



Franchise

in 30 jurisdictions worldwide

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2014



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Overview

1 What forms of business entities are relevant to the typical franchisor?

A franchise agreement in Thailand is simply a contract governing rights and duties between parties; therefore, almost all forms of business entities could be relevant to a franchisor. Nevertheless, the most typical choice of business entity for a franchisor in Thailand is a limited liability company (private or public).

For a public liability company, it is generally preferable for a large-scale business requiring investment from the public to list its stocks for sale on the Thai stock market. A private limited liability company is more suited for a medium or small-sized franchise business since there will be fewer restrictions and statutory compliance requirements compared to establishing a public limited liability company. In addition, the concept of a corporate veil has been adopted in the corporate provisions under Thai law; unlimited liability may not be imposed on the owners of the business (stakeholders) beyond what they have invested in the form of equity.

2 What laws and agencies govern the formation of business entities?

As Thailand is a civil law jurisdiction, the Civil and Commercial Code (CCC) is the main source of law that governs the formation of business entities in Thailand. The relevant agency for the formation of entities is the Thai Ministry of Commerce. For a foreign investor, the Foreign Business Act also provides further legislation concerning foreign-owned businesses in Thailand. If the structure is in the form of a public limited liability company, the Public Company Act is also applicable.

3 Provide an overview of the requirements for forming and maintaining a business entity.

The specific requirements for forming and maintaining a business entity depend on the kind of business entity, whether it is public or private and whether it is owned by Thai nationals or foreigners. For a private company, which is the most common type of entity, the minimum number of shareholders is three persons and at least one director is required. Its registered capital must be at least 25 per cent paid up, but there is no stated minimum capital requirement under the CCC.

To maintain a private company, an annual general meeting of shareholders must be held at least once every 12 months. An audited financial statement and an up-to-date list of shareholders must be filed annually. Twice a year, a private company must file tax return (namely, a half-year income tax return and an annual income tax return).

However, for most types of business entity the process is fairly straightforward, unlike that of other jurisdictions.

4 What restrictions apply to foreign business entities and foreign investment?

As mentioned above, under the Foreign Business Act, if a company is fully owned or majority-owned by foreigners (namely, not Thai nationals), it is restricted in the types of business it can conduct in Thailand. For example, such a business cannot operate a newspaper or radio station, engage in certain types of farming or operate a business involving national security, natural resources or arts, culture and traditional customs without receiving prior approval from the government. Under the Foreign Business Act, a foreign-owned company, or a company where majority ownership belongs to foreigners (a foreign-owned company), is permitted to conduct franchising business activities only after obtaining applicable foreign business licences from the Thai Ministry of Commerce (MOC).

The approval of a foreign business licence is at the discretion of the MOC and is evaluated on a case-by-case basis. Based on past experience, if such a business is approved for a foreigner and is to be conducted in Thailand, the authority would take into account any impact on:

- national security;
- development of the national economy and society of the country;
- Thai culture and tradition;
- the preservation of the environment, energy and national resources; and
- the business sector in which Thais are not ready to compete with non-Thai businesses.

The process is very time-consuming. It is commonly expected to take a period of at least eight to 12 months and the outcome is unlikely to be predictable.

In addition, US nationals, including companies, are permitted to hold a majority share in Thai companies carrying on certain business activities that would otherwise be prohibited under the Foreign Business Act (as mentioned above). A US-exempted foreign business certificate is still required for a US-owned company prior to conducting business (including franchising business activity) in Thailand and it normally takes three to six months to obtain such a certificate.

5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

Royalties paid to franchisors are subject to income tax in Thailand. If a franchisor receiving royalties is considered having a permanent establishment (PE) in Thailand, eg, being a company incorporated in Thailand or a Thai branch of a foreign company, those royalties are considered as assessable income of the recipient (franchisor) to determine the net profit. If there is a net profit it is generally subject to a 30 per cent corporate income tax. The rate may be lowered if a company is considered to be a 'small or medium enterprise' (SME). The corporate tax rate applicable to companies (except SMEs), was temporarily lowered from 30 per cent to 23 per cent on 1 January

2012, and was further reduced from 23 per cent rate to 20 per cent on 1 January 2013. The 20 per cent rate will apply until 31 December 2014.

If a franchisor is a foreign entity not having PE in Thailand, the franchisee is required to withhold 15 per cent, or at the lower rate according to applicable Double Tax Agreement (DTA) (if any), of royalties paid to the franchisor and remit the tax to the Revenue Department.

- 6** Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

There are no labour or employment considerations that are specifically relevant to franchisors. Under Thai labour law, an employment relationship exists where one party (the employer) has authority and direct control and command over another party (the employee). It is therefore unlikely that the relationship between the franchisor and franchisee could fall within the definition of employment relationship.

To be safe, the franchise agreement should specify that the relationship between the franchisor and the franchisee cannot in any way be interpreted as employment. There should also not be any terms and conditions under the franchise agreement granting the franchisor direct control and command over the franchisee.

Another concern that may arise when entering into a franchise agreement is that the established relationship could be interpreted as an 'agent-principal relationship'. Thai CCC 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.

- 7** How are trademarks and know-how protected?

As in other countries, trademarks are secured to their owners once registered with the Thai authorities, as required under the Thai Trademark Act. The Thai Trademark Act imposes civil and criminal penalties on those who infringe the rights of the trademark owner (for example, the unauthorised use of the trademark or use of any other trademark similar to the one that has already been registered).

The licensing of a registered trademark must be made in the form of a written licensing agreement registered with the Thai authorities. Non-compliance with this registration requirement will render the licensing void and not enforceable under Thai law. Another advantage of having a licensing agreement (either incorporated into the franchise agreement or in a separate agreement), is that restrictions regarding use of the trademark can be specifically imposed on the licensee (namely, franchisee).

Know-how is protected under the Trade Secrets Act of 2002. This Act protects against the unauthorised disclosure of trade secrets, even allowing courts to issue an injunction against such disclosure. Nevertheless, a franchisor must take adequate precautions with regard to its trade secrets by entering into a confidentiality agreement with a franchisee, either separately or within the franchise agreement itself. It is only by demonstrating that such careful steps have been taken to protect trade secrets that a franchisor can be protected under the Trade Secrets Act. Similarly, in the most recent draft of an act that will specifically govern franchise agreements, a franchisee is prohibited from revealing any franchise information that has been previously specified by the franchisor in the contract.

- 8** What are the relevant aspects of the real estate market and real estate law?

At present, there is no specific franchise or retail law controlling franchise businesses. The relevant Thai laws concerning franchise businesses specifically in relation to real estate are the Town Planning Act and the Building Control Act. Such laws control the size and area permissible for specific types of building including retail and wholesale stores.

Under the current draft Retail Act, wholesale or retail businesses would require a licence before commencing operations if they have:

- a business area of at least 1,000m²;
- a combined income or estimated combined sales of all branches in the previous fiscal year, or estimated earnings in the first year of business of 1 billion baht or more; or
- have received consent from an operator under the first or second points above to use intellectual property or other rights at a specified location or for a specified period (namely, the franchisee).

However, the current draft Retail Act may be amended to be in line with ASEAN Economic Community (AEC), which Thailand is going to join in 2015.

Laws and agencies that regulate the offer and sale of franchises

- 9** What is the legal definition of a franchise?

As there is currently no legislation that specifically governs franchise agreements, there is no legal definition of a franchise. 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.

- 10** Which laws and government agencies regulate the offer and sale of franchises?

As mentioned previously, there are currently no laws that specifically regulate all aspects of the offer and sale of a franchise in Thailand. Nevertheless, there are multiple sources of law that contain relevant provisions, including the CCC (related to the establishment and enforcement of contract), the Trademark Act of 1991 (related to the licensing of the trademark), the Trade Secrets Act of 2002 (related to know-how), the Foreign Business Act (controlling the participation of businesses to be conducted by a foreign-owned company), the Trade Competition Act (restricting conditions of the agreement), the Unfair Contract Terms Act (related to standard form contract) and the Thai Revenue Code.

According to the draft Retail and Franchise Acts, the Central Commission on Retail Trade (Retail Commission) and the Central Commission on Franchise Business (Franchise Commission) will be created. The Franchise Commission will directly control the operation of franchise businesses and will regulate the type and wording of franchise agreements. The Retail Commission will control the retailers operating in the marketplace including the expansion of stores. Having said the above, it is also possible that the current draft Retail and Franchise Acts may be amended, or there may be new laws and regulations enforced in the future to be in line with the AEC in 2015.

11 Describe the relevant requirements of these laws and agencies.

The requirements of laws and agencies are only relevant to a few basic elements of franchise agreements, apart from restrictions set out under the Trade Competition Act (see question 40), and many of the terms of a franchise agreement are left open to the parties for negotiation under the contract law provisions of the Thai CCC.

The licensing of a registered trademark requires registration with the government agency for enforcement and the Thai Revenue Code imposes tax obligations on the franchisor. Once the draft Franchise Act comes into effect, it can be expected that certain terms and conditions may be imposed to control franchise businesses in Thailand.

12 What are the exemptions and exclusions from any franchise laws and regulations?

Since there is no specific franchise legislation, there are no exemptions or exclusions. Nevertheless, the most recent draft of the Franchise Act would exclude franchise agreements formed outside Thailand, and those where the franchisor has domicile abroad (although the franchise agreement will be exercised in Thailand).

13 Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

At present, there is no statutory requirement to be met by a franchisor before offering a franchise to a franchisee. Nevertheless, according to the draft franchise act, we expect that generally, a franchisor, if a juristic person, must be a company incorporated under Thai law. In addition, a franchisor must have conducted its business to be offered as a franchise for at least two years and have been earning profit from a minimum of two existing branches for at least two accounting years. If it meets those eligibility qualifications, it must also apply for a licence to operate a franchise business in Thailand. Once it has obtained the licence, the franchisor can then offer its franchise to a franchisee.

14 Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

Yes, the Trade Competition Act prohibits or restricts the acts amounting to monopoly, reduction of competition or restriction of competition in the market of any particular goods or any particular services. Those acts include fixing of locations between the franchisor and the franchisee, which must be first approved by the Thai Trade Commission Committee. Please see question 40 for greater detail.

15 In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

Thai law does not specifically cover sub-franchising, and nor does the most recent draft of franchise legislation. Therefore, it seems likely that the same disclosure rules that apply to franchisors and franchisees will also apply in cases of sub-franchising.

16 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

Currently there is no law in Thailand that forces companies to make pre-contractual disclosure. Nevertheless, the most recent draft of the Franchise Act requires the disclosure of the franchisor when

advertising its business to the potential franchisee or by not less than 14 days prior to the franchise contract execution.

17 What information must the disclosure document contain?

Under current legislation, no specific information must be disclosed in a franchise agreement. Nevertheless, this is likely to change if the most recent draft of the Franchise Act is followed. The draft requires that certain information must be specified in the franchise contract. Please see question 39 for greater detail. The draft also includes a requirement that after a franchise agreement is made, the franchisor must reveal all information that is necessary for operating the franchise business within 60 days. What kinds of information are to be considered 'necessary' have not been specified, so unless this is changed in future drafts of the bill, the requirement will exist but will remain fairly vague.

18 Is there any obligation for continuing disclosure?

At present, there is no regulation obligating franchisees or franchisors to disclose or continue to disclose information. Nevertheless, the most recent draft of the Franchise Act requires the franchisor to reveal all necessary information for operating the franchise business within 60 days after the franchise agreement is made; otherwise, the franchisee has right to terminate the contract and claim from the franchisor all expenses and damages (if any).

19 How do the relevant government agencies enforce the disclosure requirements?

Since there is no legislation forcing specific information disclosure, no specific government agencies are responsible for enforcing disclosure requirements. Nevertheless, under the recent draft Franchise Act, the information to be disclosed by the franchisor must be in accordance with the details announced by the Minister of Ministry of Commerce.

20 What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

Under current legislation, a franchisee would probably have to seek relief for non-disclosure under the Unfair Contract Terms Act of 1997 or certain other laws depending on the specific situation.

At the same time, under the draft Franchise Act, if a franchisor fails to disclose all necessary information within 60 days after the agreement is made, the franchisee has the right to cancel the contract, to no longer be bound by it and to be reimbursed for all expenses and damages incurred as a result of the contract.

21 In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

The draft franchise act and other related laws provide no information on this issue. It depends on the terms and conditions of the agreements between the concerned parties.

- 22** In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

The general principles of contract law and bargaining in good faith are applicable to the offer and sale of franchises. The courts in Thailand generally uphold contracts made between parties as long as they are demonstrated to be bargains at arm's length made in good faith. This is especially true with regard to franchise agreements under the current law, because there is no specific legislation differentiating franchise agreements from other kinds of contracts. Another law which may be related to this franchise agreement is the Trade Competition Act. Please see question 40.

- 23** Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub franchisee regarding predecessors, litigation, trademarks, fees etc, are there any general rules on pre-sale disclosure that might apply to such transactions?

At present, there is no general rule on pre-sale disclosure or franchise-specific rules requiring a franchisor to disclose certain information or documents or both to a potential franchisee, or for a franchisee to disclose to a sub-franchisee. Nevertheless, the most recent draft of the Franchise Act requires the disclosure of the franchisor when advertising its business to the potential franchisee. The detail of information to be disclosed will be in line with the announcement of the Minister. Please see questions 16 and 19 for greater detail.

- 24** What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under the franchise sales disclosure laws?

Fraudulent or deceptive practices that cause any damage to the franchisee are subject to wrongful act provisions under the Thai CCC. This allows the damaged party (franchisee) to file a lawsuit against the damaging party. Nevertheless, a concept of punitive damages has not been adopted under Thai law. Therefore, damages are equivalent to what has actually been suffered as a result of such fraudulent or deceptive practices. It should be noted that no related provision regarding franchise sale disclosure law is found in the draft Franchise Act.

Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship

- 25** Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

There are no specific laws that govern the entire ongoing relationship between the franchisor and franchisee after the contract comes into effect. Nevertheless, for the period following the expiry of the contract, Thai courts' interpretation of the Unfair Contract Terms Act and the Trade Competition Act is that after termination of the agreement, the competition clause may last for a period of two to five years with limited jurisdiction (for example, within Thailand or Asia) depending on related facts. Otherwise, it will be deemed as an unfair contract term and will therefore be adjusted as considered fair and appropriate by Thai Court.

- 26** Do other laws affect the franchise relationship?

The laws listed in question 10 may affect the franchise relationship, depending on the circumstances.

- 27** Do other government or trade association policies affect the franchise relationship?

No specific policies exist that would significantly affect the franchise relationship. Nevertheless, it should be noted that the government has a general policy of supporting agreements between private parties, including franchise agreements, because such agreements encourage economic growth and development.

- 28** In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

There are no specific circumstances under which a franchisor may terminate a franchise relationship, and there are no specific legal restrictions on doing so either. This is the case under both current legislation and the most recent draft of the Franchise Act. Nevertheless, if the franchisee breaches the contract, the franchisor may have the right to terminate the relationship under regular contract law. Similarly, contract law would require the franchisor to compensate the franchisee for early termination of contract without cause.

- 29** In what circumstances may a franchisee terminate a franchise relationship?

Current legislation provides no specific circumstances under which a franchisee can terminate a franchise relationship. The most recent draft of the Franchise Act allows the franchisee to terminate the contract if all necessary information has not been disclosed by the franchisor within 60 days after the formation of the agreement, or if the result of investment has not reached the amount confirmed or guaranteed by the franchisor, without any fault caused by the franchisee. The only other way for a franchisee to get out of a franchise relationship would be through breach of contract by the franchisor or termination of contract without cause by the franchisee.

- 30** May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

This depends mainly on the contractual agreement between the franchisor and the franchisee, as there is no specific statutory law governing the issue. Nevertheless, under the most recent draft Franchise Act, the franchise agreement must contain certain provisions, including the conditions related to contract renewal. Please see question 39.

- 31** May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

Yes. Under the terms of a franchise agreement, a franchisor may restrict a franchisee's ability to transfer its franchise or ownership interests, as long as the restriction was initially agreed upon in the contract. There are currently no specific laws that give franchisors special power in this area, but parties are generally free to agree on such restrictions.

- 32** Are there laws or regulations affecting the nature, amount or payment of fees?

Under current legislation there are no such laws or regulations. The most recent draft of the Franchise Act requires that the payment of

Update and trends

According to the official news in 2011, seminars were arranged by the Ministry of Commerce to find out public opinion of the draft Franchise Agreement. The purpose of the arrangement was for the draft to be revised and improved before being proposed and enacted. However, there has been no further significant development related to the enforcement of this Act from the time aforementioned.

fees be made, but it does not specify the nature or amount of those fees. It only prohibits the franchisor to call for any fee or deposit before signing of the contract.

- 33** Are there restrictions on the amount of interest that can be charged on overdue payments?

There are no restrictions on the amount of interest that can be charged if the amount is set forth in the contract. Monetary penalties can be imposed for late or overdue payments. At the same time, it should be noted that if the amount of the penalty is unreasonably high, the Thai courts are empowered to adjust the amount to a reasonable sum. Determination of an unreasonably high penalty is conducted by the Thai courts on a case-by-case basis.

- 34** Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

There is no requirement under Thai law or the draft Franchise Act requiring payment to be made in Thai currency. This depends primarily on the agreement between the parties concerned.

- 35** Are confidentiality covenants in franchise agreements enforceable?

Yes. Confidentiality covenants in franchise agreements are generally enforceable as Thailand allows for freedom of contract. Additionally, the Trade Secrets Act provides added protection for the trade secrets of franchisors, and the most recent draft of the Franchise Act provides even more protection regarding confidentiality.

- 36** Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

Yes. Under section 5 of the CCC there is a fundamental legal obligation on parties to deal with each other in good faith. This requirement

affects franchise relationships in the same way it does all other areas of law. If a party does not deal in good faith, the Thai courts may find the agreements to be void, or void them at the option of the other party.

- 37** Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

The current Thai Consumer Protection Act will apply to the contract and advertisement made between the franchisee and the consumers. However, both franchisee and franchisor are considered business operators and the franchisee is not considered as a 'consumer' for its relationship with the franchisor under the Thai Consumer Protection Act.

- 38** Must disclosure documents and franchise agreements be in the language of your country?

Disclosure documents and franchise agreements can be in Thai or in another language which is subsequently translated into Thai if used with Thai authority or in Thai courts. Nevertheless, the most recent draft Franchise Act requires that the franchisor must prepare and provide the franchisee with the 'business operation manual'. Such a manual must be made in Thai and in line with the details described by the minister.

- 39** What restrictions are there on provisions in franchise contracts?

There are currently no specific restrictions on provisions in franchise contracts under the most recent draft of the Franchise Act. Nevertheless, the draft does require at least the following to be provided:

- the date of the contract and the date the contract becomes effective;
- the rights, duties and responsibilities of the franchisor;
- the rights, duties and responsibilities of the franchisee;
- the time period and area in which the franchisor gives permission to the franchisee to use its intellectual property rights in operating its business;
- any deposits, fees and other costs that the franchisee must pay the franchisor; and
- agreements regarding contract renewal, cancellation, transfer of rights and return of money in the event that the franchisor breaches the contract.

Also see question 40 for additional requirements under the Thai Trade Competition Act.



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- 40** Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

The Thai Trade Competition Act prohibits or restricts any business operator (namely, franchisor) from entering into an agreement with another business operator (namely, franchisee) to conduct any act amounting to a monopoly, reduction of competition or restriction of competition in the market of any particular good or a service, such as:

- fixing selling prices or restricting the sale volume;
- fixing buying prices at a single price or restricting the purchase volume;
- entering into an agreement to have market domination or control;
- fixing conditions to enable one party to win a bid or tender or to prevent one party from participating in a bid; or
- fixing geographical areas or customers to whom each business operator may sell goods or provide services, etc.

Some actions are strictly prohibited while other actions require prior approval from the Thai Trade Competition Committee.

- 41** Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

The court system is similar to the court system in other civil law jurisdictions. Other dispute resolution procedures, such as mediation and arbitration, are also available to parties engaged in a franchising agreement.

- 42** Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

Foreign franchisors contracting with Thai local franchisees often choose arbitration, whether foreign or domestic, as the dispute settlement mechanism. The main reasons for such a decision are as follows: expedited hearing (in comparison with the Thai court process), less formality, and the ability to choose a more familiar language.

Nevertheless, even though this expediency and flexibility is advantageous, the arbitration award must be submitted to a Thai court for enforcement if the adverse party refuses to comply – the award has no enforcement power of its own. The room for challenging the award when it is being enforced through the Thai court is quite slim.

- 43** In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

Other than the different legal requirements for business entity formation and taxation as discussed, foreign franchisors are treated in the same way as domestic franchisors.



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