



# Special Alert

July 2021

[www.indochinecounsel.com](http://www.indochinecounsel.com)

## What an overseas franchisor needs to know when granting a franchise in Vietnam

In recent years, franchising has been utilized by foreign investors for market entry and business expansion in Vietnam. As published by the Ministry of Industry and Trade of Vietnam (“**MOIT**”), as of 12 June 2020, there have been 262 foreign franchisors that have registered their franchise activities in Vietnam, including well-known and popular brands such as McDonalds, Baskin Robbins, NYS Collection Eyewear (US), Pizza Hut, Burger King (SG), Lotteria, BBQ Chicken (KR), Swensens (MY), Karren Millen, Coast London (UK), Bvlgari, Moschino, Rossi (IT), Wayne (SE), and Inglot (PL). The majority of inward franchises are in the form of a master franchise for F&B industry (restaurants, coffee and tea shops), retail, education, healthcare and beauty.

The main legislative documents that govern franchising in Vietnam comprise:

- ✓ Commercial Law No. 36/2005/QH11 dated 14 June 2005, as amended in 2017 and 2019 (the “**Commercial Law**”);
- ✓ Decree No. 35/2006/ND-CP dated 31 March 2006, as amended by Decree No. 120/2011/ND-CP dated 16 December 2011 and Decree No. 08/2018/ND-CP dated 15 January 2018, guiding for the implementation of the Commercial Law with respect to franchising activities (“**Decree 35**”); and
- ✓ Circular No. 09/2006/TT-BTM dated 25 May 2006, as amended by Circular No. 04/2016/TT-BCT dated 6 June 2016, providing guidelines on the registration of franchising activities (“**Circular 09**”).

## Pre-franchising Conditions and Annual Update Requirements for Franchisors

Conditions for overseas franchisors to grant a franchise in Vietnam comprise: (i) the overseas franchisors, including sub-franchisors must register their franchise activity with the MOIT; and (ii) the

business to be franchised must have operated for at least one year prior to the franchise being granted.

Regarding the registration of a franchisor's franchise activity in Vietnam, one of the required documents is the franchise introductory document ("FID") which is made in the standard form provided in Annex III of Circular 09. In the FID, certain prescribed information must be declared, including (i) information about the franchisor's experience in franchise business; (ii) the franchise business's involvement in litigation within the last year; (iii) financial obligations of the franchisee; initial investments of franchisee; (iv) obligations of franchisee to purchase or lease equipment appropriate to the franchise business as stipulated by the franchisor; (v) obligations of franchisor before and in the course of executing the franchise agreement, in the setting-up and operating of business establishments under the franchise system by the franchisee; (vi) information about the franchise system; (vii) information about the franchisor's standard franchise agreement of which a copy should be enclosed with the FID; and (viii) information about financial statements which are declared by way of enclosing with the FID a copy of the franchisor's latest annual audited financial statement. In case of the overseas-to-Vietnam franchise being a sub-franchise, the application dossier for registration of the franchisor's franchise activity in Vietnam must additionally include the preliminary franchisor's consent which allows the master franchisee to grant the sub-franchise in Vietnam. Such consent may be in the form of relevant clauses included in the master franchise agreement, or of a separate letter of consent.

The prescribed time limit for the examination of an application dossier for registration of the franchisor's franchise activity in Vietnam is five working days from the submission date. For properly submitted application dossiers, the MOIT will issue a notification of acceptance of registration of the franchise activity and record such registration in the Franchise Register. In practice, it may take several weeks from submission of the proper application dossier to completion of the registration of franchisors' franchise activity in Vietnam. According to Decree No. 98/2020/ND-CP dated 26 August 2020, providing administrative sanctions in commerce activities, manufacture and trade of counterfeit and prohibited goods, and protection of consumer rights, failing to register franchise activities by a franchisor being a corporation may be subject to a fine of from VND10 million to VND20 million (about US\$425-850), and the profits earned from the franchising in Vietnam by such non-registered franchisor may be forfeited.

After registration of the franchise activity in Vietnam, the franchisor is required to submit annual updates of certain information which has been declared in Part B of the FID, such as franchise system, financial statement, etc. before 15 January of each year. If there is any change in the franchisor's registered information declared in Part A of the FID, such as name, contact details, form of franchise, sector of franchise, the franchisor must notify the MOIT within 30 days of such change.

## Disclosure and Notification Requirements

Before signing a franchise agreement with a local franchisee, unless otherwise agreed by the parties, the franchisor is required to provide the prospective franchisee with the franchisor's FID and the

standard franchise agreement, which are already submitted to the MOIT, fifteen days prior to the signing date of the franchise agreement. This allows the prospective licensee to consider the documents and consult advisers in respect of the prospective franchised business. In case of an overseas-to-Vietnam sub-franchise, the master franchisee must provide the sub-franchisee with information about the master franchisor, the contents of the master franchise agreement, and how to resolve the sub-franchise agreement in case of termination of the master franchise agreement.

During the local franchisee's operation of the franchised business, if there is any important change to the franchise system which affects the franchised business, according to Article 8.2 of Circular 35, the franchisor must immediately notify the franchisee of such change.

## Franchise Agreement

Franchise agreements with Vietnamese franchisees must be made in writing or in another form with equivalent legal validity. Accordingly, the franchise agreement may be in the form of an e-franchise agreement with digital signatures provided by service providers licensed by the competent authorities of Vietnam.

While parties are allowed to choose foreign law to govern overseas-to-Vietnam franchise agreements, the language of such agreements must be in Vietnamese. In practice, franchise agreements can be made in Vietnamese and foreign languages with a clause that denotes the prevailing language in case of any discrepancies between the Vietnamese and foreign languages.

It would be important for a franchisor to be aware of Article 287 of the Commercial Law, under which a franchisor has the following obligations unless otherwise agreed with the franchisee:

- ✓ Providing the franchisee with the franchise operation manuals;
- ✓ Providing the franchisee with initial training and on-going technical supports to enable the franchisee to operate the franchised business in accordance with the franchisor's franchise system;
- ✓ Designing the layout of the franchisee's outlets at the franchisee's cost;
- ✓ Ensuring the intellectual property rights ("IPRs") in association with the operation of the franchised business as specified in the franchise agreement; and
- ✓ According equal treatment to franchisees in the franchise system.

As provided in Article 16.1 of Decree 35, the franchisee will have the right to unilaterally terminate the franchise agreement with the franchisor if such franchisor fails to comply with these obligations.

## IPRs Issue

IPRs in association with the franchised business must be declared in the FID, and copies of such IPRs protection titles must be included in the application dossier for registration of the franchisor's franchise activity. IPRs associated with the franchised business must be owned or legally licensed to

the franchisor, and as provided at Clause 2(d), Section II of Circular 09, the relating IPRs protection titles may have been granted in Vietnam or in an overseas country. In practice, IPRs which have not yet obtained protection in Vietnam, an application for registration of the respective intellectual property object in Vietnam should be filed before registering the franchisor's franchise activity to avoid undue delay in the registration process. If the franchisor is not the owner of the relevant IPRs, an IPRs license agreement between the franchisor and the legal IPRs owner, under which the franchisor has the right to sub-license to other parties, should be made before registering the franchisor's franchise activity in Vietnam.

As provided in Articles 10 and 14.2 of Decree 35, the IPRs licensing under a franchise agreement must be in accordance with the 2005 Intellectual Property Law as amended in 2009 and 2019 (the "**IP Law**"), and such IPRs licensing should be structured as a separate part of the franchise agreement. In practice, IPRs licensing in a franchise agreement can also be included in a separate agreement, so as to facilitate the registration of such IPRs license agreement with the National Office of Intellectual Property of Vietnam (the "**NOIP**"). In this connection, the IP Law no longer requires the registration of trademark license agreements with the NOIP so as to be effective against third parties.

## Tax Issues

Subject to the agreement of the parties under a franchise agreement, fees payable by the local franchisee to the overseas franchisor may include, but are not limited to, franchise fees, royalties, training fees, technical assistance fees, advertising fees and management fees. Such fees are subject to the foreign contractor tax ("**FCT**") as regulated under Circular No. 103/2014/TT-BTC of the Ministry of Finance dated 6 August 2014 guiding the implementation of tax obligations applied to foreign organizations and individuals doing business in Vietnam or having income from Vietnam, which normally comprises a combination of value added tax (VAT) and corporate income tax (CIT), or personal income tax (PIT) for income of foreign individuals.

The local franchisees must be responsible for withholding the applicable foreign contractor withholding tax from the amounts payable to the franchisor under the franchise agreement, and pay the same, on behalf of the overseas franchisor, to the competent tax authority of Vietnam. Because of different tax rates imposed on royalties and service fees, parties in a franchise agreement are recommended to separate royalties and service fees in the franchise agreement, to facilitate the local franchisee's declaration, payment and finalization of the tax with the competent tax authority.

## About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading business law firms in Vietnam. The firm provides professional legal services for corporate clients making investments and doing business in Vietnam. The legal practitioners at Indochine Counsel are well qualified and possess substantial experience from both international law firms and domestic law firms. The firm boasts more than 45 legal professionals working at the main office in Ho Chi Minh City and a branch office in Hanoi.

Indochine Counsel's objective is to provide quality legal services and add value to clients through effective customized legal solutions that work specifically for the client. The firm represents local, regional and international clients in a broad range of matters including transactional work and cross-border transactions. The firm's clients are diverse, ranging from multinational corporations, foreign investors, banks and financial institutions, securities firms, funds and asset management companies, international organizations, law firms to private companies, SMEs and start-up firms in Vietnam.

Indochine Counsel advises clients in the following areas:

- Inward Investment
- Corporate & Commercial
- Mergers & Acquisitions
- Securities & Capital Markets
- Banking & Finance
- Property & Construction
- Taxation
- Intellectual Property
- Technology & Media
- Mining & Energy
- International Trade
- Dispute Resolution

A full list of partners, associates and other professionals is available on our website. |

## Contact Us

For further information or assistance, please contact the following Indochine professionals:



**Dang The Duc**  
Managing Partner  
duc.dang@indochinecounsel.com



**Nguyen Thi Hong Anh**  
Partner, Head of IP&T Practice Group  
anh.nguyen@indochinecounsel.com



**Le Nguyen Huy Thuy**  
Partner  
thuy.le@indochinecounsel.com



**Le Van Duong**  
Partner, Head of Hanoi Office  
duong.le@indochinecounsel.com



**Phan Anh Vu**  
Partner  
vu.phan@indochinecounsel.com



**Steven Jacob**  
Foreign Associate  
steven.jacob@indochinecounsel.com



**Pham Thi Thanh Lan**  
Partner  
lan.pham@indochinecounsel.com



Greater China Desk  
**Ly Nghia Dzung / 李義勇**  
Associate  
dung.ly@indochinecounsel.com

### Ho Chi Minh City

Unit 305, 3rd Floor, Centec Tower  
72-74 Nguyen Thi Minh Khai, District 3  
Ho Chi Minh City, Vietnam  
T +84 28 3823 9640  
F +84 28 3823 9641  
E info@indochinecounsel.com

### Hanoi

Unit 705, 7th Floor, CMC Tower  
Duy Tan Street, Cau Giay District  
Hanoi, Vietnam  
T +84 24 3795 5261  
F +84 24 3795 5262  
E hanoi@indochinecounsel.com

[www.indochinecounsel.com](http://www.indochinecounsel.com)

This Special Alert is designed to provide our clients and contacts with general information of the relevant topic for reference only, without the assumption of a duty of care by Indochine Counsel. The information provided is not intended to be nor should it be relied upon as a substitute for legal or other professional advice.

© 2021 Indochine Counsel. All Rights Reserved.