 2016 and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (to which Myanmar is a signatory), foreign arbitral awards are recognized and enforceable by Myanmar courts, except in certain cases. For example, Myanmar courts may refuse to recognize a foreign arbitral award if the party against whom it is invoked can prove that a party to the arbitration agreement was incapacitated; the agreement concerned is not valid under the law to which the parties have subjected it; or the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Enforcement of a foreign arbitral award may be refused if the Myanmar courts find that the subject matter of the dispute is not capable of settlement by arbitration under Myanmar laws, or if the enforcement of the award would be contrary to the public policy of Myanmar. Therefore, unless the dispute arising from a franchise agreement falls within one of the limited exceptions of the Arbitration Law 2016, Myanmar courts are required to honor an election of international arbitration dispute resolution where an arbitration clause has been incorporated into the franchise agreement.

A foreign civil court judgment is enforceable in Myanmar under the Code of Civil Procedure if it was issued by a court of competent jurisdiction, was decided on merits, was not obtained by fraud, is not against the principles of natural justice, is in accordance with the principles of international law, and does not contradict any law in force in Myanmar.

THAILAND

Alan Adcock ● Chariyaphon Vachanavuttivong

Industry research indicates that there are currently more than 350 franchisors (the majority of which are foreign-owned) and more than 15,000 franchisees in Thailand. Some of the most popular franchise operations are in the food and restaurant sector, services, education, and retailing.

While there are no specific statutes governing franchising in Thailand, the Trade Competition Commission of Thailand has issued a set of guidelines in 2019 to regulate unfair trade practices in franchise businesses. The government has also been contemplating the enactment of the Franchising

Business Act. It is widely considered that Thailand may follow the China model as set out in the 2005 PRC Ministry of Commerce's Administrative Measures on Commercial Franchising and the subsequent 2007 Franchise Regulations. An important point to watch here will be whether Thailand follows the China model by requiring a franchisor to prove the viability of its business model by showing a record of profitability at two or more outlets before selling a franchise contract to a franchisee.

Franchise Agreements

The terms of a franchise agreement in Thailand will generally need to conform to the following laws:

- Civil and Commercial Code
- Trademark Act B.E. 2534 (1991), as amended by Trademark Act (No. 2) B.E. 2543 (2000) and Trademark Act (No. 3) B.E. 2559 (2016)
- Patent Act B.E. 2522 (1979), as amended by Patent Act (No. 2) B.E. 2535 (1992) and Patent Act (No. 3) B.E. 2542 (1999)
- Copyright Act B.E. 2537 (1994), as amended by Copyright Act (No. 2) B.E. 2558 (2015) and Copyright Act (No. 3) B.E. 2558 (2015)
- Trade Secrets Act B.E. 2545 (2002), as amended by Trade Secrets Act (No. 2) B.E. 2558 (2015)
- Unfair Contract Terms Act B.E. 2540 (1997)
- Trade Competition Act B.E. 2560 (2017)
- Act Relating to Price of Merchandise and Service B.E. 2542 (1999)
- Revenue Code B.E. 2481 (1938)

The parties must be well aware of all relevant local regulations when negotiating the terms of a given agreement. A deal between parties of equal bargaining power will generally not be disturbed by the Thai courts unless there is a clear public policy reason to do so.

A franchisor must be reasonable in setting terms, or the term may be held to be unenforceable as an unfair limitation on competition. For example, in the context of a franchising arrangement involving use of technology, a "tying arrangement" in which the franchisor requires the franchisee to purchase materials from the franchisor, or his or her agent, for use in production of a particular item without justifiable reasons may be seen as anticompetitive and may be unenforceable.

Empowered under the Trade Competition Act B.E. 2560 (2017), the Office of the Trade Competition Commission of Thailand recently issued its Guidelines for the Consideration of Unfair Trade Practices in Franchise Businesses in December 2019 (Franchise Guidelines), which is aimed at preventing franchisors from adopting overly restrictive and unfair contractual conditions that could cause damage to franchisees. For example, franchisors are prohibited from stipulating unjustified restrictions on the franchisees, such as forcing the latter to exclusively buy products or services that are irrelevant to the operation of the franchise business from a source designated by the franchisors. Franchisors are also not allowed to prevent franchisees from offering discounts on perishable items that are close to their expiration, and neither are franchisors allowed to discriminate against their franchisees by stipulating different conditions without justifiable reasons.

The Franchise Guidelines also impose precontractual disclosure requirements on Thai franchisors and master franchisees of foreign franchisors, specifying that franchisors must provide details on matters concerning franchise fee payments, intellectual property rights, renewal and termination terms, and the model of the franchising system in a disclosure document or letter to the franchisee before entering into a franchise agreement. There is currently no prescribed format or timeline for this disclosure. Under the Franchise Guidelines, franchisors who wish to enter the market by setting up a branch on their own are also required to offer right of first refusal to the franchisee operating in that area.

Intellectual Property

One of the most important components of a franchise system is the trademark portfolio of the franchisor. The proprietor of a registered trademark may grant a license to other persons to use it for any or all of the goods or services for which it was registered.

A trademark license agreement, which is typically a separate stand-alone agreement but may also be contained within the franchise agreement itself, must be registered with the Department of Intellectual Property (DIP). The unrecorded use of a trademark by a franchisee or licensee will not be considered proof of use of that trademark for the purposes of defending the franchisor or licensor's registered trademark from a third party trademark cancellation action based on alleged non-use of the trademark. Both the franchisor/licensor and the franchisee/licensee may take action against infringers, although the franchisee's/licensee's ability to take action is restricted by the terms of the agreement. Since Thailand is a freedom-of-contract jurisdiction, the contracting parties can adopt any terms or conditions they deem appropriate concerning the ability to take action, as long as the terms and conditions are legal, possible, and not contrary to public order or good morals.

Another important component of some franchises is the franchisor's patented technology. In Thailand, the law of patents is primarily enshrined in the Patent Act B.E. 2522 (1979). Section 41 of the current Patent Act requires that a patent license agreement be similarly registered with the DIP.

A franchisor must be vigilant to identify and carefully control the use and disclosure of its proprietary trade secrets, such as secret know-how, formulas, recipes, inventions, client lists, and sales data. This can be done in a separate nondisclosure or confidentiality agreement or with an airtight confidentiality provision within the franchise agreement itself, or both. In Thailand, trade secrets are protected under the amended Trade Secrets Act B.E. 2545 (2002). Provisions in this law protect against unauthorized disclosure of trade secrets and enable the court to issue injunctions against disclosure of trade secrets.

The TSA provides for broad protection and severe penalties for trade secret infringement. However, one can only resort to the TSA for enforcement purposes if careful, demonstrable steps have been taken to maintain the secrecy of whatever proprietary information is in dispute. The expansion of such protection should be viewed as a benefit for trade secret owners in seeking remedial action for unauthorized disclosure of secrets.

VIETNAM

Tu Ngoc Trinh ● Nu Thi To Nguyen

Franchising has become increasingly commonplace in Vietnam in recent years. International franchise brands are now commonly seen in Vietnam's major cities, with particular prominence in the fields of food and beverage, education, fashion, and convenience stores. As of May 2024, the Ministry of Industry and Trade had granted over 330 franchise licenses, with the dominant franchise business sectors being food and beverage (51%), fashion (19%), education (12%), retail stores (4%) and other services (14%).

With the franchise model now well established in restaurants and retail, areas such as services, entertainment, and technology are expected to develop and follow suit.

Direct franchising is usually used in domestic franchises. Overseas franchisors expanding into Vietnam have used a variety of franchising models, ranging from direct franchising methods (for example, multi-unit or development agreements) to master franchise agreements. Based on our experience, single-unit franchising methods are uncommon.

There are no specific laws in Vietnam to encourage franchising. Franchising is governed by the Commercial Law, along with the following implementing legal instruments:

- Decree 35/2006/ND-CP, as amended by Decree 120/2011/ND-CP and Decree 08/2018/ND-CP Decree 35).
- Decree 98/2020/ND-CP.
- Circular 09/2006/TT-BTM, as amended by Circular 04/2016/TT-BTC (Circular 09)

The Commercial Law vests control of the business operations with the franchisor, and the financial obligation to perform such business operations with the franchisee. This arrangement can create a significant financial burden for the franchisee if the franchisor decides to change the layout or design of the operation outlet, resulting in a substantial change to the franchisee's financial obligations. Regulations do require the franchisor to inform its franchisees of any potentially consequential changes, but they do not provide legal means for franchisees to refuse the changes or escape from the resulting obligations.

The offer and sale of franchises is also likely to trigger Vietnam's rules relating to mergers and acquisitions. Since there is no single body of legislation governing mergers and acquisitions, several areas of law (such as investment, company, competition, securities, tax, and foreign exchange law) may apply. The ongoing relationship between a franchisor and franchisee is also likely to be affected by several areas of law, including intellectual property and contract law.

Franchising activities in Vietnam must comply with the country's competition laws. Under Decree 98/2020/ND-CP, if a commercial franchise transaction shows signs of violation of the regulations on anticompetitive activities, provisions of the competition laws on investigation and handling of the violation will be applied. The most recent Law on Competition, which took effect on July 1, 2019, contains a number of provisions that could restrict franchising activities. It is especially restrictive of agreements that restrain technical or technological development, or agreements barring trade with outside parties, and prohibits various price fixing, supply, exclusivity, and other potentially competition-lessening arrangements if such agreements "have or potentially have the effect of significantly restricting competition in the market."

The primary regulatory authority responsible for enforcing franchising laws and requirements in Vietnam is the Ministry of Industry and Trade (MOIT). All franchising activities from overseas into Vietnam must first be registered with the MOIT before they are carried out.

Franchise Agreements

Franchising regulations require the franchise agreement to be made in Vietnamese. Thus, foreign franchisors typically require that the franchise agreement be prepared in both a foreign language (e.g., English) and Vietnamese.

When preparing to enter into a franchising agreement, franchisors and franchisees generally have the right to freely negotiate the agreement's terms and conditions, including their rights and obligations toward one another. However, general contracting principles apply as follows:

- Parties are free to enter into contracts provided that the contracts are consistent with law and social morals; and
- The contracts must be entered into on a voluntary basis, in good faith, and with equality, goodwill, cooperation, and honesty.

Regarding precontractual disclosure requirements, franchisors must provide a copy of the franchise agreement form and a franchise disclosure document to the proposed franchisee at least fifteen business days before the signing of the agreement. The franchise disclosure document should include general information on the franchisor (such as incorporation details), initial costs to be paid by the franchisee, rights and obligations of the franchisor and the franchisee, and a description of the franchise system. However, it does not include any information on the franchisee. In addition, the proposed franchisee is responsible for providing all reasonably requested information to the franchisor. As for local sub-franchising, only the local sub-franchisor will be under these various regulatory obligations, rather than the overseas franchisor and IP owner.

Noncompete covenants are not expressly prohibited by law and are commonplace in franchise agreements. However, enforcement of these covenants is relatively untested.

A franchisor can restrict a franchisee's freedom to sell, transfer, assign, or otherwise dispose of the franchised business. It is key to ensure that franchisors have a broad discretion to reject the sale, transfer, or assignment of the franchised business. Vigilance and responsiveness are equally important because Vietnamese law presumes that the franchisor has given its approval if it does not give a written response to the franchisee within fifteen days of receipt of a request for an assignment.

Parties may freely decide on the payment of fees, such as franchisee or initial fees, continuing fees, and advertising contributions. Interest can be charged on overdue payments, and if the governing law of the franchise agreement is Vietnamese law, there should be a limitation on the amount of interest that can be charged.

Intellectual Property

The assignment of intellectual property rights is part of the franchising agreement terms and can thus be decided freely by the parties. Licenses for trademarks, industrial design rights, and patent rights can be registered with the Intellectual Property Office of Vietnam (IP Office). Under the IP Law, a trademark license agreement is binding on the involved parties as well as third parties, even without recordal at the IP Office. However, licenses for other industrial property rights, such as patents, must still be recorded with the IP Office to be legally binding on a third party.

Vietnamese law does not have any specific definitions of know-how, but generally, business secrets are protected by law and by nature are not registered.

Dispute Resolution

For the settlement of disputes that may arise in relation to franchising operations, the Civil Code allows for a transaction involving at least one foreign organization to be governed by the laws of a foreign country if the parties so agree. Therefore, if one of the parties to the franchise agreement is an offshore company (e.g., the franchisor), they are allowed to select the governing law of the franchise agreement as the foreign law. However, the foreign law must not be contrary to the "basic principles of Vietnamese law"—a phrase that has been interpreted very broadly. Even seemingly minor inconsistencies could render contract terms unenforceable. Therefore, choosing foreign law as the governing law requires that the franchise agreement be closely reviewed to ensure compliance with Vietnamese law.

Foreign arbitral awards and some foreign court judgments can be enforced in Vietnam. As Vietnam is a member of the New York Convention, dispute resolution by foreign arbitration can be enforced in Vietnam if it is recognized by a Vietnamese court. However, a foreign court judgment may be enforced in Vietnam on a treaty or reciprocal basis. The particular dispute resolution forum thus needs to be selected carefully, as the choice of forum can greatly impact the chances of successfully enforcing an award against a local franchisee.

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