



## Article

# Vietnam's Franchising Law: Critical Assessment and Comparisons with the Legal Framework of Franchising in the Republic of Korea and Thailand

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**Abstract:** Franchising occurred in Vietnam during the implementation of government policy for economic reform and openness in the mid-1990s. The Vietnam-specific franchise law was passed in January 2006 to create a stable growth in the franchise sector in Vietnam. The legal framework in Vietnam generally follows international legal frameworks. However, the legal framework of franchising businesses is still uncertain. This paper explores Vietnam's franchising law and displays a comparison to the legal framework of Thai franchising law and the Republic of Korea franchising law. The paper concludes that while Vietnam's franchising law generally conforms to international standards, some legal issues should be addressed for further development of the Vietnamese franchising sector.

**Keywords:** Vietnam; Republic of Korea; Thailand; franchising law



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## 1. Introduction

Franchising is a well-known business method which has totally transformed the way of distributing goods and services and has reorganised the economic environment of countries (Hoy et al. 2017). Doing franchise business is a complicated commercial relationship between the franchisor and the franchisee where the franchisor grants a right to control the operation of the franchising business to the franchisee with a return on the franchising fee. In Vietnam, franchising is considered a new way of doing business starting during the mid-1990s by the establishment of foreign franchisors, such as *Jollibee* (in 1996), *Lotteria* (in 1997) and *KFC* (in 1997). However, until 2006, there were only 23 franchise systems in Vietnam. The late appearance of franchising had resulted from lack of commercial and legal framework for franchising. While there was a *Doi Moi* economic reform in 1986, the legal framework of franchising was still not certain (Nguyen 2014). In the legal framework of Vietnam, franchising was not a distinct business form (Treutler 2010) because there was no legal framework for governing franchise contracts (Vision and Associate 2003). In Vietnam, “where the general rule is that anything not explicitly permitted is not allowed” (Cooper 2007), the process of franchising became not practicable. A franchisor could not sign only one franchising agreement but would have to enter into various contracts, and this way of doing franchising seems to be like “hammering a square peg into a round hole” (Cooper 2007).

The specific franchising law of Vietnam was introduced in 2006 as to keep up with Vietnam's accession into the World Trade Organisation (Nguyen 2020). The Franchising Law provides a dedicated legal environment for franchising. The provisions of the Franchising Law are included in various laws and regulations as follows: the 2005 *Commercial Law* (Section 8 of Chapter VI) setting out the legal foundation on franchising; the 2006 *Decree 35 Making Detailed Provisions for the Implementation of the Commercial Law with Respect to Franchising Activities* (Decree 35) (Decree 35 was amended by the 2011 *Decree Amending and Supplementing Administrative Procedures in a number of Decrees of the Government Detailing*

*the Implementation of the Commercial Law (Decree 120) and the 2018 Decree on Amendments to business conditions for business fields regulated by the Ministry of Industry and Trade (Decree 08)); the 2006 Circular 09 of the Ministry of Industry and Trade Providing Guidelines on Procedures for Registration of Franchising Activities; and the 2008 Decision 106 of the Minister of Finance Providing Guidelines on the Levels and Regime for the Collection and Payment, Management and Use of Charges for Commercial Franchising Registration.*

Vietnam's Franchising Law was built in accordance with a rather popular regime on prior disclosure, registration and relationship issues (Terry and Nguyen 2009). The franchising law seems to positively influence the development of franchising in Vietnam (Russin and Vecchi 2022). The number of franchise systems had risen 5-fold, from 23 to 115, in only 5 years since the introduction of the Franchising Law (in 2006) to 2011, and it is estimated that, currently, there are more than 300 franchise systems in Vietnam.<sup>1</sup> This paper aims to study the details of legal frameworks of Vietnam franchising and compare them to the legal frameworks of franchising in Republic of Korea and Thailand. This paper also attempts to evaluate Vietnam's Franchising Law by comparison with the two countries. The Republic of Korea and Thailand are chosen as they are civil law countries such as Vietnam, but they have different perspectives on specific franchising laws. The research methods in this paper are documentary research and comparative research methods. The paper is organised into five parts. The first part provides an introduction of the paper. The second part discusses Vietnam's Franchising Law. The third part presents a study on Republic of Korea and Thailand franchising laws. The fourth part is a comparison of those three legal frameworks on franchise businesses. The fifth part discusses the conclusion and recommendation for development on Vietnam's franchising legal framework.

## 2. Legal Frameworks on Franchising in Vietnam

### 2.1. Jurisdiction and Definition of Franchising

The Franchising Law regulates the franchising of domestic and foreign businesses "in the territory of the Socialist Republic of Vietnam."<sup>2</sup> The meaning of "in the territory of the Socialist Republic of Vietnam" is still unclear due to whether this law can also apply to franchising from local Vietnam expanding to international branches. In the past, when the registration obligation existed, the franchisor would have to register their franchise businesses with the agencies to grow their business abroad<sup>3</sup>. However, it is uncertain whether other obligations prescribed by this law shall also be applied to such a franchisor. Some countries have been successful in clarifying the applicable scope of their franchising law.

According to the 2005 Commercial Law, franchise business are defined in article 284 as *"a commercial activity whereby a franchisor authorises and requires a franchisee to conduct on its behalf the purchase and sale of goods or provision of services under the following conditions:*

1. *The purchase and sale of goods or provision of services be conducted according to the method of business organisation specified by the franchisor and be associated with the trademark, trade name, business know-how, business mission statements, business logo and advertising of the franchisor.*
2. *The franchisor has the right to control and offer assistance to the franchisee in the conduct of the business."*

The subordinate regulation, Decree 35 Article 3, provides additional clarification for the franchising business as a master franchising agreement involving a franchisor granting franchising rights to a franchisee and a franchise development agreement relating to a franchisor who provides an additional right to franchisees to set up more than one within a specific area. Nonetheless, Decree 35 does not allow the business conduct of secondary franchisees to make a sub-franchising. Vietnam's definition of franchising seems to be different from most other countries because the definition does not explain payment obligations in the franchising business. Without the specific obligation of franchising

payment in a legal framework, it can enable the franchisor to refrain from classifying its business as franchising, and the franchisor can be excluded from any legal obligation under the scope of the law.

Vietnam seems to follow the US's legal framework in setting up the definition of franchising, including the formula of "system or marketing plan" as a vital part of this definition. In addition, Vietnam adopts the US's frameworks of the franchisor's control over the franchisee, which contribute to the franchising business being different from other commercial activities (Warren [Pengilley 2008](#)). In terms of "brand", the definition of a brand in the franchising business is ambiguous as to whether the franchisor in Vietnam must confer all features of brand usage to the franchisee<sup>4</sup> or the franchisor can provide the right to use part of the brand with some aspects of the brand. Additionally, since most contemporary franchising businesses are service-based rather than goods-based, article 284 of the 2005 *Commercial Law* only applies to trademarks, not service marks. According to Vietnamese intellectual property law, a service mark for services is distinct from a trademark for goods.<sup>5</sup> This can contribute to a possible difficulty in doing a franchising business that sells both goods and services, but the franchisor and franchisee establish only one franchising agreement.

## 2.2. Credentials of Franchisor and Franchisee

Vietnam's franchising law states the obligation of credibility and certainty of franchise business before conducting franchising that there must be an operation of the franchising business at least one year (article 5 of *Decree 35*)<sup>6</sup>. Generally, the pre-condition for certainty of a franchising business is to provide confidence to a franchisee that the franchisor has more than a pure concept of the franchising business ([Terry 2007](#)). Nevertheless, there is still a concern about viability that may not be consummated ([Terry 2007](#)). It is because the requirement for one year before extending the franchising system to franchisees may not be appropriate for some businesses and can obstruct franchising opportunities ([Phan 2007](#)). Recently in 2022, in the appeal case of *Le Thi D v Ho Thi Phuong A*, the Superior People's Court in Da Nang City of Vietnam ruled that the franchising contract was invalid because the franchisor had not yet operated for one year before signing the franchising contract ([The Superior People's Court in Da Nang City 2022](#)).

Before the issuance of *Decree 08*, franchisees had to satisfy the only pre-condition that their business registration was conformable with the subject of franchising (article 6 of *Decree 35*). In the then-legal context, it was reasonable that there was a general rule for every enterprise under the 2005 Law on Enterprises (article 9) requiring every business to have the business registration conformable with their business line. However, since 15 January 2018, *Decree 08* has also removed this condition for franchisees to reduce unnecessary administrative procedures for businesses ([Vietnam's National Portal on Business Registration 2015](#)).

## 2.3. Disclosure of Franchising Information

Vietnam's Franchising Law is similar to international franchising laws in that it requires ([Terry 2007](#)) prior disclosure<sup>7</sup>. The concept of prior disclosure is widely recognised as an effective mechanism for decreasing potential franchisor bargaining power because the franchisor retains essential business information for a franchisee to choose to partner with the franchisor's system ([Terry 2018](#)). While most international franchising laws require a prior disclosure without a solid contractual template, Vietnam's Franchising Law prescribes that franchisors use disclosure templates according to the law ([Terry 2007](#)). The Franchising Law states that the franchisor has to disclose a copy of the franchising agreement and the prior disclosure information no less than 15 business days before signing the franchising agreement. In case there is no paper agreement,<sup>8</sup> under *Decree 35*, the Ministry of Industry and Trade has the authoritative power to obligate the compulsory prior disclosure according to the Franchising Law.<sup>9</sup> The requirement on the prior disclosure is vital for the franchisee's consideration. In addition, there are further requirements for the

sub-franchisor that there must be documents of prior disclosure of master franchise details, master franchising agreement, and the resolution for the sub-franchising agreement if there is a termination of the master franchising agreement (article 8.3 of *Decree 35*). Vietnam follows international prior disclosure practices by obligating a franchisor to provide details of prior disclosure to a franchisee. Nevertheless, Vietnam's franchising Law does not obligate franchisors to provide franchisees with vital details of territory and financial systems.

The obligations of Vietnam's Franchising Law on prior disclosure seem to be very general. As an obligation, the franchisor has to provide prior disclosure of the "business experience", but there is no definition in detail of what is "business experience". Franchisors may only provide brief information on the franchising business without practical details of how to run and develop a franchising system. Compared to international legal frameworks on franchising, Vietnam's Franchising Law, *Decree 35* article 8.2, obligates franchisors to disclose significant modifications of the franchising system impacting the franchisee. *Decree 35* also obligates franchisees to provide important information to franchisors.<sup>10</sup> *Decree 35* Article 9 states that the franchisee must provide all important information to the franchisor to ensure that the franchisor has sufficient information in determining granting its franchising system to the franchisee.

In addition, Vietnam's *Commercial Law* Article 287 requires the franchisor to give a disclosure report based on the proviso "unless otherwise agreed". It is thus Vietnam's Franchising Law (*Decree 35* and *Circular 09*) that compels details of the disclosure regime. However, it is a concern that there may be a conflict of interpretation where the higher Vietnam's *Commercial Law* may conflict with specific regulations on franchising. In a normal situation, the application of regulations is to be considered to have a higher legal effect than the main law (Ngo 2007; Pham 2008).

#### 2.4. Details of the Franchising Agreement

Vietnam's *Commercial Law* Article 285 obliges that the franchising agreement must be in writing to clarify the franchising relationship and franchising operation between the franchisor and franchisee. The requirement for a franchising agreement to be in writing is thus to ensure a clear understanding of working on the franchising business of the two parties. While concerning freedom of contract under the 2005 *Civil Code*, Vietnam's Franchising Law *Decree 35* Article 11 sets guidelines on a franchising agreement that it *should* have the contractual details such as contents of franchising, royalty fees, payment method, agreement terms, expiry and extension of the agreement and dispute resolution.

In addition to the contractual details guided by *Decree 35*, the franchisor would have to follow the legal requirement of prior disclosure of terms, extension conditions, termination of the agreement, the amendment of the franchising agreement, conditions for providing franchising operation and business to a franchisee and the non-eligibility clarification of status in case of the death of franchisor/franchisee. However, there is still room for establishing a franchising agreement by the preference of the franchisor and franchisee by adhering to the 2005 *Commercial Law*, but the details of the contract must not contradict other laws in Vietnam.

#### 2.5. Franchising Relationship

The 2005 *Commercial Law* articles 286-289 stipulate the rights and obligations of both the franchisor and the franchisee so that the franchisor has the rights in conducting franchising of (1) obtaining royalties; (2) arranging to advertise for the franchising system; and (3) inspecting the franchising site to maintain standard and consistency of the franchising. Nevertheless, the franchisor also has the duties of (1) giving prior disclosure information; (2) supplying initial training and ongoing professional assistance; (3) planning franchising retail; (4) ensuring intellectual property rights of franchising; and (5) equally treating all franchising retail. The 2005 *Commercial Law* also stipulates the franchisee rights that the franchisee must (1) provide business support and (2) perform up to franchising standard equally with other franchisees. The law also stipulates the franchisee duties of (1) paying

franchising fees; (2) paying for building a franchising outlet; (3) having sufficient finance and staff; (4) complying to the franchising control and standard of franchising; (5) keeping trade secrets and confidentiality of the franchising within the period of the franchising agreement and after the end of the agreement; (6) terminating the usage of any intellectual property upon the expiry of the franchising agreement; (7) operating the franchisee's outlets at the standard of the franchising business; and (8) not conducting sub-franchise without the permission from the franchisor (*Decree 35* article 15). It is also noted that the franchisee has the right to terminate the franchising agreement in case the franchisor violates their obligations (*Decree 35* article 15). In the same way, the franchisor is entitled by *Decree 35* Article 16 to unilaterally terminate the franchising agreement in case that (1) the franchisee cannot maintain a business licence or equivalent document to operate a business according to laws; (2) the franchisee is under insolvency and bankrupt; (3) the franchisee conducts a serious violation leading to potential damage to the franchising business and prestige; and (4) the franchisee cannot solve a non-fundamental breach of the franchising agreement within a reasonable time after receiving franchisor's notice.

While there are very precise details of the legal condition of Vietnam's Franchise Law, there is still an ambiguity in the case that the franchisee cannot solve a non-fundamental breach of the franchising agreement within a reasonable period. The ambiguity is on how to identify the reasonable period. It is also unclear how to determine what breach of the agreement can be classified as a non-fundamental breach. Furthermore, Vietnam's Franchising Law does not clearly provide an obligation for dealing with the possible situation of a franchisor deciding not to renew the franchising agreement with the franchisee. The law does not obligate the franchisor's advance notice for the non-renewal, compared to other jurisdictions that have a legal obligation to the franchisor to provide notice of non-renewable of the franchising agreement (Terry 2007).

## 2.6. Franchising Registration

The initial adoption of the Franchising Law in Vietnam in 2005 obligates the registration of franchising businesses in order to maintain the certainty of franchising businesses. Nevertheless, Vietnam imposed a "light-hand approach" where the franchisor will have to register the franchising business by only filing and recording documents without government inspection of the franchising business. After two years of applying the Franchising Law in Vietnam, there were not many franchising business registrations with the Ministry (Bill Magennis 2007). Through 2006–2008, there was a lack of subordinate regulation on registration fees (required by *Circular 09*) and ineffective government sanctions for unfair franchising business.<sup>11</sup> Later, the Vietnam government in 2011 ended the registration obligation for domestic franchisors by *Decree 120*.<sup>12</sup> Although *Decree 120* is said to represent the government's policy on reducing redundant administrative processes for a better business environment,<sup>13</sup> the ineffective administration of the franchising registration tended to be the main reason for the end of the registration system. In addition, the removal of registration for only domestic franchisors contributed to potential criticism of discriminatory treatment between domestic franchisors and foreign franchisors. It was inconsistent with Vietnam's WTO accession commitments. Later, on 15 January 2018, the Vietnam government adopted *Decree 08* for the termination of franchising registration for both domestic and foreign franchisors.

## 3. Legal Framework of Franchising in Republic of Korea and Thailand

### 3.1. Legal Framework on Franchising in Republic of Korea

#### 3.1.1. Civil Act and Commercial Code

The legal frameworks of Franchise in Republic of Korea are generally based on the Civil Act 1958 by Law No.471 and Commercial Act 1963. The Civil Act 1958 (latest amendment 2013) governs private property, private autonomy, and liability. The commercial code 1963 (latest amendment 2018) is to provide a particular commercial matter. The commercial code 1963 contains legal frameworks of general provision on merchants, trade employ-



ees, trade names and commercial registration. The commercial code 1963 also contains articles 46–47 about the legal obligation on commercial activities of sale, mutual account, undisclosed association, commercial agents, brokerage, agency, carriage, entertainment business, warehouse financial lease franchise and factoring. The commercial code 1963 articles 169–288 also set the types of juristic business as company and partnership. With specific focus on the paper on the franchise, the commercial code article 168-6 defines the franchise as *“a person who carries on business according to the quality standards and business policies designated by a person (franchisor) who engages in the business of providing his or her own trade name, trademark, after obtaining a permit for the use of the trade name, etc. from the franchisor is called a franchisee”*. In addition, article 168-7 sets the duties of the franchisor as follows:

- “A franchisor shall provide the necessary support for the business of his or her franchisees.
- Unless agreed otherwise, a franchisor may not engage in the same or similar type of business or enter into a franchise agreement for the same or similar type of business as a franchisee within the business area of the franchisee.”

Article 168-8 sets the duties of the franchisee as follows:

- “A franchisee shall ensure that he or she does not infringe on the rights of a franchisor for his or her business.
- A franchisee shall keep a franchisor’s trade secrets he or she has become aware of in connection with a franchise agreement even after the franchise agreement is terminated.”

Article 168-9 states transfer of business by franchisees as follows:

- “A franchisee may transfer his or her business to another person with the consent of a franchisor.
- A franchisor shall consent to the transfer of business under paragraph (1), except in extenuating circumstances.”

Article 168-10 sets the cancellation of agreements by franchisees as follows: *“under unavoidable circumstances, any party to a franchise agreement may cancel the such agreement after giving prior notice to the other party within a set reasonable period, regardless of whether a stipulation concerning the period of existence is provided for in the franchise agreement.”*

### 3.1.2. Trademark Laws

Trademark Act, Act No. 14033, February 29, 2016, Article 2 sets out the definition of a trademark as *“a mark used to distinguish goods (including services or goods related to the provision of services except goods on which a geographical indication is used; hereinafter the same shall apply) of one business from those of others”*. The Act article 36 also requires registration of trademark and registration of trademark licensing. The franchisor thus must register the trademark of the franchise business in order to obtain sole right over a trademark. In providing the franchisee with the right to use a trademark to a franchisee, the franchisor has to also register trademark licensing to the Korean Intellectual Property Office (KIPO). In doing a franchise business which involves granting the right to use a mark, the franchisor thus has to comply with the Trademark Act 2016.

### 3.1.3. Fair Transactions in Franchise Business Act

In addition to the Civil Act and the Commercial Code, the Republic of Korea enacted the Fair Transactions in Franchise Business Act 2002 (latest update 2022), which is a specific law governing the franchise sector in the Republic of Korea. The Act has six chapters, including general provision, the basic principle for franchise transaction, a fair transaction in the franchise, mediation of dispute, investigation and enforcement procedure of the Fair Trade Commission (KFTC) and penalty provision.

The first chapter, Article 1, pronounces its objective to promote the welfare of consumers and fair trading of franchise businesses. Article 2 defines franchise business as *“a continuous business relationship in which a franchiser allows its franchisees to use its own trademarks, service marks, trade names, signs, or any other trademarks in selling goods (including raw materials and auxiliary materials; hereinafter the same shall apply) or services in compliance with certain quality standards or business methods, and supports, trains, and controls its franchisees in regards to their management, business activities. etc., and in which franchisees pay required payments to their franchiser in return for the use of trademarks and the support and training provided for their management, business activities, etc.”*.

The second chapter, Article 4-6 specifies the duties of the franchisor and franchisee in doing franchise business. The third chapter, Article 6-2 sets out requirements for registration of franchise business and information disclosure statement that the franchisor must register an information disclosure statement to be provided to prospective franchisees with the KFTC. Where a franchisor intends to alter matters included in an information disclosure statement, the franchisor has to register a change of an information disclosure statement with the KFTC. The Act article 7 also stipulates that the franchisor must provide correct information of franchise disclosure documents, meaning that the master franchisor or franchise broker must provide its prospective franchisees with a franchise disclosure document which was registered or the alteration of which was registered pursuant to KFTC. The franchise disclosure document includes the following:

- The general status of a franchiser;
- The current status of the franchise of a franchiser (including matters concerning sales of its franchisees);
- Details of any violation of the Monopoly Regulation and Fair Trade Act or defrauding another person's property, such as fraud, misappropriation or embezzlement or a crime of acquiring or defrauding another person's property, such as fraud, embezzlement, or malpractice;
- Charges of franchisees;
- Conditions of and limitations on business activities;
- Detailed procedures for the commencement of franchise and the duration required for the commencement of business;
- Explanations on the management of a franchiser and support for education and training on business activities, etc.;
- Status of direct retail stores of a franchiser.

The Franchise Business Act chapter four, Article 16 relates a dispute mechanism by mediation between franchisor and franchisee by a Franchise Transaction Dispute Mediation Council under KFTC. Any franchisor or franchisee may file a written application for mediation of matters prescribed by Presidential Decree with the Council. The Franchise Business Act chapter five empowers KFTC to be an agency governing franchise business according to the Act. Chapter Five Article 32-2 empowers KFTC to conduct fact-finding surveys on trade between franchisors and franchisees and publish the results to establish fair trade. Chapter five, Article 32-2 also authorised KFTC to investigate any infringement of the Act. In case there is an infringement, according to Article 33, the KFTC may issue corrective measures for discontinuing violations and to be in compliance with the Act.

The Franchise Business Act chapter six prescribes the penalty for infringement of the Act, both in administrative fine and criminal penalty. Regarding administrative fines, article 35 states that KFTC may impose a penalty surcharge on a franchisor that violates the Act to the extent not exceeding an amount of money calculated by multiplying the sales by 2/100. In the case that the franchisor infringes the Act without franchise sales, KFTC may impose a penalty surcharge of up to 500 million won. Regarding the criminal penalty, Article 41 states that if franchisor did provide false or exaggerated information or deceptive information, they shall be punished by imprisonment with labour for no more than five years or by a fine not exceeding 300 million won. Article 41(3) sets out that in the case that the franchisor fails to register a franchise disclosure document to the KFTC, the KFTC may

impose a criminal penalty of imprisonment with labour for no more than two years or a fine not exceeding 50 million won.

### 3.1.4. Monopoly Regulation and Fair Trade Act

The Monopoly Regulation and Fair Trade Act 1990 (latest amendment 2016) has its purpose, according to Article 1, to promote fair and free competition and unfair trade practices. The franchise business is thus subject to the Monopoly Regulation and Fairtrade Act in terms of abuse of dominance, unfair cartel conducts and unfair trade practices. Article 23 prohibits any unfair business practice including the following:

- Unfairly refusing a transaction or discriminating against a certain transaction partner;
- Unfairly excluding a competitor;
- Unfairly soliciting or coercing customers of competitors to make transactions with it;
- Making a transaction with a certain transaction partner unfairly taking advantage of their bargaining position;
- Making a transaction under terms and conditions that unfairly restrict business activities of a transaction partner or disrupting business activities of other business entities;
- Assisting a related party or another company to gain advantage over another company.

By the obligation of the Monopoly Regulation and Fair Trade Act, a franchisor that has higher bargaining power must not conduct any unfair trade conduct such as imposing unfair restraint of trade, abusing their bargaining power, unfair restriction of franchise products or services, unfair change of franchise contract terms and unfair setting up of new branches in the same territory of the franchisee.

## 3.2. Legal Framework on Franchising in Thailand

Thailand has not yet passed unified legislation to regulate franchising. Although there was an aim to put the draft legislation on franchising business, the draft was still on hold under the Ministry of Commerce. There is not any update about the progress of the draft. Without unified law on a franchise business, various laws are broadly applied and interpreted to govern franchise relationships. Example laws include the Civil and Commercial Code, Intellectual property laws and Trades competition laws.

### 3.2.1. Civil and Commercial Code

Franchising is under the Thai civil law system under the freedom of contract based on the Thailand Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์) which is the vital body of laws that deals legal affairs and rights of private persons (natural and juristic persons).<sup>14</sup> The Civil and Commercial Code contains areas such as family law, inheritance law, contract law, property law and corporate law. Thus, for conducting franchising business in Thailand, the main legislation that franchisors and franchisees must consider is the Thailand Civil and Commercial Code. Based on the code, any franchising agreement is a legally binding agreement which outlines the franchisor's terms and conditions adhering to the perception of freedom of contract.<sup>15</sup> Thus, the Civil and Commercial Code is a cohort legislation that governs franchise relationships with a broad term of a commercial operation or commercial relationship. In the case of signing a franchising agreement, there are specific sections of the Code, Chapter I Sections 354–368, which prescribe a formation of a contract to which contracting parties have to obey. The contracting parties must also pay attention to Chapter II Effect of Contract Sections 369–376.

### 3.2.2. Intellectual Property Laws

The Patent Act BE 2522 is legislation controlling and supporting new inventions capable of industrial application.<sup>16</sup> According to the Patent Act BE 2522, inventors can register their patents with the Minister of Commerce and can claim their right to apply for the patent.<sup>17</sup> Franchisors with registered patents can then require the franchisee to use



the patented innovation in the franchising businesses. In the *Trademark Act BE 2534(2559)*, the franchisor can also control the franchisee in using its registered trademark<sup>18</sup> under the agreements of their franchising businesses. The franchisor is able to exercise their rights over a franchisee's improper use of their trademark. Additionally, the *Trade Secrets Act BE 2545* is purported to be legislation that protects a franchisor's formula and other essential trade secrets.<sup>19</sup> Any franchisee's Act of disclosure, deprivation or usage of trade secrets without the consent of the franchisor in a manner contrary to honest trade practices is a breach of the Act.<sup>20</sup> Therefore, franchising activities have to be governed by those legislations relating to intellectual property protection. Intellectual property laws tend to establish essential relationships between the franchisor and the franchisee with regard to the use of innovations, trademarks and trade secrets. The laws protect both franchisors and franchisees where there is a breach of any intellectual property by third parties. This can be seen in the "Starbunk case" where the Starbucks Coffee (Thailand) Co., Ltd. sued Starbunk—a street coffee vendor—due to the Starbunk's logo being in violation of the Starbucks Coffee's registered trademark.<sup>21</sup>

### 3.2.3. Trade Competition Law

It is important to consider legislations that prohibit unfair business conducts. The legislation prescribing prohibition on unfair business conduct is the Trade Competition Act BE 2560 (2017). The Trade Competition Act contains prohibitions dealing with abuse of market power, cartels, mergers and acquisitions and unfair trade practices. Section 50 of the Act prohibits dominant firms from engaging in the abuse of market power.<sup>22</sup> Section 54 of the competition act forbids collusive and cartel agreements that affect market competition.<sup>23</sup> Section 57 of the Thai Competition Act proscribes businesses not to engage in unfair practices where there is equality of bargaining power between businesses. The Thai Trade Competition Commission issued Guidelines for the Assessment of Unfair Trade Practices in Franchising BE 2562 (2019) according to section 57. The guideline stipulates that a franchisor must disclose detailed information on the nature and operations of its franchise system to a franchisee prior to a conclusion of a franchise agreement on the following:

- Information on fees and expenses to operate a franchise;
- Franchise business plan;
- Information concerning rights on relevant trademark, patent, and/or copyright, effective period, extent and scope of licensing and terms and conditions related to those rights;
- Renewal of a franchise agreement, revision of such agreement, termination and withdrawal of a franchise agreement (see note 23);

In addition, the Guidelines for the Assessment of Unfair Trade Practices in Franchising BE 2562 (2019) (No.3) also states the geographic consideration for franchising in Thailand. The guideline set rules that the franchisor, in expanding their new branch near the existing franchisee's branch, must

*"notify to the franchisee(s) who have its branch(es) in nearest vicinity and those existing franchisee(s) shall have a priority to be offered to consider taking a license to operate that proposed branch, in which the franchisor shall allow a reasonable time of at least 30 (thirty) days for the prospective franchisee(s) to reply, unless the existing franchisee did have unsatisfactory performance below the franchisor's explicit criteria and being notified of such poor performance in advance.*

*To assess the area of nearest vicinity per the first paragraph, demand for products or services in relevant geographical area and competitive constraint(s) shall be considered together;*

*For an operation of franchise in a form of area development whereby a franchisor grants rights to operate a franchise to a franchisee within a mutually agreed designated area and a franchise agreement, or an auxiliary agreement supplementary to the franchise contract, containing clauses regarding the exclusive branch expansion in which prevent the right*

*to open a new branch to be granted to a franchisee in the nearest vicinity with priority, the franchisor may grant the right to open a new branch to a suitable franchisee given that the reasonable business, marketing, or economic rationale could be heard."*

The Guidelines for the Assessment of Unfair Trade Practices in Franchising BE 2562 (2019) (No.3) is to ensure that the franchisor will not open their new branch near the existing franchisee's branch. However, the franchisor may open a new branch near the existing franchisee's unit if there is reasonable business justification in the franchise business.

#### **4. Vietnam's Franchising Law: A Comparative Perspective with the Legal Framework of Franchising in the Republic of Korea and Thailand**

This part of the paper compares the three countries' legal frameworks to search for possible developments in Vietnam's Franchise Law. This part focuses on the main points of specific franchise laws, the registration system, the legal requirements on franchise agreement details and the trade practices on unfair franchise conduct.

*Specific franchise law*—Vietnam and the Republic of Korea are in the same position where they have issued specific franchise laws to ensure the certainty of a franchise business. Thailand still lacks specific franchise laws. Having specific franchise laws tends to be advantageous for legal governance, and franchise businesses can rely on the specific franchise law for doing their business. While the advantages and disadvantages of having specific franchise laws for franchise businesses are arguable, in terms of certainty of governance, having specific laws can be superior. The government and private sectors can rely on the main legal framework of the specific franchise laws and generate further expansion of franchise business. In addition, by having a set of franchise laws, there can be legal ease for future legal development for the franchise. An example is from the Republic of Korea, which adopted the main legislation of franchise law. It is to ensure that there is one rule for franchise business while having complementary rules from other general governing laws on the franchise business. Overall, Vietnam has significantly developed its own set of specific franchise laws for the certainty of a franchise business.

*Registration system*—The Republic of Korea sets rules for all franchises to be registered; otherwise, there will be a legal penalty. Vietnam, while having a previous registration system, removes the registration system due to the ineffectiveness of the registration procedure. Thailand has no specific law, has no registration system, and allows all franchises be under dealings between franchisor and franchisee. The advantage of registration systems is that the government can govern franchise sectors via registration control, and the registration ensures a statistic of franchise systems. Without registration systems, the government cannot monitor or control changes in franchise businesses. Additionally, without accurate data by lack of registration, it will be difficult for private and public sectors to formulate policy development for franchise sectors.

*Legal requirement on details of the franchise agreement*—Thailand has no specific law on franchises and lacks legal requirements for more information about franchise agreements. The franchisor and franchisee are free to deal with the details of a franchise agreement. However, in typical situations, there will be an information asymmetry where the franchisor has the upper hand on franchise information and can exploit the franchise with legal terms of the franchise agreement. This is different from the Republic of Korea and Vietnam. The Republic of Korea and Vietnam are in a similar position in having legal requirements on details of franchise agreements. The Republic of Korea, by its dedicated law on a franchise, obligates all franchise agreements to have a franchise disclosure document and detailed procedures for a franchise business. Vietnam obligates all agreements to be in writing, and any franchising must follow franchise prior-disclosure arrangements. Vietnam franchise law also sets a requirement that franchising must be an operation of the franchising business at least one year before expanding the franchise to a franchisee. The Republic of Korea and Vietnam's franchise laws also set rights and duties. The set details of a franchise agreement can be vital tools to ensure fair dealing in the franchise business for the less legal disputes between franchisor and franchisee.

*Trade practice on unfair franchise conducts*—The Republic of Korea and Thailand maintain legal obligations that there must be fair dealing between the franchisor and franchisee. The Republic of Korea's Fair Transactions in Franchise Business Act was passed with details to provide equal bargaining power between the franchisor and franchisee. Thailand's Guidelines for the Assessment of Unfair Trade Practices in Franchising BE 2562 (2019) also aimed to set rules for equal bargaining power between the franchisor and franchisee. Vietnam Commercial Law 2005, as a specific franchise business law, also contains some aspect of fair dealing in franchise conducts. However, compared to the Republic of Korea and Thailand, Vietnam seems less obligated for fair dealing where the franchisor may have superior franchise information and the franchisee may lack of experience in doing business. In addition, regarding unfair trade law, the Republic of Korea and Thailand maintain legal obligation on monopoly and dominant conducts that the franchisor must not use their dominant position to exploit the franchisee in doing franchise business. It is different from Vietnam, which lacks rules for unfair dealing in franchising conducts.

## 5. Conclusions and Recommendations for Vietnam's Franchising Law

This study assesses Vietnam's Franchising Law with examples from the Republic of Korea and Thailand. It is accepted that there is a limitation of research in aspects of different legal systems, business sector development and franchise business environment. However, the study into details of Vietnam's Franchising Law with the comparisons to the Republic of Korea and Thailand at least shows that there is a possible point for Vietnam to develop its franchise law. The Franchising Law of Vietnam maintains various obligations of doing franchise business. While the specific franchise law is not an exclusive factor in the development of franchising, the law can provide a clearer understanding of doing franchise business. It is the role of the specific regulation that can help facilitate the development of franchising in Vietnam. Nevertheless, some concerns in connection to certain parts of Vietnam's Franchising Law may have to be reformed to put forward the growth of the franchising business.

The conclusion of the paper thus proposes some changes to Vietnam's Franchise Law:

- Establishing clearer provisions on a mandatory franchise agreement with details of fair dealing on franchise business to ensure that both the franchisor and franchisee in Vietnam can follow the details in establishing their franchise agreement. In developing countries with an unclear rule of law, a clear franchising law can provide a potential track for the development of franchising and a strategy to expand franchising.
- Resuming registration system: Vietnam's Franchising Law has previously required registration of the franchise system but removed the requirement later. By having no registration system, there will be a lack of control on the sector and a lack of information in making decisions or policies for franchise development. Thus, Vietnam may follow the Republic of Korea's system, where all franchises must be registered to create governance and clear franchise information.
- Development in unfair trade terms of a franchise: the Franchising Law helps balance the freedom of commerce and the protection of rights between the franchisor and franchisee. For Vietnam, the rules regarding fair dealing of franchise conducts should be developed to ensure that the franchisor and franchisee can be fairly treated in the process of running a franchise business. Vietnam may add unfair conduct to its specific franchise law or revise its competition law to ascertain fair business conduct in franchise sectors.

This paper has a limited research scope on documentary research and comparative analysis. It will be more beneficial in the field of law on franchising if there is future research such as in-depth interviews and questionnaires on awareness of the Franchising Law in Vietnam.

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## Notes

- 1 Collected by the authors.
- 2 Vietnam Commercial Law, *Decree 35*. Articles 1-2.
- 3 Article 18.1.b, *Decree 35*.
- 4 Article 284 of the 2005 *Commercial Law*.
- 5 According to Vietnam's *Law on Intellectual Property 2005*, the marks include trademarks and service marks.
- 6 Article 7.4, the 2005 *Franchise Measures*. A similar provision is retained in the 2007 *Commercial Franchise Regulation* which replaced the 2005 *Franchise Measures*.
- 7 Franchisee disclosure is also mandated the *Decree* providing that the proposed *franchisee* must provide the franchisor with all information reasonably requested by the franchisor in order to make a decision or grant of the franchise to such proposed franchisee (article 9).
- 8 The *Franchise Description Document* itself provides that “unless the parties agree otherwise a prospective franchisee has at least 15 days” to study the *Document*.
- 9 Appendix III of the *Circular Providing Guidelines in Procedures for Registration of Franchising Activities*.
- 10 China also required franchisees to conduct this obligation in the 2005 *Franchise Measures* but then removed it by the 2007 *Franchise Law*.
- 11 A fee regime was introduced in 2008, 2 years after the introduction of the *Franchise Law*.
- 12 The registration obligation is also ended for franchise businesses which export from non-tariff zones and other special customs zones in Vietnam.
- 13 Interview with officials of Vietnam's Ministry of Industry and Trade (22 March 2012). Pinai Nanakorn, “*Thailand Civil and Commercial Code*” Department of Business Development, [http://www.dbd.go.th/dbdweb\\_en/more\\_news.php?cid=283&filename=index](http://www.dbd.go.th/dbdweb_en/more_news.php?cid=283&filename=index), accessed on 25 February 2016.
- 14 Joel Loo Sean Ee, “*Franchising in Thailand—Chapter 1: Things to Consider before Buying into/Selling a Franchise in Thailand*” (2014), <https://bangkoklegal.wordpress.com/2012/07/27/franchising-in-thailand-chapter-1-things-to-consider-before-buying-selling-a-franchise-in-thailand-with-short-foreword-on-thailand-asean-economy/>, accessed on 26 February 2016.
- 15 The Patent Act BE 2522 Section 5.
- 16 The Patent Act BE 2522 Sections 4 and 10.
- 17 See Trademark Act B.E. 2534 (2559) section 4 that defines the terms of mark and trademark as; “mark” is defined as a brand, name, word, letter, photograph, drawing, device, manual, signature, combinations of colors, shape or configuration of an object or any one or combination thereof; “trademark” is defined as a mark used or proposed to be used on or in connection with goods to distinguish those trademarked goods from other trademarked goods;
- 18 Trade Secrets Act B.E. 2545 Section 5.
- 19 Trade Secrets Act B.E. 2545 Section 6.
- 20 Jon Fernquest, “Starbungs Vs. Starbucks: Billion Dollar Corporation Vs. Street Vendor,” *Bangkok Post*, 18 October 2013.
- 21 Thai Competition Act 1999(2007) Section 25 Subsections 1,2,3, and 4.
- 22 Thai Competition Act 1999(2007) Section 27; see more detail in the Act.
- 23 Trade Competition Commission Notice on Guidelines for the Assessment of Unfair Trade Practices in Franchising B.E. 2562 (2019) Section 3.

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