

Vietnam Franchising Q&A

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As of mid-2018, more than 200 franchises had been registered in Vietnam, including franchises in food and beverages, fashion, education, and other sectors. With half of its population of nearly 100 million under the age of 30, Vietnam is one of the fastest growing franchise markets in the world.

Before entering Vietnam, foreign franchisors should have a solid understanding of the country's franchising regulations and practice. Below, we answer 10 questions commonly asked by prospective franchisors.

1. Are franchises required to be registered in Vietnam?

Foreign franchisors in any business sector must register their franchising activities with Vietnam's Ministry of Industry and Trade (MOIT) before conducting franchising activities in Vietnam. A Franchise Disclosure Document (FDD), which includes information about the franchisor, costs and fees payable by the franchisee, and other relevant matters, must be filed with the MOIT as part of the registration process. In practice, registration with the MOIT typically takes about one to two months from the date of submitting a duly prepared application dossier.

Domestic franchisors do not need to register, but are required to notify their local Department of Industry and Trade of their activities.

2. We just set up a Singaporean company to act as the master franchisee for the Asia-Pacific region. Can it act as the master franchisee even if it was just set up last month?

The Vietnamese franchise regulations require that a franchise system must have been in operation for more than one year prior to franchising such system in Vietnam. However, in its current practice, the MOIT usually interprets this one-year qualification to mean that the local franchisor entity (the Singaporean company, in this case), as opposed to the franchise system, must have been in operation for more than one year.

Thus, if the proposed master franchisee (sub-franchisor) has only been established for one month, the MOIT is likely to reject the registration, though they will consider each application on a case-by-case basis.

3. Are there any pre-disclosure requirements for franchisors in Vietnam?

Prospective franchisees are supposed to be given at least 15 days to review the FDD before the date of entry into the franchise agreement.

4. We are in a hurry to sign the franchise agreement, can the pre-disclosure requirements be waived?

In practice, some franchisees will sign an agreement to waive the 15-day pre-disclosure requirement. However, it is recommended that the FDD be provided to the potential franchisee before or at the signing of the franchise agreement.

5. Do we need to have our trademark registered in order to enter into a franchise agreement, and to register our franchise?

The franchising rules require the franchisor to have a registered trademark. However, if the trademark is pending (i.e., has been applied for in Vietnam, but is not yet granted), the MOIT may make an exception on a case-by-case basis. This exception has not been granted in all cases.

6. Can we choose foreign arbitration as the venue for resolving any disputes with the franchisee?

Choosing foreign arbitration is one of several viable options. However, we recommend choosing local arbitration at the Vietnam International Arbitration Center (VIAC). VIAC awards can be directly enforced, whereas foreign arbitral awards must go through a judicial procedure for recognition that can be time-consuming, with an unpredictable outcome. Recent reports indicate that about 75% of foreign arbitral awards are not successfully recognized and enforced, while for domestically rendered awards, only 35% are set aside by courts. Thus, statistically, domestic awards have a better chance, though at least two foreign arbitral awards in the franchising sector in Vietnam have been enforced. For example, a U.S. arbitral award was successfully enforced against a real estate brokerage franchisee in Vietnam.

It is a good idea to also have a carve-out for local litigation for injunctions and/or administrative actions related to IP breaches or infringements. In a case involving a rogue franchisee, an administrative raid by the Ministry of Science and Technology (MOST) Inspectorate was taken to force the rogue franchisee to cease using the franchisor's trademark.

7. Should we also sign a trademark license agreement with the franchisee?

There is no precedent in Vietnam stating explicitly that the use of a trademark through a franchise agreement is guaranteed to accrue to the trademark registrant (and thus can be used as evidence to ward off a cancellation for non-use), though such conclusion would be logical and intuitive. However, by recording a trademark license agreement with the National Office of Intellectual Property (NOIP), a trademark registrant can increase the chances, if not 100% ensure, that such use inures to the trademark registrant. Thus, some very prudent franchisors choose to record their trademark license agreements with the NOIP.

8. Our franchisee plans to set up a local company incorporating the franchised brand name into the company name to act as the franchisee. Is that OK?

This situation seems to come up more and more in Vietnam and is unadvisable. If the local franchisee incorporates the foreign brand name or a local-language equivalent into its corporate name, and the franchising relationship breaks down, it would be very difficult to force the local company to change its name, even with proper license agreements in place. This is because the business licensing authorities in Vietnam are always very reluctant to force any company to change its name, even when there is a clear legal basis. It can be done, but would be time-consuming.

9. Are non-compete provisions enforceable in Vietnam?

Non-compete provisions have been included in many franchise agreements in force in Vietnam. Until recently, there had not been much precedent on the enforcement of such agreements. However, in an employment context, the Ho Chi Minh City Court recently upheld a non-compete agreement as a civil agreement between two contracting parties that should be respected and is enforceable. The court awarded damages to the employer in that case, where the employee failed to abide by a covenant to not work for a competitor for 12 months. Thus, there may be a strong basis to have a non-compete agreement enforced in Vietnam.

However, it is worth noting that, in Vietnam, a lower court's decision (such as the decision of the Ho Chi Minh City Court) is not regarded as a precedent. Only a decision of the Supreme People's Court which is specifically declared by the court as a decision precedent will have this status.

10. Are there annual disclosure requirements that franchisors in Vietnam must follow?

Yes, franchisors are required to file a disclosure report every year before January 15. The report should include updated financial statements, and should amend any changes to the franchise system that are noted in Sections A and B of the required contents of the FDD under Circular 09, which is the primary legislation governing forms in franchising registration. Any changes to Section A items must also be informed on an ad hoc basis whenever such changes occur. Section A changes include changes in the trademarks that are franchised, and changes in name, address, form of business, or franchising sector of the franchisor.

This summary is designed to provide general information only and is not offered as specific advice on any particular matter.

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