

Franchising Law in Thailand

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This presentation does not constitute legal advice. It is a high-level overview of laws and regulations in Thailand and elsewhere. For legal advice, consult a qualified lawyer.

No Franchising Act in Thailand Yet...

- But notifications and regulations under the Thai Trade Competition Act governing franchising relationships have been issued.
- And for at least the past 20 years we have told that passage of a specific Franchising Act was imminent.
- Khun Nat will discuss those notifications and regulations in some detail.
- But first we will step back and discuss what a franchising relationship is and why it could be helpful to new entrants to the Thai market. We will also discuss the regulation of franchising arrangements generally before Khun Nat discusses Thai notifications and regulations.

What is a Franchising Relationship?

- Much broader than a fast-food burger joint.
- Commercial Definition
 - A continuing relationship where:
 - A franchisor provides a licensed privilege to conduct a business; and
 - Assistance in organizing the business, training, merchandising, marketing and management in return for...
 - Money.
- Includes: fitness clubs, food delivery, property management, financial training, private schools, management consultants, assisted living, medical service providers and hotels.

Commercially Valuable for Entrants to Thai Market

- New entrants often not familiar with the Thai market.
- May not know about supply local supply chains, rental markets, potential customers, etc.
- Local franchisee often knows more about local supply chains, rental market and potential customers, etc.
- Allocation of risks.

Legal Advantages to New Entrants

- Do not have to contend with Thailand's restrictions on foreign entrants.
- Thai legal restrictions on foreign parties: Foreign Business Act, Tourism Act.
- Other local laws, permits and regulations: franchisee addresses these, not franchisor (who presumably knows less).
- Peculiar local laws: Thai Labor Law.

Burden shifted to party that knows more or should know more.

Nature of Franchising Regulation??

Franchising Agreements tend to create vertical rather than horizontal restraints on trade:

- Horizontal: A horizontal restraint is one involving direct competitors at the same level in a particular industry. Example: Creation of a monopoly where consumers will likely pay more for a good.
- Vertical: A vertical restraint involves participants who are not direct competitors because they are at different levels in distribution of a product or service. Example: Supply chain restrictions found in franchising arrangements.

Goals of trade competition laws? Only economic efficiency and consumer protection (lowest consumer prices)? Or prohibitions on anti-competitive behavior and price discrimination?

- Disclosure requirements. Protection of Franchisees.
- Contractual relationship, but unequal bargaining power?
- Obstruction of franchisee's operations. Brand protection vs. protecting franchisees.
- Unfair trade conditions.
- Discriminating against one franchisee in favor of another.

Thai Franchising Laws & Regulations

No notification or registration requirements for a franchisor/franchisee relationship.

The relationship between franchisee and franchisor is primarily contractual, but that contractual relationship is subject to various laws and regulations:

- The provisions of the Thai Civil and Commercial Code governing contracts.
- Unfair Contract Terms Act.
- Intellectual Property laws, in particular the Trademark Act.
- Trade Secret Act.
- Consumer Protection Act and “Controlled Contracts”.
- Laws governing the specific business activity that is the subject of the franchise, such as the Food Act or the Cosmetic Act.
- Trade Competition Act.

Franchise Guidelines

- A notice issued under the Thai Trade Competition Act (“TCA”) is pivotal to the regulation of franchisor/franchisee relationships in Thailand. That notice is known as the Trade Commission’s Notice on Guidelines for the Assessment of Unfair Trade Practices in Franchising, B.E. 2562 (2019).
- There have been two amendments to that notification, including one that came into effect in August of 2021 (collectively, the “Franchise Guidelines”).

Franchise Guidelines

Definition of “Franchise Business”, “Franchisor” and “Franchisee” in the Franchising Guidelines:

- A business operation where one party, called a franchisor, contracts with another party, called a franchisee:
 - To use the franchisor’s business method, model, system, procedures and intellectual property rights (or any business method, intellectual rights, etc., the franchisor has the right to license).
 - Within a specific time period and at a specific location.
 - Where the business operation is under the support and a business plan of the franchisor.
 - And the franchisee has an obligation to pay fees to the franchisor.

Franchise Guidelines

Pre-Disclosure of Key Particulars:

- Fees.
- Business Plan.
- Detail of related trademarks, patents and copyrights and licensing details.
- Renewal, cancellation and withdrawal of the franchise contract.

Expansion of the franchise business:

- This was the subject of Notice numbers 2 and 3 under the Franchise Guideline.

Franchise Guidelines

Unfair Treatment of Franchisee:

- Restricting the franchisee's business without unreasonable grounds.
- Imposing additional conditions on the franchisee after the contract is executed.
- Prohibiting the franchisee from purchasing goods or services from other parties.
- Prohibiting the franchisee from selling perishable goods with a discount.
- Different terms and conditions among franchisees (price discrimination).
- Specifying unsuitable terms and conditions outside the scope of the franchise business.

Franchise Guidelines

TCA Section 59 Submission to the Thai Trade Competition Commission (“TCC”).

Violation of the Franchise Guidelines is considered a violation of TCA Section 57, the unfair business practices provision of the TCA. Consequences:

- The TCC can order a franchisor to suspend, cease or alter activities that are considered unfair business practices. The franchisor can appeal a TCA order to the Administrative Court. TCA Section 60.
- The franchisee or any other party allegedly damaged by the unfair business practices can file a lawsuit for damages. The lawsuit must be filed within one year of that date that party suffered damages or should have known it suffered damages.
- Administrative Fine: 10% of turn over (income) in the year the violation occurred. If offense committed in first year of operations, not more than one million Thai Baht.
- If the case is settled and the fine paid, the TCC does not have to forward the case to the public prosecutor. Important: TCA also has criminal penalties.

Example of an “Unfair Business Practice”

M-150 Case – Energy Drink

- TCC imposed a fine of six million Thai Baht on a producer of a famous energy drink and a six million Thai Baht on the director responsible for the violation of the TCA because...
- The energy drink producer unfairly used market and bargaining power to restrict its distributor from selling similar products.
- The energy drink allegedly producer threatened that it would not sell its product to the distributor unless the distributor stopped selling similar products.
- Energy drink producer and director paid the fine. The matter was settled without having to go to trial.
- The TCC is actively imposing enforcing these provisions of the TCA.

Take-away

TCA Compliance Check

- Any company that has business relationship with other companies where it allows other business operators to use its rights or business models – irrespective of the label used to describe that business relationship – should carefully examine that business relationship to determine if it constitutes a franchisee/franchisor relationship.
- All such business relationships could be considered franchise relationships.
- Substance over form.

Questions?

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