

# Franchise

in 33 jurisdictions worldwide

# 2013

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### Contributing editors

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DLA Piper LLP (US)

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### Chief subeditor

Jonathan Allen

### Subeditors

Davet Hyland  
Caroline Rawson

### Editor-in-chief

Callum Campbell

### Publisher

Richard Davey

### Franchise 2013

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Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
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# Vietnam

Thom Thi Mai Nguyen and Huong Thi Thanh Nguyen

Tilleke & Gibbins

## Overview

### 1 What forms of business entities are relevant to the typical franchisor?

A franchise in Vietnam is conducted through a franchise agreement and thus, essentially, is a contractual arrangement. There is no requirement for a foreign franchisor to establish a commercial presence in Vietnam, including the establishment of a corporate entity. Typically, a foreign franchisor with significant business in Vietnam establishes a representative office to oversee its franchise operations in Vietnam rather than establishing a corporate entity. However, technically, a representative office cannot engage in any 'profit-making activity,' including most forms of sales and marketing. For this reason, foreign franchisors may consider establishing a corporate entity because franchisors may provide many of their services under the 'management consultancy' business line.

### 2 What laws and agencies govern the formation of business entities?

The Law on Investment and the Law on Enterprises passed by the National Assembly of Vietnam in 2005 are the primary laws governing the formation of business entities. Meanwhile, the Ministry of Planning and Investment (MPI) and the Department of Planning and Investment (DPI) at the provincial or city level are the main authorities granting licences of establishment for an entity. The involvement of ministries or departments in other relevant industries may occur upon the request of the MPI or DPI for obtaining a professional appraisal in relation to granting an establishment licence for an entity.

### 3 Provide an overview of the requirements for forming and maintaining a business entity.

Investors will need to prepare an application dossier to obtain an investment certificate for the company. The contents of the application dossier may vary depending on the specific type of entity established, the location and size of the project, and the size and method of capital contribution.

A company may take the form of a one-member limited liability company (1LLC), a multiple-member limited liability company (MLLC), or a shareholding company (SC). A 1LLC is an enterprise owned by one organisation or individual. The owner of the 1LLC shall be liable for all of the 1LLC's debts and other property obligations within the amount of the charter capital of the 1LLC. A 1LLC may not issue shares or reduce its charter capital. A MLLC is an enterprise owned by multiple organisations or individuals called members, with the condition that there are no more than 50 total members. A member shall be liable for the debts and other property obligations of the MLLC within the amount of capital that the member has undertaken to contribute to the MLLC. A MLLC may not issue shares, but, unlike a 1LLC, it may reduce its charter capital two years after formation. A SC is an enterprise in which the charter

capital shall be divided into equal portions called shares. Shareholders may be organisations or individuals, with a minimum of three shareholders and no restriction on the maximum number of shareholders. A shareholder is liable for the debts and other property obligations of the SC only within the amount of capital contributed to the SC. With a few exceptions, shareholders may freely assign their shares.

The application dossier shall be submitted to the DPI of the province or city where the company locates its headquarters. The licensing authority is required to issue the investment certificate within 15 to 30 working days from the receipt of a completed application dossier. In practice, this period is usually 60 to 180 calendar days, depending on the nature of the application.

After the licence for establishment is granted, the company will need to carry out the following procedures as required by statute to maintain the company's operations:

- making a company seal and registering it with the local police authority;
- opening a bank account at an authorised local bank;
- publishing an announcement of the company's establishment in three consecutive issues of a local newspaper;
- registering the company's accounting system with the Ministry of Finance if the company's accounting system is different from the Vietnamese accounting system; and
- registering trademarks and publishing product specifications, if applicable.

The company will also need to handle related matters such as recruiting and hiring local employees and reporting such to the local Labour Department, registering contributions of social and health insurance for local employees with the social insurance authorities, obtaining social insurance books and health insurance cards, and obtaining visas and work permits for foreign employees. Tax filing and insurance reporting on a monthly basis are also required.

### 4 What restrictions apply to foreign business entities and foreign investment?

Foreign investment is prohibited in certain sectors, such as pharmaceutical distribution. In certain other sectors, such as banking, securities, insurance, mining, telecommunications, real estate, ports and aviation, foreign investment is subject to conditions. Some typical types of conditions include: conditions on the nationality of foreign investors in trading and logistics, which require that the foreign investor be from a country that is a party to an international treaty to which Vietnam is a member and is undertaking to open such sectors; conditions on the experience or licensing of investors in the operating sectors, such as insurance, banking, security, or securities services; and conditions on the limitation of foreign equity in Vietnamese companies such as listed companies, trading service enterprises, enterprises engaging in certain business activities such as banking,

oil and gas, aviation, publishing, education, and securities. Other conditions also apply in employment areas such as recruitment of foreign employees.

- 5** Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

If a foreign franchisor is a business entity in Vietnam such as a limited liability company, then it is subject to corporate income tax (CIT) at the rate of 25 per cent. A foreign franchisor without a business entity in Vietnam will be considered a foreign contractor in Vietnam on the basis of the franchise agreement signed with Vietnamese franchisees. All fees generated under the franchise agreement, including royalties, administrative fees, and advertising fees, are subject to foreign contractor tax. The two components of foreign contractor tax are value added tax (VAT) and CIT.

Taxes applicable to a foreigner will be withheld at the source of payment by the Vietnamese franchisee, and the franchisee will pay the tax amounts to the tax authority on the franchisor's behalf. Circular 134 requires the Vietnamese franchisee to register the payment of the foreign contractor tax on behalf of the foreign franchisor.

- 6** Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

No. While the relationship between a franchisor and a franchisee is based on a franchise agreement, an employment relationship under Vietnamese laws is based on an employment contract. Thus, as long as the franchisor does not engage in a labor contract with the franchisee's employees, and the franchise agreement expresses no such employment relationship, then there is no risk.

- 7** How are trademarks and know-how protected?

Only trademarks and know-how that are registered in Vietnam can be licensed in Vietnam. Thus, it is always prudent to register one's trademarks and know-how as early as possible, especially in light of the fact that Vietnam gives priority to the 'first to file.' Unregistered trademarks may be protected in Vietnam provided that they are considered 'well known' in Vietnam. However, the enforcement of well-known trademarks that are unregistered in Vietnam is time-consuming and inefficient.

- 8** What are the relevant aspects of the real estate market and real estate law?

Generally, the real estate market and real estate law do not affect franchising activities, except for when the franchisor wishes to acquire a franchised business which includes real estate. In general, the law does not allow a franchisor to directly purchase assets, such as buildings, for the sole purpose of buying, selling, or leasing assets on the land. However, it is possible if the franchisor invests in an existing asset to improve it.

#### **Laws and agencies that regulate the offer and sale of franchises**

- 9** What is the legal definition of a franchise?

The legal definition of a franchise refers to a commercial activity whereby a franchisor authorises and requires a franchisee to conduct on its own behalf the purchase and sale of goods or provision of services. In accordance with this activity, the purchase and sale of goods or the provision of services must be conducted according to the method of business organisation specified by the franchisor, and

must be associated with the trademark, trade name, business know-how, business mission statements, business logo and advertising of the franchisor, and, finally, the franchisor has the right to control and offer assistance to the franchisee in the conduct of the business.

- 10** Which laws and government agencies regulate the offer and sale of franchises?

The offer and sale of franchises are governed by the Commercial Law, Decree 35/2006/ND-CP, and Circular 09/2006/TT-BTM, which provides details for implementation of the Commercial Law on franchising activities. The Ministry of Industry and Trade (MOIT) and the Department of Industry and Trade (DOIT) are both involved in the registration of franchise activities. Specifically, the MOIT shall register franchising activities from overseas into Vietnam. Meanwhile, the DOIT of the province or city of central authority where the proposed franchisor registers its operations shall be responsible for the management of domestic franchising activities.

- 11** Describe the relevant requirements of these laws and agencies.

The relevant requirements of these laws include the key issues in relation to franchise business, including: conditions for franchising, franchise agreements, franchise disclosure documents, and registration requirements for franchise activities.

Under these laws, franchisors are subject to certain conditions, including: either a franchisor or a sub-franchisor must have been in operation at least one year; the franchised goods or services must not be prohibited from sale or supply and must be within the business lines registered with the authorities; and the franchising activity must have been registered with the competent authority.

#### **Franchise agreement**

A franchise agreement for a foreign franchise in Vietnam is required to be made in Vietnamese. A copy of the franchise agreement template and a copy of the franchise description document must be provided to the franchisee at least 15 days before the signing date of the franchise agreement. The licensing of industrial property rights is normally provided in a separate contract and is governed by a separate law on industrial property.

#### **Franchise disclosure**

Under these laws, the document for franchise disclosure is legally known as the 'franchise description document' (FDD). The FDD must be in the statutory form, which requires the franchisor to disclose information about the franchisor, trademarks or intellectual property rights, the initial costs of the franchisee, other financial obligations of the franchisee, the initial investment of the franchisee, the obligations of each party, the market, the franchising system and the financial report of the franchisor. The basic terms and conditions of the franchise agreement are also requested to be disclosed.

#### **Registration of franchising activity**

Franchising activities must be registered with the MOIT. The MOIT is responsible for the registration of franchising activities from outside of Vietnam, while the DOITs of cities and provinces are competent for the management of domestic franchising. An application dossier for registration includes an application in the statutory form, the FDD and other supporting documents. A response to such registration from the authority is required to be issued within five days upon submission of the complete application dossier. However, this time limit is normally much longer due to the delay from the competent authority.

**12** What are the exemptions and exclusions from any franchise laws and regulations?

There are no exemptions and exclusions from any of these laws and regulations on franchise activities. Accordingly, any franchise activities must follow these laws and regulations.

**13** Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

Several requirements must be met before a franchisor may franchise in Vietnam. Namely, a prospective franchisee must be registered to engage in a line of business that is suitable with the goods or services contemplated by the franchise agreement. A foreign franchisor must also have been in operation for at least one year prior to franchising in Vietnam. Similarly, a Vietnamese franchisee must operate a franchise for at least one year in Vietnam before it may sub-franchise. Moreover, the goods or services to be franchised must not be banned from trade under Vietnamese law.

**14** In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

The sub-franchisor will have to make pre-sale disclosures to sub-franchisees in a sub-franchising structure. Further to the franchisor's obligation to provide certain information to the franchisees, a sub-franchisor must also provide a sub-franchisee with written information, including: information about the franchisor; contents of the master franchise agreement between the franchisor and the sub-franchisor; and options for dealing with the franchise agreement between the sub-franchisor and the sub-franchisee in case the master franchise agreement is terminated.

**15** What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

A franchisor needs to register its franchise activities before franchising to Vietnam. A disclosure document which includes the disclosure of basic terms and conditions of the franchise agreement is also required to register. A copy of such a franchise agreement form and franchise disclosure document must be provided to the proposed franchisee at least 15 business days before the date of entry into the franchise agreement (unless the franchisor and franchisee have some other agreement). The proposed franchisee is also responsible for providing all reasonably requested information to the franchisor in order for the franchisor to make a decision about whether to grant the franchise to the proposed franchisee.

The franchisor is required to update the franchisee on any important changes to the franchise system which affect the franchise business of a franchisee. Should any changes occur to information stated in part A of the FDD, information on the legal status of the foreign franchisor, or information on the relevant industrial property protection certificates in Vietnam or abroad (if applicable), the foreign franchisor must notify the MOIT within 30 days of the change. In addition, the foreign franchisor must periodically submit a report to the MOIT no later than 15 January of each year to report changes in the information stated in part B of the franchise description document (such as initial fees payable by the franchisee, other financial obligations of the franchisee, financial report of the franchisor, etc).

**16** What information must the disclosure document contain?

The franchisor must provide an FDD and a model franchise agreement to the potential franchisee. The Ministry of Trade provides regulations on and announces which items must be included in the FDD, such as general information about the franchisor, trademarks on goods or services and intellectual property rights, initial costs payable by the franchisee and other financial obligations, obligations of the franchisor, a description of the market of the goods or services to be franchised, and audited financial reports. A standard form for the FDD is included in Circular 09.

**17** Is there any obligation for continuing disclosure?

A franchisor is obligated to provide continuing disclosure to all franchisees upon any important change to the franchise system which affects the franchise business of a franchisee, and this notification shall be provided immediately. As discussed in question 15, moreover, a franchisor is obligated to notify the MOIT of any changes of certain registered information either annually or ad hoc, depending on which information changes.

**18** How do the relevant government agencies enforce the disclosure requirements?

This requirement is enforced through the prerequisite requirement of registration of the disclosure document with the MOIT. Without the registration of franchise activity which includes a registration of the disclosure document in a statutory form, a franchisor is not permitted to conduct franchising in Vietnam.

**19** What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

While there are no specific regulated actions that franchisees can take to obtain relief for the franchisor's violations of disclosure requirements, in general, the franchisee can lodge a complaint with management authorities (ie, the MOIT or the DOIT). A violation of the franchisor regarding disclosure requirements can lead to a monetary fine. If such violation causes damage to the franchisee, then the franchisor must compensate for such damages as per the actual damages incurred by the franchisee. A failure to follow disclosure registration requirements can also lead to the franchise agreement being voided.

**20** In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

Vietnamese law is silent on this type of liability. Therefore, how the liability is shared, who is subject to such liability, and what is the liability, will be upon agreement between the franchisors and sub-franchisors in the franchise agreements.

**21** In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

The Civil Code of Vietnam provides principles for the establishment of a civil relationship, covering franchise relationships. These principles include, among others, the principle of free and voluntary

undertaking and agreement, the principle of equality, the principle of goodwill and honesty, and the principle of respect for good morals and traditions. In addition, a breach of legal prohibitions or contravention of social morals, falsification, misunderstandings, deception, or threats will lead to the invalidation of the transaction under the civil laws of Vietnam (see question 35).

- 22** Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub franchisee regarding predecessors, litigation, trademarks, fees etc, are there any general rules on pre-sale disclosure that might apply to such transactions?

No other general rules on pre-sale disclosure apply to such franchise transactions.

- 23** What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under the franchise sales disclosure laws?

The franchisee can lodge a complaint with the competent authorities if a franchisor engages in fraudulent or deceptive practices related to the offer and sale of franchises. An administrative sanction may be applied in this case. The franchisee can bring the case to the competent court and the franchisor may have to compensate for any damages caused by the franchisor's fraudulent or deceptive practices to the franchisee. The franchisee can also resolve the case through criminal proceedings, which can lead to imprisonment for the franchisor.

#### **Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship**

- 24** Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

Yes, there are. In Vietnam, the commercial law and its implementing regulations directly and specifically regulate the relationship between the franchisor and franchisee. In particular, at present the franchise relationship is governed by Vietnam's Commercial Law (adopted in 2005 and in effect since 1 January 2006), Decree 35/2006/ND-CP (issued on 31 March 2006), Circular 09/2006/TT-BTM (issued on 25 May 2006), Decision 106/2008/QD-BTC (issued on 17 November 2008), and Decree 120/2011/ND-CP (issued on 16 February 2011).

- 25** Do other laws affect the franchise relationship?

Other laws generally do not affect the franchise relationship. However, where the franchise agreement refers to other areas of the law, then such laws may affect the franchise relationship. Some areas which often appear in a franchise agreement include but are not limited to the following:

#### **Intellectual property law**

The franchisor is obligated to ensure the intellectual property rights for the franchised goods or services. A failure of the franchisor to do so can be a legal basis for the franchisee to unilaterally terminate the franchise agreement.

#### **Commercial law**

Under Vietnam's WTO commitments, there are currently some limitations for foreign franchisors on distribution services, including wholesale trade services and retailing services. These limitations may impact the franchise agreement where it refers to the acquisition by the franchisor of the franchised business, including retail shops.

#### **Laws on real estate**

As mentioned in question 8, due to certain limitations on a foreign franchisor directly purchasing assets such as buildings for the sole purpose of buying, selling, or leasing assets on the land, the relevant terms and conditions between the franchisor and the Vietnamese franchisee may be affected.

- 26** Do other government or trade association policies affect the franchise relationship?

The government's policies in the area of franchising undoubtedly affect the franchise relationship. For instance, Vietnam recently opened the market to trading activities, including franchise activity. This has created favourable conditions for foreign franchisors to access Vietnam's market. Except for this general effect, it seems that the government policies do not affect the franchise relationship in a specific way. Rather, the applicable legal regulations will take that role.

Vietnam currently has a Franchise Business Association. However, this association is not well known and has a limited number of members. There is no information on whether this association has its own policies. However, in general, the trade association policies in Vietnam are not a strong binding tool to affect a relationship within the enterprise.

- 27** In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

The circumstances under which a franchisor may terminate a franchise relationship are governed by the franchise regulations issued by Vietnam's government and the franchise agreement itself. According to current franchise regulations of Vietnam, a franchisor has the right to unilaterally terminate the franchise agreement if:

- the franchisee no longer possesses the licence or equivalent document required by law in order to carry out the franchise business;
- the franchisee becomes bankrupt or is dissolved in accordance with the laws of Vietnam;
- the franchisee commits a serious breach of law which may significantly damage the reputation of the franchise system; or
- the franchisee fails to remedy a non-fundamental breach of the franchise agreement within a reasonable time after the franchisee has received written notice from the franchisor to request remedy of such breach.

In addition to the above-mentioned grounds, the franchisor may terminate the franchise agreement in other circumstances as agreed by the parties in the franchise agreement, provided that these agreements on termination are not contrary to Vietnamese law. In our experience, the parties in the franchise agreement are fairly free in reaching this kind of agreement. There is no specific legal restriction on a franchisor's ability to terminate a franchise relationship.

- 28** In what circumstances may a franchisee terminate a franchise relationship?

Similar to the termination right of the franchisor, the circumstances under which a franchisee may terminate a franchise relationship include those provided by law and those agreed to in the franchise agreement.

According to the current franchise regulations of Vietnam, the franchisee has the right to unilaterally terminate the franchise agreement if the franchisor fails to:

- provide the franchisee with the disclosure document on the franchise system (this document is required to be prepared in a standard form and must be provided to the franchisee for consideration at least 15 working days before the execution of the franchise agreement);
- provide the franchisee with initial training and ongoing technical assistance to enable the franchisee to operate the business in accordance with the franchise system;
- design and lay out the goods or service sales outlet at the franchisee's expense;
- ensure the intellectual property rights with respect to the objects stipulated in the franchise contract; or
- accord equal treatment to franchisees in the franchise system.

In addition, the parties can agree in the franchise agreement on other circumstances for termination.

- 
- 29** May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

Vietnamese law does not force the franchisor to continue a franchise relationship with a franchisee once the franchise agreement expires. This means a franchisor can refuse to renew the franchise agreement with a franchisee for any reason, unless otherwise agreed by the parties in the franchise agreement. In this case, the franchisor must comply with the provisions set out in the franchise agreement. In our experience, the parties to a franchise agreement normally agree on the conditions which must be satisfied by the franchisee in order to renew the franchise agreement. Failure to comply with the agreed-upon conditions of the franchisee will give rise to a right to refuse the renewal of the franchise agreement.

Please note that a franchisor cannot refuse to renew a franchise agreement and agree to renew another franchise agreement if the performance of the franchisees in these franchise agreements is the same, because it is the obligation of the franchisor to accord equal treatment among franchisees in the franchise system.

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- 30** May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

Yes, the franchisor can make restrictions in the franchise agreement. However, please note that these restrictions must be applied to all franchisees. Bestowing equal treatment to franchisees in the franchise system is one of the basic obligations of the franchisor under the current laws of Vietnam. If the franchisor imposes the restrictions on franchisees in Vietnam only, and if they discover this issue, the franchisees shall have the right to terminate the franchise agreements.

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- 31** Are there laws or regulations affecting the nature, amount or payment of fees?

There are no laws or regulations affecting the nature, amount, or payment of fees in a franchise agreement. Vietnam's commercial law gives the liberty to the franchisor and franchisee to negotiate and agree on the franchise fees. However, in terms of monetary issues, please note that the level of penalty and damages for loss are subject to certain restrictions. In particular, Vietnam's Commercial Law provides that the level of penalty with respect to any one breach of a contractual obligation or the total amount of penalty with respect to multiple breaches can be agreed upon by the parties in the contract, but must not exceed 8 per cent of the value of the contractual obligation which is the subject of the breach. Regarding the compensation of damages for loss, this law provides that the value of the damages

for loss comprise the value of the actual and direct loss suffered by the aggrieved party and the direct profits which the aggrieved party would have earned in the absence of the breach. The responsibility to compensate arises only when:

- there is a violation or breach of the contract;
- there is actual damage; and
- the breach of contract is the direct cause of the damages.

Thus, when negotiating the penalty and damages for loss clauses in the franchise agreement, the franchisor should take into account these provisions of Vietnam's Commercial Law.

- 
- 32** Are there restrictions on the amount of interest that can be charged on overdue payments?

According to Vietnam's Commercial Law, the aggrieved party has the right to demand interest on overdue payments at the average interest rate applicable to overdue debts in the market at the time of such payment for the delayed period, unless otherwise agreed by the parties or otherwise provided by law. At present, there is no restriction on the amount of interest charged on overdue payments applicable specifically to the franchise sector. Thus, the franchisor and franchisee can agree on the interest rate themselves.

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- 33** Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

The payment to the franchisor in the franchisor's domestic currency is generally allowed in Vietnam. Although payment by foreign currency is strictly controlled by Vietnam's government, where only eligible transactions and organisations and individuals are allowed to do so, payments made under a franchise agreement seem to be acceptable to Vietnamese authorities. The issue is that, at present, Vietnam has a list of current transactions in which payment in a foreign currency is allowed. However, since the list was enacted in 1999, it has not been updated with recent changes in other legal regulations and consequently the franchise fee is not clearly listed in the list. Instead, the list refers to costs for technical, management, maintenance and repair consultant services (including licensing fees, technology transfer fees, administrative fees and trademark use fees) and similar transactions. Thus, if broadly interpreted, the payment of franchise fees in foreign currency is an allowable transaction under the laws of Vietnam.

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- 34** Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants are often found in franchise agreements as well as in other commercial contracts. Legally, this kind of agreement is not restricted or prohibited by Vietnamese law. Vietnam also provides a legal framework to protect personal and business confidentiality. Therefore, such covenants theoretically are enforceable in Vietnam. However, in practice, to the best of our knowledge, there have not been any such claims regarding confidentiality covenants submitted to the courts in Hanoi and Ho Chi Minh City, the two biggest cities of Vietnam. An official at the Supreme Court of Vietnam has also confirmed that he is not aware of any cases regarding this issue in the Supreme Court.

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- 35** Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

As a civil law system, Vietnam does not have the 'good faith' concept. Alternatively, the Civil Code of Vietnam provides principles for the establishment of a civil relationship, covering franchise relationships. These principles comprise, among others, the principle of free and

voluntary undertaking and agreement, the principle of equality, the principle of goodwill and honesty, and the principle of respect for good morals and traditions. In addition, the Civil Code provides that a civil transaction will be considered invalid due to certain reasons, such as a breach of legal prohibitions or contravention of social morals, falsification, misunderstandings, deception, or threats.

An invalid civil transaction will not give rise to civil rights and obligations of the parties after the date that the transaction is entered into. The parties will restore everything to its original state and must return to each other what they have received. If restitution cannot be made in kind, it may be paid in money, except where the transacted property, benefits, and income which had been received are confiscated in accordance with the law. The party at fault which caused the damage must compensate the injured party.

**36** Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

It appears that franchisees are not considered consumers for the purpose of consumer protection in Vietnam. The Law on Consumer Protection defines the ‘consumer’ as a person purchasing or using goods and services with the aim of consumption for living purposes by an individual, family, or organisation. The use of franchising services provided by the franchisor or the franchisees is not clearly for ‘living purposes’.

**37** Must disclosure documents and franchise agreements be in the language of your country?

Yes. The franchise regulations clearly state that the franchise agreement must be in Vietnamese. Although the regulations are silent on the language of the disclosure document, this document is also required to be in Vietnamese because it must be submitted to the Ministry of Industry and Trade for registration.

**38** What restrictions are there on provisions in franchise contracts?

Generally, except for some restrictions provided by laws which the parties must comply with, franchisors and franchisees are allowed to freely agree on the terms and conditions of franchise agreements, such as duration, territories, prices, governing law or dispute resolution.

At present, the restrictions which may be applicable to provisions in a franchise agreement under Vietnamese law are found in scattered laws and general principles and are not regulated in any specific legal document. For instance, the law requires that the franchise agreement must be in Vietnamese. Thus, the provision on language of the franchise agreement must be amended to comply with this requirement. In some franchise agreements, parties may agree that the franchisor shall have the right to buy out the franchise during the term of the agreement via a predetermined valuation. This provision may cause problems under Vietnamese law. Vietnam’s commitments to the WTO do not provide any restrictions on a foreign investor to establish a company for owning a franchised store. However, to start the operation of such stores under the ownership of the franchisor, it would require the franchisor to establish a distribution company in Vietnam, for which procedures could take three to six months from preparation to obtaining an investment licence. Furthermore, a foreign-owned company is entitled to open one retail outlet when applying for its investment licence. Whether other outlets may be opened depends on an Economic Needs Test (ENT), which will be considered by the licensing authority at its sole discretion. Therefore, the right to open other retail outlets is not guaranteed.

**39** Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

Competition law in Vietnam primarily falls under the Law on Competition No. 27/2004/QH11 passed by the National Assembly of Vietnam on 3 December 2004 (Law on Competition) and its implementing regulations. The Law on Competition applies to foreign companies and individuals conducting business or operating in Vietnam as well as domestic companies and Vietnamese nationals. However, note that at present there is no clear guidance under Vietnamese law to determine when foreign companies are considered to be operating in Vietnam for the purposes of the Law on Competition. Therefore, whether the franchise relationship would mean that the franchisor is ‘operating in Vietnam’ is still questioned.

If, through a franchise relationship, the franchisor is considered a foreign company operating in Vietnam and thus is subject to the competition laws of Vietnam, the following should be noted:

Pursuant to the Law on Competition, prohibited anti-competitive behaviours include:

- agreements in restraint of competition;
- abuse of dominant market positions and monopolies; and
- unfair competitive practices.

Among these prohibited behaviours, the first group (agreements in restraint of competition) seems to be relevant to franchisors. The agreements in restraint of competition may include agreements either directly or indirectly fixing the price of goods and services; agreements to share consumer markets or sources of supply of goods and services; agreements to restrain or control the quantity or volume of goods and services produced, purchased, or sold; agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services or to force other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract.

In some franchise agreements, there are clauses limiting the prices franchises may charge to their customers, restricting sources from which a franchisee may purchase or lease goods or services, or restricting the kind of customers the franchisee may serve, etc. However, the determination regarding whether these kinds of agreements are considered ‘agreements restraining competition’ is solely decided by the Vietnam Competition Authority, which will base its conclusion on various factors.

To enforce the competition regulations, the Law on Competition provides a separate procedure for handling competition-related complaints. Pursuant to this procedure, individuals or organisations who have their interests harmed by a violation of the competition regulations can initiate a complaint. The Vietnam Competition Authority will receive and deal with the complaint. The procedure involves the claimant, the party being claimed against, lawyers, witnesses, appraisal persons, translators, and other related parties. It is, in general, similar to a civil procedure. The conclusion or decision in a competition case will be enforced by the competent authorities of Vietnam, including the civil judgment enforcement agency. Violations of the Law on Competition will result in sanctions including warnings, fines, and the revocation of business registration certificates, licences, or practising certificates. Enterprises may also be subjected to restructuring in the event of abuse of a dominant market position, division or splitting of the merged or consolidated enterprise or forced resale of the acquired enterprise parts, to make public corrections, and to remove illegal provisions from the business contracts.

**40** Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

The Vietnamese People’s Courts are responsible for resolving disputes based on the law. However, the courts in Vietnam do not have the power to review and interpret the laws. There are three levels of



**Update and trends**

The most recent legal documents governing franchise activities in Vietnam include the Vietnam Commercial Law (adopted in 2005 and in effect since 1 January 2006), Decree 35/2006/ND-CP (issued on 31 March 2006), Circular 09/2006/TT-BTM (issued on 25 May 2006), Decision 106/2008/QĐ-BTC (issued on 17 November 2008), and Decree 120/2011/ND-CP (issued on 16 February 2011). To the best of our knowledge, there is no proposal to replace or amend any of the above legal documents.

Franchising is rather new in Vietnam. However, in recent years, there has been a boom of franchise operations in Vietnam with the market entry of many well-known foreign brands, such as KFC, Subway, Yum!, MK restaurants, Gloria Jean's Coffees and Lotteria in the area of food and beverage; and Debenhams Retail, GR, Hamleys, and Ministop in the area of retail.

Market analysts are predicting that, in the near future, franchising activity will be a very attractive area of investment in Vietnam. Food and retail areas will be the most developed areas because of the youth of the Vietnamese market.

courts, namely: the Supreme People's Court, the Provincial People's Courts and the District People's Courts. The Supreme People's Court is the highest court and the final court of appeal from lower courts. The Supreme People's Court and each court at the provincial level are divided into five divisions: Economic Court, Civil Court, Criminal Court, Labour Court, and Administrative Court. At district courts, each individual judge is often responsible for a particular area such as economic, civil, or criminal law.

Franchising is a commercial activity, the parties to which all have a profit-making purpose. Therefore, any disputes arising or relating to a franchise agreement will be heard by the Economic Court or by a judge who specialises in economic disputes. The dispute settlement procedure applicable to a franchise dispute is the civil procedure, which is specifically regulated in the Civil Procedure Code of Vietnam.

Besides the court procedure, the parties to a franchise agreement can agree to bring their dispute to arbitration (either local arbitration or foreign arbitration). If an arbitration clause is properly drafted, the Vietnamese court will refuse their jurisdiction over the dispute. In other words, a valid arbitration clause in the agreement will exclude the jurisdiction right of the Vietnamese court, except in certain circumstances for the sake of public policy.

Mediation is available in Vietnam as a part of the civil procedures and arbitration procedure. However, this form of dispute resolution is not regulated in any specific legal document and therefore no centralised regime for proceeding with and enforcing this kind of dispute resolution currently exists. In practice, mediation is not common in Vietnam.

**41** Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

The selection of arbitration as the method of resolving disputes in Vietnam has advantages and disadvantages. In addition to the general advantages of the arbitration procedure over the court procedure

(such as confidentiality, speed, and freedom in selecting arbitrators with a deep knowledge of the case), the greatest advantage of the arbitration procedure in Vietnam is the notable neutrality of the arbitrators. The courts in Vietnam are generally considered to have neutrality and corruption concerns.

In terms of disadvantages, although the arbitration procedure has been formally codified in legal documents and the enforcement of the arbitral decision is guaranteed by a regime which is the same as the enforcement procedure for a judgment, in practice, the enforcement of arbitral awards is still new in Vietnam and thus more difficult than a court judgment. If one party wishes to apply for injunctive relief, a foreign arbitral panel itself cannot issue such an order, which must be issued by the court. In addition, if the arbitral award is rendered by a foreign arbitration, the arbitral award must be recognised by Vietnam's courts through a separate procedure before being enforced in Vietnam. Although Vietnam is a member of the New York Convention, the enforcement of an arbitral award may still be rejected due to the reason that the recognition and enforcement of the foreign arbitral award is contrary to the fundamental principles of the laws of Vietnam. The recognition procedure is also time-consuming itself, even if the arbitral award is in line with Vietnamese law.

**42** In what respects, if at all, are foreign franchisors treated differently (legally, or as a practical matter) from domestic franchisors?

Generally, there is no difference in treatment between a domestic and a foreign franchisor under Vietnamese law, except for the registration requirement. Under this requirement, the foreign franchisor is required to register its franchising activity with the Ministry of Industry and Trade of Vietnam before carrying out its franchise activity in Vietnam (in other words, before execution of franchise agreements with Vietnamese franchisees). This registration requirement is not compulsory to domestic franchisors and for franchise activity from Vietnam to abroad.

## Tilleke & Gibbins

**Thom Thi Mai Nguyen**  
**Huong Thi Thanh Nguyen**

**maithom.n@tilleke.com**  
**thanhhuong.n@tilleke.com**

HAREC Building, 4th Floor  
4A Lang Ha Street, Ba Dinh District  
Hanoi  
Vietnam

Tel: +84 4 3772 6688  
Fax: +84 3772 5568 / 5569  
www.tilleke.com

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