

ANALYSIS ON LAWS RELATING TO FRANCHISE BUSINESS IN MYANMAR*

Su Su Mon¹

Abstract

The research proposes to analyse legal protection and the ways how to develop franchise businesses in Myanmar and how to overcome the legal barriers to be effective these businesses in Myanmar. Franchising is the practice of using brand name of another firm and business strategies. The need for developing franchise business as a strategy to promote SME sector is to reform and enact the laws relating to franchise business. Franchising can support not only small and medium-sized enterprises (SMEs) sector but also foreign and local investments. In order to develop franchising in Myanmar, there are many barriers to overcome. This research will contribute to addressing the weakness of legal protection and enforcement, to proposing to the policy makers and legal expertise to consider franchising as a strategy for economic development of Myanmar, and educating the entrepreneurs to be qualified to compete with foreign entrepreneurs. Thus, the research is conducted by applying analytical method and qualitative method.

Keywords: Franchise business, franchising, franchisors, franchisees, foreign investment, franchise agreement, franchising law, intellectual property law, trade secret and trademarks, consumer protection and competition law

Introduction

To enter foreign markets as one of the former biggest challenges has now released. Most countries have welcomed foreign investment to their countries. Improvements in infrastructure all over the world have made more feasible products and transporting goods. In that case, it needs to take into account external risks and internal parameters to comprehend its market strategies, basic competencies, and financial implications.

Franchising is a system to expand business and distribute goods and services, and also an opportunity for operating a business under a branded or trade name. The beginning of franchise business was originated in the 18th

¹ Dr, Lecturer, Department of Law, University of Yangon

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Century when Benjamin Franklin and Thomas Whitmarsh introduced the first franchise. However, the widespread use of franchise strategies commenced in the United States around 1850 when Singer Sewing Machines planned to sell its products throughout the United States.

“At the time, the “franchising” element (Product and Brand) consisted only of the right to use the brand name at the store and sell the product. Then General Motors and Coca-Cola began to use the franchising concept to expand the markets to which they could sell their products. The largest expansion of franchising occurred in the late 1940’s at the end of World War II. In the 1950’s, major fast food chains like Burger King, McDonald’s and Dunkin Donuts began to appear. By the 1960’s onward, these and other American fast food chains began their expansion into international markets.”¹

In franchise system, the partners, franchisors and franchisees, are interdependent on each other and on one’s purposes and performance to achieve their same aims. In addition, a successful franchise provides benefits not only to the franchisees and franchisors but also to the customers. As it can provide know-how and employment, it is an alternative way to enhance the small and medium-sized enterprises (SMEs) sector of a country and to flow foreign investment in a country.

Internationally, franchising is a successful model and very popular in developed countries and some ASEAN countries such as Malaysia, Indonesia, Singapore, Thailand and Vietnam. Although franchising is one of the prospective ways to help drive economic development of a country, it possesses advantages and disadvantages on franchisors and franchisees.

In addition, there are three types of franchising. They are product distribution franchise, business format franchise and management franchise. Most of the famous and successful franchise businesses are based on business format franchise and product distribution franchise.

In some countries, like Finland and Germany, franchising is viewed as an entrepreneurial activity. Some literatures mentioned that franchising has

¹ Olafemi Ayopo Olotu, *Reinventing Business Growth through Franchising in Developing Economies: A Study of the Nigerian Fast Food Sector*, *International Journal of Marketing Studies*, Vol. 3, No. 1; February 2011, p. 164.

many characteristics overlapping with the small and medium-sized enterprises policy programme.

In Myanmar, there are some franchise businesses although franchising is still in its infancy level and starting to boom rapidly. Foreign investors can take advantage by doing franchise businesses in Myanmar taking help from local entrepreneurs as franchisees and there is lower risk than doing their owned businesses or investments. However, there are many barriers such as political instability, lack of efficient banking system, lack of specific economic policy, and poor legal protection and enforcement.

As a result, the government should pass the effective Intellectual Property Law that plays the major important role to induce the franchise business and foreign investment as well as practice robust enforcement. Hence, local entrepreneurs should be educated to do franchise businesses to expand and start their businesses, and be qualified to compete with foreign entrepreneurs as well as legal institutions should be reformed.

Research Method of the Study

Analytical method and qualitative method are used to conduct the research. The study intends to introduce the modern business system and to contribute to the Myanmar entrepreneurs for doing franchise business by enhancing economic development. Thus, the comparative case study on Thailand and Vietnam is necessary to point out how their franchise systems work and how local laws are provided. The primary data for the study is collected by surveying some local franchisees, and secondary data is collected from legal journals, articles, literature books and some reliable online sources.

Problem Statement

Developing countries should take into account the importance of franchising for their economic development.² During Myanmar's economic

² Guriqbal Singh Jaiya, The Importance of Intellectual Property for the Competitiveness of SMEs, 2003.
(http://www.wipo.int/edocs/mdocs/sme/en/wipo_bak_03/wipo_ip_bak_03_www_34145.pdf.)

transaction, priority must be given to removing economic controls, encouraging foreign and local investment and exports, removing structural impediments to entrepreneurship, encouraging and facilitating the use of technology, improving and producing skilled labour through education and training, providing all forms of access to credit, and improving the country's infrastructure. More areas of the economy should be opened to the private sector along with improved regulations, laws and policies for businesses.

By franchising, the franchisee needs little time to establish the brand and does not need to worry about managing the shop because the franchisors support training to the franchisees and staff. This is one of the advantages of franchising. For example, if a person has enough money to run a food shop but does not have experience in it, he can franchise a brand from an established one.

At this moment franchising system cannot be separated of small and medium-sized companies. That is why small and medium-sized companies through the franchising system are essential components of economic development. Nowadays the government should take into account franchise businesses in promoting the SMEs development and investment flows in Myanmar.

To increase the number of franchise businesses, there are many barriers. One of the major barriers is laws and regulations. It is essential to evaluate the maturity of the legal protection because franchise businesses are based on principal and agent relationship and lack of legal protection can lead to a lack of trust and free riding problems. Additionally, comparativeness of market system is also one of the barriers to develop franchising system in Myanmar.

Thus, the government should enact separate Franchising Law. Even though franchising law cannot be provided in Myanmar, some existing laws relating to franchising are already available but just need to be applied effectively and efficiently. If these needs are fulfilled, Myanmar would be an easier place to build a franchise business domestically and internationally. At present, Myanmar is receiving a lot of attention from the international community. As economic opportunities increase, some foreign investors will be interested in doing franchise businesses to invest in the country.

Franchising Laws: Thailand, Vietnam and Myanmar

The Role of Domestic Laws relating to Franchising in Thailand

In Thailand, there is no specific provision for franchise operations in Thailand. However, this does not mean that franchise relationships are wholly uncontrolled. The Ministry of Commerce regularly announces plans to commence drafting regulations. Legal franchising issues are dealt with under civil and commercial laws. Nevertheless, the most recent draft of new franchise legislation defines a franchise as: “the operation of a business in which one party called a franchisor agrees to let the other party, the franchisee, use its intellectual property rights, or to use its rights to operate a business during a specified time or in a specified area, such operation being under the direction of the franchisor’s business plan, and the franchisee having a duty to reimburse the franchisor.”³

“Thailand is generally a "freedom of contract" jurisdiction where judges rarely attempt to look beyond the specific terms of a mutually agreed written contract to determine the intent of the parties at the time of agreement. However, there are mandatory provisions in franchise agreements such as quality control provisions and written grants of trade mark usage rights.”⁴

Drafting a franchise agreement will cover consideration of the Civil and Commercial Code, the Trade Competition Act (1999), the Unfair Contract Terms Act (1997), the Trademark Act (1991), as amended by the Trademark Act (No 2) (2000) and the Trademark Act (No 3) (2016), the Copyright Act (1994) as amended by the Copyright Act (No 2 and 3) (2015), the Patent Act (1979) as amended by the Patent Act (1992) and Patent Act (1999), Product Liability Act (2008), the Foreign Business Act (1999), the Trade Secret Act (2002), the Direct Selling Act and the Revenue Code (2002) and the Act Relating to Price of Merchandise and Service (1999).

³ Thom Thi Mai Nguyen and Huong Thi Thanh Nguyen, Tilleke & Gibbins, “Vietnam”, Franchise in 33 jurisdictions worldwide, Philip F Zeldman, Getting the Deal Through Franchise, 2013, p. 227.

⁴ Alan Adcock, Tilleke & Gibbins, Franchising in Thailand: overview, 2016. (<http://www.uk.practicallaw.thomsonreuters.com/franchising-guide>)

Ministerial regulations that execute and supplement these Acts are also helpful to the courts in handling franchising disputes. However, after the franchisor and the franchisee finalize terms in a franchise agreement and commence executing those terms, Thai courts will generally defer to the contract's terms, unless doing so would violate law or public policy. Thai courts have great discretionary power in determining whether contract terms unreasonably restrict the right of (or excessively create a burden on) a contracting party under Section 5, Unfair Contract Terms Act (UCTA).⁵

Franchise agreement could be interpreted as “agent – principal relationship”. Thai Civil and Commercial Code provisions require that if the agent, in the course of their appointment, commits any wrongful act to another party, the principal will be solely responsible or jointly liable. To avoid misinterpretation of the franchisor-franchisee relationship as an agent-principal relationship, an explicit statement must be made in the franchise agreement that the relationship arising from the agreement could not by any means be interpreted as an agent-principal relationship.⁶

If a franchisee does not meet the satisfaction of the provisions of the agreement, he or she should not be permitted to close its unit without jurisdiction and then to reopen under a different name and compete against the former franchisor with the know-how obtained through experience to the franchise system.

It is required to define the scope of confidential information. Without a clear meaning, there is a risk that valuable information will enter the public domain.

Under the Foreign Business Act, “a foreign owned company or a company where majority ownership belongs to foreigners is permitted to carry out franchising business activities only after obtaining applicable foreign business licenses from the Thai Ministry of Commerce (MOC)”.

⁵ Alan Adcock, Tilleke & Gibbins, Franchising in Thailand: overview, 2016.
(<http://www.uk.practicallaw.thomsonreuters.com/franchising-guide>)

⁶ Chanvitaya Suvarnapunya and Pattama Jarupunphol, Getting the Deal through Franchise 2018, Law Business Research Ltd, 2017, pp. 150-153.
(<http://www.franchise.org/sites/default/files/F2018 Thailand.pdf>)

In addition, intellectual property rights play the major role of a franchise agreement and have to be clearly defined in the agreement. After defining these rights, the parties to the agreement have to determine the enforceability of such rights, especially to make clearly who is entitled to take actions against third-party infringers. An unclear practical problem that arises with a Franchising Agreement is whether such an agreement may be registered with Department of Intellectual Property (DIP) or not. Regarding this issue, there are no clear court decisions. Trademark and its licensing agreements should also be registered with the DIP to be prevented from copying or imitation by civil or criminal proceedings. When a franchise agreement is terminated, a franchisor may discover that the franchisee has filed similar trademarks that may compete with his or her marks. Thus, a correct understanding of the scope of the intellectual property rights is essential.⁷

In order to protect trademarks and know-how, “the Thai Trademark Act imposes civil and criminal penalties on those who infringe the rights of the trademark owner. The licensing of a trademark must be made in the form of a written licensing agreement registered with the Thai authorities. Know-how is protected under the Trade Secret Act of 2002”.⁸

“In Thai courts, there are two opposing points of view. Some judges consider the trademark licence agreement to be inseparable from the franchising relationship. In this case, if the franchise agreement (including the trademark licence) is not registered, the agreement is void. However, other judges consider the trademark licence agreement as part of the franchise agreement.”⁹ “Moreover, if the provisions regarding trademark use are not registered, they will be void, but the franchise agreement will survive. Generally, franchisors will enter into a separate short form trademark licence agreement with the franchisee and register that agreement with the

⁷ Stephen Frost and Teerakarn Noichiaum, Bangkok International Associates, “Franchising in Thailand – Seventh heaven or something else!”, 2012, p.1.

⁸ Chanvitaya Suvarnapunya and Pattama Jarupunphol, Getting the Deal through Franchise 2016, Law Business Research Ltd, 2015, p. 136.
(<http://www.franchise.org/sites/default/files/F2016 Thailand.pdf>)

⁹ Alan Adcock, Tilleke & Gibbins, Franchising in Thailand: overview, 2016.
(<http://www.uk.practicallaw.thomsonreuters.com/franchising-guide>)

Department of Intellectual Property. Thailand does not currently have any specific legislation regulating franchise agreements. Therefore there are no franchise disclosure requirements, governmental approval requirements, or registration or other filing requirements.”¹⁰

Therefore, in order to develop franchise businesses, legal provisions and effective legal enforcement are very important. In this case, Thailand has other effective provisions for franchise operations although there are no specific provisions for franchising. To make a clear and binding franchise agreement, additionally, Intellectual Property Law plays a major role. It is suggested to disclose information on both parties to the agreement, so as not to take any advantage like free riding of franchisee and to build trust between the parties although there is no certain disclosure law for franchising.

In conclusion, to grow and expand in Thailand for foreign goods and services as well as Thai goods and services in overseas markets, franchising model could maintain its growth with sufficient government plans dealing with intellectual property rights, tax, disclosure and termination of agreement.

The Role of Domestic Laws relating to Franchising in Vietnam

Vietnam has emerged as one of the most attractive countries in Asia for franchisors seeking to expand their business. Franchising was not legally recognized until 2005 but franchising activities have steadily increased since the adoption of the Commercial Law in 2005, which, for the first time, provided a legal framework for franchising. The Vietnamese market has become even more enticing since the country joined the World Trade Organization in 2007.¹¹

Till 2005, Vietnamese law did not provide a clear basis for franchising arrangements, but the passage of Decree No. 35 and Circular No. 09 in 2006 laid the basis for franchising to develop in Vietnam. The new decree provides for key concepts in franchising, requirements of franchise agreements and State administration of franchises.¹² The relevant requirements of these laws

¹⁰ Ibid

¹¹ <http://www.wileyrein.com/practices-Franchise.html#InternationalSeries>

¹² Doing Business in Vietnam: 2013 Country Commercial Guide for U.S. Companies, International Copyright, U.S. & Foreign Commercial Service and U.S. Department of State, 2013.

include conditions for franchising, franchise agreement, franchise disclosure documents, and registration requirements for franchise activities.¹³

“The legal definition of a franchise refers to 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 this activity, 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 must be associated with the trademark, trade name, business know how, business mission statements, business logo and advertising of the franchisor, and finally, the franchisor has the right to control and offer assistance to the franchisee in the conduct of the business.”¹⁴ “The Commercial Law defines franchising as a commercial arrangement under which a party grants another party the right to carry out the business of selling its goods or supplying services under the following conditions:

- (i) 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
- (ii) The franchisor has the right to control and assist the franchisee in carrying out the franchised business.”¹⁵

In order to satisfy Vietnamese law, a franchise agreement should include: (1) details of franchise rights; (2) the rights and obligations of the franchisor; (3) the rights and obligations of the franchisee; (4) the franchise price, periodic franchise fee, and method of payment; (5) the term of the franchise agreement; and (6) renewal, termination, and dispute resolution

(http://export.gov/vietnam/build/groups/public/@eg_vn/documents/webcontent/eg_vn_063160.pdf)

¹³ Thomas J. Treutler and Nguyen Thi Thuy Dung, Tilleke & Gibbins, “International Franchising: Vietnam”, Juris Publishing, 2013, p.8

¹⁴ Thom Thi Mai Nguyen and Huong Thi Thanh Nguyen, Tilleke & Gibbins, “Vietnam”, Franchise in 33 jurisdictions worldwide, Philip F Zeldman, Getting the Deal Through Franchise, 2013, p. 227.

¹⁵ Russin & Vecchi, International Legal Counsellors, “Legal Framework for Franchising in Vietnam”, 2013, p.3.

procedures. The licensing of industrial property or intellectual property rights may be dealt with in a separate agreement and is governed by the Law on Intellectual Property.¹⁶

Under these laws, franchisors are subject to certain conditions, including: “either a franchisor or a sub-franchisor must have been in operation at least one year; the franchised goods or services must not be prohibited from sale or supply and must be within the business lines registered with the authorities; and the franchising activity must have been registered with the competent authority”.¹⁷ Moreover, “the document for franchise disclosure is legally known as the “franchise description document (FDD) under these laws. The basic terms and conditions of the franchise agreement are also requested to be disclosed”.¹⁸

As a prerequisite to franchising in Vietnam, the foreign franchisor should register a trade mark in Vietnam; otherwise, it will not have enforceable trade mark rights in the jurisdiction. If the trademark license agreement is not registered, it cannot be enforced against third-party infringers, although it can still be enforced amongst the parties to the trade mark license agreements. Only trademarks registered in Vietnam can be licensed in Vietnam. In theory, if the franchisor has not registered any intellectual property, it may not be able to engage in franchising in Vietnam. Yet unregistered trademarks may be protected if they are considered “well-known” in the jurisdiction.¹⁹

As a civil law system, Vietnam does not have the ‘good faith’ concept. Alternatively, the Civil Code of Vietnam provides principles for the establishment of a civil relationship, covering franchise relationships. These principles comprise, among others, the principle of free undertaking and

¹⁶ <http://www.wileyrein.com/practices-Franchise.html#InternationalSeries>

¹⁷ Thom Thi Mai Nguyen and Huong Thi Thanh Nguyen, Tilleke & Gibbins, “Vietnam”, Franchise in 33 jurisdictions worldwide, Philip F Zeldman, Getting the Deal Through Franchise, 2013, p. 227.

¹⁸ Ibid, p. 227.

¹⁹ Thomas J. Treutler and Nguyen Thi Thuy Dung, Tilleke & Gibbins, “International Franchising: Vietnam”, Juris Publishing, 2013, p. 14.

agreement, the principle of equality, the principle of goodwill and honesty, and the principle of respect for good morals and traditions.²⁰

However, business culture in Vietnam is traditionally based on trust and relationships, and many small businesses still rarely consider legal implications of their conduct. Therefore the requirement of disclosure seems to offer little assistance to small businesses, but imposes great costs on the franchisor to produce such documents and deliver them to the franchisee.²¹

Vietnam's legal framework encourages the development of commercial activities, including franchising. There is intense local interest among both large and small entrepreneurs to be a franchisee of an international franchisor. The legal framework for franchising is all but complete. With the World Trade Organization (WTO) now in place and with interest in franchising growing both within and outside of Vietnam, it seems that conditions are right for franchising to flourish.²²

Vietnam's government recognizes franchising as a good opportunity for foreign businesses to introduce their brands to the Vietnamese market, as it is a favorable avenue for small and medium sized Vietnamese entrepreneurs to embark on new ventures and with lower capital investment. With the passage of several franchise laws and decrees, franchising businesses have become more widespread in recent years, with a number of foreign and domestic franchise brands operating in the market. Among laws relating to franchising, intellectual property law plays a very important role.

Overview of Franchising in Myanmar

Franchising can be a good solution when there is a need to grow private owned enterprises or small and medium-sized enterprises within a short time. In addition, it is making easy to expand their franchise businesses.

²⁰ Thom Thi Mai Nguyen and Huong Thi Thanh Nguyen, Tilleke & Gibbins, "Vietnam", Franchise in 33 jurisdictions worldwide, Philip F Zeldman, Getting the Deal Through Franchise, 2013, pp. 228-229.

²¹ Thomas J. Treutler and Nguyen Thi Thuy Dung, Tilleke & Gibbins, "International Franchising: Vietnam", Juris Publishing, 2013, p.7.

²² Russin & Vecchi, International Legal Counsellors, "Legal Framework for Franchising in Vietnam", 2013, p.7.

Franchise businesses would promote Myanmar economic development. Additionally with the legislation opening Myanmar to foreign investment, franchise businesses will assume a greater role in the overall economy.

Since 1990s, foreign and local franchise businesses had been started in Myanmar. But it did not long last. In addition, most of the foreign companies withdrew from Myanmar with many reasons in the late 1990s. Although Myanmar Foreign Investment Law 1988 (the old one) had already passed earlier than some ASEAN countries, Myanmar foreign investment left behind.

One of the foreign franchisors in Myanmar, Pepsi Cola, decided to enter as a joint venture with Myanmar Golden Star Co. in 1991. It was a product distribution franchise. In 1997 Pepsi Cola was withdrawn by U.S government because of U.S sanctions on Myanmar for abusing of human rights.²³ Therefore, in this case, to do a franchise business in Myanmar political stability and legal protection with strong enforcement are important.

Although franchising was not popular in Myanmar, business systems like franchising were introduced in Mandalay in the 1940's. The notable one is "Mandalay Meeshay (noodle salad)", fast food.²⁴ However, nobody in Myanmar recognized it as a franchise business (Business Format Franchise).

In recent times, there are some foreign franchisors such as CP, Lotteria, KFC, Marry Brown, B.B.Q Chicken and Chewy Junior, Ya Kun Coffee and Toast, MGOU, Pingu's English Myanmar, Eton House International Pre-School, Yangon as well as local franchisors like MCC computer training centre (Myanmar Computer Co. Ltd – education services), KMD Computer Group, Miami Grill and so on.

In case of MCC computer training Centre, it has specific franchise enquiry form to apply to be a franchisee. It is a service franchise and the franchisor provides the lecture notes, and other Intellectual things. In such a case, Myanmar needs to pass Intellectual property law to protect franchisors from infringing their intellectual property rights and free riding from them.

²³ http://www.irrawaddy.org/research_show.php?art_id=457 (13/09/2013)

²⁴ Interview with Grandson of the Mandalay Meeshay owner, U Chit Myoe. Mandalay, 13/10/2013.

In addition, Franchising is also a way of foreign companies to enter the local market. In order to increase FDI inflows in Myanmar, the government has already passed the new investment law. Yet FDI inflows have remained very poor and the economic outlook for Myanmar does not look very promising when compared to other countries in the region and members of the Association of Southeast Asian Nation (ASEAN) in which Myanmar became a member in 1997. Therefore, the government need to focus on the foreign investors and local investors or entrepreneurs to do franchise businesses as a better solution.

This study analyzes advantages and disadvantages of private owned enterprises and franchise businesses. The following table shows the result of analysis.

Private owned Enterprise	Franchise Business
High risk	Low risk
Independent	Not totally independent, but interdependent
No Free riding	Free riding
Less job creation	More job creation
No need to have Trust	Need to have trust
No need to have incentives	Need to have incentives
Large amount of Capital (High Start-up cost)	Rational Capital or less Capital (Low Start-up cost)
Need more time to start up	Need short time to start up

Franchising Model and SMEs development in Myanmar

SMEs are important for the structural change of a country from being agriculture based to industrial and service-oriented. Moreover, Myanmar SME sector is still weak. The barriers or issues are difficulties to access financing, lack of knowledge and environmental awareness, failure to adopt technology, poor infrastructure, increasing global and regional competitiveness and unskilful labour. To solve these issues, franchising is the most important options for Myanmar.

Franchising is not banned by Myanmar law, but there are not many franchise businesses in Myanmar. After 2010, although some foreign

franchisors have started their business with local franchisees in Myanmar, the franchising model is not much familiar with local entrepreneurs to expand their businesses domestically and internationally. Only a few small local companies operate local franchises, although there is strong interest among local business people in franchising opportunities.

This study argues that franchising model can promote SMEs development in Myanmar. Features of franchising adjoin to the SME Policy. Franchising model can create employment by training and educating the labours, create entrepreneurial opportunities for women in particular, create efficiency and competition, lower the threshold to entrepreneurship, and be a form of internationalization.²⁵

Therefore, Myanmar also needs to set up franchise market in Myanmar, not only for foreign franchise businesses but also for local franchise businesses to develop SMEs sector that plays very important role of economic development in a country. In addition, franchise business can grow faster than private owned business.

The Role of Domestic Laws relating to Franchising in Myanmar

Among the barriers, one of the barriers to develop franchise business in Myanmar is lack of legal provisions and protection. In Myanmar, there is no specific legislation dealing with franchising. For franchising agreement or contract, only Myanmar Contract Act is applied. In addition, weak of arbitral awards is one of the issues for foreign franchisors to do businesses with local franchisees. Trusteeship between franchisor-franchisee is very important. To get long term relationship between these two parties, maturity of legal enforcement of a country is a major element.

There are no specific provisions for intellectual property law in Myanmar yet. Although Copyright Law has been enacted in Myanmar since 1914, it is poorly enforced. In case of trademark protection, trademark can be registered but issues related with early use of mark and registered mark still

²⁵Gerard Cliquet, George Hendrikse, Mika Tuunanen, Josef Windsperger (Editors), "Economics and Management of Networks, Franchising, Strategic Alliances, and Cooperatives", Physica-Verlag, A Springer Company, 2007, p. 226.

exist. Intellectual Property Law is essential for franchise business. There are some laws which are relating to Franchise business although there is no specific franchising law. Generally they are Investment Law 2016, Arbitration Law 2016, Competition Law 2015, Consumer Protection Law 2014, Export and Import Law 2012, Foreign Exchange Management Law 2012, Law of Taxation and Myanmar Companies Act 1914.

The intellectual property rights that are licensed in a franchising arrangement almost always include trademarks and copyright, and often include trade secrets, industrial designs and patents depending on the nature of the business.²⁶ Although Myanmar has only drafts on Intellectual Property Law, there are some provisions relating to the intellectual property rights under the Myanmar Investment Law 2016. Regarding to investment, intellectual property rights under any laws, including technical knowhow, patent, industrial designs, and trademarks are included under Section 40 (d) of the Myanmar Investment Law 2016. In franchising model, intellectual property law plays an important role. The reason is that franchisors have to allow using their trademarks, trade secret and technical know-how to the franchisees by mutual agreement on franchise contracts as well as disclosure documents.

By Section 56 (b) of the Myanmar Investment Law, “Foreign investors may transfer the following funds abroad relating to the investments made under this Law: proceeds, profits from the asset, dividends, royalties, patent fees, license fees, technical assistance and management fees, shares and other current income resulting from any investment under this Law”. Royalty fees and patent fees are essential in doing franchise business. Therefore, there is no specific provision for franchising but some are relating with this model. In addition, although there is no Intellectual Property Law, some provisions relating to intellectual property rights are included in Myanmar Investment Law.

Under Section 59 of the Myanmar Investment Law, “Any transfer of funds shall be allowed only after paying all tax obligations imposed on the amount to be transferred in accordance with the stipulated tax laws.” As

²⁶ WIPO, In Good Company Managing Intellectual Property Issues in Franchising, 2012, p.8.

franchising is a type of business, it has to pay tax. Most of the franchisors are from foreign countries so that they need to pay the tax under Myanmar Investment Law.

Including arbitration clauses in franchise agreements is increasingly common these days. With the enactment of the Arbitration Law 2016, foreign arbitral awards are now enforceable in Myanmar in accordance with the country's obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards under Sections 45 and 46 of the above Law.²⁷

Section 13, 15, 16, 17, 18, 19, 23, 25, 29 of the Myanmar Competition Law 2015 are also relating with franchise business to some extent.

According to Section 13 (f) of the Myanmar Competition Law 2015, any person shall not carry out the act of restraining or controlling on production, market acquisition, technology and development of technology and investment which cause act of restraint on competition. According to the nature of franchising model, as franchisors can control the franchisees and they are interdependent, but they are bound by franchising agreements as well as disclosure agreement, franchisors has authority to control fairly to some extent under the agreement. However, there is no provision of unfair contract terms in Myanmar. Therefore, some agreements can be unconscionable ones from the side of franchisors and franchisees need to consider carefully before concluding the franchising agreement.

Section 10 of the Consumer Protection Law 2014 states the conditions with which the entrepreneur shall, in selling and buying, not deceive or mislead the consumers. Regarding this provision, franchising businesses have to provide the safe products to the consumers.

Therefore, all classes of customers can enjoy the goods and services but another important thing is controlling quality and product safety. In this case, consumer protection law and competition law play the important roles.

²⁷ Sher Hann Chua, *Franchising in Myanmar: Navigation the Local Requirements*, 2016. ([http:// www. 2016_IC_Nov_Franchising in Myanmar.pdf](http://www.2016_IC_Nov_Franchising_in_Myanmar.pdf))

Section 5 of the Export and Import Law 2012 provides that “No person shall export or import restricted, prohibited and banned goods.” Under Section 6 of the said law, without obtaining license, no person shall export or import the specified goods which is to obtain permission. Section 7 of the above said law states that “A person who obtained any license shall not violate the conditions contained in the license.”

Under the Section 4 Commercial Tax Law 1990, the tax shall be charged on the goods produced in the country, the services carried out in the country and the imported goods. In addition, Section 5 of the said Law, the tax due under section 4 shall be responsible to be paid by the relevant producer, service provider or importer. As most of franchisees in Myanmar are local franchisees, they need to pay tax on the imported goods.

Franchisors should sign non-disclosure agreements with potential franchisees prior to sharing their franchise disclosure documents. Section 27 of the Myanmar Contract Act 1872 appears to prohibit the inclusion of exclusivity and non-complete clauses in franchise agreements by stating that “every agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void”.

Therefore, domestic laws relating to franchise business can be applied in Myanmar until the specific franchising law is enacted, the intellectual property law however should be enacted as soon as possible.

Findings

Nowadays franchising in Myanmar is still in its infancy. In Myanmar there are local franchisors and franchisees as well as foreign franchisees. According to interviews with foreign franchisees, the common problem is choice of law in franchise contract as governing law. Most of them choose third country’s law as the choice of law in contract, especially Singaporean law. The reason is that there is no intellectual property law in Myanmar and the foreign franchisors rely on Singaporean law with its strong protection and well-organized provisions and regulations. Another barrier is that exchange rate seems to be stable but shows considerable fluctuation. That is why local

franchisees have to face exchange rate problem. Most local franchisees are master franchisees who can allow sub-franchisees in territory of Myanmar.

For local franchisors, they are not willing to do franchise business because they do not want to share their small amount of profit. In addition, trust between the parties plays very important role in franchise business. To build trust, the role of legal enforcement should be strong and firm. From legal point of view, there is no transparency in Myanmar. In addition, there are no specific procedures for doing business. For instance, to register the business, some registered their businesses with their company's name, some with their trade name. Registration of franchise business is not practiced in Myanmar and just registered as normal business.

Recommendation

Therefore, to develop franchising model in Myanmar, the government should reform the institutions especially legal institution, adopt the economic policy and enact Franchising Law, Intellectual Property Law and other laws relating to franchising, enhance tourism sector, control political stability, and maintain good international relations. Besides, like Vietnam and Thailand, Myanmar should have the strong enforcement and accountability by enforcing the existing laws.

Conclusion

To summarize, although there are many barriers to develop economy in Myanmar as well as franchising model, the most important barrier is to reform legal institutions that plays an important role to develop franchising as well as economy in Myanmar. Nowadays, Government is trying to enact necessary laws to enhance economic sector. As franchising model can promote Myanmar economic by supporting SME sector, government needs to enact laws for franchise business, especially intellectual property law even if specific franchising law is not passed like Thailand. But like Vietnam, if Myanmar Government can promulgate specific franchising law, it will be very useful and effective in supporting development of franchise business. At that time, foreign franchise business in Myanmar will be easy to carry out as

Thailand and Vietnam without doubtless on legal enforcement and accountability.

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