

LEGAL FRAMEWORK FOR FRANCHISING IN VIETNAM

RUSSIN & VECCHI INTERNATIONAL LEGAL COUNSELLORS

HO CHI MINH CITY
OSC-VTP Building, 15/F
8 Nguyen Hue Blvd
Tel: (84-8) 3824-3026
Eml: lawyers@russinvecchi.com.vn

HANOI
Hanoi Central Office Building, 11/F
44B Ly Thuong Kiet St
Tel: (84-4) 3825-1700
E-mail: lawyers@russinvecchi.com.vn

* * *

**LEGAL FRAMEWORK FOR FRANCHISING
IN VIETNAM¹**

INTRODUCTION

More than a decade ago, cafés with the same trademark and the same style of service, menus, uniforms, and decoration were a new phenomenon in Vietnam. Since then, this business model has developed quickly. Today, many famous foreign brands reach Vietnamese customers through franchise networks. The common trend has been to receive franchises from foreign franchisors, but several Vietnamese businesses are also franchised abroad.

In fact, franchising is well suited to Vietnam, where there is a strong culture of entrepreneurship. It is a good method for small and medium size entrepreneurs who want to start a new business in a short period of time. Franchises, in comparison to new business, have a more limited risk, a modest amount of invested capital, and a proven track record of success. Although most existing franchise operations in Vietnam are in the fast food and beverage business, franchising has potential to develop in other sectors. A strong surge of interest in franchised businesses is anticipated among local entrepreneurs, and interest from franchisors is also expected to grow.

This article discusses regulation of franchising under the laws of Vietnam.

**PRACTICES AND LEGISLATION AS THEY RELATE TO THE FRANCHISE
RELATIONSHIP**

1. International practices

Although it originated centuries ago, franchising first became popular as a business form in the United States in the 1950s, when the U.S. constructed an interstate highway system. As the highway system allowed the American public to travel away from home to unfamiliar areas, consumers sought familiar businesses with familiar products and service.

Today, as the world is becoming ever more mobile, the opportunities for franchising to serve traveling consumers are growing across the globe. Franchising has taken hold in Asian markets such as Thailand, Hong Kong, the Philippines, China, and Japan. Recently opened markets such as Vietnam are just now beginning to realize the potential of the franchise business model (according to *Vietnam Economic News*, franchising did not begin booming in Vietnam until 2009, when the country eased restrictions in the retail market to fulfill its WTO commitments).

As franchising is a relatively new concept in many markets, some countries have specific franchising legislation while others do not. The United States has well-developed laws on franchising, which can provide some insights and guidance about the business model. In the United States, franchising is governed by laws that require franchisors to inform prospective franchisees in some detail about the system, the risks, and their obligations.

In the U.S., this required information is contained in a document called the Uniform Franchise Offering Circular (“UFOC”). Under federal and state rules, a franchisor cannot offer a franchise until the franchisor has prepared a UFOC and has disclosed specific information about the

¹ This paper on franchising was prepared by Mai Thi Minh Hang of Russin & Vecchi. This version is current through April 2013.

RUSSIN & VECCHI

franchise. For example, the franchisor is required to disclose its business experience and past or pending litigation, the franchise fee and initial investment, any restrictions on sources of supplies, and much more.

The UFOC or its equivalent has been adopted in many other countries. In some countries, once the UFOC has been issued, the government does not intervene and the parties are free to negotiate and enter into a franchise agreement. In others, however, the UFOC may have to be filed or registered with the authorities before an offer is made to a potential franchisee.

Laws on intellectual property rights in Asia vary widely, but generally speaking, registration of an intellectual property licensing agreement is not required.

2. Franchises as regulated by Vietnamese law

Vietnamese franchise law

The basic regulations on franchising are provided in the Commercial Law, adopted by the National Assembly on 14 June 2005 (“**Commercial Law**”). These regulations are elaborated upon in Decree No. 35/2006/ND-CP of the Government (31 March 2006) (“**Decree 35**”) as amended by Decree No. 120/2011/ND-CP of the Government (December 16, 2011) (“**Decree 120**”), and Circular No. 09/2006/TT-BTM of the Ministry of Trade (25 May 2006) (“**Circular 09**”). Regulations related to franchising can also be found in the Law on Intellectual Property, adopted by the National Assembly on 29 November 2005, and the Law on Technology Transfer, adopted on 29 November 2006.

Vietnamese franchise law applies to franchising activities between Vietnamese parties, to a foreign franchisor who grants a franchise to a franchisee in Vietnam, and to a Vietnamese franchisor who grants a franchise to a franchisee in a foreign country.

Definition of franchise

The Commercial Law defines franchising as a commercial arrangement under which a party (the franchisor) grants another party (the franchisee) the right to carry out the business of selling its goods or supplying services under the following conditions:

- the franchisee may carry out the business under a format determined by the franchisor, and may affix the franchisor’s trademarks, trade names, business logos, slogans, and advertisements at the franchisee’s business premises; and
- the franchisor has the right to control and assist the franchisee in carrying out the franchised business.

Decree 35 gives a rather comprehensive interpretation of franchising. It includes:

- rights received by the franchisee from the franchisor to carry out a business under a system determined by the franchisor and to affix the franchisor’s trademarks, trade names, business logos, slogans, and advertisements at the franchisee’s business premises;
- rights received by a primary franchisee from a franchisor under a master franchise agreement;
- rights received by a sub-franchisee from a sub-franchisor (i.e. the primary franchisee) under a master franchise agreement; and/or
- rights received by a franchisee from a franchisor under a franchise development contract, which allow a franchisee to carry out the franchised business at more than one location within a locality.

RUSSIN & VECCHI

Master franchise

In a master franchise, in addition to the franchise arrangement, the master franchisor gives the franchisee the right to act as a sub-franchisor and the right to grant a franchise to a sub-franchisee. When we refer to a foreign franchisor in this article, we intend to include a foreign entity that has been awarded a master right to sub-franchise a business in Vietnam.

Decree 35 regulates master franchises. A particular condition for a sub-franchise arrangement under a master franchise is that the local franchisee that receives a franchise from abroad cannot sub-franchise to a sub-franchisee unless that local franchisee *“has already run [the primary] franchised business for at least one year.”* This restriction is intended to ensure the sustainable development of a franchising network. The policy rationale is that the primary franchisee should gain experience to run the franchised business before sub-franchising to others.

Franchise Agreement

In Vietnam, a franchise agreement must be in writing. A franchise agreement need not be registered to be effective.

The regulatory authorities of franchising activities

The Ministry of Industry and Trade (“**MOIT**”) is the central regulatory authority for franchising activities. The MOIT has the power to provide guidance for implementation of policies and legislation on franchising, and to organize the registration of franchises.

The MOIT registers franchises from overseas, an export processing zone, a non-tariff area, or a separate customs area. The Services of Industry and Trade (the “**SOITs**”) are the provincial agencies of the MOIT. The SOITs supervise franchising in provinces and centrally-run cities. The SOITs also receive reports submitted by Vietnamese franchisors who franchise their business to Vietnamese or to foreign franchisees.

We discuss franchise registration and reporting requirements below.

Information disclosure

Decree 35 requires an information disclosure document called “**Introduction of the Franchise Business,**” which is equivalent to the UFOC. The Introduction of the Franchise Business must be prepared according to a standard form provided by the MOIT under Circular 09. It must be submitted to the MOIT in order to register the franchising activities, as we discuss below.

Under Decree 35, the franchisor must provide the prospective franchisee or master franchisee with the Introduction of the Franchise Business and a copy of the form of the franchise agreement at least 15 working days prior to the execution of a franchise agreement.

As the master franchisee/sub-franchisor is a franchisor in relation to a sub-franchise granted under a master franchise, the master franchisee/sub-franchisor must comply with the disclosure requirements as if it were a master/primary franchisor. The master franchisee/sub-franchisor is also required to provide a sub-franchisee with the contents of the Master Franchise Agreement and information about the master/primary franchisor. It must also inform a sub-franchisee of remedies in case the Master Franchise Agreement is terminated. In case a foreign franchisor grants a master

RUSSIN & VECCHI

franchise to a local master franchisee/sub-franchisor, the foreign franchisor is not required to provide disclosure to local sub-franchisees, as that is the responsibility of the master franchisee/sub-franchisor.

Ongoing disclosure obligations

Besides the initial disclosure requirement mandated in the Introduction of the Franchise Business, a franchisor is required to keep its franchisees updated concerning all significant changes related to its franchise system. A “significant change” is defined as any change that may have an impact on the business activities of a franchisee.

Circular 09 requires the franchisor to report to the MOIT any change in: (a) the name of the franchisor; (b) address of the head office; (c) telephone and fax number; (d) scope of business; or (e) type of business to be franchised. The report must be made within 30 days from the date on which the change occurs.

Registration requirement

The registration requirements apply to franchises from overseas and to franchises from an export processing zone, a non-tariff area, or a separate customs area. An offshore franchisor has only to register its franchising business once. Such registration must be filed with the MOIT.

The registration dossier must include:

- registration form of the franchise activity, made on a standard form provided in Circular 09;
- Introduction of the Franchise Business;
- certified copy of the franchisor’s business registration; and
- certified copy of patents and certificates of intellectual property rights of the prospective franchisor, if any.

If any of the above documents are in a foreign language, a certified translation is required.

In addition, if the applicant is a master franchisee/sub-franchisor, it must present a document issued by the master/primary franchisor permitting it to sub-franchise the business.

The MOIT has discretion to determine whether the documentation submitted for registration of the franchising activity meets disclosure requirements. It may require changes or additional information in the Introduction of the Franchise Business. For the purpose of registration, it is preferable for a franchisor to use Introduction of Franchise Business which has a similar format to the template provided in Circular 09.

The regulatory time frame for the MOIT to register the franchising activity is five working days from the date on which a complete dossier is submitted by the franchisor. In practice, the time

RUSSIN & VECCHI

frame may be longer--perhaps a month. A registration fee is stipulated in Decision 106/2008/QD-BTC (November 17, 2008) of the Ministry of Finance as follows:

- new registration: VND 16,500,000²
- amendment of a franchise registration: VND 6,000,000
- re-issuance of a franchise registration: VND 500,000

A franchisor and a franchisee may freely negotiate the terms and conditions of a franchise agreement. Decree 35 gives some suggested terms and conditions which can be used for reference, but it is not compulsory to include them in a franchise agreement.

The franchising agreement itself need not be included in the registration dossier, except if necessary to register the licensing of intellectual property rights that are associated with a franchised business and fall within the regulations on intellectual property. Licensing regulations in the Law on Intellectual Property are rather flexible on what is required to conclude and register such an agreement. An agreement to license the right to use an intellectual property asset--for example, a trademark licensing agreement (“**TLA**”)--need not be registered with any authority in order to be effective. The parties to such a licensing agreement, however, may wish to register it with the National Office of Intellectual Property (“**NOIP**”), as registration will protect the asset from a third party’s claim. The registration procedures are rather simple.

Decree 35 does not contain a requirement to register the transfer of technology that may accompany a franchise. In the context of a franchise, technology could mean business secrets and know-how if they form part of the franchised business. According to the Law on Technology Transfer, transfer of technology occurs only through a written agreement. A technology transfer agreement (“**TTA**”) need not be registered. The Law on Technology Transfer, however, suggests that parties to such an agreement should register it with authorities to enjoy benefits in accordance with this Law and other related regulations. Even if it is not registered, however, a TTA is effective between its parties, as well as in relation to any third party. The law sets out areas in which transfer of technology is restricted. In those cases, a certificate issued by the Ministry of Science and Technology (“**MOST**”) is required for the TTA to be effective.

According to the Law on Technology Transfer, transfer of technology must not harm national interests, human health, national cultural values, the environment, or natural resources, and must comply with international agreements of which Vietnam is a member.

Reporting requirements

Under Decree 120, a Vietnamese franchisor, whether it grants franchises to a foreign or Vietnamese entity, is no longer required to register its franchising activities with state agencies. Instead, the Vietnamese franchisor must report its franchising activities to the provincial SOIT where it is registered to operate. There is no specific provision under Decree 120 that specifies the content of the report, and the procedure by which the report is filed. Due to the lack of implementing regulations, the report requirement appears not to be fully operational.

Duration

Neither the Commercial Law nor Decree 35 imposes any maximum duration for a franchise agreement.

² US\$1 approximates VND 21,000.

RUSSIN & VECCHI

There are some limitations on the term of a trademark license in the context of a franchise agreement. A trademark registration, for example, is valid for ten years. However, this rarely poses any problems, as the trademark license can be renewed for an indefinite number of 10-year terms. A TLA may continue for the period of protection of each of the licensed trademarks, and may simply be renewed when the trademark registration is renewed.

Parties to a TTA are free to agree on its term, and may agree on the moment at which the TTA becomes effective.

Language

Decree 35 requires all franchise agreements to be made in the Vietnamese language. The MOIT has explained that this requirement has been included because many local franchisees are small- and medium-size entrepreneurs who are not familiar with a foreign language. A franchising agreement made in Vietnamese is intended to ensure that a local franchisee thoroughly understands and properly performs the agreement, and to avoid disputes due to misinterpretation. This language restriction, however, does not apply to a franchise agreement under which a Vietnamese franchisor grants a franchise in a foreign country.

For that same reason, and because it must be registered with the MOIT, the Introduction of the Franchise Business can be made in English, but it must be translated into Vietnamese and the Vietnamese translation must be certified.

CONCLUSION

Vietnam's legal framework encourages the development of commercial activities, including franchising. In this sense, Vietnam continues to come closer to the international norm. There is intense local interest among both large and small entrepreneurs to be a franchisee of an international franchisor. The legal framework for franchising is all but complete. With the WTO now in place and with interest in franchising growing both within and outside of Vietnam, it seems that conditions are right for franchising to flourish.

Appendix: Compulsory contents of the Introduction of the Franchise Business

1. Required information

The franchisor must provide the following information:

- the franchisor's name;
- address of head office;
- incorporation date;
- scope of business;
- type of business to be franchised;
- a description of the organizational structure of the franchisor, including the department that is in charge of the franchising activities of the franchisor.

The franchisor must also indicate whether it is a primary franchisor or a sub-franchisor, and whether it has registered the franchising activities with the appropriate agencies.

2. Business experience of franchisor's management team

The Introduction of the Franchise Business must provide a prospective franchisee with information on the business and management experience of the franchisor and its experience in the franchising business. The franchisor must disclose background information on members of the Board of Directors, including their names, positions, and business experience.

3. Litigation history

The franchisor is required to disclose past and pending lawsuits related to its franchising activities that have been filed against the franchisor during the preceding year. The franchisor is not required to disclose information on civil, administrative, or criminal proceedings that are not related to its franchising activities.

4. Initial fees

The Introduction of the Franchise Business must specify types and amount of initial fees that the franchisee must pay. It must also specify time of payment and conditions for reimbursement of fees paid.

5. Other fees

Other fees, including one-time payment of fees, periodic payment of franchise fees (royalty fees), advertising fees, training fees, service fees, rents, etc., must also be disclosed. For each type of such fees, the franchisor must provide their fixed amount, time of payment, and conditions for reimbursement.

6. Initial investment

The Introduction of the Franchise Business must provide information on the initial cost that a prospective franchisee must invest in the business. It includes costs for the business premises, facilities and equipment, decoration, and the security system. It must also specify costs that a prospective franchisee has to pay for the initial inventory required to operate the franchise business. Necessarily, some of these costs will be estimates.

7. Trademarks, patents, copyrights, and other intellectual property

In the Introduction of the Franchise Business, the franchisor must disclose information on its trademarks and service marks that will be used in association with the franchised business. It must indicate whether the trademark is registered in Vietnam. If so, details of the registration must be provided. However, it is not a condition precedent of offering a franchise that the trademarks or service marks to be used must be registered.

The franchisor must describe its other intellectual property rights, including patents and copyrights, in the Introduction of the Franchise Business. Details of registered intellectual property rights must be disclosed to the prospective franchisee.

8. Sources of products and services

Circular 09 requires that the Introduction of the Franchise Business include a description of goods, services, and equipment that the franchisee must purchase or lease in order to ensure the consistency of the franchise system. The franchisor is also required to indicate if the franchisee may adjust standards and regulations within the franchise system. If permitted, the franchisee must be informed of procedures necessary to make such adjustments.

9. Franchisor's obligations

Circular 09 generally requires the franchisor to provide the franchisee with a description of the obligations of the franchisor, including:

- (a) obligations prior to the execution of the franchise agreement;
- (b) obligations during the course of operation of the franchise system;
- (c) obligations to consider the franchisee's proposed premises for the franchised business; and
- (d) obligations to provide training, including initial training, and other training programs.

The franchisor is not required to disclose its obligations in connection with advertising activities or its obligation to provide computer and cash register systems for the franchisee.

10. Description of the products and services market

The franchisor is required to provide a prospective franchisee with a description of the Vietnamese market for the products and services to be franchised, including the geographical market where the franchise business will operate. The franchisor must inform the franchisee on prospects for the development of these markets.

11. Franchise agreements

The Introduction of the Franchise Business must include a summary of the form of the franchise agreement. It should include:

- (a) headings of terms and conditions of the franchise agreement;
- (b) duration of the franchise agreement;
- (c) conditions and obligations of the franchisor/franchisee in connection with unilateral termination of the franchise agreement;
- (d) circumstances under which the franchise agreement can be modified;
- (e) conditions under which the franchisee can transfer the franchise agreement to another prospective franchisee; and

- (f) circumstances under which either the franchisor or franchisee is not legally qualified to be a party to the franchise contract.

This summary is only for the purposes of registration of the Introduction of the Franchise Business with the relevant regulatory authority. For purposes of disclosure to a prospective franchisee, Decree 35 requires that a complete form of the franchise agreement must be delivered along with the Introduction of the Franchise Business 15 working days before the date the agreement is intended to be signed.

12. Information on outlets

The franchisor is required to disclose the number of outlets that have operated under its franchise system, including the outlets that are currently in operation and the outlets that have ceased to operate. The franchisor is also required to disclose the number of franchise agreements it has signed with franchisees, the number of agreements that have been transferred by franchisees to third parties, and the number of franchise agreements that have been terminated or renewed. However, there is no requirement to disclose names and contact information of franchisees.

13. Financial statements of the franchisor

The Introduction of the Franchise Business must include the franchisor's audited financial statement of the preceding year.

14. Awards and recognition

The franchisor can disclose information on awards or recognition that the franchisor may have received.