

# Vietnam

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## **Introduction**

### **In General**

The streets of Hanoi and Ho Chi Minh City are being filled with popular brand names of international franchises like KFC, Lotteria, and Circle K. Early 2013 notably saw the opening of Vietnam's first Starbucks,<sup>1</sup> while a year later, in February 2014, McDonald's finally opened its first restaurant in the country. Yet a foreign tourist wishing to find a corner 7-Eleven for forgotten travel necessities would be rather surprised to find that the brand, so common in Asia and around the world, is still absent from the Vietnamese market (at the time of this writing).

Franchising is still in its early stage in Vietnam, and the same could be said of the country's laws on franchising. There is a registration system with the state authority and a comprehensive set of regulations, yet there is still a lack of depth, which can cause uncertainty in many areas for businesses wishing to operate a franchise system in Vietnam.

### **Market Realities**

There are 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 mixture of nationalities. The dominant business sectors are retail, education, and foodservice. Brands like KFC and local franchise Pho 24 have proved to be popular in Vietnam, yet other brands like G7 Mart, a venture of local coffee giant Trung Nguyen, have already failed. Commentators claim that G7 Mart had weak planning strategy and did not concentrate enough resources on building strong brand awareness. Brand awareness among Vietnamese consumers remains weak, even though it is improving.

Increasing optimism about economic growth, the expanding market, and liberalization of the Vietnamese market following World Trade Organization (WTO) accession have resulted in more businesses considering expansion.

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<sup>1</sup> Though the coffee chain's "no franchising" policy is well known, Starbucks is registered as a franchisor with the MOIT, and its outlets in Vietnam are operated through a licensing agreement with Coffee Concepts (Vietnam) Ltd., a subsidiary of the Hong Kong-based Maxim's Group.

There are many reasons why a franchise business may have interest in Vietnam. Vietnam is a young market with nearly a quarter of its population under 14 years of age.<sup>2</sup> Consumer trends have dramatically changed in recent years. In 2005, only 12.7 per cent of the population were Internet users. By 2012, this had climbed to 35.58<sup>3</sup> per cent. Mobile phone penetration has shown even more astonishing growth, exploding from 12 phones per 100 people in 2005 to 150 phones per 100 people — more than one per person — in 2012. As of August 2013, there were at least 19 million Facebook users in Vietnam, with local social networks like Zing also attracting large followings. This shows how consumers are increasingly exposed to media, thus opening additional means for businesses to communicate their brand image to consumers. However, the rate of businesses registering franchising activities in Vietnam remains relatively low, but is increasing.

## Legal Framework

### In General

In the 1990s, it was a huge hurdle for a foreign entity to set up a business in Vietnam. At the time, the government was of the opinion that foreign investment in the foodservice sector would adversely affect the exchange rate market in Vietnam. This regulation is no longer in effect, and the attitude of the government toward foreign direct investment has changed considerably. Yet, franchising was not legally recognized until 2005, and businesses wishing to set up franchises before then had to resort to alternative business arrangements that did not fully accommodate the needs of a franchise.

In 2005, the National Assembly passed the Commercial Law, which recognized franchising as a form of commercial activity for the first time.<sup>4</sup> Article 284 provides a broad definition of a franchise as a commercial activity in which a franchisor gives a franchisee the right to independently purchase and sell goods or provide services in accordance with the business system specified by the franchisor, and for such goods and services to be associated with the trade mark, trade name, business know-how, business logo, and advertising of the franchisor; and the franchisor has the right to control and provide support to the franchisee in conducting the business.<sup>5</sup> The law requires a prospective franchisor to register with the Ministry of Industry and Trade (MOIT).<sup>6</sup>

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2 The World Bank, <http://data.worldbank.org/indicator>.

3 Report on internet statistics of Vietnam, <http://www.thongkeinternet.vn/>.

4 Commercial Law Number 36/2005/QH11, passed by the National Assembly, 14 June 2005.

5 Commercial Law Number 36/2005/QH11, passed by the National Assembly, on 14 June 2005, Article 284.

6 Commercial Law Number 36/2005/QH11, passed by the National Assembly, on 14 June 2005, Article 291.

Subsequently, Decree Number 35 was promulgated by the government regulating franchising activities in detail.<sup>7</sup> Early drafts of Decree Number 35 attempted to make a distinction between outbound and inbound franchising, but the idea was dropped for more uniform franchising regulations. Circular Number 09 was further introduced by the MOIT to guide businesses and authorities on the procedures for registration of franchising activities.<sup>8</sup> The novelty of the franchising concept in Vietnam is shown in the lack of public data and absence of available information on any administrative or court dealings with the subject matter. The regulations are silent on the involvement of the courts in franchising disputes, but contain provisions on administrative sanctions for violations of franchising law.<sup>9</sup>

### **Qualifications**

A broad definition of a franchise is provided in the Commercial Law. Decree Number 35 further expands the definition to include rights under the franchise and introduces the notion of a franchisor, a primary franchisee, a secondary franchisor, and a secondary franchisee.

Decree Number 35 appears to suggest that the franchisor has the right to grant “master franchising rights” to the franchisee, but any further sub-franchising of master franchising rights is prohibited, so the last franchisee of the master franchising rights in the chain is the secondary franchisee.<sup>10</sup>

Decree Number 35 provides certain restrictions on businesses wishing to set up franchises. Franchising often involves one business claiming success and selling it to another entity. In practice, such success may potentially be overstated or misrepresented, or the buyer may have unrealistic expectations of the franchise. Agreements under such circumstances can lead to considerable social costs, as franchisees may not succeed. Therefore, considerations have been made in the regulations to define who is eligible to become a franchisor and a franchisee.

### **Franchisor**

According to Decree Number 35, a foreign franchisor is not required to have a legal presence in Vietnam and is permitted to franchise in Vietnam without establishing a business entity in Vietnam.<sup>11</sup>

However, the franchisor is required to have been in business for at least one year prior to franchising in Vietnam.<sup>12</sup> An early draft of Decree Number 35 proposed two years as the threshold, but this was lowered in the end.

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7 Decree Number 35/2006/ND-CP of the Government of 31 March 2006.

8 Circular Number 09/2006/TT-BTM of the Ministry of Trade of 25 May 2006.

9 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Section 4.

10 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 3(9).

11 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 5.

12 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 5.

The intention was to ensure that only businesses with proven success were allowed to franchise in order to protect small businesses from entering into costly and risky business arrangements with inexperienced franchisors. The law further requires that the primary franchisee also must have been in the business under the franchise for at least one year prior to sub-franchising in Vietnam.<sup>13</sup>

### **Franchisee**

The regulations appear to require that a franchisee be a company rather than an individual. A franchisee is defined as a “trader” which is granted a franchise.<sup>14</sup> Under the Commercial Law, “traders” are economic organizations which have been lawfully established and individuals who conduct commercial activities independently and regularly and who have business registrations.<sup>15</sup> In terms of business registrations, a prospective franchisee must be registered to engage in a line of business that is suitable and consistent with the goods or services contemplated by the franchise agreement.<sup>16</sup> In order to register for such business line, the entity must be duly established in Vietnam. A franchisee can therefore be a local company, a joint venture between a local company and a foreign business entity, or a wholly foreign-owned business entity. Even though foreign businesses are allowed to set up wholly foreign-owned business entities in Vietnam, historically it was impossible under the laws of Vietnam until 2009.

Decree Number 23 also imposes further restrictions on foreign-invested businesses operating in the retail and foodservice industries.<sup>17</sup> In terms of retail, only a business with a business permit from the relevant state agency in Vietnam is allowed to open a retail outlet in Vietnam.<sup>18</sup> If the retailer wishes to set up another outlet, it must apply for an additional permit to set up the retail outlet.<sup>19</sup> The authorities will grant such permit if setting up such outlet meets an “economic test”. Historically, in terms of foodservice, foreign-invested businesses also faced restrictions in trying to establish their own restaurants.<sup>20</sup>

The restrictions imposed on foreign firms will limit the number of potential franchisees. Brands like McDonald’s, which requires an agreement term of 20

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13 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 5.

14 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 6.

15 Commercial Law Number 36/2005/QH11, passed by the National Assembly, on 14 June 2005, Article 6(1).

16 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 6.

17 Decree Number 23/2007/ND-CP of the Government of 12 February 2007.

18 Decree Number 23/2007/ND-CP of the Government of 12 February 2007, Article 5(4).

19 Decree Number 23/2007/ND-CP of the Government of 12 February 2007, Article 5(4).

20 World Trade Organization commitment document WT/ACC/VNM/48, 27 October 2006, p. 43, see <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/ACC/VNM48.doc>.

years in various countries, would require substantial financial capacity and business drive from a primary franchisee to take on such business.<sup>21</sup> In practice, global brands often seek a local partner, though finding a potential partner that meets the financial and business expertise requirements can be challenging.

### Procedures

In the early days of franchising, the international community was of the opinion that minimal government intervention was required and that the market would self-regulate. However, history has proved that franchising is unique due to its scale. Failure of a franchise affects not only a business, but also a network of businesses. It could lead to adverse yet significant economic and social consequences. The franchise law in Vietnam, therefore, requires all foreign franchisors to register franchising activities with the authorities before commencing the franchise. Registering franchise activities with the authority gives the government an extensive amount of information to make informed decisions to establish policies on franchising. In 2011, the government through Decree Number 120 removed the requirement of franchise registration applicable for Vietnamese franchisors. Vietnamese franchisors here include subsidiaries of foreign companies in Vietnam.

The authority responsible for managing the registry and policies on franchising is the Ministry of Industry and Trade (MOIT).<sup>22</sup> The MOIT sets out requirements for the application dossier for a foreign franchisor to register its activities in Vietnam. As part of the application, a foreign franchisor is required to submit a “Franchise Description Document” (FDD),<sup>23</sup> which may contain a considerable amount of commercially sensitive data about the franchisor. The FDD consists of information on:

- Information about the franchisor;
- Costs payable by the franchisee: rates, timing, and details on refund;
- Other fees payable by the franchisee;
- Capital and other investment obligations of the franchisee;
- Obligations of the franchisee to buy or lease equipment required by the franchise;
- Obligations of the franchisor;

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21 Philip Maloney, McDonald’s Australia Ltd., Proof Committee Hansard, Canberra, 17 October 2008, p. 9 (extracted from white paper Inquiry into Franchising Code of Conduct, Australia).

22 Commercial Law Number 36/2005/QH11, passed by the National Assembly, on 14 June 2005, Article 291.

23 Circular Number 09/2006/TT-BTM of the Ministry of Trade of 25 May 2006, Section II, Article 2.

- Description of the subject matter of the franchise;
- Main terms and conditions of the contract;
- Description of the franchising system, including activities abroad;
- Latest financial statement; and
- Rewards.<sup>24</sup>

Apart from the extensive FDD, the application file must include relevant business certificates, industrial property certificates and, in the case of a secondary franchisor, a letter of approval to sub-franchise from the franchisor.<sup>25</sup> If the above documents are in a foreign language, they must be translated into Vietnamese and be notarized by a notary public in Vietnam.<sup>26</sup> The franchise agreement does not need to be registered, but the authorities need to be informed of the most important terms of the agreement. Businesses are required to report on the information contained in the FDD annually before 15 January of each year.<sup>27</sup> Changes to the intellectual property rights and the following changes to the information of the franchisor need to be updated with the authorities:

- Trade name of the franchisor;
- Head office address of the franchisor;
- Telephone and fax number of the franchisor;
- Date of establishment of the franchisor;
- Whether the franchisor is a primary or secondary franchisor;
- Sector in which the franchisor operates its business; and
- Registration details of the franchising activity.<sup>28</sup>

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. The information required, such as financial information, terms of the agreement, and litigation information, may contain commercially sensitive data that businesses typically do not like to make public. When confiding such information to a private entity, the business may seek to rely on confidentiality

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24 Circular Number 09/2006/TT-BTM of the Ministry of Trade of 25 May 2006, Appendix III.

25 Circular Number 09/2006/TT-BTM of the Ministry of Trade of 25 May 2006, Section II, Article 2.

26 Circular Number 09/2006/TT-BTM of the Ministry of Trade of 25 May 2006, Section II, Article 4.

27 Circular Number 09/2006/TT-BTM of the Ministry of Trade of 25 May 2006, Appendix III, n. 10.

28 Circular Number 09/2006/TT-BTM of the Ministry of Trade of 25 May 2006, Section III.

clauses of the agreement that protect their rights and pursue remedies. Neither Decree Number 35 nor Circular Number 09 makes any reference to the role or obligation of the authorities to keep such information confidential.

The benefits of an online registration system may offset the delays in submitting such a large amount of data in some respect. Indeed, Circular Number 09 provides that such online registration system should be made available.<sup>29</sup> However, this has not yet been implemented in practice. If it were to be introduced in the future, it would help speed up the registration process.

### **Disclosure of Information**

Decree Number 35 requires the franchisor to disclose information regarding the franchise by providing the Franchise Description Document and a model franchise agreement to a potential franchisee for review at least 15 days prior to signing the franchise agreement, unless the parties agree otherwise.<sup>30</sup> The policy behind the disclosure is to prevent the franchisees from entering a business arrangement without full knowledge of its operation or with a misrepresented view of the business.

The amount of information to digest is enormous, and in practice most franchisees fail to review all the documents thoroughly and do not fully understand the implications such information may have on the franchise. This is more often evidenced in cases where the franchisee is a family business. In different jurisdictions, the government may undertake responsibility by providing comprehensive training materials and information for potential franchisees.<sup>31</sup> However, the MOIT website currently provides limited information that could help potential franchisees better evaluate businesses and understand the real implications of engaging in a franchise. Circular Number 09 recommends that a prospective franchisee should study the disclosure documents carefully and seek legal and business advice.<sup>32</sup>

### **Agreement**

#### *Vietnamese Language Requirement*

The regulation requires that the franchising agreement be made in Vietnamese.<sup>33</sup> In the early drafts of Decree Number 35, the legislature considered that both Vietnamese and English versions were permissible. However, the government

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29 Circular Number 09/2006/TT-BTM of the Ministry of Trade of 25 May 2006, Section V, Article 3.

30 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 8.2.

31 Inquiry into Franchising Code of Conduct, Australia, p. 34.

32 Circular Number 09/2006/TT-BTM of the Ministry of Trade of 25 May 2006, Appendix III.

33 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 12.

was of the opinion that many small, local businesses would find it hard to fully understand the terms and conditions in English and made it compulsory for the contract to be written in Vietnamese. This requirement places an added burden on many franchisors as they are often more comfortable with other languages. Franchisors are often concerned with the prevailing language of the agreement and, in turn, the legal implications if there are language inconsistencies between different versions of an agreement.

Decree Number 35 makes a distinction between a foreign and a local business entity. It also makes a distinction between a primary franchisee and a secondary franchisee. Despite having such distinctions in place, the authorities still decided to make a uniform Vietnamese language requirement for the franchising agreement for the reasons discussed above.

#### *Freedom to Negotiate Contract Terms*

Decree Number 35 stipulates that both parties have the right to freely negotiate the terms and conditions of the franchise agreement.<sup>34</sup> Circular Number 09 recommends that potential franchisees assess the disclosure information carefully and seek professional advice before signing the agreement.<sup>35</sup> The regulations also give the proposed franchisee 15 business days for accessing such information, unless agreed otherwise.<sup>36</sup> The terms in the disclosure may include, among others, while not mandatory, conditions for extension and termination, and obligations of the franchisor and franchisee arising from the termination of the agreement.<sup>37</sup>

Franchising often involves a multinational business in the role of a franchisor and a small or medium-sized business acting as a franchisee. This inevitably leads to an imbalance of power in the bargaining process to negotiate favorable contract terms. Though other jurisdictions have strong case law and regulations addressing issues arising from the potential imbalance of such powers, there is little reference found in Vietnamese laws. Article 6 of the Civil Code introduces the principle of “goodwill and honesty”, which may have some resemblance to the principles of “good faith” in other jurisdictions.<sup>38</sup> However, the Commercial Law provides no reference to such principles.

#### **Competition Law**

The Competition Law was enacted in 2004. It was created before the franchising concept was introduced in Vietnam. The regulations on franchising make no

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34 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 13.

35 Circular Number 09/2006/TT-BTM of the Ministry of Trade of 25 May 2006, Appendix III.

36 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 8.1.

37 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 11.

38 Civil Code Number 33/2005/QH11, Article 6.



reference to the Competition Law, yet the Competition Law contains more than a few provisions that could potentially restrict franchising activities. The Competition Law prohibits agreements that fix prices, share sources of supply, restrict changes to the quality of goods, or impose quantity restrictions and conditions on the sale and purchase of goods.<sup>39</sup> However, such activities are the essence of franchising as they allow the franchisor to control the business system of the franchise.

Decree Number 35 clearly gives the franchisor the right to require the franchisee to purchase and sell the goods in accordance with the system it dictates.<sup>40</sup> The government has not yet addressed the issue, so the law seems to be unclear on these inconsistencies. The reasonable approach to take is that where the term is not part of the franchise rights as stipulated under Article 3.6 of Decree Number 35, such term will be subject to the Competition Law.

### **Pricing**

The franchising regulations do not impose any cap on the fees chargeable under the franchising agreement. The parties are free to negotiate price and terms and related conditions. However, such details must be included in the FDD both when submitting it to MOIT and during the information disclosure process.

There are practical considerations as to why legislators should consider imposing a cap on fees and costs payable by the franchisees. The fact that most local franchisees have little business expertise and limited choice, compared to the franchisor, makes it unlikely that the pricing terms will be negotiated by the parties in all cases. In some cases, the agreements may be conducted on a “take it or leave it” basis.

The issue arises when the actual costs cannot be determined at the time of signing the agreement. The fees for training and support arise depending on the circumstances. It may be that the franchisee requires extra training due to lack of experience, or it may be due to changes in the franchise system. The latter may prove detrimental to a franchisee that did not anticipate such financial obligations when entering the agreement.

### **Compliance with Operation Manual**

The operation manual is often a part of the franchise agreement, and franchisees have an obligation to comply with the operation manual. The Commercial Law provisions vest control of business operations with the franchisor, and the financial obligation to perform such business operations with the franchisee.<sup>41</sup>

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39 Competition Law Number 27/2004/QH11, passed by the National Assembly, on 3 December 2004, Articles 14–18.

40 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 6(6)(a).

41 Commercial Law Number 36/2005/QH11, passed by the National Assembly, on 14 June 2005, Article 287.

Such arrangements could create an unfair financial burden on the franchisees when the franchisor decides to change the layout or design of the operation outlet, resulting in a substantial change in the financial obligations of the franchisee, as compared to the obligations in place when the agreement was signed.

Even though the regulations require the franchisor to inform the franchisee of changes that may affect their business, they do not give a franchisee any legal means to escape from such obligations.<sup>42</sup> For example, a company that is the franchisee of a well-known beverage franchise stated that it tried to negotiate changes to the terms imposed by the franchisor regarding the outlet layout, but in the end had to succumb to the demands of the franchisor.<sup>43</sup>

The Competition Law would prohibit such behavior if it were proved that the franchisor has made the changes in order to drive the franchisee out of the business.<sup>44</sup> The franchisee would have to prove that the changes are outside “the essential scope of performance of the contract”.<sup>45</sup>

### **Restraint of Trade Clause**

It is common practice in franchising agreements to include clauses that restrict the franchisee from engaging in a business in competition with the franchise in question, and such restriction may apply even after the termination of the agreement.

This type of restraint of trade clause can cause difficulty for franchisees, because it means that after the termination the franchisees are not able to use the skills acquired and the assets they have invested to create their own businesses. The franchising law does not prohibit such terms, but the Competition Law on its face appears to prohibit such terms in the agreement. It prohibits agreements that prevent distributors from trading in goods or services of other competitors.<sup>46</sup>

### **Renewal**

The franchising regulations do not provide much guidance on renewals, except for the registration of such renewals. Neither a franchisor nor a franchisee has the automatic right to renewal; thus, it must be agreed to in the terms of the franchise agreement. Circular Number 09 indicates that as part of the FDD,

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42 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 8(2).

43 Phap Luat, 19 January 2008, <http://plo.vn/kinh-te/nhuong-quyen-thuong-mai-dau-tri-toe-lua-moi-thuong-luong-duoc-272518.html>.

44 Competition Law Number 27/2004/QH11, passed by the National Assembly, on 3 December 2004, Article 30.

45 Competition Law Number 27/2004/QH11, passed by the National Assembly, on 3 December 2004, Article 30.2.

46 Competition Law Number 27/2004/QH11, passed by the National Assembly, on 3 December 2004, Article 31.2.

conditions for the extension of the agreement must be disclosed to the potential franchisees.<sup>47</sup>

### **Assignment**

The conditions for the assignment of a franchise are stipulated in Decree Number 35. The franchisee is allowed to assign the franchise if the assignee operates in a business appropriate to the subject of the franchise and the original franchisor approves such assignment.<sup>48</sup> The franchisor does not have the automatic right to reject the assignee because the regulation provides specific circumstances in which such assignment may be rejected.

Therefore, any terms prohibiting assignment based on circumstances other than those provided by law would be rendered illegal. The franchisor may only refuse if the assignee is unable to meet the financial requirements, does not satisfy the selection criteria of the direct franchisor, has an adverse effect on the existing franchise system, or does not agree in writing. In practice, this broad language of the regulation means that the original franchisor would not have much difficulty in finding a reason to reject such assignment.<sup>49</sup> However, the law presumes that the franchisor has agreed if the franchisor fails to produce a written response to the franchisee within 15 days of the receipt of an assignment request.<sup>50</sup>

### **Termination**

The regulation provides for the circumstances in which the parties may be entitled to unilateral termination of the agreement. A franchisee has the right to unilaterally terminate the franchise agreement if the franchisor:

- Fails to fully disclose information;
- Fails to provide initial training and assistance;
- Fails to manage the design of sales outlets;
- Lacks intellectual property rights; or
- Does not treat franchisees equally.<sup>51</sup>

A franchisor also has the right to unilaterally terminate the franchise agreement if:

- The franchisee lacks the permissions to conduct the franchise;

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47 Circular Number 09/2006/TT-BTM of the Ministry of Trade of 25 May 2006, Appendix III, Part B, VIII(3).

48 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 15(1).

49 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 15(3).

50 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 15(2).

51 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 16(1).

- The franchisee is bankrupt;
- The franchisee commits a serious offence; 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 remedy such breach.

The “non-fundamental” breach could be interpreted as any minor breach of contract, and such provision may create an environment where the franchisor is able to abuse its position over the franchisee and conduct opportunistic behavior. The Commercial Law provides that the parties should not be able to terminate the contract in case of insubstantial breach of contract, unless it is so agreed by the parties.<sup>52</sup> However, it seems that Decree Number 35 allows at least the franchisor to terminate for such breaches if the franchisee fails to remedy.<sup>53</sup>

The regulation is silent on the period of notice that must be given for unilateral termination. This theoretically means that parties could terminate the contract immediately. In this case, franchisees may have substantial capital investment tied to the franchising in question and immediate termination may create unfavorable financial conditions for such franchisees.

### **Business Restrictions**

In a franchise where a franchisor requests a franchisee to import raw materials or goods, the parties may have to consider the legal restrictions that are imposed on import of such goods. Vietnam maintains a relatively high level of import tariff rates. The tariff system in Vietnam is divided into three major types:

- Most-favored-nation status;
- Special preferential import duties; and
- Common tariff duties.

Most-favored-nation status covers countries in the WTO, whereas special preferential import duties generally apply to the Association of Southeast Asian Nations (ASEAN) region. Common tariffs are applied to those countries without bilateral trade agreements with Vietnam. The government has pointed out that many countries trading with Vietnam have signed a bilateral trade agreement, and common tariff rates rarely apply.<sup>54</sup>

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52 Commercial Law Number 36/2005/QH11, passed by the National Assembly, on 14 June 2005, Article 310.

53 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 16(2)(d).

54 World Trade Organization commitment document WT/ACC/VNM/48, 27 October 2006, p. 40, see <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/ACC/VNM48.doc>.

Vietnam ranked 158th out of 181 countries in 2009 based on the lowest rates of the most-favored-nation status tariffs.<sup>55</sup> The government's line of argument for high tariff rates was that farmers in Vietnam rely solely on their agricultural output as the source of income and need protection. Vietnam's population is 70 per cent rural, and the income gap between the rural and urban population is immense.<sup>56</sup>

Prior to WTO accession, the average tariff rate on agricultural products was 21.4 per cent. The domestic textile industry also received significant governmental support through subsidies and a high import tariff of 37.3 per cent.<sup>57</sup> Upon WTO accession, the government committed itself to many changes. Gradually, the quantitative import restrictions were replaced with import tariff rates. Tariffs on textiles have been reduced by half and subsidies have been removed.<sup>58</sup>

Currently, the import tariffs remain high for goods in the foodservice and retail industries. The tariff rates on imported poultry are at 20 to 40 per cent even for countries with most-favored-nation status.<sup>59</sup> High tariff rates also are imposed on coffee, tea, vegetables, spices, beverages, and spirits.

Although the government has removed quantitative restrictions on import of sugar, the import of sugar above the quota level faces up to a 100 per cent tariff rate. Not only raw materials used to produce goods in the foodservice industry, but also the machines used in foodservice face high import duties.<sup>60</sup> Similarly, the retail industry suffers from high import tariff rates on such products as luxury goods, footwear, furniture, electrical appliances, and some toys.

Importers face not only financial burdens from high import tariff rates, but practical burdens in relation to cumbersome import procedures as well. Although the government committed itself to apply a transparent, uniform, and non-discriminatory importing system, in practice there is still room for improvement.<sup>61</sup> Businesses importing goods to Vietnam have complained that

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55 World Trade Indicators 2009/10, Vietnam Trade Brief from World Bank, see <http://documents.worldbank.org/curated/en/2009/12/17236585/vietnam-world-trade-indicators-2009-vol-1-2-trade-brief>.

56 Population census 2009, General Statistics Office of Vietnam, see [http://www.gso.gov.vn/default\\_en.aspx?tabid=617&idmid=&ItemID=9811](http://www.gso.gov.vn/default_en.aspx?tabid=617&idmid=&ItemID=9811).

57 World Trade Organization commitment document WT/ACC/VNM/48, 27 October, 2006, p. 38, see <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/ACC/VNM48.doc>.

58 World Trade Indicators 2009/10, Vietnam Trade Brief from World Bank, see <http://documents.worldbank.org/curated/en/2009/12/17236585/vietnam-world-trade-indicators-2009-vol-1-2-trade-brief>.

59 Vietnam's Customs Tariff Schedule for 2013, Chapter 2, available at [http://www.itpc.gov.vn/importers/how\\_to\\_import/tax/folder\\_listing/?set\\_language=en](http://www.itpc.gov.vn/importers/how_to_import/tax/folder_listing/?set_language=en).

60 Vietnam's Customs Tariff Schedule for 2010.

61 World Trade Organization commitment document WT/ACC/VNM/48, 27 October 2006, p. 36, see <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/ACC/VNM48.doc>.

customs inspection procedures are unpredictable and complicated and that customs fees are higher in comparison to neighboring countries.<sup>62</sup>

Importers also are required to apply for an automatic import license if they wish to import cosmetics and pharmaceuticals.

## **Intellectual Property**

### **In General**

As a prerequisite to franchising in Vietnam, the foreign franchisor should have a registered trade mark in Vietnam; otherwise, it will not have enforceable trade mark rights in the jurisdiction.

As a best practice, the foreign franchisor should have the registration for its trade marks in its own name as the registrant. If the local franchisee is the registrant of the trade mark, complications may arise if a dispute occurs between the foreign franchisor and the franchisee.

Trade mark license agreements are common in Vietnam, and they may be recorded with the National Office of Intellectual Property. An unregistered trade mark license agreement shall be effective only for the signatory parties, but not third parties such as enforcement bodies. If a trade mark license agreement is not registered, in most cases, it cannot be enforced against third-party infringers, although it can still be enforced amongst the parties to the trade mark license agreement.

It is always prudent to register one's trade marks as early as possible, especially in light of the fact that Vietnam gives priority to the "first to file". In theory, if a franchisor has not registered any intellectual property anywhere in the world, it may not be able to engage in franchising in Vietnam.

Trade marks that are registered outside of Vietnam can be used for franchise registration with the MOIT. Unregistered trade marks may be protected, provided that they are considered "well known" in the jurisdiction. However, the enforcement of well-known trade marks that are unregistered in Vietnam is time-consuming and inefficient.

### **Enforcement**

Although Vietnamese law has a strong system for registering intellectual property rights, the enforcement of intellectual property rights is still inefficient, but improving. Trade mark rights can be enforced administratively through

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62 World Trade Organization commitment document, 27 October 2006, p. 63, see <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/ACC/VNM48.doc>.

petitions to administrative bodies such as the local Department of Science and Technology or the Market Management Bureau, and/or civilly through petitions to the courts. Criminal measures are also available, but thus far have rarely been used. Vietnamese courts are not experienced in intellectual property. It may take six to 12 months to receive a decision from the court, but administrative channels respond more quickly. Emergency measures (i.e., injunctions) are available from the court in theory, but so far have not yet been issued in intellectual property cases.

Enforceable civil remedies against the party committing trade mark infringement may include an order to cease infringement, apologies and issuance of a public retraction, compensation for damages, and destruction of goods. The enforceable remedies in administrative cases include, but are not limited to, an order to cease infringement, a warning or monetary fine of up to US \$25,000, destruction of goods, and suspension of a business license. In one case, a fine of US \$30,000 was imposed against an infringer. Assuming that the trade marks have been registered, the franchise agreement should provide an adequate basis to contractually prevent the franchisee from continuing to use the trade marks after the termination or expiry of the franchise agreement. However, the enforcement authorities in Vietnam are not yet familiar with franchise agreements, but are more familiar with trade mark license agreements. Thus, as discussed above, execution and recordal of a trade mark license agreement is advised.

## **Taxation**

A foreign franchisor is not required to have a legal presence in Vietnam and is permitted to franchise in Vietnam without establishing a business entity in Vietnam, such as a limited liability company. Note that a Vietnamese limited liability company is subject to corporate income tax (CIT) at the rate of 22 per cent (at the time of this writing). A foreign franchisor that does not establish 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, rather than CIT at the rate of 22 per cent. The two components of foreign contractor tax are Value-Added Tax (VAT) and CIT (although at a rate much lower than 22 per cent).

## **Dispute Resolution**

### **In General**

The franchising regulations do not provide guidance on dispute resolution, so it may be assumed that general dispute resolution provisions of Vietnamese

law apply.<sup>63</sup> The parties may choose to resolve disputes through arbitration or the courts.

The remedies available under the law of Vietnam are specific performance, penalty for breach, compensation for damages, temporary cessation of performance of contract, termination of the performance of contract, rescission of contract, or other means specified in the contract that are consistent with the law of Vietnam.<sup>64</sup> Penalty for breaches should not exceed eight per cent of the value of the contractual obligation.<sup>65</sup> Damages will be awarded for the actual and direct loss.<sup>66</sup> The limitation period for claims of breaches of contract is typically nine months from the date the obligation should have been fulfilled, unless agreed otherwise by the parties.<sup>67</sup> The limitation period may differ depending on the underlying claim.

### **Arbitration**

Commercial arbitration is available in Vietnam and is increasingly used as a process for dispute resolution. Over the past decade, the Vietnam International Arbitration Centre (VIAC) has handled about 100 cases per year, though this number continues to rise.<sup>68</sup> In the past, VIAC did not handle many cases because of the limited number of qualified and experienced Vietnamese arbitrators and the difficulty in enforcing arbitration awards. The situation improved somewhat in 2010 when the National Assembly passed a new Law on Commercial Arbitration that addressed many previously conflicting issues and increased the courts' involvement in the arbitration process.<sup>69</sup> The Law on Commercial Arbitration allows foreign arbitration centers to operate in Vietnam<sup>70</sup> and provides the court with the duty to reject jurisdiction if there is an arbitration agreement and where such agreement is not void.<sup>71</sup>

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63 Commercial Law Number 36/2005/QH11, passed by the National Assembly, on 14 June 2005, Chapters 7 and 8.

64 Commercial Law Number 36/2005/QH11, passed by the National Assembly, on 14 June 2005, Article 292.

65 Commercial Law Number 36/2005/QH11, passed by the National Assembly, on 14 June 2005, Article 301.

66 Commercial Law Number 36/2005/QH11, passed by the National Assembly, on 14 June 2005, Article 302(2).

67 Commercial Law Number 36/2005/QH11, passed by the National Assembly, on 14 June 2005, Article 318(3).

68 Viet Finance, 24 April 2013, [http://vietf.vn/2013/04/24/gan-1-000-vu-kien-duoc-giai-quyet-qua-trong-tai.html#.U0dxnqh\\_tGY](http://vietf.vn/2013/04/24/gan-1-000-vu-kien-duoc-giai-quyet-qua-trong-tai.html#.U0dxnqh_tGY).

69 Law on Commercial Arbitration Number 54/2010/QH12, passed by the National Assembly, on 17 June 2010.

70 Law on Commercial Arbitration Number 54/2010/QH12, passed by the National Assembly, on 17 June 2010, Chapter 12.

71 Law on Commercial Arbitration Number 54/2010/QH12, passed by the National Assembly, on 17 June 2010, Article 6.



In the case where one of the parties is a foreign franchisor or foreign franchisee, the parties have the right to choose jurisdiction, location, and the language of the arbitration, as agreed in the contract. Where the dispute does not involve a foreign entity, the arbitration must be carried out in the Vietnamese language by the Vietnamese arbitration center under the jurisdiction of Vietnam.<sup>72</sup> Parties also have the right to negotiate and terminate the dispute resolution proceedings by reaching agreement during the arbitration proceedings.<sup>73</sup>

Vietnam is a signatory to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitration Awards, and, as such, Vietnam is obligated to enforce foreign arbitration awards rendered in other member countries, subject to the usual exceptions regarding procedural formalities.

A foreign arbitration award has to be submitted to the Vietnamese courts (via the Ministry of Justice) for enforcement, but Vietnamese courts do not have a solid track record of providing meaningful comfort as to the outcome of an enforcement action. Although injunctions are provided for under Vietnam's Civil Procedure Code, injunctions are rarely issued.

The Law on Commercial Arbitration also contains detailed guidelines on recognition of the arbitration award by the courts and its enforcement. The parties must register the ad hoc arbitration award with the local court where the arbitration proceedings occurred.<sup>74</sup> Even though the foreign parties may choose a different jurisdiction, the courts may set aside the arbitration award if the award contradicts the fundamental principles of the law of Vietnam.<sup>75</sup>

### Courts

The Economic Court was created to resolve commercial conflicts. However, franchising is still a relatively novel concept in Vietnam, and thus it is doubtful that the courts would have enough experience to adjudicate franchising disputes. In a noteworthy case, the court refused to issue an injunction forcing the franchisee to sell its outlet to the franchisor, even though the terms of the agreement gave the franchisor the right to buy back the outlet in case the franchisee breached the terms of the agreement.

The court was of the opinion that if the franchisee refused to sell the outlet to the franchisor, the court had no power to enforce such a contract term.<sup>76</sup> Indeed, for

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72 Law on Commercial Arbitration Number 54/2010/QH12, passed by the National Assembly, on 17 June 2010, Chapter 1.

73 Law on Commercial Arbitration Number 54/2010/QH12, passed by the National Assembly, on 17 June 2010, Article 37.

74 Law on Commercial Arbitration Number 54/2010/QH12, passed by the National Assembly, on 17 June 2010, Article 62.

75 Law on Commercial Arbitration Number 54/2010/QH12, passed by the National Assembly, on 17 June 2010, Article 68(2)(dd).

76 Phap Luat, 19 January 2008, see <http://plo.vn/kinh-te/nhuong-quyen-thuong-mai-dau-tri-toe-lua-moi-thuong-luong-duoc-272518.html>.

foreign businesses, the historic ineffectiveness of the arbitration and court systems is one of the least satisfactory attributes of doing business in Vietnam.<sup>77</sup>

Vietnam is ranked 44th out of 185 countries based on contract enforcement. Contract enforcement in Vietnam requires 34 procedures, takes an average 400 days, and costs on average 29 per cent of the total claim.<sup>78</sup>

### **Jurisdiction**

Decree Number 35 seems to suggest that parties may choose a different jurisdiction to adjudicate the franchising agreement.<sup>79</sup> In practice, global businesses with established internal regulations may use a standard agreement with all franchisees, and choose one jurisdiction to apply to all agreements entered in different countries. Such standard agreements provide consistency for global businesses. The question is whether such agreements are enforceable in Vietnam.

Under the Civil Procedure Code, a judgment of a foreign court may be recognized and enforced in Vietnam if that judgment is made by a court of a country that has signed an international treaty with Vietnam governing this issue.<sup>80</sup> The parties would need to make sure that the jurisdiction in question has signed an international treaty on civil judgment enforcement with Vietnam.

Since many large franchisors come from the United States, such franchisors should bear in mind that, to the extent agreements require resolving disputes through U.S. courts, judgments from those courts are generally not enforceable in Vietnam because the United States and Vietnam have not signed a civil judicial enforcement treaty.

### **Administrative Sanctions**

Decree Number 35 stipulates that if any party in a franchise violates any regulation under the decree, it will be subject to administrative sanctions.<sup>81</sup> The administrative sanctions apply to both the franchisor and the franchisee, and violations include:

- Conducting a franchise without satisfying all the conditions under the regulations, including a franchise without proper registration or on a non-contract basis;<sup>82</sup>

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77 Vietnam Business Forum Consultative Group Meeting 2010.

78 *Doing Business in Vietnam 2013*, The World Bank, see <http://www.doingbusiness.org/data/exploreeconomies/vietnam/>.

79 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 24.1.

80 Civil Procedure Code, Article 343.2.

81 Decree Number 35/2006/ND-CP of the Government of 31 March 2006, Article 24.

82 Decree Number 185/2013/ND-CP of the Government of 15 November 2013, Article 95.

- Conducting a franchise involving prohibited goods and services;
- Providing untruthful information;
- Failing to pay taxes; and
- Violating other provisions under Decree Number 35.

The party in violation has the obligation to compensate, where the violation has caused damage to any organization or individual. Administrative violations are subject to penalties listed in Decree Number 185 on Administrative Sanctions of Breaches of Provisions on Commercial Activities.<sup>83</sup> Typically, the monetary penalties for some administrative violations are relatively low, with a maximum level of VND 100 million for trading in prohibited goods. Other violations which may be subject to administrative sanctions include, among other matters, trading without necessary permits and continuing to operate a franchise after the termination of the franchise agreement.<sup>84</sup>

## **Alternatives to Franchising**

### **In General**

The Commercial Law provides a broad definition of a franchise. It is at the MOIT's discretion to ascertain on a case-by-case basis whether the business is in the form of a franchise.

Therefore, other forms of business arrangements, like distribution agreements, trade mark licensing agreements, or technology transfer agreements, could potentially fall under the definition of a franchise. This gives potential franchisors the choice of different business arrangements to sell and distribute their goods in Vietnam.

Registering a franchise system requires disclosure of commercially sensitive information, so it is plausible that businesses might opt for alternative forms of business arrangements in order to circumvent the cumbersome registration procedure. Potential franchisors should consider whether undertaking such options would be beneficial.

### **Distribution Agreements**

Distribution agreements fall within the scope of the Commercial Law in the form of sale and purchase of goods agreements that could be made with an authorized dealer or through a commercial agency. If the goods are sold under

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<sup>83</sup> Decree Number 185/2013/ND-CP of the Government of 15 November 2013, Article 95.

<sup>84</sup> Decree Number 185/2013/ND-CP of the Government of 15 November 2013, Article 95.

the trade mark of the seller, a separate trade mark agreement needs to be made. Since there is no agreement registration requirement, such agreements may be more cost effective.

### **Technology Transfer**

Technology transfer agreements are regulated by the Law on Technology Transfer.<sup>85</sup> Technology transfer agreements involve the transfer of ownership rights of information and know-how on processes and solutions to convert raw materials into finished products.<sup>86</sup> The definition suggests that businesses offering services as opposed to goods might not be within the scope of the regulation. Technology transfer could seemingly apply to the foodservice industry, as the franchisor transfers the production know-how of its goods to the franchisee.

Unlike franchising agreements, technology transfer agreements can be written solely in English where one of the parties is a foreign entity.<sup>87</sup> The law seems to provide that the parties have a “right” instead of an “obligation” to register technology transfer contracts with the State administrative body for science and technology.<sup>88</sup> The law clearly provides that bodies registering such contracts have the obligation to maintain confidentiality of the information on technical know-how.<sup>89</sup>

The use of a trade mark would have to be agreed in a separate trade mark agreement, and the protection of intellectual property rights is governed by the intellectual property laws. Franchising, on the other hand, offers extra sanctions for any violation of franchising regulations.

### **Conclusion**

The government has made great efforts to set up a comprehensive set of regulations that allow franchises to be established in Vietnam. This has resulted in a number of global brands entering the market, including recent entries by Starbucks and McDonald’s. The regulations provide adequate

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85 Law on Technology Transfer Number 80/2006/QH11, passed by the National Assembly on 29 November 2009.

86 Law on Technology Transfer Number 80/2006/QH11, passed by the National Assembly on 29 November 2009, Article 3.

87 Law on Technology Transfer Number 80/2006/QH11, passed by the National Assembly on 29 November 2009, Article 14(2).

88 Law on Technology Transfer Number 80/2006/QH11, passed by the National Assembly on 29 November 2009, Article 25(1).

89 Law on Technology Transfer Number 80/2006/QH11, passed by the National Assembly on 29 November 2009, Article 26.

guidance on the creation of a franchise, while imposing relatively few barriers to market entry.

The real issue is that the regulations lack guidance on how to strike a balance between the powers of the parties and protecting the rights of both the franchisor and the franchisee. It is also unclear how the Competition Law applies to franchising agreements, and the dispute resolution process still requires more transparency. These issues are likely to further evolve as Vietnam's laws on franchising continue to develop.

