



FRANCHISING ACTIVITIES



IN VIETNAM



ABOUT OUR LAW FIRM

Established in 2016, Apolat Legal is a licensed law firm providing a board range of legal services in multiple practice areas for domestic and international clients. The firm commits resolving legal issues regarding businesses thoroughly and in the most beneficial way for various clients in Vietnam.

Apolat Legal is also honored to receive numerous recognitions and/or articles posted by world-leading and local organizations and publications including: The Law Association for Asia and the Pacific (LawAsia, 1966), The Legal500, IP Link, AIPPI, IP Coster, Lexology, Global Trade Review (GTR), The Saigon Times, etc.

Apolat Legal lawyers have long been recognized for their legal expertise and paid attention to their dedication in work as well as the capacity to take advantages from their relationship to maximize the interests of clients. The lawyers will be grouped into specialized teams, directly participate in each case to provide advices and close support to customers, thereby quickly completing the assigned work in the most effective way.



AREAS OF PRACTICE

The firm's lawyer team specializes in almost all legal practice areas in Vietnam including: Enterprise and Investment; Labor and Employment; Intellectual Property; Real Estate and Construction; Health; Culture, Sports and Tourism; Information and Communication; Natural Resources and Environment; Transport; Resident and Immigration; Industry and Trade; Education and Training; Finance and Banking; Agriculture, Forestry and Fisheries.

Each practice area is covered with six principal legal services: Legal Due Diligence; Regular Legal Consultancy; Investment Consultancy; Dispute Resolution; Legal Document Translation; Intellectual Property; Legal Training.

APOLAT LEGAL's reputation and the quality of its services are reflected by its clients. We are serving nearly 1,000 clients both local and foreign clients. Some past and current long-term clients which the firm worked with such as: LG Electronics, Coastal Living Land Joint Stock Company, Wall Street English, Hochiki Asia Pacific Pte.Ltd, Asus Technology (Vietnam) Company Limited, AEON Mall Vietnam, Baskin Robbin, Citigym, Woori Bank Vietnam Limited, Central Group, CJ Gemadept Logistics Holdings Company Limited, K Group Company Limited, Digiworld Corp., Yellow Cab Pizza, Bamboo Capital Joint Stock Company, Sinobright Pharma Co. Limited, Mayekawa, Sky Music Jsc, Oxalis Holiday Company Limited, PGT Holdings, Vinacapital, Capitaland, Donghyup,...

TYPICAL CLIENTS



Introduction

Nowadays, thanks to the rapid development of modern technology, multinational corporations and enterprises now have more options for running, operating and managing an international business. Accordingly, instead of the traditional approach of direct investment, many multinational corporations and enterprises have chosen a business concept of franchising to conduct their international investments.

Via a franchise business concept, corporations and enterprises can develop more rapidly and conveniently in specific fields of theirs by removing legal limitations and barriers of the traditional approach, such as legal conditions and licenses, etc. However, like other business methods, it is necessary to have a good knowledge of the legal regulations and legal framework for franchising.

For that reason, this handbook will help readers understand more about the legal aspects of franchising activities in accordance with the laws of Vietnam as well as some key takeaways in franchising a business from offshore to Vietnam.



LEGAL FRAMEWORK AND FUNDAMENTAL LEGAL ISSUES



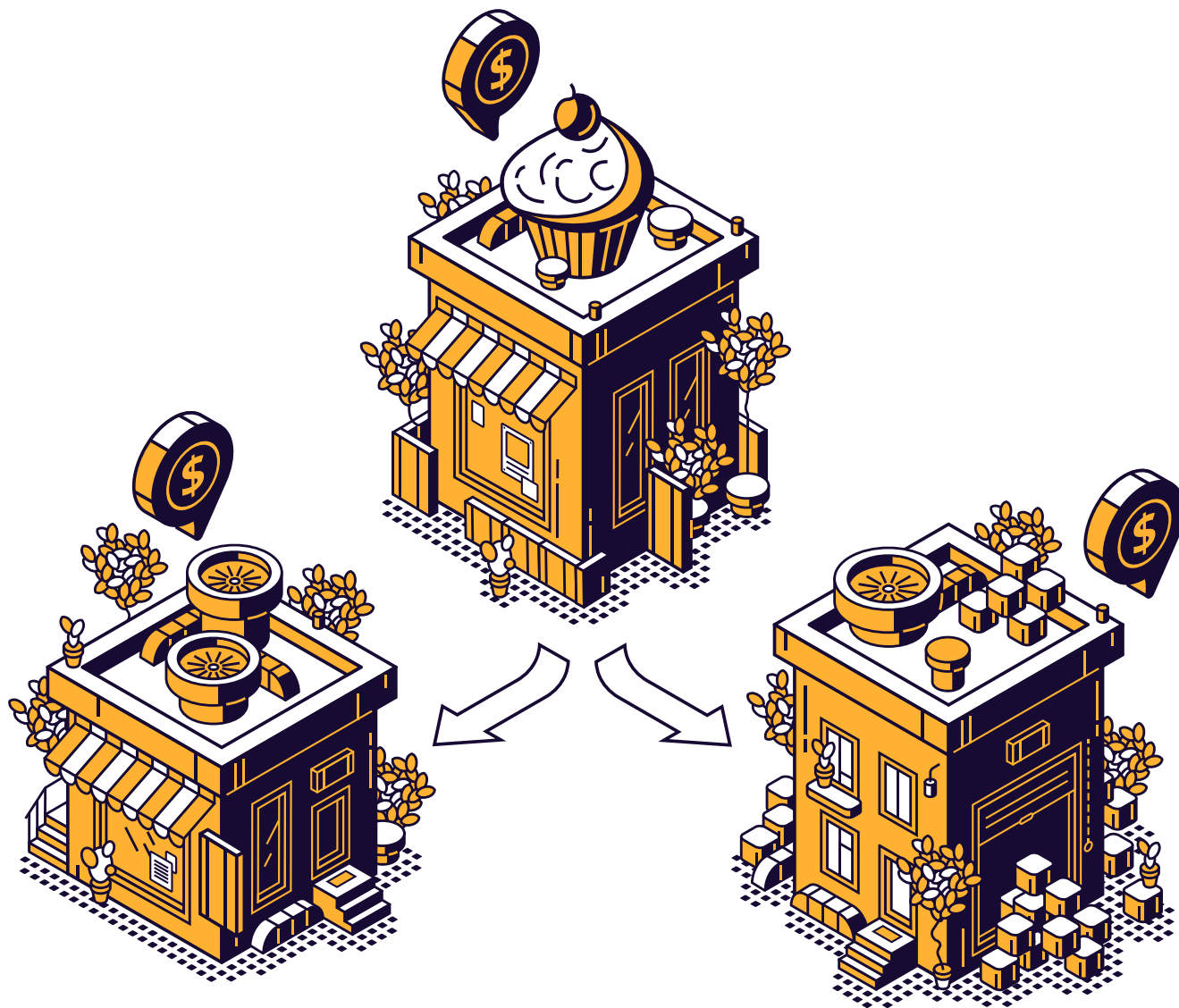
Definition of franchising

Pursuant to Article 284 of the Commercial Law 2005, franchising is defined as “a commercial activity whereby a franchisor authorizes and requires a franchisee to conduct on its own behalf the purchase and sale of goods or provision of services in accordance with the following conditions:

- (1) *The purchase and sale of goods or the provision of services must be conducted according to the method of business organization 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.”*

According to the above definition, franchising is a form of commercial activity performed by a business entity whose franchising objects are “a set of commercial rights”, including: trademark, trade name, business know-how, business mission statements, business logo and advertising.

In addition to the above Commercial Rights specified in the Commercial Law 2005, the following rights are also deemed as Commercial Rights in franchising under Article 3.6 of Decree 35/2006/ND-CP: (i) Commercial rights that are granted by the franchisor to the primary franchisee; (ii) Rights that are sub-granted by the secondary franchisor to the secondary franchisee under the master franchising contract; and (iii) Commercial rights that are granted by the franchisor to the franchisee under the commercial right development contract.



Legal framework for franchising activities in Vietnam



Up to the present, the legal framework for franchising activities in Vietnam is mainly prescribed in the following legislations:

(i) Commercial Law 2005 – Section 8, Chapter 6, Articles 284 – 291

The Commercial Law is considered as a constitution for the legal framework for franchising activities in Vietnam. Accordingly, the Commercial Law provides general provisions on franchising activities, including: Definition of franchising; forms of Franchise contracts; general rights and obligations of the franchisor and the franchisee; franchising to a third party and the obligation to register a franchise in accordance with the laws.

Therefore, the Commercial Law 2005 plays a vital role because it not only provides a definition of franchising, rights and obligations of franchisors and franchisees, but also serves as a legal basis for Decrees, Circulars, other sub-law documents on franchising activities, especially Decree No. 35/2006/ND-CP and Circular No. 09/2006/BTM.

(ii) Decree No. 35/2006/ND-CP (amended and supplemented by Decree No. 120/2011/ND-CP and Decree No. 08/2018/ND-CP)

Decree No. 35/2006/ND-CP was issued by the Government to regulate and provide detailed regulations for franchising activities in Vietnam. In particular, the Decree details more legal issues existing in the franchise contracts, such as language, duration, contract effectiveness, unilateral contract termination, etc. Moreover, the Decree also provides regulations on the registration of franchising as well as the general order and procedure for franchise registration.

(iii) Circular No. 09/2006/BTM

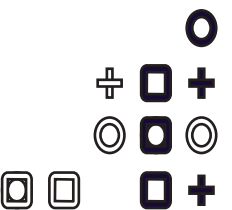
Circular No. 09/2006/BTM was issued by the Ministry of Trade (a.k.a the Ministry of Industry and Trade at the moment) to detail Decree No. 35/2006/ND-CP on the conditions and formality requirements for the franchise applications, statutory templates and forms that are necessary to register a franchise, and procedures for the franchise registration.

(iv) Decree No. 98/2020/ND-CP (Article 75)

Decree No. 98/2020/ND-CP stipulates the sanctions for administrative violations in commerce, production and trading of counterfeit and prohibited goods and protection of consumers' rights. Accordingly, this Decree also describes administrative violations of the law in franchising activities and provides corresponding administrative fines/sanctions for those violations.

(v) The Vietnam's Commitments on Trade in Services in the WTO

According to the Vietnam's WTO commitments, franchising services (CPC 8929) belong to the distribution service sub-sector. Accordingly, from January 1, 2009, the requirement to establish a joint venture with Vietnamese partners with foreign capital ownership not exceeding 49% has been abolished. At present, franchising services under the Vietnam's WTO commitments will not be restricted to foreign investors.



Apart from the above main legal framework for franchising activities, below are other relevant legislations on franchising activities:

(i) Competition Law 2018 and Decree No. 35/2020/ND-CP

The law of competition has always been a matter of concern for enterprises in general, especially for franchising activities. Due to the nature of “sharing” the business model and market share, there will always have agreements on competition restrictions in the franchising business. Accordingly, it is necessary to take the law of competition into consideration when running a franchising business.

(ii) Law on Technology Transfer 2017 and Decree 76/2018/ND-CP

Pursuant to the Law on Technology Transfer, if there is a transfer of know-how or technology from abroad to Vietnam, regardless of the transfer of ownership or only the right to use, it must be registered with the competent State authority of science and technology. Hence, the part of transferred technology under franchising activities is also subject to this Law.

(iii) Law on Intellectual Property 2005 (amended in 2009 and 2022)

In essence, franchising is an activity that allows others (franchisees) to use the business models, trade secrets as well as other industrial property objects of the franchisors, such as trademarks and trade names. Therefore, the Law on Intellectual Property and relevant regulations are indispensable legal norms for franchising activities.

(iv) Circular No. 103/2014/TT-BTC

Circular No. 103/2014/TT-BTC stipulates tax obligations for foreign organizations and individuals earning incomes from business activities in Vietnam, also known more widely as “Contractor Tax” (Foreign Contractor Tax). Accordingly, franchising from abroad into Vietnam is considered an income-generating activity of foreign franchisors in Vietnam and shall be subject to this Circular in terms of tax. Therefore, the foreign franchisor is required to declare and remit contractor tax to the tax authority in Vietnam. In specific cases, the franchisee in Vietnam may represent the foreign franchisor to perform the payment of contractor tax.



FRANCHISING REGISTRATION

#2





Pursuant to Article 291 of the Commercial Law 2005, before franchising the business, the franchisor must register with the Ministry of Trade (currently the Ministry of Industry and Trade). Accordingly, the franchising registration is stipulated in Decree No. 35/2006/ND-CP and Circular No. 09/2006/BTM, specifically as follows:

a. Conditions for the franchisor:

The franchisor shall be entitled to franchise a business if the franchise business has been operating for at least 1 year.

b. Cases in which the franchising must be registered:

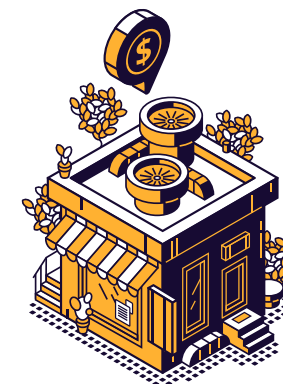
Currently, only franchising from abroad into Vietnam is required to be registered with the Ministry of Industry and Trade.

For franchising within the country or from Vietnam to abroad, business entities only need to report to the Department of Industry and Trade. However, at present, there are no specific regulations/guidance on the content of the periodic reports as well as on the reporting methods or procedures. Despite that, in the author's practical experience, the report templates will be issued and applied separately by each province's Department of Industry and Trade. Therefore, it is recommended that franchising enterprises need to contact the Department of Industry and Trade to make periodic reports in accordance with the laws.

c. Term for appraisal of Franchising dossiers:

The term for dossier appraisal is limited to 05 working days after receiving a complete and valid dossier. In most administrative procedures in Vietnam, the terms/durations for dossier appraisal by the competent authorities usually start from the date of receiving a complete and valid dossier.

The words "complete and valid" are extremely ambiguous for the applicant. In the author's experience, the adequacy of the dossier in accordance with the law, in some cases, is still not enough to be considered complete and valid under the view of the competent authority. Specifically, the competent authority can also consider the franchising content declared in the Franchise Disclosure Document and request the franchisor to tailor it to the opinions/views of the Ministry of Industry and Trade. Therefore, in practice, the appraisal of the dossier can take up several months.



d. Application dossier for franchising registration:

Dossier of application for registration is prescribed in Circular No. 09/2006/BTM, including:

- (i) An application form for Franchising Registration in line with the statutory form;
- (ii) A written Franchise introduction (Franchise Disclosure Document) in line with the statutory form. This Disclosure Document shall include the following contents:
 - Information about the Franchisor, including organizational structure, names, duties and working experience of members of the franchisor's board of directors, information about the department in charge of the franchising field, information about litigation related to franchising activities of the franchisor within the latest one (01) year;
 - Information on franchised trademarks of goods/services and intellectual property rights;
 - Information on the initial costs to be paid by the Franchisee, other financial obligations of the franchisee, the initial investments of the franchisee;
 - The franchisee's obligations relating to the purchase or lease of equipment in conformity with the franchise business system specified by the franchisor and other financial obligations of the franchisee;
 - Obligations of the franchisor before signing the contract and during the operation, including training obligations, other additional training courses, decision on the option of business premises...;

- A description of the general market for the goods/services subject to the franchise contract, prospects for the development of the market;
 - Information about the franchisor's franchise system, including the number of ongoing and ceased franchise establishments, the number of signed, assigned, or terminated franchise contracts, etc.
 - Sample franchise contract, including names of the contract provisions, contract duration, the conditions for renewing the contract, conditions for the franchisee/franchisor to rescind the contract, post-termination obligations of the franchisor/franchisee, contract modification, conditions for contract assignment, provisions/regulation on death cases, declaration that the franchisor/franchisee does not meet the conditions.
- (iii) Incorporation Certificate or equivalent documents of foreign business entity;
 - (iv) IP protection titles in Vietnam or a foreign country if the franchisor intends to license the franchisee its IP subject matters for which protection titles have been granted;
 - (v) Audited financial statements for the latest 01 year;
 - (vi) Documents proving the approval for sub-franchising into Vietnam (in case of sub-franchise).

e. Consular Legalization and Translation:

In principle, foreign documents are required to be consularly legalized and translated into Vietnamese before being submitted to State authorities. Most documents of the above franchise dossier must be legalized and translated into Vietnamese, except for the application for franchising registration.

As explained above, a franchise dossier may be required to be tailored to the opinions/views of the Ministry of Industry and Trade. It is unclear whether or not the amendments/supplements need to be legalized just like the original one. However, in the author's experience, if the documents are required to be modified, supplemented by the Ministry of Industry and Trade during the process of franchising registration, consular legalization may not be required in terms of the modified, supplemented documents in case the Ministry of Industry and Trade approves to do so.

In the author's opinion, the fact that the Ministry of Industry and Trade does not require consular legalization of the amended and supplemented dossiers is also completely consistent with the current laws. Specifically, pursuant to Decree 111/2011/ND-CP on consular certification and legalization, foreign documents and materials may not need to be legalized (exempt from consular legalization) when the receiving Vietnamese agencies do not require legalization (if appropriate with the corresponding legal provisions). Therefore, to the acceptable extent within the above context, the Ministry of Industry and Trade has flexibly applied the law and created favorable conditions for the Franchisor's Franchise registration.





f. Updating changes/Periodical Report:

The Franchisor is required to notify the modification of registered information to the Ministry of Industry and Trade within 30 days from the date of changing the contents of Part A of the Franchise Introduction (Disclosure Document), such as changes of the franchisor's information or changes to trademarks of goods/services and intellectual property rights. Furthermore, the Franchisor is obliged to periodically notify the Ministry of Industry and Trade of the contents of Part B of the Franchise Introduction (Disclosure Document), such as the franchisee's initial investment costs, the sample franchise contract, etc.



g. Costs and fees:

Previously, the cost for franchising in Vietnam was VND 16,500,000 pursuant to Decision No. 106/2008/QĐ-BTC. However, this provision was annulled in 2017. Currently, the franchising registration in Vietnam no longer has any State costs and fees.



h. Penalties for breaches:

Pursuant to Article 75.3 of Decree No. 98/2020/ND-CP, failing to register for franchising activities can be fined from VND 5,000,000 – 10,000,000 for franchisors being individuals and from VND 10,000,000 – 20,000,000 for franchisors being organizations.

FRANCHISE AGREEMENT





In the franchising business, controlling the quality of products/services is extremely essential. In fact, multinational corporations and enterprises with deep experience in operating franchise chains usually take many different methods/ways of quality control in order to achieve the most optimal results. The franchise agreement is one of the best methods of quality control to ensure maximum legitimate rights and interests for the franchisor. The below will provide readers with legal provisions and some issues related to the franchise agreement in Vietnam.

Form of agreement: Pursuant to Article 285 of Commercial Law 2005, a Franchise Agreement must be made in writing or in another form with equivalent legal validity. Thus, the franchise agreement can also be made in electronic form.

However, the franchise agreement is one of the important legal bases to establish the franchise relationship between the parties as well as giving rise to the parties to take on legal activities to protect their rights and interests in accordance with the laws. Therefore, if the franchise agreement is made in an electronic form, it is recommended to pay attention to the relevant regulations on electronic documents to ensure that the legal aspects of the electronic franchise agreement are adequate to be treated the same as a traditional agreement, such as criteria to be valid as a written document, to be valid as the original, to be valid as evidence in litigation, and so on in accordance with Law on Electronic Transactions.

Governing Law and Dispute Settlement Authority: The governing law and dispute resolution authority of the Franchise Agreement shall be agreed upon by the parties. In fact, most Franchise Agreements are drafted by and in favor of the Franchisor, while the Franchisees often do not have a chance to negotiate legal terms such as governing law or settlement dispute authority. Therefore, most Franchise Agreements are subject to the law and dispute resolution authority of the franchisor's country in case of franchising from overseas into Vietnam.

However, being governed by the laws and dispute resolution authority of the franchisor country are not always beneficial for the franchisor, in some cases, it presents certain risks to the foreign franchisor. In particular, pursuant to the law of Vietnam, judgments/awards of foreign courts/arbitrations must be approved by the Vietnamese courts for recognition and enforcement before they take effect in the territory of Vietnam. Accordingly, Vietnamese courts may refuse to recognize and enforce any foreign judgments if such judgments/judgments are contrary to basic principles of Vietnamese law; or based on the principle of reciprocity, in which the Vietnamese Court considers it necessary to refuse to recognize and enforce the judgments .



Language: Pursuant to Article 12 of Decree No. 35/2006/ND-CP, the Franchise Agreement must be made in Vietnamese. In case of franchising from Vietnam to overseas, the language of the franchise agreement shall be agreed upon by the parties.

Regardless of the above regulation, in practice, as the Franchise Agreement is not a mandatory component of the dossier in the franchise registration, the franchisor will prefer to use the English language instead of Vietnamese. However, please note that failure to make a Franchise Agreement in Vietnamese may result in an administrative fine from VND 6,000,000 to VND 10,000,000 according to Decree No. 98/2020/ND-CP.

Effective term of the Agreement: The law of Vietnam on franchising does not set an effective duration for a Franchise Agreement. Specifically, pursuant to Article 13 of Decree No. 35/2006/ND-CP, the effective term of the franchise agreement is agreed upon by the parties. However, one party is entitled to terminate the agreement before the expiry of the term in several cases permitted by law.



Contents of the Franchise Agreement: Pursuant to Article 11 of Decree No. 35/2006/ND-CP, in case the parties choose to apply Vietnamese law, a franchise agreement “may” have the following main contents:

- (i) Franchised commercial rights.
- (ii) Rights and obligations of the franchisor.
- (iii) Rights and obligations of the franchisee.
- (iv) Periodical franchise fee and mode of payment.
- (v) Valid term of the Agreement.
- (vi) Renewal and termination of the agreement, and settlement of disputes.

Although the above provisions do not require the franchise agreement to contain the above main contents, it should be noted that the parties may still be sanctioned for administrative violations under Decree No. 98/2020/ND-CP if the main contents of the franchise agreement fail to encompass the above contents.

In practice, when the relationship between the parties is coming to an end, before applying a legal measure, such as taking a legal proceeding, the franchisor has rapidly used various "non-legal" measures, such as immediately disconnecting the franchisee from the franchise system, ceasing sharing data, documents, etc.

Assignment of the Agreement: Pursuant to Article 15 Decree No. 35/2006/ND-CP, the franchisee is entitled to assign the commercial rights to another qualified franchisee if the assignment is agreed by the franchisor.

To obtain the franchisor's approval, the franchisee must send a written request for assigning commercial rights to the franchisor. Within 15 days from the date of receiving the request, the franchisor must reply to the franchisee in writing as to whether the franchisor agrees or not. In case of rejection, it should be in line with one of the following reasons:

- (i) The intended franchise assignee fails to fulfill its financial obligations under the franchise agreement;
- (ii) The intended franchise assignee has not yet satisfied the criteria for being a qualified franchisee set out by the Franchisor;
- (iii) The assignment of commercial rights may exert a great adverse impact on the existing franchising system of the franchisor;
- (iv) The intended franchise assignee disagrees in writing to fulfill the obligations of the franchisee under the franchise agreement;
- (v) The Franchisee (assignor) has not yet fulfilled its obligations/responsibilities towards the franchisor, except for the case that the intended franchise assignee makes a written commitment to, on behalf of the Franchisee (assignor), fulfil such unfinished obligations.

If the above term for response of 15 (fifteen) days expires without no response from the franchisor in writing, the assignment of commercial rights shall be deemed as having agreed by the franchisor. After assigning the rights, all rights and obligations related to commercial rights of the Franchisee (the assignor) shall be assigned to the franchise assignee (the new franchisee), unless otherwise agreed by the parties (including the franchisor).





Unilateral termination of the Agreement: Each party has the right to unilaterally terminate the franchise agreement in the cases specified in Article 16 of Decree 35/2006/ND-CP, specifically as follows:

(i) For the franchisee: Decree No. 35 entitles the franchisee to unilaterally terminate the franchise agreement in case where the franchisor breaches its obligations specified in Article 287 of the Commercial Law 2005.

Regardless of the above regulation, in the author's opinion, not any breach of the franchisor's obligations under Article 287 of the Commercial Law 2005 shall give rise to the franchisee's right to unilaterally terminate the franchise agreement.

In contrast, it is necessary to take the extent of such breach in consideration to be entitled to unilaterally terminate the franchise agreement. In this case, the breach should be considered a fundamental breach of the franchisor under Commercial Law 2005 to be subject to unilateral termination.

(ii) For the franchisor: Similar to the franchisee, Decree No. 35 also permits the franchisor to have the right to unilaterally terminate the franchise agreement in the following cases:

The franchisee no longer has a business license or another equivalent document that is required by law to be eligible to conduct the franchised business.

The franchisee is dissolved or goes bankrupt in accordance with the laws of Vietnam.

The franchisee commits material violations of the law which can cause significant damage to the reputation of the franchise system.

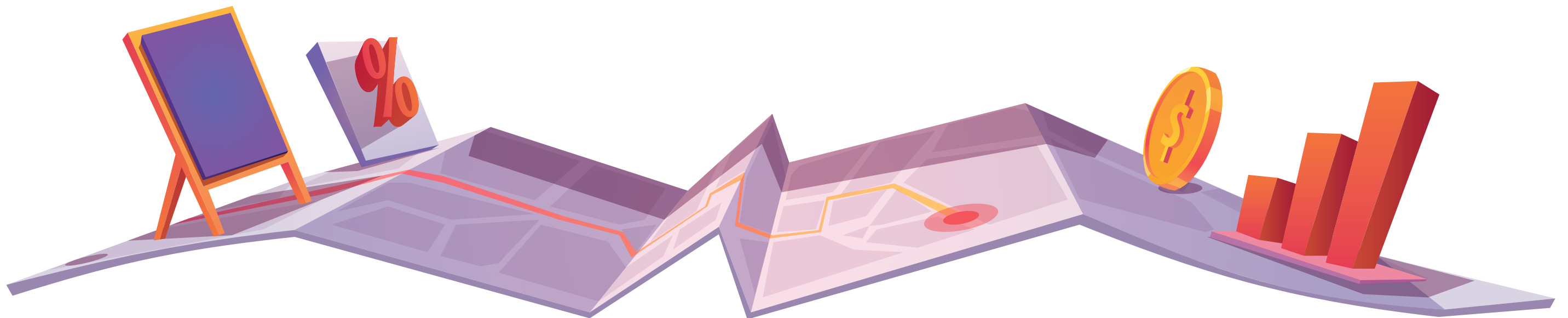
The franchisee fails to remedy the non-fundamental breach of the franchise agreement within a reasonable time, despite receiving written notice from the franchisor of requesting to remediate such breach.

Similar to the case of the franchisee, the above termination rights of the Franchisor should be taken into consideration along with the agreement of the parties in the franchise agreement and other relevant governing laws, such as Commercial Law.

Penalty for breach and consequences of franchise agreement termination: The current law does not have separate regulations on penalty for contractual breach and consequences of franchise agreement termination. Therefore, the general law will be applied in this regard. Accordingly, the Commercial Law only allows the maximum penalty for contractual breach of 8% of the value of the breached obligation.

Like other agreements, the termination of a franchise agreement also gives the aggrieved party the right to demand compensation from the violating party. However, only the statutory compensation for damages and losses is not sufficient. As a matter of fact, the franchisor usually requires the franchisee to stop running the franchise business along with ceasing the use of the franchisor's trademark, brandname, trade secrets,... and return and/or destroy the documents and facilities that the franchisor has provided in the course of conducting a franchise business.

In practice, when the relationship between the parties is coming to an end, before applying a legal measure, such as taking a legal proceeding, the franchisor has rapidly used various "non-legal" measures, such as immediately disconnecting the franchisee from the franchise system, ceasing sharing data, documents, etc.





Intellectual property rights and technology transfer: One of the important issues of franchising activities is the right to use intellectual properties such as business know-hows, trademarks, trade names, etc. Therefore, Decree No. 35/2006/ND-CP also stipulates this case in terms of the franchise agreement. Specifically, if the franchisor grants the franchisee the rights to use industrial property objects and the contents of the commercial rights, the content of the granted rights may be made into a separate section in the franchise agreement.

In order to avoid law conflicts, Decree No. 35/2006/ND-CP does not provide any further regulations/guidance on this issue, but refers to the law on industrial property.





Responsibility to disclose information before entering into the franchise agreement: Pursuant to Article 8 of Decree No. 35/2006/ND-CP, the franchisor is required to provide the franchisee with a copy of the franchise agreement template and the written franchise disclosure document at least 15 working days before concluding the franchise agreement, unless otherwise agreed by the parties, including disclosing the compulsory contents contained in the sample form of written franchise disclosure document issued by the Ministry of Trade (being the Ministry of Industry and Trade now).

In case of sub-franchising, the secondary franchisor shall also be required to disclose information in writing to the franchisee of the following contents: (i) Information on the Master Franchisor that has granted commercial rights to the secondary franchisor; (ii) Contents of the master franchise agreement; and (iii) Method of handling the sub-franchise agreement in case of termination of the master franchise agreement. In addition, in the course of franchising, the Franchisor is required to immediately notify all Franchisees of any important changes in its franchise system that affect the Franchisees' business operation.

In practice, the franchise agreement often has one or several general provisions under which the franchisee acknowledges and recognizes that the franchisee has been adequately provided with all necessary documents and information in accordance with the law, consulted by a law firm, etc. before entering into the franchise agreement voluntarily.

SEVERAL LEGAL ISSUES AND PRACTICAL NOTES



Foreign contractor tax for franchising activities from overseas into Vietnam:

Persons subject to tax and types of tax: As franchising from overseas into Vietnam, the franchisor is a foreign organization or legal entity. Under Vietnamese law, foreign franchisors generating income in Vietnam must pay foreign contractor tax, including Value-Added Tax and corporate/ personal income tax.

In case the foreign franchisor does not have any commercial presence in Vietnam, the franchisee shall be required to withhold/deduct from any payments to the foreign franchisor in order to represent the foreign franchisor to pay foreign contractor tax.

Tax rates: Franchising usually includes various activities with different tax rates. Thus, there is not one specific tax rate for franchising.

However, pursuant to the guidance of the Ministry of Finance to tax authorities on issues related to foreign contractor tax, franchising activities that are accompanied by the right to use intellectual property rights (including the right to use the Trademark) are subject to Value-Added Tax (5% by direct method or 10% by deduction method) and Corporate Income Tax (10% of payable tax amount) under Circular No. 103/2014/TT-BTC. Conversely, if the franchising is accompanied by the ownership assignment of intellectual property rights, it is not subject to value-added tax under the Law on Value-Added Tax.



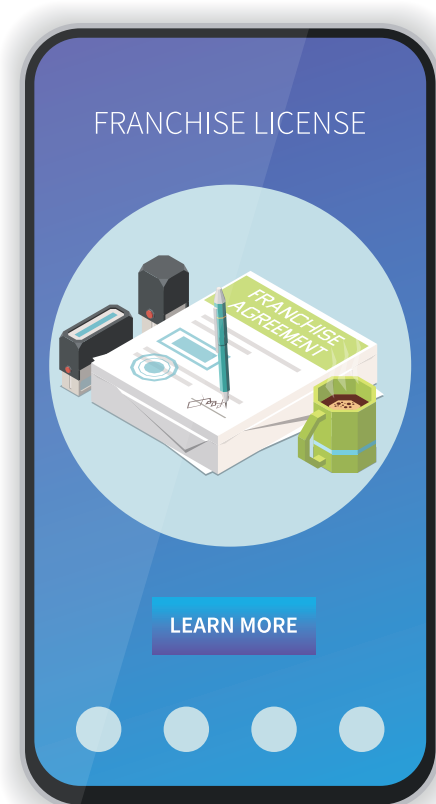


Trademark Registration in Vietnam:

Trademark registration is not a mandatory condition for franchisors when engaging in franchising activities in Vietnam. Accordingly, the law only sets forth one condition for the franchisor that the business system intended for franchising has been in operation for at least 01 (one) year.

However, in most cases, franchising activities include the transfer of the right to use industrial property objects, one of which is Trademark. Pursuant to Circular No. 09/2006/BTM, one of the statutory documents in the dossier for franchise registration includes: "a copy of the title of protection of industrial property rights in Vietnam or in a foreign country in case of there is a transfer of the right to use industrial property objects which have been granted protection titles". According to the above regulations, franchisors need to register their trademarks in Vietnam or "in a foreign country" so that they are able to meet this condition for franchise registration.

However, in practice, although the franchisor has successfully registered its trademark in the franchisor's country, the Ministry of Industry and Trade may still refuse the application. This can be attributed to the fact that one of the fundamental natures of the Trademark protection is the territorial nature (i.e., trademark rights are limited to the country where they have been granted). Therefore, from the perspective of state management, the phrase "in a foreign country" should be understood precisely as "international registration with the designation of Vietnam" instead of in the franchisor's country. Hence, it is recommended that the franchisors have to take heed of the trademark registration in Vietnam in the form of either national or international registration before conducting franchising activities in Vietnam that are accompanied by the transfer of the right to use the trademark.



Distinguishing with License Agreement under laws on intellectual property:

A license agreement (also known as a contract for transfer of industrial property rights under the Law on Intellectual Property) is an agreement in which the owner of an industrial property object allows others to use its industrial property object within the scope of the owner's rights. A license agreement and a franchise agreement have many similar characteristics. For example, both may cover the licensing of the right to use industrial property objects; or the assignee exercises the licensed rights under certain control of the assignor; or the assignee shall be subject to several restrictions on the use of licensed industrial property object, such as being prohibited from arbitrarily making any changes and improves to the industrial property object, etc.,

Although in theory, there are some clear differences between a license agreement and a franchise agreement (for example, the objects of the franchise agreement are wider than those of a license agreement), in practice, it is still difficult for not only enterprises but also for the state authorities to distinguish them clearly. Specifically, taking the case of using "Big C" trademark in Vietnam in 2017 as an example, the competent authorities showed their "confusion" in determining whether the secondary license contract between Cavi Retail and Big C An Lac on the use of Big C brandname in retail establishments in Vietnam was a franchise agreement or not.

Regardless of many official dispatches exchanged among the relevant Ministries/authorities in the above case, there is still no clear answer to which elements of a license contract can make the contract to be considered a franchise agreement. However, we can conclude that distinguishing between a license contract and a franchise contract is actually not easy in practice. From the response of the Ministry of Industry and Trade, we can come to a practice note that a license contract shall be deemed as a franchise contract only if the franchise registration has been registered with the Ministry of Industry and Trade (or notice of domestic trade franchise).





Taking into consideration the laws on competition (anti-competitive agreements):

Franchise activities often encompass various anti-competitive agreements, such as territorial agreements (market division), fixing the prices of goods or services, forcing to cooperate with fixed source providers of raw materials, etc. Those types of agreements can be considered anti-competitive actions and may be subject to the scope of the laws on competition. Therefore, in compliance with the law, the parties participating in franchise activities are recommended to pay attention to the competition law.

In the author's experience, before participating in franchise activities, the parties need to conduct a self-assessment on the possibility of having an influence or an impact on competition in accordance with the law (e.g., the combined market share of the parties (less than 5% of the total market share); whether the cooperation can hamper the objectives of research, development, technological innovation in the related industries and fields, ...). Based on the results of the self-assessment, the parties can determine whether the above clauses in the franchise agreement are considered anti-competitive agreements in view of the law on competition or not.

If the cooperation between the parties is likely to cause a significant anti-competitive impact, the parties should actively register for an exemption by submitting the request to the National Competition Committee. Please note that although at the time of this article, the National Competition Committee has not been established yet, the functions of this Committee are still undertaken and resolved by the Vietnam Competition and Consumer Authority, Ministry of Industry and Trade.



APOLAT LEGAL | FRANCHISE CONSULTING SERVICE

Franchising has always been considered one of the business models having high socio-economic value. This activity not only brings enormous benefits to franchising owners, but also provides a way to effectively share a business opportunity with many others, especially in developing countries such as Vietnam, helping individuals and organizations who are insufficient sources to self-build a business from zero.

In addition to the reputation of their service and product's quality to build a truly effective franchise system, franchisors must also keep in mind legal issues involved in this activity. In fact, franchising covers a wide range of issues such as entering a contract, franchise contract registration, intellectual property, technology transfer, confidential information, raw materials supply, and operating franchise stores... Especially when franchisors want to expand their business worldwide, this activity will be governed by at least two different legal systems.

Therefore, Apolat Legal, with lawyers and associates advised and assisted in the implementation of many complicated franchise transactions, will help customers orient and understand the legal issues surrounding this operating model thoroughly. Specifically, the scope of our services includes:

- *General consulting in relevant legal policies;*
- *Drafting or reviewing exclusive franchise and sub-franchise agreements;*
- *Drafting or reviewing other documents and agreements related to the system's operation to ensure consistency with franchise agreements and regulatory compliance;*
- *Consulting the compliance with laws and contracts during the franchising term;*
- *On behalf of the franchisor or the franchisee to negotiate and enter into a franchise agreement;*
- *Registering the Franchise system to competent authorities;*
- *Other relevant legal services upon clients' request;*
- *On behalf of the franchisor or franchisee resolves disputes related to franchise activities.*

Apolat Legal believes that the range of services we provide will fulfil all the requirements of our customers and act as a support link to help clients keep up with the development in the field of franchising.

Main contact:



TRAN CHAU HOAI HAN

T: +84988787285

E: han.tran@apolatlegal.com

HUMAN RESOURCES



PHAM HONG MANH | Marcus
Managing Partner
T: +84932014986
E: manh.pham@apolatlegal.com



PHAM THI THOA | Helen
Senior Partner
T: +84918950066
E: thoa.pham@apolatlegal.com



DINH QUANG LONG | Alex
Senior Partner
T: +84919963977
E: long.dinh@apolatlegal.com



NGUYEN MINH TIEN | David
Senior Partner
T: +84909881277
E: tien.nguyen@apolatlegal.com



APOLAT LEGAL LAW FIRM

M: (+84-28) 3899 8683
E: info@apolatlegal.com