

Franchising in Cambodia: overview

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MARKET

1. What have been the main developments in the franchising market over the past 12 months?

In recent years, Cambodia has experienced rapid economic growth and has attracted an increasing number of foreign investors. As per capita income grows (currently at US\$1,100), Cambodia offers investment opportunities in:

- Fast food and beverage franchises.
- Fashion franchises.
- Retail chains and convenience stores.
- Beauty and healthcare.
- Architecture.
- Hospitality and travel sectors.
- Education.

The following well-known franchise businesses, among others, have recently entered Cambodia:

- Starbucks.
- Krispy Kreme.
- Century 21.
- BreadTalk.
- Carl's Jr.
- Giant Supermarket.
- Dairy Queen.

2. What are the most commonly used methods of local and international franchising?

Local franchising

Most local franchising consists of direct franchising, which requires a relatively low initial investment by the franchisee. Many of these are home businesses, such as laundry services. The franchisee is trained well and provided with systems to operate successfully and at an efficient level of pricing.

International franchising

Most international franchising in Cambodia is conducted through master franchise agreements. Master franchising can save a franchisor the expense and uncertainty of setting up an infrastructure in a country like Cambodia, which the master franchisor may not necessarily be familiar with.

3. Are there any specific reasons for an overseas franchisor to use a separate entity for entering into a franchise agreement with a franchisee in your jurisdiction?

There are no specific reasons for an overseas franchisor to use a separate entity to enter into a franchise agreement with a franchisee in Cambodia. However, for practical reasons franchisors are recommended to use a separate entity to enter into a franchise agreement with a franchisee, because this can simplify the audit procedures and avoid the disclosure of the parent company's confidential information.

REGULATION OF FRANCHISING

4. What is the legal definition of franchising and/or a franchise?

Cambodian law does not have a specific legal definition of "franchising" or a "franchise", even though a number of franchise businesses are operating in Cambodia. Franchising is primarily governed by the:

- Civil Code.
- Law Concerning Marks, Trade Names and Acts of Unfair Competition.

The Ministry of Commerce is currently preparing a draft Law on Commercial Contracts, which includes a section on franchise agreements. This draft statute has been under consideration for several years. However, there is no current indication of whether this will be finalised and enacted in the near future.

5. What are the laws regulating franchising?

Cambodia does not have a specific law that regulates franchising alone. Franchising is currently governed by the:

- Civil Code.
- Law Concerning Marks, Trade Names and Acts of Unfair Competition.

The Ministry of Commerce is preparing a draft Law on Commercial Contracts, which includes a section on franchise agreements, but there is no current indication of when this statute will be enacted.

Franchise agreements, and the ongoing relationship between the franchisor and franchisee, are governed by the various general principles contained in the Civil Code that are applicable to all contracts, including the requirement to exercise rights and perform duties in good faith.

Under the Civil Code, where a party enters into a contract on the basis of another party's misrepresentation, that party is entitled to rescind the contract and recover damages from the misrepresenting party. In addition, under the Civil Code a personal guarantee is invalid if the guarantor was not fully informed of all material information concerning the guaranteed obligation at the time that the guarantee was provided.

Franchise agreements prepared in a foreign jurisdiction must have the following provisions localised in order for them to be enforceable in Cambodia:

- Guarantee provisions.
- Real estate provisions.
- Intellectual property provisions.
- Advertising requirements.
- Tax issues.
- Non-compete obligations.
- Dispute resolution and prescription.

Cambodia currently does not impose any specific requirements to localise a franchise agreement, although it does have provisions that require that a licensor must have effective control over the quality of the goods and services of a licensee in connection with which a trade mark is used (*section 19, Trademark Law*).

The government fee to record a franchise agreement is KHR120,000 (approximately US\$30).

There are no specific laws in Cambodia that encourage franchising.

Section 52 of the Law Concerning Marks, Trade Names and Acts of Unfair Competition requires that all licence and franchise agreements that relate to registered trade marks must be recorded with the Trademark Registrar of the Department of Intellectual Property Rights under the Ministry of Commerce. Section 19 further provides that all licence and franchise agreements must provide effective control by the licensor over the quality of the licensee's goods and services in connection with the registered trade mark's use. IP licence agreements and franchise agreements can be recorded in short form, and they must be translated into Khmer. The Trademark Registrar will register a licence agreement only if it concerns a trade mark that is registered in Cambodia.

Under Cambodian real estate law, foreign nationals and majority foreign-owned companies cannot own real estate. A lease can have a maximum lease term of 50 years, although one 50-year renewal period is also permitted.

All advertisements must be pre-approved in Cambodia by the local authorities. In addition, mandatory advertising budgets may be considered as royalties for the purposes of withholding tax.

6. What is the regulatory authority responsible for enforcing franchising laws and requirements in your jurisdiction?

There is no specific regulatory authority responsible for enforcing franchising laws and requirements in Cambodia.

However, franchising falls under the general remit of the Civil Code, and the Ministry of Justice is the regulatory authority responsible for enforcing the Civil Code in Cambodia.

7. Must the franchisor be registered with a professional or regulatory body before setting up a franchise system?

Cambodian law does not require a franchisor to register with any professional or regulatory body before setting up a franchise system, or to pilot any outlets or comply with any registration requirements before accepting payments from franchisees. The law does not require a franchisor or an IP owner to register with any intellectual property registry before commencing a franchise.

However, section 52 of the Law Concerning Marks, Trade Names and Acts of Unfair Competition requires that all franchise agreements and licence agreements that relate to registered trade marks must be recorded with the Trademark Registrar of the Department of Intellectual Property Rights under the Ministry of Commerce. Licence or franchise agreements that are not recorded remain valid and enforceable between the parties, but will not be enforceable against third parties.

The Trademark Registrar will register a licence agreement only if it concerns a trade mark that is registered in Cambodia.

8. Is there a code of ethics or other means of promoting ethical franchising in your jurisdiction?

There is no applicable code of ethics or other means of promoting ethical franchising in Cambodia. The European Code of Ethics has not been adopted.

9. Do franchisees benefit from any laws designed to protect consumers or small businesses?

Cambodia does not have any specific laws designed to protect consumers or small businesses. Consumers and small businesses are protected by the general rules contained in the Civil Code.

10. Are there any other requirements which must be met before a business can sell a franchise?

There are no other requirements that must be met before a business can sell a franchise. Cambodia does not have a national franchise association.

FRANCHISE AGREEMENT Pre-contract disclosure requirements

11. Is the franchisor subject to any general or formal pre-contract disclosure requirements?

Franchise agreements, and the ongoing relationship between the franchisor and franchisee, are governed by the various general principles contained in the Civil Code that are applicable to all contracts, including the requirement to exercise rights and perform duties in good faith.

The franchisor is not subject to any specific pre-contract disclosure requirements. However, the Civil Code permits a contracting party to rescind a contract and recover damages if that party entered into the contract on the basis of the other party's misrepresentation.

In addition, the personal guarantor to a franchise agreement can be released from the guaranteed obligations if he was not fully informed of all material information concerning the guaranteed obligations at the time the guarantee was provided, including the risks attached to those obligations.

12. Must the franchisor disclose fairly and in good faith all facts material to the prospective franchisee's decision to enter into the arrangement, or must the prospective franchisee rely on its own due diligence?

See *Question 11*.

Formalities

13. What are the formal contractual requirements to create a valid and binding franchise agreement?

Franchise agreements are currently categorised as licence contracts under the Law Concerning Marks, Trade Names and Acts of Unfair Competition.

To create a valid and binding franchise agreement, the franchisor (licensor) must provide quality control for the franchisee's (licensee's) goods or services in connection with any registered trade marks.

Further, section 52 of the Law Concerning Marks, Trade Names and Acts of Unfair Competition requires that all licence and franchise agreements that relate to registered trade marks must be recorded with the Trademark Registrar of the Department of Intellectual Property Rights under the Ministry of Commerce. If the licence or franchise agreement is not recorded, it will remain valid and enforceable between the parties, but it will not be enforceable against third parties. The Trademark Registrar will register a licence or franchise agreement only if it concerns a trade mark that is registered in Cambodia.

To record a licence or franchise agreement, the Trademark Registrar requires the following documents:

- Original licence/franchise contract or a notarised copy.
- Translation of licence/franchise contract from English to Khmer.
- Certificate of trade mark registration in Cambodia.

Parties' rights and obligations

14. Is there a general obligation to behave fairly, reasonably or in good faith to the other party during the term of the franchise agreement?

Obligations of the franchisee

The Civil Code imposes the principle of good faith on both the franchisee and the franchisor in terms of their contractual rights and duties.

Obligations of the franchisor

The franchisor/licensor must provide effective control over the quality of goods or services of the franchisee/licensee in connection with registered trade marks. This provision cannot be overridden in the franchising agreement. The franchisor is also subject to the good faith provisions contained in the Civil Code (see *above, Obligations of the franchisee*).

An overseas franchisor, or its officers and directors, cannot be held liable for failures of the local sub-franchisor, unless the overseas franchisor is a party to the sub-franchise agreement.

15. Does local law require that particular provisions must be expressly included in a franchise agreement?

The law does not require any specific provisions to be expressly included in a franchise agreement, other than the provisions providing for "effective control by the licensor of the quality of the licensee's goods and services in connection with a registered trade mark" under Article 19 of the Law Concerning Marks, Trade Names and Acts of Unfair Competition.

16. Are exclusion and entire agreement clauses enforceable in your jurisdiction? If so, are they effective to protect the franchisor?

Exclusion and entire agreement clauses are generally effective in protecting the franchisor and can be enforced in Cambodia. However, they will not be enforced in cases that involve a misrepresentation originating from a local or an overseas franchisor.

17. Can the franchisor impose product tying or other purchasing restrictions and non-compete obligations on the franchisee during the term of the agreement?

Restrictions on purchasing and product tying

Cambodia does not have any specific competition legislation and the law does not impose any restrictions or limitations on purchasing and product tying.

Non-compete obligations and transfer restrictions

Since Cambodia does not currently have any specific competition legislation, the law does not impose any limitations on non-compete obligations during the term of a franchise agreement.

Fees and payments

18. What fees are usually payable by the franchisee? Are there any restrictions on the parties' freedom to set the fees and payments, or any other payment requirements?

Initial fees, continuing fees (or management charges), advertising contributions, required advertising spend, and other customary franchisee fees are common in franchise agreements in Cambodia. Fees associated with the application for, and maintenance of, licences required for the import and distribution of products regulated by the Cambodia Department of Essential Drug and Food may be required of the franchisee at the franchisor's request.

Cambodian law does not currently restrict the amount that can be charged for initial fees, continuing fees or charges, advertising contributions, or required advertising spend. However, advertising contributions and required advertising spend are generally deemed as royalties payable to the franchisor under Cambodia's tax law.

Interest on overdue payments is expressly allowed under the Civil Code. The default rate of interest (where the contract is silent on the matter) is 5% per year. There is no maximum interest rate that can be charged for overdue payments, except in the context of a loan. If interest accrues unpaid for over one year in spite of a demand notice to pay, the franchisor can add the overdue interest to the principal amount.

Term of agreement and renewal

19. Are parties free to agree on the term of the franchise agreement? What is the typical term of a franchise agreement in your jurisdiction?

Cambodian law does not impose a minimum or maximum term on franchise agreements and these terms can be freely agreed between the parties.

20. What rights of renewal are usually included in the franchise agreement? Are fees paid on renewal?

Commercial practice

Franchisees are normally entitled to renew the franchise agreement if they have fulfilled all of their material obligations during the initial term of the agreement.

Rights of renewal are usually included in the franchise agreement and will be enforced provided that the franchisee has fulfilled its material obligations during the initial term of the agreement.

Renewal fees are not common in Cambodia.

Local law

There are no statutory provisions that give the franchisee a right to renew. A right of renewal is governed by the terms of the franchise agreement, and if a franchisor fails to comply with a contractual right of renewal the franchisee's sole remedy is to sue the franchisor for breach of contract.

Termination

21. Are there any limitations on the right of a franchisor to terminate the agreement?

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

Cambodian law does not govern when a franchisee can terminate a franchise agreement. The franchisee's right to terminate without liability will be governed by the terms of the agreement itself.

Liquidated damages clauses are generally enforceable in Cambodia, to the extent that the amount of liquidated damages reasonably correlates to the losses anticipated to result from a breach. The court is authorised to decrease the liquidated damages fixed by the parties if they seem punitive, or if they are grossly higher than the amount of damages actually suffered. The court is also authorised to award damages in addition to the liquidated damages provided under the contract if the actual damages exceed the liquidated damages.

22. Are post-term restrictive covenants enforceable?

Cambodia does not currently have any specific competition legislation, although the Ministry of Commerce is currently working

on a draft Competition Act. It is common practice for foreign companies to insert a post-term restrictive covenant in their agreements to restrict partners and licensees from engaging in activity that competes with the enterprise. Local courts will generally enforce such a clause on the ground of breach of contract.

Cambodia's Labour Law states that contractual provisions are unenforceable against employees to the extent that they restrict an employee's activities after the employment relationship expires. Non-compete agreements with employees can be challenged in Cambodia, and so it is important that the franchisor and franchisee cannot be deemed to have an employment relationship for non-compete agreements to be enforced.

23. Can the franchisor or a replacement franchisee continue to sell to the former franchisee's customers?

Cambodian law does not expressly prohibit a franchisor or replacement franchisee from selling to the former franchisee's customers, or require any compensation to be paid to the former franchisee.

Choice of law and jurisdiction

24. Will local courts recognise a choice of foreign law in a franchise agreement for a business operating in your jurisdiction?

The local courts will recognise a choice of foreign law in a franchise agreement for a business operating in Cambodia. However, the courts will not apply a foreign law where the application of that foreign law would provide a result that contravenes public order and good customs.

Certain subject matter (for example, real estate and zoning issues, advertising approval requirements, and so on) can only be governed by local law.

25. Will local courts recognise a choice of foreign jurisdiction in a franchise agreement for a business operating in your jurisdiction?

The local courts will recognise a choice of foreign jurisdiction in a franchise agreement for a business operating in Cambodia.

OPERATIONS MANUAL

26. How does the franchisor ensure that the franchisee complies with the business standards, systems and requirements?

Normally, the franchisor ensures compliance with its business standards, systems and requirements by including language in the franchise agreement that reserves the franchisor's right to establish and modify such standards and systems without the prior consent of the franchisee.

27. Can the franchisor change the Operations Manual unilaterally, as is usually required?

There are no statutory restrictions on the right of the franchisor to unilaterally introduce changes to the Operations Manual and other aspects of the franchised business, provided that the right to do so is expressly included in the franchise agreement.

LIABILITY ISSUES

28. What are the franchisee's remedies against the franchisor for deceptive or fraudulent selling practices?

Where the franchisor has used deceptive or fraudulent selling practices, the franchisee can rescind the franchise agreement and bring a claim for damages.

29. How can third-party claims against the franchisee be brought successfully against the franchisor?

A franchisee is generally regarded as legally independent of the franchisor. As a general rule, third-party claims against a franchisee are rarely successful against the franchisor unless the third-party claims arise from the franchisor's conduct. For example, product liability claims can be brought successfully against the manufacturer of a dangerous or defective product.

Indemnity

Both the franchisor and franchisee can bring indemnity claims against the other. Rights of indemnification should be addressed in the franchise agreement. Clauses that purport to exclude rights of indemnification are generally enforceable, but they can be challenged successfully in cases involving misrepresentation or other intentional misconduct.

Precautions

In practice, most franchisors include a clause that exempts the franchisor's liability (particularly financial liability) for claims brought against the franchisee in the franchise agreement.

INTELLECTUAL PROPERTY

30. What provisions are usually made in relation to intellectual property rights (IPRs), including know-how?

Franchisors typically grant franchisees the right to use the franchisor's trade marks, systems, logos, advertisements, know-how and so on in connection with the franchised business. Rights that are typically reserved include the:

- Right to sub-license to a third party without the franchisor's consent.
- Use of trade marks for a different business purpose from that contained in the franchise agreement.

There are no statutory limitations on the ability of the franchisor to limit the use of the IPRs, know-how or confidential information.

31. What are the registration requirements for licensing IPRs?

In order to enforce IPRs against third parties, contracts granting a licence to use IPRs (including franchise agreements) must be registered with the following bodies:

- Trade mark licence agreements must be registered with the Department of Intellectual Property Rights under the Ministry of Commerce.
- Licence agreements over patents and designs must be registered with the Department of Industrial Rights under the Ministry of Industry and Handicraft.
- Copyright licence agreements must be registered with the Department of Copyright under the Ministry of Culture and Fine Arts.

A licence agreement remains valid and enforceable between the parties (although not as against third parties) if the licence agreement is not registered with the appropriate bodies outlined above.

It is not necessary to use a licence separate from the franchise agreement itself. As a matter of practice, franchise agreements normally include IPR licensing provisions, but the parties will usually register a short-form licence agreement instead of the entire franchise agreement in order to ensure that commercial and other confidential information is protected as much as possible.

REAL ESTATE

32. Are consents from landlords difficult to obtain when transferring leases or granting subleases from a franchisor to a franchisee?

Commercial leases typically run for three years or longer, depending on the nature of the enterprise. Under Cambodian law, a lease can have a maximum duration of 50 years, with one right to renew for another 50-year period. Any lease with a duration of 15 years or longer is called a "long-term lease", and must be made in writing and registered with the Land Office in order to prevail against third parties.

As a matter of practice, it is not usually difficult to obtain consent from a landlord when transferring leases or granting a sub-lease from a franchisor to a franchisee, provided the new lessee meets the landlord's credit criteria and business mix criteria. Any payments to the landlord should be addressed in the lease agreement. The parties will be required to create the lease in writing and register the lease (and the new lessee) with the Land Office if the lease is a long-term lease.

33. How can a franchisor prevent the franchisee from occupying the premises after the franchise agreement has ended?

One option to maximise control is for the franchisor to lease the premises from the landlord, and then sub-lease the premises to the franchisee. In addition, the lease or sub-lease agreement and the franchise agreement should include cross-default and cross-termination provisions, so that the expiration or termination of the franchise agreement constitutes the automatic termination of the lease agreement.

34. How can the franchisor effectively acquire the franchisee's premises at the end of the franchise relationship?

Since Cambodia does not have specific regulations governing franchises, the franchisor should include any such provisions in the franchise agreement.

Foreign nationals are prohibited from owning land in Cambodia, and so where the franchisor is a foreign national, the franchisor's option to purchase the franchisee's premises needs to be carefully drafted to accommodate any future liberalisation in the law (if any occurs), and to permit the landlord to nominate a Cambodian transferee. Cambodia does not currently have a procedure to register an option to purchase immovable property.

35. If the franchisor leases or subleases its own site to its franchisee, can it pass on all related costs to the franchisee? Can the franchisor charge its franchisee tenant a rent expressed as a percentage of the franchisee's sales?

Cambodian law does not expressly prohibit the franchisor from passing on these related costs to the franchisee, and we are not aware of any case law that prohibits such arrangements.

Although it has not been common practice in Cambodia for landlords to charge rents that are a percentage of the tenant's sales, this is not prohibited by law. In the newest commercial developments this is becoming normal practice.

COMPETITION LAW

36. What is the effect of competition law rules on franchising agreements? Are there any available exemptions?

Competition law

Cambodia does not currently have any specific competition legislation, although the Ministry of Commerce is currently working on a draft Competition Law. However, it is common practice for foreign companies, particularly in the franchising industry, to insert non-competition provisions in their franchise agreements to restrict partners and licensees from engaging in activity that competes with the subject of the agreement.

Exemptions

There are no applicable exemptions, as Cambodia does not currently have any specific competition legislation.

Online/e-commerce restrictions

Since Cambodia does not currently have any specific competition legislation, or any regulations specifically governing the obligations between a franchisor and franchisee, the franchisor can include website and internet restrictions in the franchise agreement, and these provisions should be enforceable.

EMPLOYMENT ISSUES

37. Can a franchisee be regarded as an employee of the franchisor?

There are very few regulatory aids to determine whether a franchisee can be considered as an employee of the franchisor. One tax regulation indicates that an employer (or franchisor) can minimise the risks that an independent contractor (or franchisee) can be regarded as an employee by avoiding certain indications that would imply that the franchisee is, in fact, an employee of the franchisor. Therefore, a franchisor should do the following for the avoidance of any doubt:

- Minimise its direction, control of work or supervision of the franchisee.
- Permit flexibility concerning the time and place that the franchisee conducts work.
- Do not provide remuneration in return for the franchisee's performance.
- Include a provision to specify that the franchisee is an independent contractor in the franchise agreement.

DISPUTE RESOLUTION

38. How are franchising disputes typically dealt with? What provisions for handling disputes are usually included in domestic franchise agreements?

In Cambodia, the parties to an international or domestic franchise agreement typically include an arbitration clause, since litigation in the Cambodian courts is neither transparent nor predictable. Non-binding mediation can be an excellent add-on, but mediation is not mandatory by law.

Foreign parties almost always include arbitration clauses in their franchise agreements, and they usually require arbitration to be conducted under the rules of an established foreign arbitration body such as the Singapore International Arbitration Centre (SIAC).

An arbitration clause that requires an overseas forum is generally enforceable in Cambodia.

39. How are foreign judgments or foreign arbitral awards enforced locally?

Cambodia is a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Therefore, Cambodia is obligated to recognise and enforce foreign arbitral awards, subject to conventional technical exceptions. In addition to the New York Convention, under Cambodia's Law on Commercial Arbitration, foreign arbitration awards are recognised and can be enforced through the Appeals Court of Cambodia. Unfortunately, to date, we are not aware of, and are unable to confirm, any instance of a foreign arbitral award being enforced in Cambodia. Most foreign parties tend to conclude their disputes by arriving at a settlement.

EXCHANGE CONTROL AND WITHHOLDING

40. Are any exchange control or currency regulations applicable to payments to an overseas franchisor?

The Law on Foreign Exchange governs all foreign exchange operations relating to payments for commercial transactions, transfers or capital inflows. However, there are no restrictions on foreign exchange operations, although transactions must be made through a bank that has been authorised by the National Bank of Cambodia.

41. Is there a withholding obligation on payments made to an overseas franchisor?

Cambodian law imposes a 14% withholding tax which must be deducted from the following payments where they are made to non-residents:

- Royalties, rent and other income related to property.
- Interest.
- Management and technical services (currently undefined in the Law on Taxation).
- Dividends.
- Marketing and advertising spend, which is also considered to constitute royalty payments and is subject to the 14% withholding tax.

REFORM

42. Are there any proposals to reform the laws affecting franchising?

Currently, the Ministry of Commerce is preparing a draft Law on Commercial Contracts which includes a section on franchise agreements. The draft law broadly requires a franchise agreement to include (among other things):

- The respective obligations and rights of the parties.

- Provisions related to the use of intellectual property rights by the franchisee.
- Provisions related to quality control.
- Terms of the contract.
- Provisions for termination.

This draft statute has been under consideration for several years, and we have no indication at the present time whether this will be finalised and enacted in the near future.

ONLINE RESOURCES

Ministry of Commerce

W www.moc.gov.kh

Description. The official website of the Ministry of Commerce, which is the government ministry responsible for regulating and promoting commerce and trade in Cambodia.

Secretariat of National Committee for Intellectual Property Rights

W www.cambodiaip.gov.kh

Description. An official website containing intellectual property laws and regulations in Cambodia. This is one of the most updated government websites.

Council for the Development of Cambodia

W www.cambodiainvestment.gov.kh

Description. The official website of the Council for the Development of Cambodia, a governmental entity that is a one-stop service organisation responsible for rehabilitation, development and investment activities in Cambodia.

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