

Legal news

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INDUSTRIAL PROPERTY

Draft Of Decree On Franchising Bring Opportunities To Entrepreneurs

By Tran Bich Ngoc

As of January 1, 2006, the prevailing Commercial Law, adopted in 1997, will be replaced by a new Commercial Law (amended) which was passed by the National Assembly during its May 2005 session. The Amended Commercial Law is regarded as an important innovation in the field of commerce with quite a lot of new stipulations and major changes. Among those, the section on franchising which is covered in Section 8, Chapter VI has drawn great attention from the business community, both local and offshore.

Although this kind of commercial activity has only recently appeared in Vietnam, it is currently increasing steadily, proving to be an advantageous form of conducting a business. If a favourable, clear and detailed legal framework is created soon, it is likely that franchising shall develop at a rapid pace in the coming time. With this in mind, a Decree is being drafted, which is expected to be issued at the year-end, to provide specific guidelines for the provision of the Amended Commercial law on this issue.

With just three Chapters and 36 Articles, the salient points of the Draft contain (i) eligibility for franchisors and franchisee, (ii) franchisable goods or services, (iii) franchising scope, (iv) franchise agreement, and (v) management of franchising activities.

Under the draft Decree, franchising is a commercial activity which allows the franchisor (either Vietnamese or foreign organisations and individuals) to grant permission and require others (franchisees) to manufacture, trade goods and services with under conditions. Upon the franchise agreement, the franchisee has the right to carry out business activities under the franchisor's trademark, trade name, trade secrets, trade slogans, trade symbols, and advertisement based on the existing forms of franchisor. In return, the franchisor may be paid an amount of money due to royalties set forth in the franchise agreement. The amount of royalties are subject to the negotiation and agreement between parties and is not limited by the Draft.

It is noted that the Draft clearly provides conditions for the franchisor, including (i) being incorporated in accordance with the laws, (ii) having been in operation for two years at least, (iii) being the legal owner of the franchise or having the right to grant that franchise, and (iv) goods or services which are franchisable objects. It means that not every company can grant franchising agreements under the law.

One interesting note is that the franchisor must have been operating for two years, (that qualification is not applicable to the franchisee). Obviously, this requirement is designed to protect the interests of both franchisor and franchisee as the period is necessary for creating a sound basis for franchising to happen. For instance, the period of time for trademark registration will take around one year not including a certain time for advertising and promotion of the trademark. When the value of trademark is

remarkable, the franchisor may get a fee and royalties due to the amount they invested in the mark. On the other side, the franchisee's business in general and its profitability in particular, shall be guaranteed with the reputation of franchisor's trademark, business symbols, business slogan, the advance of the trade secrets and advertising.

In fact, when a company creates and develops the trademark of a good or service that are known by many, using a well-known trade symbol and advertisement, or a trade secret that incorporates specific characteristics of a company or enterprise, franchising is one of the most favourable forms selected by businesses to develop their network. Recent years have witnessed some foreign companies, including KFC and Lotteria, successfully penetrate Vietnam's market and launch establishments bearing their name via a franchising model. Local companies have also taken advantage of this kind of business with a series of shops, restaurants, and cafés such as Trung Nguyen Coffee, Pho24, Highlands Coffee and Kinh Do Bakeries.

Following the conditions applied to franchisor and franchisee, the franchise agreement has also been stipulated in the details of the Draft. Regarding contractual issues, in the case that the franchisor transfers to the franchisee the title or the right to intellectual property objects or other prescribed franchising contents, the above move must be specifically provided in a separate part of the franchise agreement and shall be governed by the laws covering intellectual property.

The significant provision in the Draft is that the franchise agreement's duration is negotiable and agreeable by the parties but not under 5 years. Such regulatory duration is to ensure that the period is enough for the stable commercial operation of the parties performing the agreement in the practice. Naturally, the parties have the right to reach an agreement of other duration that is reasonable and appropriate to the parties. However, the draft Decree does not stipulate the maximum years of the contract duration and maximum times of renewal.

Furthermore, franchising is a specific activity in the business and it does not include trademark, trade secrets, business symbols, trade-name, business slogan and advertisement, which are deemed to bring about not only the particular characteristic and business style, but also the businesses' reputation and prestige. Then, the Draft requires that the franchise agreement must be registered with the authorities. These provisions are to avoid possible intended deceit in the franchising transaction and to protect contractual parties' interest.

The Ministry of Trade and the Provincial Department of Trade (or Department of Trade and Tourism) are the agencies which shall be in charge of receiving the registration of the franchise agreement as prescribed by the draft. The Ministry of Trade shall receive the registration of any agreement to grant a cross-border franchise (from Vietnam to overseas, or from overseas to Vietnam); meanwhile domestic franchise agreements must be registered with the Provincial Department of Trade only.

It is of interest to note that, under Governmental Decree No. 11/2005-ND-CP dated February 2, 2005 on Technology Transfer, under the grant of special commercial right, accordingly the transferee may use the commercial name, trademark and know-how of the transferor in order to conduct business activities. That is to say, the definition of the term of "grant of special commercial right" is similar to the term of "franchise" in the Draft. In comparison with the provisions of Decree No. 11 and those of the Draft,

there are similarities and overlaps between the two legal documents in terms of the delegation of authorities certifying the contract. Technology transfer contract is registered with the Ministry of Science and Technology or Provincial Department of Science and Technology while a separate part of that contract related to the transfer of objects of industrial property shall be submitted at National Office of Intellectual Property, but the franchise agreement must be registered at Ministry of Trade or the Provincial Department of Trade. For this reason, the Draft should clarify the responsibilities of relevant authorities, explicitly identifying the repealed provisions of relevant legal instruments for convenient execution.

We do hope and believe that the Draft will set up a sound legal framework for the boom of franchising activities in Vietnam, helping local entities and foreign investors take advantage of the optimum conditions of this model and apply it to business practices soon.

Other Sectors

Finance

- Circular 95/2005/TT-BTC, dated October 26, 2005, of the Ministry of Finance, guiding the implementation of regulation on registration fee.
- On October 31, 2005, the Prime Minister issued Decision 270/2005/QD-TTg, on mobilization, management and using of the source of postal savings.
- On November 01, 2005, the Government issued Decree 134/2005/ND-CP, promulgating the regulation on management of borrowing and payment of debts to foreigners.
- The Ministry of Finance issued Decision 77/2005/QD-BTC, on November 01, 2005, on the issuance of 3 standards of Vietnam price assessment, 2rd batch.

Accounting – Auditing

- The Government issued Decree 133/2005/ND-CP, on October 31, 2005, on amendment of and supplementation to a number of articles of Decree 105/2004/ND-CP, on independent auditing.

Securities

- Decision 72/2005/QD-BTC, dated October 21, 2005, of the Ministry of Finance, on amendment of and supplementation to a number of articles of Regulation on registration, deposit, balance and payment of securities, issued together with Decision 60/2004/QD-BTC.

Trading

- Interministerial 18/2005/TTLT/BTM/BCN, dated October 21, 2005, of the Ministry of Trade and Ministry of Industry, guiding the grant and implementation of textile export quota into United State of America market in 2006.

- On November 03, 2005, the Prime Minister issued Decision 279/2005/QD-TTg, on the Regulation on setting up and implementation of National Commerce Promotion campaign for the period of 2006-2010.
- On November 08, 2005, the Ministry of Trade issued Circular 19/2005/TT-BTM, guiding a number of articles of Government's Decree 110/2005/ND-CP, dated August 24, 2005, on the management of multi level – sales activity.

Banking

- Decision 1571/2005/NHNN, dated October 31, 2005, of the State Bank of Vietnam, on amendment of and supplementation to a number of articles of Regulation on interbanking electronic payment.

Labor

- Circular 118/2005/TT-BNV, dated November 09, 2005, of the Ministry of Internal Affairs, guiding severance allowance due to workforce reduction.
- The Government issued Decree 141/2005/ND-CP, on November 11, 2005, on the management of Vietnamese employees working oversea.

Education

- On November 02, 2005, the Government issued Resolution 14/2005/NQ-CP, on basic and comprehensive innovation of Vietnam's university education for the period of 2006-2010.

Culture

- Government's Decree 138/2005/ND-CP, dated November 09, 2005, on organisation and operation of Inspector of Culture and Information.

Healthcare

- On October 31, 2005, the Ministry of Health issued Decision 36/2005/QD-BYT, on issuing the List of high-tech and high expenses services, which are paid by Social Insurance.
- Decision 276/2005/QD-TTg, dated November 01, 2005, of the Prime Minister, regulating preferential allowance according to profession to officers, staff in State's healthcare organizations.

Transportation

- On October 12, 2005, the Ministry of Transportation issued Decision 51/2005/QD-BGTVT, promulgating the Regulation on Vietnam marine vessel register.

- Circular 13/2005/TT-BGTVT, dated November 07, 2005, of the Ministry of Transportation, guiding the implementation of a number of articles of Government's Decree 186/2004/ND-CP, dated November 05, 2004, regulating the management and protection of road infrastructure composition.

Construction

- Circular 17/2005/TT-BXD, dated November 01, 2005, of the Ministry of Construction, guiding the estimation and management of cost of urban public services.
- Interministerial Circular 18/2005/TTLT-BXD-TTCP, dated November 04, 2005, of the Ministry of Construction, Governmental Inspector, guiding a number of issues on construction inspection.

Irrigation

- The Government issued Decree 140/2005/ND-CP, dated November 11, 2005, dealing with administrative violation in the field of exploitation and protection of irrigational works.

Science and Technology

- The Ministry of Science and Technology issued Decision 17/2005/QD-BKHHCN, on November 01, 2005, regulating the certification seal, stamp and paper.
- Circular 18/2005/TT-BKHHCN, dated November 02, 2005, of the Ministry of Science and Technology, guiding the implementation of management allowance in science and technology organizations.

Miscellaneous

- On October 20, 2005, the Government issued Decree 132/2005/ND-CP, on the implementation of rights and duties of State ownership on State companies.
- Decision 272/2005/QD-TTg, dated October 31, 2005, of the Prime Minister, on the approval of the plan on collective economy development for 5 years 2006-2010.
- The Ministry of Justice issued Decision 1985/2005/QD-BTP, on November 03, 2005, on the implementation of Prime Minister's Directive, on the implementation of the Resolution of National Assembly, on execution of Civil Code.
- On November 14, 2005, the Government issued Decree 142/2005/ND-CP, on collecting the money of land lease, water surface lease.

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