

# **LEGAL FRAMEWORK FOR FRANCHISING IN VIETNAM**

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**GLOSSARY**

<b>MOIT</b>	Ministry of Industry and Trade
<b>MOST</b>	Ministry of Science and Technology
<b>NOIP</b>	National Office of Intellectual Property
<b>SOIT</b>	Services of Industry and Trade
<b>TLA</b>	Trademark Licensing Agreement
<b>TTA</b>	Technology Transfer Agreement
<b>FDD</b>	Franchise Disclosure Document

## **LEGAL FRAMEWORK FOR FRANCHISING IN VIETNAM<sup>1</sup>**

### **INTRODUCTION**

It was not so long ago that cafés with the same trademark and the same style of service, menus, uniforms, and decoration were a new phenomenon in Vietnam. Franchising began to bloom in Vietnam from 2009, when the country eased restrictions in the retail market to fulfill its WTO commitments. Since then, the franchise 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 within Vietnam and 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 businesses, 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 the 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 out businesses with familiar names, products and services.

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 Franchise Disclosure Document (“**FDD**”). Under federal and state rules, a franchisor cannot offer a franchise until the franchisor has disclosed specific information about the franchise. For example, the franchisor is required to disclose its business experience

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<sup>1</sup> The current version of this paper on franchising was prepared by and is updated by lawyers from Russin & Vecchi. This version is current through April 2018.

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and past or pending litigation, the franchise fee and initial investment, any restrictions on sources of supplies, and much more.

The FDD or its equivalent has been adopted in many other countries. Vietnam has adapted the FDD. In some countries, once the FDD has been issued, the government does not intervene and the parties are free to negotiate and enter into a franchise agreement. In others such as Vietnam, however, the FDD must be filed or registered with the authorities before an offer is made to a potential franchisee. For ease of reference, the Appendix presents the FDD as used in Vietnam, in laymen's language.

### **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 (16 December 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;

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- 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.

### **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 (“**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.

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## **Information disclosure**

Decree 35 requires an information disclosure document called “**Franchise Description Document**,” which is the FDD; again, see the Appendix. The Franchise Description Document 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 Franchise Description Document 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 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 Franchise Description Document, 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;
- Franchise Description Document;

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- certified copy of the franchisor's business registration
- certified copy of the audited financial statements of the franchisor of the year preceding the date of registration; and
- certified copy of patents and certificates involving intellectual property rights of the franchisor.

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 Franchise Description Document. For the purpose of registration, it is preferable for a franchisor to use the Franchise Description Document 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 frame may be longer--perhaps a month.

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 in order 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. Proof of registration may also be required by some banks in order to remit licensing fees.

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

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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. Again, some banks may want to see a registered TTA in order to remit fees. 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 not 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.

A TLA is treated as a civil contract. There is general freedom of contract. That is, parties are free to agree upon the contents of their TLA.

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, but must be renewed when the trademark registration is renewed. Oddly, the TLA, despite its term, expires automatically when the oldest trademark under the TLA expires. In such case, both the trademark and the TLA must be 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,

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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 Franchise Description Document 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 close 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 virtually complete.

**Appendix: The Franchise Description Document**

<b><i>Prescribed form of the Franchise Description Document as provided in Circular 09</i></b>	<b>Explanation</b>
<p><i>This Franchise Description Document contains information for a prospective franchisee to study carefully before entering into a franchise agreement. A prospective franchisee should note that:</i></p> <ol style="list-style-type: none"> <li><i>1. Unless the parties agree otherwise, it has at least 15 days to study this document and other relevant information before entering into a franchise agreement;</i></li> <li><i>2. It should study the Commercial Law, Decree No. 35/2006/ND-CP and this Franchise Description Document carefully; it should talk with other franchisees that have conducted or are conducting a franchise business; it should assess its financial capacity and its ability to meet the requirements for this form of business;</i></li> <li><i>3. It should seek advice from independent legal counsel, and independent accounting and business consultants before entering into a franchise agreement; and</i></li> <li><i>4. It should attend training courses, especially if it has no prior business experience.</i></li> </ol>	<p>[Compulsory introductory section]</p>

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<p><b>PART A</b></p> <p><b>I. General information about the Franchisor</b></p> <ol style="list-style-type: none"> <li>1. Name of the Franchisor:</li> <li>2. Address:</li> <li>3. Tel/Fax (if any):</li> <li>4. Date of incorporation:</li> <li>5. Indicate whether the Franchisor is the primary franchisor or the secondary franchisor:</li> <li>6. Scope of business of the Franchisor:</li> <li>7. Franchised business:</li> <li>8. Information on the franchise registration as recorded with the competent authorities: The franchise was registered with the Ministry of Industry and Trade of Vietnam on _____ and has Registration No. _____.</li> </ol>	<p>General information of the Franchisor:</p> <ul style="list-style-type: none"> <li>• the franchisor’s name;</li> <li>• address of head office;</li> <li>• incorporation date;</li> <li>• scope of business;</li> <li>• type of business to be franchised; and</li> <li>• whether it is a primary franchisor or a secondary franchisor.</li> </ul> <p>After the franchise is registered with the MOIT, the Registration Number must be included before the Franchise Description Document is disclosed to the franchisee.</p>
<p><b>II. Trademark and Intellectual Property (IP) Rights</b></p> <ol style="list-style-type: none"> <li>1. Right of the Franchisee to use trademarks and any other IP rights</li> <li>2. Detailed information about registered trademarks and IP rights</li> </ol>	<p>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 its trademarks and service marks are 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 in Vietnam.</p> <p>The franchisor must describe its other intellectual property rights, including patents and copyrights, in the Franchise Description Document. Details of registered intellectual property rights must be disclosed to the prospective franchisee.</p>

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	<p>The rights to use the trademarks and any IP object granted to the franchisee should be included in this section. If the franchisor and the franchisee have a separate license agreement, such agreement should be mentioned.</p>
<p><b>I. Information about the Franchisor</b></p> <ol style="list-style-type: none"> <li>1. <i>Company's structure</i></li> <li>2. <i>Name, authority and experience of members of the board of directors of the Franchisor</i></li> <li>3. <i>Information about the division/department in charge of the franchising activity of the Franchisor</i></li> <li>4. <i>Experience of the Franchisor in the franchise business</i></li> <li>5. <i>Information about disputes in connection with the Franchisor's franchise business in the preceding year</i></li> </ol>	<p>Information on the business structure and management experience of the franchisor and its experience in the franchising business must be disclosed to the prospective franchisee. The franchisor must disclose background information on members of the Board of Directors, including their names, positions, and business experience.</p> <p>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.</p>
<p><b>II. Initial fees paid by the Franchisee</b></p> <ol style="list-style-type: none"> <li>1. <i>Types and amount of initial fees that the Franchisee has to pay</i></li> <li>2. <i>Term of payment</i></li> <li>3. <i>Cases involving return of fees</i></li> </ol>	<p>The franchisor 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.</p>
<p><b>III. Other financial obligations of the Franchisee</b></p>	<p>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.</p>

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<p><b><i>IV. Initial investment by the Franchisee</i></b></p> <p><b><i>V. Obligations of the Franchisee to buy or lease equipment for compatibility with the franchise system as designated by the Franchisor</i></b></p>	<p>The franchisor 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.</p>
<p><b><i>VI. Obligations of the Franchisor</i></b></p>	<p>Circular 09 generally requires the franchisor to provide the franchisee with a description of the obligations of the franchisor, including:</p> <ul style="list-style-type: none"> <li>(a) obligations prior to the execution of the franchise agreement;</li> <li>(b) obligations during the course of operation of the franchise system;</li> <li>(c) obligations to consider the franchisee’s proposed premises for the franchised business; and</li> <li>(d) obligations to provide training, including initial training, and other training programs.</li> </ul> <p>The franchisor is not required to disclose its obligations in connection with advertising activities or its obligation to provide computer and cash systems for the franchisee.</p>
<p><b><i>VII. Description of the market of the goods/services to be franchised</i></b></p>	<p>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</p>

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	<p>the franchise business will operate. The franchisor must inform the franchisee on prospects for the development of these markets.</p>
<p><b>VIII. Model Franchise Agreement</b></p> <ol style="list-style-type: none"> <li>1. <i>Titles of Articles of the Franchise Agreement:</i></li> <li>2. <i>Term of the Franchise Agreement</i></li> <li>3. <i>Conditions to extend the Franchise Agreement</i></li> <li>4. <i>Conditions for the Franchisee to terminate the Franchise Agreement.</i></li> <li>5. <i>Conditions for the Franchisor to terminate the Franchise Agreement</i></li> <li>6. <i>Obligations of the Franchisor/Franchisee arising from the termination of the Franchise Agreement</i></li> <li>7. <i>Amendment of the Franchise Agreement at the request of the Franchisor/Franchisee</i></li> <li>8. <i>Conditions for the Franchisee to assign the Franchise Agreement to another business entity</i></li> </ol>	<p>The Franchise Description Document must include a summary of the form of the franchise agreement. It should include:</p> <ol style="list-style-type: none"> <li>(a) headings of terms and conditions of the franchise agreement;</li> <li>(b) duration of the franchise agreement;</li> <li>(c) conditions and obligations of the franchisor/franchisee in connection with unilateral termination of the franchise agreement;</li> <li>(d) circumstances under which the franchise agreement can be modified;</li> <li>(e) conditions under which the franchisee can transfer the franchise agreement to another prospective franchisee; and</li> <li>(f) circumstances under which either the franchisor or franchisee is not legally qualified to be a party to the franchise contract.</li> </ol> <p>This summary is only for the purposes of registration of the Franchise Description Document 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 Franchise Description Document 15 working days before the date the agreement is intended to be signed.</p>
<p><b>IX. Information about the franchise system.</b></p> <ol style="list-style-type: none"> <li>1. <i>Number of the franchise outlets which are operating in the</i></li> </ol>	<p>The franchisor is required to disclose the number of outlets that have operated under its franchise system, including the outlets that</p>

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<p><i>Franchisor's system</i></p> <ol style="list-style-type: none"> <li>2. <i>Number of the franchise outlets that were terminated</i></li> <li>3. <i>Number of the executed franchise agreements</i></li> <li>4. <i>Number of the franchise agreements that have been assigned by the Franchisees with a third party</i></li> <li>5. <i>Number of the franchise outlets that have been transferred from the Franchisees to the Franchisor</i></li> <li>6. <i>Number of the franchise agreements which were terminated by the Franchisor</i></li> <li>7. <i>Number of the franchise agreements which were terminated by the Franchisee</i></li> <li>8. <i>Number of the franchise agreements which have been renewed/not renewed</i></li> </ol>	<p>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.</p>
<p><b>X. <i>Financial statements of the Franchisor</i></b></p>	<p>The franchisor's audited financial statement of the preceding year must be included. It may be included as an attachment to the Franchise Description Document.</p>
<p><b>XI. <i>Rewards, acknowledgements received by Franchisor or that are required of Franchisee</i></b></p>	<p>The franchisor can disclose information on awards or recognition that the franchisor may have received or may require the franchisee to have received.</p>
	<p>The Franchise Description Document must be signed by an authorized corporate person and affixed with the corporate seal of the franchisor.</p>