



# Franchise

in 29 jurisdictions worldwide

# 2015

Contributing editor: Philip F Zeidman



**Published by**  
*Getting the Deal Through*  
**in association with:**

Adams & Adams  
Advocare Law Office  
Anderson Mōri & Tomotsune  
AZB & Partners  
Bersay & Associés  
DBB  
DLA Piper LLP (US)  
DLA Piper (Thailand) Ltd  
DLA Piper UK LLP  
Even Abogados  
Fieldfisher  
González Calvillo SC  
Gorodissky & Partners  
Koyuncuoğlu & Köksal Law Firm  
Lapointe Rosenstein Marchand Melançon LLP  
Makarim & Taira S  
MST Lawyers  
Meyerlustenberger Lachenal  
Nobles  
Noerr LLP  
Palacios & Asociados  
Plesner Law Firm  
Rödl & Partner  
Stewart Germann Law Office  
SylviaFreygner Rechtsanwältin GmbH  
Tess Advogados  
Tilleke & Gibbins  
Triana Uribe & Michelsen  
Wong Jin Nee & Teo

## Franchise 2015

**Contributing editor:**  
**Philip F Zeidman**  
**DLA Piper LLP (US)**

*Getting the Deal Through* is delighted to publish the ninth edition of *Franchise*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 29 jurisdictions featured. New jurisdictions this year include Brazil, China, Guatemala and Spain.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

*Getting the Deal Through* gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. *Getting the Deal Through* would also like to extend special thanks to contributing editor Philip F Zeidman of DLA Piper LLP (US) for his invaluable assistance with this volume.

## Getting the Deal Through

London  
July 2014

Introduction	3	Finland	62
<b>Philip F Zeidman</b> DLA Piper LLP (US)		<b>Patrick Lindgren</b> Advocare Law Office	
Australia	5	France	68
<b>Philip Colman and John Sier</b> MST Lawyers		<b>Emmanuel Schulte</b> Bersay & Associés	
Austria	13	Germany	75
<b>Sylvia Freygnier</b> SylviaFreygnier Rechtsanwältin GmbH		<b>Karsten Metzlauff and Tom Billing</b> Noerr LLP	
Belgium	20	Guatemala	81
<b>Pierre Demolin, Véronique Demolin, Benoit Simpelaere and Leonard Hawkes</b> DBB		<b>Marco Antonio Palacios and Cynthia Sequeira</b> Palacios & Asociados	
Brazil	26	India	86
<b>Paulo Shigueru Yamaguchi and Theo Santos Cabral da Hora</b> Tess Advogados		<b>Abhijit Joshi and Kunal Doshi</b> AZB & Partners	
Canada	32	Indonesia	92
<b>Bruno Floriani and Marvin Liebman</b> Lapointe Rosenstein Marchand Melançon LLP		<b>Galinar R Kartakusuma and Reagan Roy Teguh</b> Makarim & Taira S	
China	41	Italy	100
<b>Richard Wageman, Belinda Tang and Edna Deng</b> DLA Piper UK LLP (Beijing)		<b>Roberto Pera and Filippo Maria Catenacci</b> Rödl & Partner	
Colombia	49	Japan	108
<b>Juan Carlos Uribe</b> Triana, Uribe & Michelsen		<b>Etsuko Hara</b> Anderson Mōri & Tomotsune	
Denmark	55	Malaysia	114
<b>Jacob Ørskov Rasmussen and Gitte Holtsø</b> Plesner Law Firm		<b>Jin Nee Wong</b> Wong Jin Nee & Teo	
		Mexico	121
		<b>Jorge Mondragon</b> González Calvillo SC	

### Publisher

Gideon Robertson  
[gideon.robertson@lbresearch.com](mailto:gideon.robertson@lbresearch.com)

### Subscriptions

Sophie Pallier  
[subscriptions@gettingthedealthrough.com](mailto:subscriptions@gettingthedealthrough.com)

### Business development managers

George Ingledew  
[george.ingledew@lbresearch.com](mailto:george.ingledew@lbresearch.com)

Alan Lee  
[alan.lee@lbresearch.com](mailto:alan.lee@lbresearch.com)

Dan White  
[dan.white@lbresearch.com](mailto:dan.white@lbresearch.com)



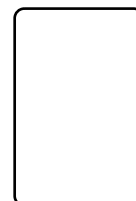
Published by  
**Law Business Research Ltd**

87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2014  
No photocopying: copyright licences do not apply.  
First published 2007  
Ninth edition  
ISSN 1752-3338

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of July 2014, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

---

New Zealand	128	Turkey	164
<b>Stewart Germann</b> Stewart Germann Law Office		<b>Hikmet Koyuncuoğlu and Seza Ceren Aktaş</b> Koyuncuoğlu & Köksal Law Firm	
Russia	133	Ukraine	170
<b>Vladimir Biriulin and Sergey Medvedev</b> Gorodissky & Partners		<b>Volodymyr Yakubovskyy and Alexander Weigelt</b> Nobles	
South Africa	139	United Kingdom	176
<b>Eugene Honey</b> Adams & Adams		<b>Chris Wormald and David Bond</b> Fieldfisher	
Spain	145	United States	181
<b>Ignacio Alonso</b> Even Abogados		<b>Michael G Brennan and Philip F Zeidman</b> DLA Piper LLP (US)	
Switzerland	152	Vietnam	191
<b>Martin Ammann and Christophe Rapin</b> Meyerlustenberger Lachenal		<b>Jim Dao and Tu Ngoc Trinh</b> Tilleke & Gibbins	
Thailand	158		
<b>Chanvitaya Suvarnapunya and Pattama Jarupunphol</b> DLA Piper (Thailand) Limited			

# Vietnam

**Jim Dao and Tu Ngoc Trinh**

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. If a foreign franchisor would like to establish a presence in Vietnam, it may establish a representative office to oversee its franchise operations in Vietnam or it may establish 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 for the establishment of an entity. The involvement of ministries or departments in other relevant industries may occur at 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 file to obtain an investment certificate for the company. The contents of the application file 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.

An 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. An MLLC may not issue shares, but, unlike a 1LLC, it may reduce its charter capital two years after formation.

An 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 generally only within the amount of capital contributed to the SC. With a few exceptions, shareholders may freely assign their shares.

The application file will 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 file. 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 operate the company:

- 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 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 22 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 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 60 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 law is based on an employment contract. Thus, as long as the franchisor does not engage in a labour 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 that 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 in which 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) shall register franchising activities from overseas into Vietnam. There is no requirement for registration 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: (i) the business system to be franchised must have been operating for at least one year prior to franchising in Vietnam; (ii) the franchised goods or services must not be prohibited from sale or supply and must be within the franchisee's business lines as registered with the authorities; and (iii) the franchising activity must have been registered with the competent authority.

#### **Franchise agreement**

A franchise agreement for a foreign franchise in Vietnam needs 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, unless the parties agree otherwise. The licensing of industrial property rights may be provided for in a separate section of the franchise agreement, or in a separate agreement, and is governed by the laws 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 also need to be disclosed.

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

Franchising activities must be registered with the MOIT. An application file for registration includes an application in the statutory form, the FDD and other supporting documents. In theory, the authorities are required to issue a response within five days from submission of the complete application file. However, timing is normally much longer in practice due to delays from the authorities.

- 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, 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. The business system to be franchised must have been operating 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** Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

The franchise legislation clearly gives the franchisor the right to require the franchisee to purchase and sell goods in accordance with the system it dictates. However, the Competition Law currently exists uncomfortably with franchise legislation and prohibits certain agreements in restraint of competition when the parties have a combined market share of 30 per cent or more of the 'relevant market'. However, there are several broad exclusions to the Competition Law provisions.

- 15** 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. Similar to a franchisor's obligation to provide certain information to franchisees, a sub-franchisor must also provide sub-franchisees with written information, including: (i) information about the franchisor; (ii) contents of the master franchise agreement between the franchisor and the sub-franchisor; and (iii) options for dealing with the sub-franchise agreement between the sub-franchisor and the sub-franchisee in case the master franchise agreement is terminated.

- 16** 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 franchisor also needs to register a disclosure document which includes the disclosure of basic terms and conditions of the franchise agreement. A copy of the 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 agree otherwise). 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 needs 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 provided 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, and the financial report of the franchisor, among other matters).

- 17** What information must the disclosure document contain?

The franchisor must provide an FDD and a model franchise agreement to the potential franchisee. The MOIT 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.

- 18** Is there any obligation for continuing disclosure?

A franchisor is obliged to provide continuing disclosure to all franchisees upon any important change to the franchise system that affects the franchise business of a franchisee, and such notifications need to be provided immediately. Moreover, as discussed in question 16, a franchisor is obliged to notify the MOIT of any changes of certain registered information either annually or on an ad hoc basis, depending on the subject matter of the change.

- 19** How do the relevant government agencies enforce the disclosure requirements?

This requirement is enforced through a condition requiring registration of the disclosure document with the MOIT as part of registering the franchise activity. Without registration of its franchise activity, a franchisor is not permitted to conduct franchising in Vietnam.

- 20** 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 compulsory disgorgement of benefits gained from conducting acts in violation of the law.

- 21** 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, should be agreed between the franchisors and sub-franchisors in the franchise agreements.

- 22** 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 violation of legal prohibitions or contravention of social morals, falsification, misunderstanding, deception, or threats in contracting will lead to the invalidation of the transaction under the civil laws of Vietnam (see question 36).

- 23** 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.

- 24** 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 file lawsuits against the franchisor and the franchisor may have to compensate for damages caused by the franchisor's fraudulent or deceptive practices in respect of the franchisee.

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

- 25** 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 govern 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/QĐ-BTC (issued on 17 November 2008), and Decree 120/2011/ND-CP (issued on 16 February 2011).

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

Other laws generally do not directly 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 that often appear in a franchise agreement include but are not limited to the following.

**Intellectual property law**

The franchisor is obliged 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.

**Civil law**

As mentioned in question 22, general contracting principles, such as those on the basis of goodwill and honesty, would also apply.

- 27** 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 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 which affect franchise relationships. However, in general, trade association policies in Vietnam are not strong binding tools to affect relationships such as franchise.

- 28** 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 to contract what suffices for termination. There is no specific legal restriction on a franchisor's ability to terminate a franchise relationship.

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

Similar to the unilateral termination rights of a 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, unless agreed otherwise);
- 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 agreement; 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.

- 30** 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. A franchisee's failure to comply with the agreed-upon conditions for renewal could allow a franchisor to refuse renewal of the franchise agreement.

**31** 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 set out restrictions in the franchise agreement. However, please note that these restrictions should be applied to all franchisees equally in the franchise system. Furthermore, under Decree 35, the franchisee is allowed to assign its franchise business entity only if the assignee operates in a business appropriate to the subject of the franchise and the original (ie, direct) franchisor approves the assignment.

**32** 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 freely allows the franchisor and franchisee to negotiate and agree on the franchise fees. However, in terms of monetary awards, the level of contracted penalties 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 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 the Commercial Law.

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

According to the 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.

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

Payment to the franchisor in the franchisor's domestic currency is generally allowed in Vietnam. Payment by foreign currency is strictly controlled by Vietnam's government, where only eligible transactions and organisations and individuals are allowed to do so. However, payments under a franchise agreement by a franchisee to

a foreign franchisor typically fall under exceptions that would allow the use of foreign currency.

**35** 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. Therefore, the enforceability of the confidentiality covenants in franchise agreements has not been tested in practice.

**36** 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 concept of 'good faith'. Nevertheless, 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 violation of legal prohibitions or contravention of social morals, falsification, misunderstanding, 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.

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

The common interpretation is 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', which is generally understood to refer to essential needs, such as accommodation, food or transportation, by an individual, family or organisation. The franchisees' use of franchising services is therefore arguably not for their own 'living purposes'.

**38** 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. The regulations are silent on the language of the disclosure document, but in any case, it needs to be legalised and translated into Vietnamese before it can be submitted to the MOIT for registration.

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

Generally, except for some restrictions provided by law which the parties must comply with, franchisors and franchisees are allowed to freely agree on the terms and conditions of franchise agreements,



### Update and trends

There are no proposals for new franchise legislation or regulations. However, the Vietnamese government is drafting a new Law on Enterprises and Law on Investment to amend the current versions. Until these drafts are closer to their final form, it will be difficult to assess their potential effects on franchising or other areas. However, the general belief is that they will further liberalise the rules for foreign investment.

The draft Law on Enterprises suggests that there could be some changes to provisions relevant to foreign investors, such as the definition of foreign investor, foreign investment activities, contribution of capital and share acquisition. There is only a Vietnamese version available at [www.vibonline.com.vn/Duthao/1511/DU-THAO-3-LUAT-DOANH-NGHIEP-SUA-DOI.aspx](http://www.vibonline.com.vn/Duthao/1511/DU-THAO-3-LUAT-DOANH-NGHIEP-SUA-DOI.aspx).

The draft Law on Investment suggests that there could be some changes to provisions on investment conditions, application files and procedures for investment approvals in more detail. In addition, the draft Law on Investment has provisions that would broaden the rights of foreign investors. Again, there is only a Vietnamese version, which is available at [www.vibonline.com.vn/Duthao/1510/DU-THAO-LUAT-DAU-TU-SUA-DOI.aspx](http://www.vibonline.com.vn/Duthao/1510/DU-THAO-LUAT-DAU-TU-SUA-DOI.aspx).

such as duration, territories, prices, governing law or dispute resolution.

At present, the restrictions that may be applicable to provisions in a franchise agreement under Vietnamese law are found in scattered legislation 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 other areas of Vietnamese law. Vietnam's commitments to the WTO do not provide any restrictions on a foreign investor wishing to establish a company for owning a franchised store. However, to start the operation of certain types of stores under the ownership of the franchisor would require the franchisor to establish a distribution company in Vietnam (ie, one that can retail or wholesale goods), 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, the factors of which are highly subjective and thus allow the authorities wide discretion. Therefore, the right to open other retail outlets is not guaranteed.

**40** 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, at present there is no clear legal guidance 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 an open question.

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. 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; and 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 that are not related in a direct way to the subject matter of the contract.

Some franchise agreements contain clauses limiting the prices franchisees 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, among others. However, determining whether these kinds of agreements are considered 'agreements in restraint of 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 respondent, lawyers, witnesses, appraisers, 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.

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

The 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 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: the economic, civil, criminal, labour and administrative courts. 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 heard by a Vietnamese court would be regulated by Vietnam's Civil Procedure Code.

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

should exclude the jurisdiction of the Vietnamese court, except in certain circumstances for the sake of public policy or with subject matter that cannot be arbitrated.

Mediation is available in Vietnam as a part of civil procedures and arbitration procedure. However, currently, mediation is not regulated by any specific legal document and thus there is no centralised legal regime governing mediation. In practice, mediation is not common in Vietnam.

**42** 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. In contrast, the courts in Vietnam are generally considered to have neutrality and transparency 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 that 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. 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.

**43** In what respects, if at all, are foreign franchisors treated differently 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 required of domestic franchisors or for outbound franchise activity.

# Tilleke & Gibbins

**Jim Dao**  
**Tu Ngoc Trinh**

**jim.d@tilleke.com**  
**ngoctu.t@tilleke.com**

HAREC Building, 4th Floor  
4A Lang Ha Street, Ba Dinh District  
Hanoi  
Vietnam  
Tel: +84 4 3772 6688  
Fax: +84 4 3772 5568

Suite 1206, Citilight Tower  
45 Vo Thi Sau Street, District 1  
Ho Chi Minh City  
Vietnam  
Tel: +84 4 3772 2068  
Fax: +84 4 3772 2066

[www.tilleke.com](http://www.tilleke.com)

# GETTING THE DEAL THROUGH

## Annual volumes published on:

Acquisition Finance	Licensing
Advertising & Marketing	Life Sciences
Air Transport	Mediation
Anti-Corruption Regulation	Merger Control
Anti-Money Laundering	Mergers & Acquisitions
Arbitration	Mining
Asset Recovery	Oil Regulation
Banking Regulation	Outsourcing
Cartel Regulation	Patents
Climate Regulation	Pensions & Retirement Plans
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Client
Corporate Immigration	Private Equity
Data Protection & Privacy	Product Liability
Debt Capital Markets	Product Recall
Dispute Resolution	Project Finance
Domains & Domain Names	Public Procurement
Dominance	Real Estate
e-Commerce	Restructuring & Insolvency
Electricity Regulation	Right of Publicity
Enforcement of Foreign Judgments	Securities Finance
Environment	Shipbuilding
Foreign Investment Review	Shipping
Franchise	State Aid
Gas Regulation	Tax Controversy
Insurance & Reinsurance	Tax on Inbound Investment
Insurance Litigation	Telecoms & Media
Intellectual Property & Antitrust	Trade & Customs
Investment Treaty Arbitration	Trademarks
Islamic Finance & Markets	Vertical Agreements
Labour & Employment	



**For more information or to  
purchase books, please visit:**  
[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



**Franchising®**  
Building local businesses,  
one opportunity at a time.



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Strategic Research Partner of the  
ABA Section of International Law



Official Partner of the Latin American  
Corporate Counsel Association