Thailand

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Introduction

Trade marks, tax, termination, and takeover are the terms in a franchise agreement most likely to cause trouble for a franchisor in Asia. In Thailand, many of the world's most successful franchise models have established themselves to cater to the sophisticated Thai consumer. Recent well-known examples include Zara, Uniqlo, and Gap (for clothing and accessories), Krispy Kreme (food), and Ikea (home accessories).

Other successful franchise models in the Kingdom abound in sectors such as education, real estate services, automobile leasing, and hair salons and training academies. The success of these businesses lies not only with strength of brand and quality of product and service, but equally with the foresight of understanding that localization of a master franchise agreement is critically important. With this proliferation of franchise operations established in Thailand, expansion into neighboring jurisdictions such as Vietnam, Indonesia, and Cambodia is increasing as well.

In Thailand, franchise agreements arise in many contexts, such as in the case of a party's wish to grow or develop by acquisition of rights to new technologies, know-how, trade secrets, trade marks and other intellectual property, content, or other valuable assets. Sometimes, parties may need the local market or production/distribution knowledge that a franchise partner may possess. Putting a figure on the exact number of franchise businesses in operation in Thailand is tricky due to the volume of small and medium enterprises (SMEs) that may operate a franchise system. Accordingly, reputable sources have estimated the number as ranging from as low as 400 to as high as 700 franchise businesses.

While there are still no specific regulations governing franchising in Thailand, the Ministry of Commerce regularly announces plans to commence drafting regulations. In March 2011, the Ministry of Commerce held a public hearing of a draft Franchising Business Act. An outline of the most important features of this pending bill is included at the end of this chapter.

This chapter addresses several issues that commonly arise in franchise operations in the Thai context, where there remain no specific franchising rules and regulations. However, although Thailand is generally a "freedom of contract" jurisdiction whereby judges rarely attempt to look beyond the specific terms of a mutually agreed written contract to determine the intent of the parties at the time of agreement, some provisions are absolutely required in certain franchise agreements. This chapter begins with the present legislative framework for the drafting and interpretation of franchise terms, although commencement of specific legislation is anticipated in the near future.

National Legislation

In General

Thailand does not presently have any one law dedicated to the regulation of franchise operations (although, as mentioned, this may not be the case for much longer if the draft Franchising Business Act is ultimately enacted). This does not, however, mean that franchise relationships are wholly unrestricted.

As a civil law jurisdiction, Thai legislation is drafted broadly to enable the courts to consider the intent of the regulation rather than the express coverage of the law's operation. Thus, in the absence of an express law of franchise, other generally drafted laws governing contracts and business operations are applied and interpreted broadly to govern franchise relationships.

A practitioner confronted with instructions to draft or interpret a franchise agreement in Thailand will, therefore, generally need to be familiar with the following sources of law:

- Civil and Commercial Code;
- Thailand Trade Mark Act B.E. 2534 (1991), as amended by the Trade Mark Act (Number 2) B.E. 2543 (2000);
- Thailand Patent Act B.E. 2522 (1979), as amended by the Patent Act (Number 2) B.E. 2535 (1992) and Patent Act (Number 3) B.E. 2542 (1999);
- Thailand Copyright Act B.E. 2537 (1994);
- Trade Secrets Act B.E. 2545 (2002);
- Unfair Contract Terms Act B.E. 2540 (1997);
- Trade Competition Act B.E. 2542 (1999);
- Act Relating to Price of Merchandise and Service B.E. 2542 (1999);
- Revenue Code B.E. 2481 (1938);
- Direct Sales and Direct Marketing Act B.E. 2545 (2002); and
- Product Liability Act B.E. 2551 (2008).

The various Ministerial Regulations that implement and further expand on these Acts are also relevant to consider when drafting and interpreting franchise agreements and franchise development agreements. Once franchisor and franchisee have negotiated terms and executed agreed terms by way of the franchising contracts, generally such agreements will not be disturbed by Thai courts unless there is clear deviation from law or unless there is a clear public policy reason to do so.

Due Diligence

The importance of due diligence on a potential franchisee is critically important, not only to confirm that prospective franchisees are trustworthy and will responsibly build a business in Thailand, but also to make sure the franchisees have the relevant knowledge and experience to conduct the business as the franchisor would direct. Key due diligence includes the following:

- Ministry of Commerce searches on the corporate entity to confirm directors, shareholding, and corporate debt;
- Area-relevant court searches to reveal litigation or other disputes noting parties, the nature of the dispute, jurisdiction, cause(s) of action, and status for any actual, pending, or threatened litigation, administrative action, or settlements;
- The identification of all required regulatory approvals, along with copies of such approval, for food, beverage, pharmaceutical, nutritional, medical device, and cosmetics; and
- A clear understanding of takeover procedures and any necessary transitional arrangements.

Common Drafting Pitfalls

Despite the tendency of some franchise agreement drafters to go overboard in trying to provide strong protection to the franchisor, some terms are generally forbidden by law in Thailand.

For example, an agreement made in advance, exonerating a debtor from his own fraud or gross negligence, is void as a matter of law.[1] Other examples of terms that may run afoul of the Thai Unfair Contract Terms Act are:

- A term that exempts or restricts liability arising from breach of contract;
- A term that allows contract termination without reasonable grounds or without any material breach by the other party;
- A term that allows one party to delay or not to comply with its contractual obligations without reasonable grounds;
- A term that allows one party to enforce further obligations upon the other party than those agreed to on the date of contract execution;

1 Civil and Commercial Code, Section 373.

- A term that allows for confiscation of deposits (or liquidated damages) that are excessively high in relation to the damages arising or resulting from a contract under which the deposit was placed;[2] and
- Any provision that constitutes terms, notices, or statements made in advance that restrict or exempt liability for infringement or breach of contract with respect to injury to life, body, or health of a third person, caused by a deliberate or negligent act committed by the party who sought to restrict or be exempted from such liability, or by other persons to whom that party also must be liable.

Regarding the last item above, such terms, notices, or statements will be considered ineffective, as will agreements or consents of the injured parties restricting or exempting the liability for wrongful acts arising from unlawful actions contrary to public order or good morals.

Unlike most laws enacted regarding civil court jurisdiction in Thailand, the Unfair Contract Terms Act gives the courts great discretionary power in determining whether contract terms are generally unfair and unreasonable.

However, the Act does provide general guidelines under which the court must consider whether certain terms are unfair or unreasonable. For example, the court must consider:

- The time and place of making the contract or compliance therewith;
- Whether one party shoulders a much heavier burden than the other;
- The normal practice within the industry concerned; and
- The integrity, bargaining power, economic positions, and adeptness of the parties.

In this regard, the Act allows for the use of expert testimony (both local and foreign) during court hearings. In certain situations, a franchisor must be reasonable in setting terms or the term may be held unenforceable as an unfair limitation on competition.

For example, in the context of a franchising arrangement involving use of patented technology, a "tying arrangement" may likely be prohibited. In a tying arrangement, the franchisor establishes a requirement that the franchisee must purchase materials or services for use in the production of a particular item from the franchisor (or its agent).

This type of tying arrangement might be seen as anti-competitive and may be unenforceable, unless specific reasons are given as to why the agreement is necessary for the business purpose.

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2 The court will have the power to reduce the confiscation level to that of the actual damages incurred.

Intellectual Property, Licensing, and Recordal

In General

In the context of franchises, very often one of the most important components of the franchise is the intellectual property rights portfolio of the franchisor. Intellectual property rights are the core of a franchise agreement and should be clearly defined in the agreement. This should encompass any trade mark, trade name, patent, design patent, copyright, and/or trade secret relevant to the franchise agreement. After defining these rights, the parties have to determine the enforceability of such rights, in particular as to who is entitled to take actions against third-party infringers. The agreement should also determine the scope of the rights of the franchisee in registering intellectual property rights under its own name (if any).

It is common practice to limit such right only to trade marks that are not identical or confusingly similar to that of the franchisor. When an agreement is terminated, it is unfortunately common for a franchisor to discover that the franchisee has filed trade marks that may compete with the franchisor's marks. Thus, a correct understanding of the scope of the intellectual property rights is essential.

Confidentiality

A franchise agreement is not limited only to intellectual property rights. In addition to providing the use of the brand name, business model, and so on, the franchisor will provide confidential information used in training the franchisee, which can include sales techniques and documents regarding the products.

Thus, it is necessary to clearly define the scope of the confidential information. Without a clear definition, there is a risk that valuable information will enter the public domain.

Registration of Agreement

In theory, a trade mark license agreement can be registered with the Department of Intellectual Property if it fulfills two conditions, namely:

- It contains a list of goods and/or services for which the trade mark is to be used; and
- It includes terms that ensure effective control by the registered owner of the trade mark over the quality of the goods or services of the licensee.[3]

However, the Trade Mark Registrars at the Department of Intellectual Property sometimes refuse to record franchise agreements, judging that this type of agreement is not equivalent to a trade mark license agreement if such agreement

3 This registration is required for the master license agreement and any sublicense agreements granted to third parties.

does not contain the required information as mentioned above. In Thai courts, two points of view confront each other.

The first considers the trade mark license agreement as inseparable from the franchising relationship. In this case, if the franchise agreement (including the trade mark license) is not registered, the agreement is void. From a second perspective, other judges consider the trade mark license agreement as a part of the franchise agreement.

Thus, if the provisions regarding trade mark use are not registered, they will be void, but the franchise agreement will survive. For legal compliance, some franchisors enter into a separate trade mark license agreement with the franchisee and register that agreement with the Department of Intellectual Property. The Department of Intellectual Property allows the parties to conceal parts of the agreement that are irrelevant to trade mark licensing and conditions required under the trade mark law (i.e., short-form recordal).

Trade Competition Issues

In General

Thailand's Trade Competition Act (1999) has a direct impact on many of the common terms contained in franchise agreements.

Price Fixing

Some franchise agreements will either set retail prices or, perhaps, will set minimum and maximum price ranges for franchisees.

If the agreement is improperly drafted, such a limitation of a franchisee's freedom to set its own price for goods can be deemed a violation of the rules of the Trade Competition Act against price fixing.

Exclusive Supplier

The nature of a franchise is to create a unique product or service that is identical or similar from one franchise outlet to another. One means used by franchisors to ensure uniformity from one franchise outlet to another is to contractually bind the franchisee to purchase supplies exclusively from a particular manufacturer, or directly from the franchisor or the franchisor's affiliate. The Trade Competition Act expressly forbids any company from "fixing persons from whom business operators may purchase goods or services."

In the past, automobile dealers in Thailand would protect their franchise by having exclusive dealership arrangements with their foreign manufacturers and franchisors. With this in mind, the Trade Competition Act incorporated an additional section that expressly guarantees local purchasers in Thailand the right to buy directly from a foreign supplier, and bars any Thai operator from making an exclusivity agreement that requires local purchasers to buy only from an exclusive domestic distributor. This is one of the few provisions of the Trade Competition Act that expressly addresses the terms of agreement between a foreign entity and a Thai entity.

Exclusive Product Line

Franchisors will almost always restrict their franchisees from expanding their product lines to carry products other than the specific franchise products, or those approved by the franchisor. A franchisee is normally limited to selling only franchise products. However, such a limitation also may potentially violate the terms of the Trade Competition Act against exclusivity.

A recent example was that of Honda Motorcycles (Thailand). Honda Motorcycles would not permit any of its resellers to carry non-Honda motorcycles. Thailand's Trade Competition Board found such restriction to be in violation of the Trade Competition Act, and initiated a formal criminal complaint against Honda with the public prosecutor's office. Specific circumstances will dictate enforceability.

Geographic Exclusivity

Another means that franchisors utilize to maintain the value of their franchise is to grant exclusive licenses to the franchise for a geographical region to one or more franchisees. This is to provide the franchisees comfort for their capital investment in introducing or expanding the franchise into a new market.

The Trade Competition Act expressly forbids any agreement that fixes "geographical areas within Thailand in which each business operator may distribute . . . goods or services," or that fixes "geographical areas in which each business operator may purchase goods or services."

Applicability to Foreign Franchisors

Note, however, that enforcement of the Trade Competition Act is directed solely at the conduct of Thai entities, excluding from its coverage any misconduct by foreign entities that do not maintain any presence in Thailand. This is in keeping with Thailand's historical interpretation of law to apply only within Thailand (which contrasts with the extraterritorial effect applied to the interpretation of United States laws, for example).

As a result of this limited enforcement, foreign franchisors without any presence in Thailand are free to enter into agreements with Thai franchisees which may, on the face of it, violate the terms of the Trade Competition Act as described above.

However, even though a foreign franchisor may not be held liable for any infringement of the Trade Competition Act, the same foreign franchisor will be unable to enforce such contradictory terms within Thailand. Any such attempt would be in breach of public policy and, even in the case of arbitration awards, unenforceable by virtue of Thailand's conflict-of-law rules.

Franchisor Security

Liens

Thailand has not yet enacted any law for purposes of securing liens against personal property, such as equipment, inventory, or accounts receivables. While there is some provision for the registration of liens on machinery, this is limited.

As a result, in the case of a franchisee that is in default and subject to a creditor's claims, there is little a franchisor can do to ensure that franchise-unique equipment and inventory are not acquired by third-party creditors who are unauthorized franchisees.

Lease Assignment

Under Thai real property law, a lease of real property is not assignable unless it expressly so provides. As such, it is important that a franchisor ensures that any lease of retail space to a franchisee expressly contains authorization from the landlord to assign the leasehold back to the franchisor (or its appointee) and, ultimately, to a new franchisee.

In the absence of such express language, the franchisor will not be able to retake possession of the franchise location in the event of default by the franchisee.

Alien Business Law

Even in a situation where a franchisee cooperates in transferring the franchise location and operations back to the franchisor, the franchisor may not be permitted to assume operation of the franchise if it is a foreign entity.

Foreign entities are restricted from operating certain businesses under the Alien Business Act. In particular, all retail and many service businesses are strictly forbidden to foreigners. This is an additional obstacle to a foreign franchisor assuming control of a franchise location occupied by a defaulting franchisee.

Non-Compete Clauses

One risk that a franchisor should always be wary of is the possibility of a former franchisee opening a competitive business or franchise utilizing the knowledge/experience obtained while operating the original franchise.

Infringement of trade secrets, trade marks, and other intellectual property rights are one area of such risk, which mandates strong, comprehensive language to protect the franchisor. Even in the absence of such language, such intellectual property rights also are protected by operation of Thai law (see text, below).

Notwithstanding such protections, a comprehensive franchise agreement also should contain language barring the principals of the franchisor from opening a competing business either simultaneously with or upon expiration or termination of the original franchise.

Non-compete clauses will generally be enforced by Thai courts, provided they are reasonable and do not effectively bar an individual outright from seeking employment and/or conducting business in their particular profession or industry. By way of example, Thai courts are not likely to enforce a non-compete clause that bars a chef or restaurant operator from preparing food in any competing restaurant within Thailand.

Such a restriction effectively bars a Thai chef or restaurateur from ever seeking employment, or operating a business (or both) in his chosen industry or area of expertise. However, a non-compete clause is more likely to be enforced if it specifies:

- A particular kind of restaurant (e.g., a restaurant serving hamburgers);
- A particular geographic zone (e.g., within a one-kilometer radius of the franchisor's present or future locations); and
- A fixed term (e.g., for five years).

In determining the validity of a non-compete clause, Thai courts will generally look at these three limiting factors, namely:

- The definition of competing operation;
- The geographic effect; and
- The chronological term.

Therefore, practitioners are advised to always incorporate such limits into a non-compete clause, with a balancing of the franchisor's need for protection against a franchisee's ability to seek employment or operate a business (or both) in his field of expertise.

Securing a Guarantee

Franchisors will typically expect the Thai franchisee to secure a guarantee from its parent company or even in some cases a standard bank guarantee. In this respect, there have been notable changes to the Civil and Commercial Code as recent as last year to give greater protection to guarantors.

The Act Amending Civil and Commercial Code (Number 20), B.E. 2557 (2014), effective from 12 February 2015, has amended the previous sections for suretyship. The creditor must now send notice to the guarantor within 60 days from the date of default of the debtor, and the guarantor's obligation to pay will begin only on actual receipt of the notice.

This is a significant amendment, as on expiry of the 60-day period the guarantor is no longer obligated to pay interest chargeable after this period. This essentially puts the burden on the creditor to ensure adequate notice is sent to the guarantor, failing which it forfeits its right to pursue the guarantor for payment of interest, cost, and expenses incurred after the 60-day notice period.

Further, the new amendments require standard-form guarantees to clearly specify the duration and amount of the guaranteed obligation and also to specify the main agreement which is being guaranteed. A creditor can no longer require a guarantor to be jointly liable with the debtor—such a provision would in fact be void.

In light of these new developments, it may be necessary to revise the standard form of guarantee required to be furnished by the franchisee for local law compliance.

Trade Secrets and Franchising

Trade secrets in Thailand are protected under the Trade Secrets Act,[4] which came into force on 22 July 2002. The Act contains provisions to protect against unauthorized disclosure of trade secrets, including a framework that enables the court to issue injunctive relief against disclosure of trade secrets.

A franchisor must be vigilant in identifying and carefully controlling use and disclosure of its proprietary trade secrets, such as secret know-how, formulae, recipes, inventions, client lists, and sales data. This can be done either in a separate non-disclosure or confidentiality agreement, or with an airtight confidentiality provision within the franchise agreement itself, or preferably both.

The Trade Secrets Act provides far broader protection and more severe penalties for trade secret infringement than the Penal Code provides. However, one can resort to the Trade Secrets Act for enforcement only if careful steps have been taken (and can be demonstrated) to maintain the secrecy of whatever proprietary information is in dispute. The expansion of such protection should be viewed as a benefit for the owner of a trade secret in seeking remedial action for unauthorized disclosure of secrets.

Taxation Issues

Income Tax

Franchise Earnings of Foreign Franchisors and Licensors Operating outside Thailand

Franchise fees and royalties paid by Thai entities to foreign franchisors and licensors not carrying on business in Thailand are subject to income tax in the form of a withholding tax at the rate of 15 per cent. The franchisee or licensee, as the payer of franchise fees and royalties, has the duty to withhold 15 per cent income tax, and to remit the tax to the Revenue Department no later than the seventh day of the month following the month of payment.

In some cases, foreign franchisors require Thai franchisees to spend a certain amount of advertising, marketing, or promotional expenses to advertise or

4 B.E. 2545 (2002).

promote the franchisor's products or marks (e.g., trade name, trade mark, and logo). These expenses may also be deemed as part of the franchise fees, which are subject to 15 per cent withholding tax, even though the expenses were not paid directly to the foreign franchisor (Supreme Court Judgment 4440/2552 (2009)).

The 15 per cent withholding tax may be reduced under some double taxation treaties that Thailand has with various countries. The 15 per cent withholding tax paid to the Thai Revenue Department may be used as a credit against the licensor's income tax payable on such franchise fees/royalties in the resident country (credit method).

Under some double-taxation treaties, the exemption method is applied instead of the credit method. Under the exemption method, franchise fees/royalties subjected to tax in Thailand are exempt from income tax in the resident country.

There is no requirement to inform the Revenue Department of the payment of franchise fees/royalties. The Thai franchisee or licensee will file a withholding tax return and remit the tax to the Revenue Department no later than the seventh day of the month following the month of payment.

However, the withholding tax certificate issued by the Thai Revenue Department may be required as evidence for a tax credit in the resident country. In this regard, the foreign franchisor/licensor generally appoints the Thai franchisee or licensee as its appointee on an application for a withholding certificate.

Documents required for submission to the Thai Revenue Department for the application include a franchise or license agreement, a copy of the withholding tax return, the receipts issued by the Revenue Department, and a power of attorney.

Franchise Earnings of Foreign Franchisors and Licensors Operating in Thailand

In some franchising arrangements, a foreign franchisor will commit to sending or "dispatching" an employee to the franchisee in Thailand for training or to teach the practice of the operation. Under certain circumstances, this may create a tax liability for the franchisor.

Under Thai tax law, a foreign corporation may be deemed as carrying on business in Thailand if it has an employee, a representative, or a go-between in Thailand, whose activities generate income or gains for the corporation in Thailand.

One needs to be wary in this circumstance, as the Thai Revenue Department may claim that the employee so dispatched is generating revenue for the foreign franchisor in the form of the royalty stream. Such a corporation may then be subject to Thai income tax, which is 20 per cent corporate income tax on net profits and 10 per cent profit remittance tax on the net after-tax profits remitted, or deemed remitted, abroad.

Franchise Earnings of Thai Franchisors or Thai Branches of Foreign Entities

Franchise fees or royalties paid by Thai entities to Thai franchisors/licensors or Thai branches of foreign companies are subject to corporate income tax on net profits.

The corporate income tax is generally imposed at the rate of 20 per cent of net profits. However, reduced rates at progressive rates beginning from 15 per cent, with an exemption on the first Baht 300,000 of net profits, are granted to small and medium-sized enterprises.

Thai franchisees or licensees, as the payers of franchise fees or royalties, have the duty to withhold three per cent income tax and remit the tax to the Revenue Department no later than the seventh day of the month following the month of payment. This three per cent withholding tax is regarded as an advance tax payment, which can be used as a credit against the corporate income tax payable.

Value-Added Tax

Value-added tax (VAT) is imposed on payment of franchise fees or royalties to foreign franchisors or licensors. The Thai licensee, as a payer of franchise fees or royalties, is required to self-assess and remit seven per cent VAT to the Thai Revenue Department no later than the seventh day of the month following the month of payment. The VAT paid to the Thai Revenue Department can subsequently be used by the Thai licensee as a credit against its VAT payable, or claimed as a refund.

For payment of franchise fees or royalties between Thai entities, the Thai licensee does not have to self-assess and remit seven per cent VAT to the Revenue Department. Instead, the Thai branches of foreign companies or Thai licensors have the duty to issue tax invoices and charge seven per cent VAT on franchise fees/royalties to the Thai licensee. The Thai licensee can use the VAT as a credit against its VAT payable, or claim it as a refund.

Dispute Resolution

In General

In case of conflicts among the parties, three dispute resolution options are available under Thai law, namely:

- Litigation;
- Mediation; and
- Arbitration.

Litigation

A trade mark, patent, or copyright infringement lawsuit is filed with the Central Intellectual Property and International Trade Court.

The plaintiff can claim damages and request the court to issue a permanent injunction against the infringers. Preliminary injunctions and Anton Piller orders are available in the Thai system and have been issued in recent years.

Mediation

The venue for pre-litigation mediation is the Office of Dispute Prevention and Settlement at the Department of Intellectual Property. After the case is filed, a party can file a request with the Office of Mediation at the Central Intellectual Property and International Trade Court to propose mediation with the opposing party.

A mediating judge who is not involved with the main trial will be appointed to mediate the case. In practice, mediation frequently leads to successful outcomes in Thailand.

Arbitration

The last option is the arbitration clause specifying the venue and jurisdiction for arbitration. These clauses in contractual agreements are recognized and enforced by the Thai courts under Thailand's Arbitration Act.

In light of this, it may be preferable for the franchising/licensing agreement to refer all disputes to arbitration before a defined arbitration panel in the defined jurisdiction.

Termination

Termination and Hijacked Certificates

Foreign franchisors usually opt to appoint their local franchisees, distributors, agents, or licensees as the local entity to apply for and maintain product registration and import licenses as required by the Thai Food and Drug Administration or the Thai Ministry of Agriculture. Such appointments are normally set out in the franchise agreement.

While, on most occasions, this is a mutually beneficial relationship, sometimes local partners who have built up the business for those products and/or services may begin to compete unfairly or commit other breaches.

This can lead to difficulties in terms of terminating a franchise partner who holds the keys to getting your food, cosmetic, medical device, or agrochemical products into local markets, which is sometimes referred to as a rogue ex-franchisee problem or a hijacked certificate.

How Much Is Enough to Terminate?

All commercial relationships have their ups and downs that may not reach a level of acceptable breach to warrant a termination. Economic turndowns, adverse weather conditions, livestock epidemics, increased competition, and other situations are all reasonable events whereby your local partner may need to reposition itself and the parties revisit minimum sales targets and advertising spending.

However, the foreign franchisor also should look closely into the conduct of its local partner as soon as relations appear unstable and report unsatisfactory performance regularly in order to head off what may, in time, amount to warranted termination. Simple searching will reveal whether the franchisee has applied for a similar trade mark or has filed its own trade marks for similar products.

It also is a pretty simple investigation to determine whether one's partner is selling the same or similar products and in what type of packaging. Another step is to check whether the company (or its directors) may have recently re-registered its business as a manufacturing business and whether it has obtained a manufacturing license. If so, one can easily discover whether it has been approved to manufacture products the same as or similar to yours. Checks like this can be made at the relevant Ministry of Commerce tax office. A franchise agreement likely also has a clause allowing the franchisor to make unannounced inspections.

Agreement Review in Preparation for Termination

If this type of due diligence results in disappointing news, the next step is to go through the terms of the franchise agreement with the partner carefully to determine whether these may amount to a material breach and to pinpoint the consequences for such. Frequently observed examples of breaches are:

- Registration of a similar trade mark for an identical product;
- Manufacture and/or sale of a competitive product without authorization;
- Non-observance of the target without any reasons/notification given; and
- Conspicuous decrease in sales of some products while maintaining adequate sales of others.

Another important step is to clearly check the dispute resolution and termination process in the franchise agreement to make sure one follows the process correctly. If arbitration is the stated dispute resolution procedure, it should be determined whether there has been a carve-out for court injunctive relief on the occurrence of intellectual property infringement or breach of confidentiality.

If so, one needs to wait until an arbitration panel makes a decision; one can go to court immediately to seek an injunction. It should be determined whether termination is effective immediately on termination or after a prescribed period of days.

If there is a breach, the termination process should be clearly followed, as the local franchisee may deny any wrongdoing on his part (as is usually the case). Here, a paper trail of earlier warnings will be very helpful. The termination notice should best include mention of all breaches in order to reduce the chance of the distributor thinking he can challenge the allegations. This also helps to reduce the likelihood of the distributor's counsel dragging the process out longer by an unwarranted and lengthy exchange of letters.

The drafting of the notification of termination should be carefully worded because, in the unfortunate case of litigation, the letter could be provided as evidence of defamation (particularly so in Thailand) or unlawful termination, for example.

The notification of termination should also list all documents to be returned for a clear termination of the relationship, such as the certificate of free sale and cancellation of the import license (or transfer back to the franchisor or a newly appointed distributor in jurisdictions where this is applicable) in order to discourage the local partner from pursuing further unauthorized sales of the franchisor's products in Thailand.

Avoiding Interference with Replacement Product Registration Certificates and Import Licenses

When a foreign franchisor discovers that the situation with its breaching franchisee is at the point of no return, one of the main points to check in the agreement is under which name the products were registered. In most jurisdictions, products are required to be registered in the name of a local entity. In the absence of their own office at the time of the initial launch of the product, foreign companies often opt for their franchisee as the applicant for registering their products with the local relevant ministry.

The first issue to determine is the particular process in the jurisdiction when a company wants to change the registrant's name on a product registration certificate. In some countries, the change can be made directly on the application form. However, in numerous cases, the local partner will have to request the change since the products are not officially listed under the name of the foreign company.

In other countries, such as Thailand, an amendment of the application is not possible and the foreign company has to reapply to obtain a new product registration certificate. The advantage of this method is that the local partner may not be aware of such new applications. The inconvenience is that it may take a few months before the new product certificate is granted, costs will be incurred, and sometimes retesting may be required, especially if your application reaches the desk of an overzealous examiner.

Draft Franchising Business Act

The draft Franchising Business Act has four main objectives:

- To stipulate the criteria and reasons for providing regulations in relation to franchises;
- To appoint a committee to be responsible for providing franchise business support and to submit promotion and development plans to the Minister of Commerce, as well as to consider complaints;

- To stipulate protective measures aimed at protecting franchisors and franchisees, such as measures to prevent any exaggerated advertisements and to ensure the fairness of contracts, the availability of clear business operating manuals, and the disclosure of sufficient data to facilitate decision-making relating to the purchase of franchises; and
- To stipulate criminal and administrative penalties to be imposed for breach of the law.

The draft Act provides a definition of a franchise and specifies that a franchise business must include some form of intellectual property. Also of particular note, the draft Act focuses on restrictions and registration of a franchise business operation.

Restrictions

Franchisors and franchisees will be required to comply with certain restrictions on business operations. For example, franchise business agreements must be in writing and franchisors must disclose to the franchisee all of the data necessary for the operation of the franchise business.

Such data will include the provision of clear working manuals for the franchisees to follow. To assist franchisors, however, the draft Act prohibits franchisees from disclosing data relating to business operations that have been disclosed by franchisors. Nevertheless, prudent franchisors should have strong confidentiality agreements and clear intellectual property and trade secret provisions to protect their valuable confidential business data.

Registration

The draft Act provides that any franchisor who wishes to offer a franchising business to franchisees in the future must register with the Thai Ministry of Commerce and must have the requisite qualifications. Furthermore, the draft law has followed the Chinese model (as set out in the 2005 PRC Ministry of Commerce's Administrative Measures on Commercial Franchising and the subsequent 2007 Franchise Regulations) by requiring the franchisor to have operated two franchise business outlets profitably for at least two years prior to filing the registration application.

Failure to comply with such agreements by the business operators will entitle the Committee for the Consideration of Administrative Punishment to revoke the franchise. Revocation will prevent the business operator from operating a new franchise business and relevant solicitation or advertisements can no longer be made.

Scope of Enforcement

The draft Act maintains Thailand's historical position that law should only apply within Thailand and it therefore does not apply to franchise businesses whose franchisors are domiciled outside the Kingdom and who have entered into the relevant contract. As such, agreements between a foreign franchisor and a Thai franchisee will not be subject to the restrictions under this law. However, if the Thai franchisee is permitted to grant sub-franchising agreements to other Thai entrepreneurs, the draft law will have enforcement effect in relation to the sub-franchising agreements.

Many practice standards that are laid out in the draft law are controversial and will be subject to further review and discussions before its final enactment. Currently, the draft remains with its promulgating authority, the Ministry of Commerce, and there are no reports of any imminent further consideration before passage to the National Legislative Assembly for its consideration. The progress of this draft Act should be followed by franchisors, franchisees, and lawyers alike given that many business operators stand to be potentially affected by its provisions.

Conclusion

Despite conventional wisdom, Thailand's ongoing political turmoil has not affected foreign investment flows into and out of the country. Statistics show that despite the coup, which began on 22 May 2014, foreign investment remains stable and Thai investment outward is increasing.

The year 2015 was a year of special importance for Thailand and all Association of Southeast Asian Nations (ASEAN) member states, as it marked the establishment of the ASEAN Economic Community (AEC) as agreed on by country leaders at the 2007 ASEAN Summit.

Section 9 of the AEC Blueprint clearly lays out the five core elements to attain the goal of having a single market and production base for the ASEAN region– the free flow of goods, services, investment, capital, and skilled labor. This should bode well for regional franchise opportunities and flows from other free trade agreements from recent years.

In November 2001, China and the 10 ASEAN members (including Thailand) began negotiating the setting up of a free trade area. On 1 January 2010, after nearly 10 years of negotiations and preparation, China and the 10 members of ASEAN (including Thailand) entered into the China-ASEAN Free Trade Agreement (CAFTA). CAFTA covers goods (agricultural and manufactured), investments, and services and, in terms of economic value, is the third-largest regional agreement, after the EU and NAFTA.

In terms of population, the agreement covers the world's largest free trade zone with a combined population of just over two billion people. Not coincidentally, on the same day, the ASEAN-India Trade in Goods Agreement (ASEAN-India TIG or ASEAN-India Free Trade Agreement, AIFTA) also entered into force. Thailand, through its ASEAN association, has also concluded free trade agreements with South Korea, Japan, Australia, and New Zealand and is currently negotiating a free trade agreement with the European Union.

Franchising will play an important role in introducing such global goods and services into Thailand as well as introducing Thai goods and services abroad. In fact, Thai franchisors are participating in substantial numbers in overseas franchise trade shows and exhibitions where Thai strengths in such industries as food, health, hospitality, and retail are looked at favorably by foreign franchisees.

With sufficient planning in terms of dealing with intellectual property rights, tax, and termination, franchise models should continue to grow and expand in Thailand for foreign goods and services as Thai goods and services expand in overseas markets.