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Legal news

December 2006

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Commercial Law

Primary developments of Law on Franchising in Vietnam

By Pham Thi Cuc

Franchising is rapidly spreading over continents with a lot of famous trademarks of giants such as: Mc Donald, Carrefour, etc. Franchising not only attracts well-known businessmen but also receives many considerations of individuals and entities looking for a modern business model with less risks and more foreseeable profits.

At the early stage of franchising, there were two type of franchise comprising product distribution franchising (i.e. franchise on the distribution of goods without sale method) and business format franchising, which is today the dominant mode of franchising. The later were nourished and seem extremely suite with the socio-economic structure in the United-States in the late of 1920s. Then, together with the economic power of the United States, franchising has mark its impressed growth all over the world. According to the International Franchise Association, there have been about 16,000 franchise systems of around 320,000 corporates in 75 different sectors. The total value of US\$ one trillion of franchising fee in the single year of 2001 only.

Whereas, franchising in Vietnam has just been in neophyte status. This business model appeared in Vietnam in the early of 90s of the previous century. Nowadays, according to statistics of World Franchise Council, Vietnam has only approximately 70 franchise systems and nearly 100 executed franchise agreements of which mainly come from alien enterprise.

One of the main reasons for the modest growth of franchising in Vietnam is the lack of legal frame-work for franchising for a long time. Before the effectiveness of Commercial Law 2005, franchising used to be established and disguised under other relationship forms like license, distribution, technology transfer, etc. and, therefore, be regulated by different and separate legal documents. To realize the selling and buying franchise in Vietnam, traders normally elect to enter into one or several of the above mentioned contracts instead of franchise agreement. This cause complexity and controversial issue but this is the only way to make the franchise feasible and enforceable in Vietnam market.

However, now with the advent of Commercial Law 2005 (from Articles 284 to Articles 291) Governmental Decree No. 35/2006/ND-CP, and Circular No 09/2006/TT-BTM issued by the Ministry of Trade, legal base of franchising is fundamentally set up. Nevertheless, several stipulations of such documents attract comments and criticism from business circle, especially in following issues:

Firstly, regime for the franchisor to manage franchise system

Regulations not yet specify how the franchisor can control the franchised units in terms of quality, compliance with franchise guidance. This is the key point to ensure the success of the whole franchise system. Franchisors should have the right to control their franchised units with the limitation on not intervene in the franchisee's autonomy in

daily business. The laws on franchising in most countries are designed to offer the franchisors' right to inspect and control their granted franchise system but still prevent such franchisor from taking abuse of their supervision and control role to franchisee's business activities. Technically, the legal document provides in details the activities that the franchisor is not allowed to do, such as the franchisor may not:

- (a) set the franchisee's net profit from the franchised business;
- (b) prescribe or strictly control the right of its franchisees to withdraw increases in the net worth of the franchised business;
- (c) manage daily operations of the franchised business for an extended period of time;
- (d) hire, fire, or otherwise directly control its franchisee's employees; or
- (e) require its franchisee to deposit all revenues into an account controlled by the franchisor, or from which the franchisor must consent to withdrawals.

Secondly, conditions of franchisor and franchisee

According to the regulations, franchisee and franchisor are not required to be institutional entrepreneurs. Franchisor must run franchised business in one year, at least. With this provision, even individuals or households can be franchisor or franchisee to franchise agreements. There seem to be too much of room for players in comparison with the stipulation of other countries (experience requirements in franchise must be at least 3 years in China). It is also should be noted that franchising activities of an individual would be very difficult to control by authorities or themselves.

Thirdly, franchise agreement

Regulations on franchising lack rules relating to amendment, supplement, renewal, termination, consequences of termination of a franchise agreement.

The terms of the renewed agreement in many countries as the United States offered to the franchisee may not be less favorable to the franchisee than either (a) the terms of the franchisor's then-current form of franchise agreement or (b) renewal terms offered by the franchisor to other comparable renewing franchisees. However, this is the regulations in Vietnam do not provide the same. This make the franchisors have maneuver room in the course of negotiation for renewal of the agreement and they may only offer a less favorable conditions to ask for the increase of franchising fee.

Fourthly, termination

According to Decree No. 35/2006/ND-CP, franchisee can terminate the agreement for the reason of franchisor's obligation violation as provided in Articles 287 of the Commercial Law 2005. Accordingly, franchisor is obligated to treat all franchisees equally in the same system and provide support to franchisees. If franchisor breaches this kind of obligation, regardless of the seriousness thereof, franchisee is entitled to termination. This regulation is unclear, without evident and seem to be unfair to franchisor. Clear criteria for such kind of violation must be built up and provided in legal document.

Fifthly, IP contents

Decree 35/2006/ND-CP stipulates that “licensing industrial property rights in franchise agreement is governed by regulations on industrial property right”. This likely to cause difficulties for the parties when many provisions of IP law cannot be used to regulate franchise relationship such as the provisions forbidding licensor to restrict unreasonably the right of the licensee, including the rights to improve the industrial property objects other than trademarks. However, if the franchisee improves or renovates the business format without the permission of the franchisor, this shall not be the franchise.

Franchising is a complicated and newly completed business method, subject to the governing of many different legislation branches. Traders is advised to cautiously consider the pros and cons before making decision on buying or selling franchise. Consultation with legal and financial experts for negotiating and implementing franchise agreement is also a practical approach for businessman wishing to elect franchise method.

Other Sectors

Auditing

- Decision 876/2006/QĐ-KTNN, dated November 22, 2006, of State Auditing, on issuing the Regulation on protection of State secret of State Auditing.

Finance

- Circular 107/2006/TT-BTC, dated November 20, 2006, of the Ministry of Finance, guiding the implementation of State budget forecast in 2007;
- On December 06, 2006, the Ministry of Finance issued Decision 68/2006/QĐ-BTC, regulating the rate and regime of collecting, payment, management and using of fees for content appraisalment and import, export licence of cultural products;
- On December 18, 2006, the Ministry of Finance issued Decision 73/2006/QĐ-BTC, regulating the regime of collecting, payment, management and using of fees and charges in the field of customs.

Trading

- Circular 13/2006/TT-BTM, dated November 29, 2006, of the Ministry of Trade, guiding the procedure for goods import, export of domestic and foreign contractor

as provided in Decree 111/2006/ND-CP, regulating in detail the Law on bid and choice of the contractor according to the Law on construction;

- Circular 95/2006/TT-BVHTT, dated December 06, 2006, of the Ministry of Culture and Information, on supplementation to Circular 48/2006/TT-BVHTT, dated May 05, 2006, of the Ministry of Culture and Information, guiding the implementation of Government's Decree 12/2006/ND-CP, dated January 23, 2006, with detailed regulation on the implementation of the Law on trading relating to international trade and operations of agency, buying, selling, processing and transit of goods.

Healthcare

- On November 10, 2006, the Ministry of Health issued Circular 12/2006/TT-BYT, giving guidance on the medical examination of occupational diseases.

Construction

- Circular 08/2006/TT-BXD, dated November 24, 2006, of the Ministry of Construction, guiding the maintenance of buildings.

Miscellaneous

On November 29, 2006, the National Assembly passed the following documents:

- Law No. 72/2006/QH11, on the Law on Vietnamese Employees working overseas under contracts;
- Law No.74/2006/QH11, on the Law on Amendment of and Supplementation to a number of articles of the Labor Code;
- Law No. 78/2006/QH11, on the Law on Tax Management;
- Law No. 80/2006/QH11, on the Law on Technology Transfer;
- Law No. 81/2006/QH11, on the Law on Residence;
- Law No. 82/2006/QH11, on the Law on Notarization;
- The Government issued Decree 145/2006/ND-CP, on November 30, 2006, dealing with administrative violations in the field of oil and gas;
- The Prime Minister issued Decision 276/2006/QD-TTg, on price of electricity;
- Government's Decree 141/2006/ND-CP, dated December 22, 2006, on issuing the List of legal capital level of credit organizations established and operating in Vietnam.

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