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Food and Beverage Franchising in Vietnam

On February 8, 2014, a few days after the Lunar New Year, Vietnam's first-ever McDonald's opened in Ho Chi Minh City's District 1. Situated on a major transportation axis, but away from tourist areas and the downtown core, the new restaurant boasted 24-hour service and a drive-thru—for both cars and motorbikes—which was also purported to be the first in Vietnam.

Curious customers queued round the clock in snaking lines more commonly seen at amusement parks than chain restaurants, as a flood of teens, families, and professionals awaited their first taste of the famous Big Mac. In just the first 24 hours of business, 22,500 customers were served, according to the *Daily Mail*. By the end of the first month, a staggering 400,000 people had dined at this single location. Though those numbers may be inflated, they reflect an apparent truth: the Vietnamese market has a great demand for famous worldwide brands.

As of March 2014, there were approximately 120 foreign franchisors registered in Vietnam. The businesses predominantly come from the United States, the United Kingdom, and Singapore, but there is a good mix of nations. The dominant business sectors are retail, education, and food service, with food and beverage franchises accounting for 30% of the registered franchises. KFC and Lotteria came to Vietnam over a decade ago and currently have over 140 restaurants and over 170 outlets, respectively, in the country. Pizza Hut arrived in 2007 and now has over 40 restaurants. Meanwhile, newcomers such as Subway, Starbucks, Popeye's, and Burger King are steadily opening restaurants in Vietnam, and McDonald's surely has an eye on rapid expansion.

Franchising has become a popular way for foreign food brands to enter the Vietnamese market because it is considered to be the fastest and least risky alternative, one which sidesteps certain regulatory restrictions still imposed on foreign-invested businesses in the food service industry. For example, despite Vietnam's accession to the WTO in 2007, foreign-invested businesses are not allowed to establish their own restaurants, subject to narrow exceptions (e.g., where a restaurant is established in parallel with the construction of a hotel), though this restriction is to be removed in 2015.

In addition, foreign food and beverage service providers entering Vietnam through a franchising arrangement with a Vietnamese partner do not need to have a legal presence in Vietnam or set up a business entity in Vietnam, and thus can avoid significant capital outlays. However, franchising carries its own set of challenges and hurdles.

Franchising Regulations and Procedures

Despite the market entries of a number of globally recognized food and beverage brands, potential franchisors

should understand that franchising is still in an early stage in Vietnam, and the same could be said for Vietnam's franchising laws. Franchising was first recognized as a form of commercial activity in the Commercial Law of 2005, with the legal groundwork for franchising activities laid out a year later in Decree 35 and Circular 09. There is now a registration system with the government and a comprehensive set of regulations; however, there is still a lack of depth in the regulations, which can leave ambiguities in many areas for those wishing to operate a franchise system in Vietnam.

Franchising law in Vietnam requires that all foreign franchisors register their proposed franchising activities with the Vietnamese authorities before carrying out the activities. The authority responsible for managing franchising is the Ministry of Industry and Trade (MOIT). The MOIT sets out requirements for the application file that foreign franchisors need to submit to register their activities in Vietnam. As part of the application, a foreign franchisor will need to submit a "Franchise Description Document" (FDD), which may contain a considerable amount of commercially sensitive data about the franchisor. Apart from the extensive FDD, the application file must include relevant business certificates, intellectual property certificates, and, in the case of a secondary franchisor, a letter of approval to sub-franchise from the franchisor. The amount of information that the franchisor must prepare may be substantial and the costs incurred to translate and notarize such documents can also be considerable.

Keys to Successful Franchising

As a prerequisite to franchising, foreign franchisors should ensure that their intellectual property rights (trademarks, patents, etc.) are registered in Vietnam. The registration of trademarks should be in the foreign franchisor's own name as the registrant. Otherwise, if the local franchisee is the registrant, complications may arise if a dispute occurs between the two parties.

Franchisors often want disputes arising under franchise agreements to be resolved by foreign courts or arbitration centers. However, the recognition and enforcement in Vietnam of foreign judgments or awards can be extremely difficult or even impossible to secure. Foreign courts' judgments are generally unenforceable in Vietnam unless there is a treaty between Vietnam and the relevant country on the recognition of judicial decisions. Thus, franchisors must give close consideration as to the dispute resolution provisions under their franchise agreements.

Finally, franchisors should also be aware that fees and payments arising from the franchise agreement, such as initial franchise fees, royalties, technical assistance fees, training fees, and marketing fees, are subject to Vietnam's foreign contractor tax regime, which includes value-added tax and corporate income tax. Corporate income tax rates may vary depending on whether there are applicable double tax avoidance treaties. (Vietnam is a party to double tax avoidance treaties with more than 60 other countries, but notably, not with the U.S.)

Outlook

The government has made great efforts to set up regulations allowing franchises to be established in Vietnam. This has resulted in a number of global brands entering the market, highlighted by the recent entry of McDonald's. However, additional guidance will be required as Vietnam's laws on franchising continue to develop. 🍷