

Research Article

LEGAL MECHANISM OF FRANCHISING

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ABSTRACT

In recent years, franchising activities have been quite bustling around the World. It is a new trend of business in Vietnam too. Many foreign as well as domestic investors, instead of building their own brand, have made franchising activities when do investment activities. Franchising activities have appeared and developed in many countries with developed economies such as the United States, European countries, Japan, India, etc. However, it just appeared and developed in Vietnam for about more than 10 years and still lack of legal mechanism for this business form although some legal documents have already enacted. Therefore, it is necessary to study the regulations on franchising activities in developed countries to further improve the legal policy for this model to develop in Vietnam. In this article, the authors will analyse the basic issues related to franchising activities in some developed countries, thereby withdrawing lessons from experience and proposing solutions to further improve the regulations. and legal policy on franchising for the next period in Vietnam.

Keywords: franchise; legal mechanism; facts; international experiences; Vietnam.

INTRODUCTION

Franchising is a type of commercial activity following a unified business model, associated with intellectual property rights and emphasizing the franchisor's control over the franchise system. In essence, an international trade is an agreement under which the franchisor permits the franchisee to use its intellectual property objects (such as trademarks, brand names, business secrets, logos, etc.) in the sale of goods and services. Franchisees must adhere to the franchisor's business methods. During the term of the franchise agreement, the franchisor is responsible for providing technical, sales and marketing support to the franchisee. According to many research documents, the first form of franchising appeared around the 17th and 18th centuries in Europe. However, the operation of franchising is officially acknowledged to have originated and developed in the United States in the mid-19th century, when the Singer Factory (manufacturing sewing machines) signed a contract co-franchise the first business for its partner. Franchising has really grown strongly since 1945, with the introduction of a series of restaurant, hotel and retail sales and distribution systems, which are identical in terms of infrastructure. Infrastructure, branding, service processes are the basic characteristics to identify business systems in this way. The growth of US transnational corporations in the fast food, hotel-restaurant businesses has contributed to popularizing and developing the franchise business method around the world. Today, franchising has been present in more than 150 countries around the world. In Europe, there are about 200,000 stores doing business under the franchise form. Realizing the benefits and efficiency of this business model, many countries have adopted policies to encourage franchise development. The United States is the first country to legalize franchising and has preferential policies for individuals and businesses doing business under the franchise method. Many academic and policy research centers on franchise have been established. Many universities have also opened franchise majors for training and meeting the new needs of the labor market for economy. Today, many non-governmental organizations with the motto of promoting the development, support and promotion of

franchise activities have been established. A typical example is the World Franchise Council, established in 1994, whose members are franchise associations of many countries. In addition, the oldest and most prestigious organization is the International Franchise Association, established in 1960, with about 30,000 members including businesses with franchise activities. In Vietnam, franchising has been officially recognized by law as a business model recently with the adjustment of the Civil Code, the Commercial Law and a number of decrees and announcements. implementation guidance. The legal framework for this business model still needs to be further improved to match the general international development trend to support and encourage franchising business to develop further in the future.

METHODOLOGY OF RESEARCH

To do this paper, the author used many kinds of methodologies of research to analysis international and national legal policy and documents (law and regulations) related to the franchising. Besides, the authors base on the hypotheses developed in the study show how to use law and regulation to laws when implementing activities of franchise. To examine these relationships, the authors developed some hypotheses and tested these hypotheses using some empirical models. The developed models confirm the assumptions and demonstrate legal mechanism of franchise. Moreover, statistic and survey are also used to finish this research. The authors used the poll to survey the Vietnamese citizens and enterprises in Vietnam. The authors also sent the questionnaires to ask them some question related to the law and franchise. The research of this paper is finished base on combining all of methodologies above. However, because of time and finance limitation, the article still lacks of some information. The authors hope to take the opinion of audience and reviewer to do better for the next time.

LITERATURE REVIEW

Features of franchising

Franchising activities are conducted by the parties through the franchise agreement. The franchise contract must stipulate the franchisor's capital contribution to the franchisee. In Jean-Marie Leloup's view, capital contribution is reflected in the franchisor's

handing over of know-how to the franchisee; and for the franchisee to use the signs to gather customers. Signs to gather customers include: legal names, brand names, signs and symbols, trademarks, service marks. All of these signs help distinguish a business from competing businesses/enterprises. These signs constitute the franchise system and are the property of the franchisor. The choice and use of these signs constitute a fundamental aspect of the company's overall policy, contributing to the image of the business. The franchise contract must stipulate the basic obligations of the franchisor towards the franchisee. These obligations are contested by academics and business circles, and there is still no consensus. Since it results in the franchisor having to sign an exclusive contract with the franchisee. It is not necessarily the case in practice. Franchisors and franchisees may do business together and use "customer gathering signs". However, in order to avoid unnecessary competition, the contract may stipulate the territory (geographical scope) of the business. This is very likely to be regulated by antitrust laws, as it relates to the issue of market division. The parties to a foreign trade contract can be natural or legal persons. However, in practice, for reasons of capital concentration and business continuity, the franchisor is usually a legal entity. The parties to the contract can be national of the host country or foreigners. The parties to the contract can be traders or non-traders. In fact, the majority of parties participating in a foreign trade contract are traders. However, there are times when they are not traders, especially when the international trade takes place in areas such as agriculture, crafts and self-employed. The number of parties to a foreign exchange contract can have two or more parties participating in different types of foreign exchange contracts. Two-Party Franchise: This is "franchising" – whereby there is only one franchisee, usually in the field of "franchising" production. Multi-Party Franchise Contract: This is a common type of "franchising" whereby there are multiple franchisees, and it creates a business network. A two-level commercial contract with many parties. Firstly, the type of contract under which the franchisees are divided into two levels: (i) a number of franchisees are given all the know-how and carry out significant business activities in a large geographical area. (ii) within a certain geographical area, many franchisees carry out normal business activities, thus enjoying only a portion of the benefits of the franchise system. This way of organizing business rarely works. The increase in administrative procedures and the overlapping of commercial activities will affect the advantages of the international network. At the same time, it does not constitute franchising networks. Secondly, it is a model whereby franchise activities are carried out in a large geographical area, and the franchisor gives a "master franchise" – the exclusive beneficiary in the area. This geographical area, the task of developing more franchisees, to enjoy the full benefits of the franchise system and use the franchise system in a certain area.

Features of the franchising system

First, franchisees must adhere to the franchise model faithfully. Franchisees must consistently exploit know-how within the franchise network. This is the obligation, as well as the benefit of the franchisees. The franchise contract must specify the rights that the franchisor grants to the franchisee in the use of "customer gathering signs". The franchisor is obliged to apply all the know-how of the franchisor. The franchisor has control over the franchisee in faithfully complying with the franchise model. This is the right and at the same time the responsibility of the franchisor. It is necessary to specify how the franchisor controls the franchisor's exploitation of the franchise system. This control does not mean that the franchisee has to depend on the franchisor. Faithful adherence to the franchising model must be done in cooperation with independent traders. In the case of franchisors conducting franchise activities in foreign countries, it

should be noted that it is more difficult for the franchisor to exercise control than in domestic franchising activities. The issue of franchisor control is an important and traditional aspect of the legal relationship between franchisor and franchisee. However, today in the United States, scholars and lawyers are still debating the issue of franchisor's sign, such as the franchisor's trade name or sign. Distributed franchises constitute vertical structures, allowing products to flow from upstream (production) to downstream (consumption).

FINDINGS AND DISCUSSION

Legal compliance issues in the field of foreign trade in the United States

Developing an internal legal compliance program and assigning program officers and support staff is essential for growing franchisees in today's competitive society. Franchisees often face the conflict and stress of the requirement to enter the market quickly, forcefully and legally. Therefore, it is necessary to develop the attitude and motto of teamwork from the very beginning to avoid unnecessary internal tensions. At the same time, must commit to operating within the legal framework and maintaining complete, comprehensive law enforcement records. Records must contain sufficient information about the initial meetings involved in the performance of the franchise agreement up to the termination of the contractual relationship and for the time thereafter. The timing and content of initial meetings with potential franchisees are the most important factors in discussing compliance. A legal compliance program is more than just paperwork. A good legal compliance system should include initial and ongoing training for the franchisor's sales and marketing staff, the development of special checklists and forms, management guidelines and reward and punishment mechanism, a system to monitor the entire period of registration and contract renewal, development of a legal compliance manual, periodic policy announcements, review and renewal process for the new party and the unscheduled inspection and examination of the franchisor's business activities and legal compliance records to ensure the full implementation of the process. The success of legal compliance should not depend on outside legal counsel but should be considered a priority for the management team of the franchisor. No legal compliance system can prevent breaking the law in franchising. The franchisor's ability to mobilize resources for compliance programs, selecting the right employees as program officers, and raising awareness and compliance attitudes of sales staff will determine the success or failure of this compliance program. The person in charge of legal compliance must be carefully selected, tasked with implementing and strengthening the program's processes. This person acts as an internal information center to store records and provide information related to legal compliance, and is responsible for liaising with external attorneys/legal experts. The person in charge of compliance must be respected by other members of the franchise, or the system will collapse. This can only be done if the company leadership imposes strict discipline on employees who do not comply with the law.

Special issues related to legal compliance:

- Finance forecasts: Financial forecasts must be prepared and built on the basis of real numbers and valid assumptions.
- Important changes: When there are changes in the franchise structure and program, the franchisor must immediately notify the franchisee. Regulations on how and when information is updated changes are often referred to as material changes.
- Regulations on advertising according to local laws and other company regulations regarding the quality and appearance of products and services.

Franchise contract

The most important document that binds the rights and obligations of each party in the franchise relationship is the Franchise Contract. The foreign trade contract includes many terms that bind the parties throughout the contract performance period. Therefore, a balance of rights and obligations between the parties must be maintained. On the other hand, the franchisor must maintain appropriate control, both to ensure consistency and synchronization throughout the system, and to ensure flexibility to anticipate market fluctuations and make adjustmentssystem to meet the interest and arising needs of the market for the franchisee. The franchise contract must reflect the franchisor's business philosophy and the overall course of the relationship between the franchisor and the franchisee. A good contract draft should be an amalgamation of business decisions, strategic planning, market research and customer analysis. The length and complexity of the franchise agreement should vary from one franchisor to another. Many new franchisors make the fatal mistake of using a sample contract of clauses from competitors' franchise agreements. Doing so can be detrimental to both the franchisor and the franchisee because the contract does not accurately reflect the true motives and financial capabilities of the parties in a particular franchise contractual relationship. Regardless of market size, stage, dynamics or trends. All basic foreign exchange contracts should cover the following important items:

- i. Description: is the opening part of the franchise contract, must specify the time to discuss the contractual relationship, give general information about the development and ownership of the franchising company to license the company franchisee in implementing the business model in accordance with the quality and efficiency management standards according to the franchisor's process.
- ii. Grant of rights, term and renewal of contract: An important basic clause in a franchise contract is a provision on the term of granting business rights. The length of this term is dictated by a number of factors such as market conditions, the franchisor's need to periodically change key terms of the contract, franchise costs, and the franchisee's expectations to start-up costs, the duration of agreements related to the franchisee's operations (such as lease terms, bank loans, and anticipated consumer demand for franchised goods and services). The right to renew the contract granted to the franchisee (if any) is usually provided that the franchisee is performing well under the contract. Other issues that need to be covered in the terms of contract renewal are the fees for renewal of the existing contract performance obligations between the parties and the franchisee's obligation to upgrade the terms and conditions facilities according to the latest standards. The clause should also specify the franchisee's right to change location or change the franchisor's fees.
- iii. Legal entity of the franchisee. This provision is intended to establish and confirm a long-term legal relationship between the franchisor and the franchisee affirming the parties are not operating within the jurisdiction and role of the employer and the employee. The licensor and franchisee, general partners or any other legal relationship that may imply that the franchisor is the licensor of the intellectual property (from a liability standpoint). Franchisees should not be portrayed as an employee or department of the franchisor as that may make termination more difficult (in terms of fulfilling an anti-competitive commitment, requiring minimal notice) minimum or compulsory payment of compensation upon termination in a particular country).
- iv. Permissions granted. The franchisor grants the right to use the intellectual property to the franchisee. Specific contents related to intellectual property will be clearly communicated to the franchisee and consultants. Thereby, the expectations of the franchisee can be determined about the added value that the franchisor provides and the scope of use of the license. For the franchisee, the rights granted are also a form of investment prospecting and the Party's consultants can assess the franchisor's readiness to face the challenges and needs of the market. The scope of franchising is usually quite broad and often includes a set of trade-marks, service marks, commercial decorations (signs, stall designs, apparel, special design features, etc.), know-how (often systematized in operational manuals, initial training programs, support programs, continuing training), ongoing technical support, access to resources power, right to manufacture or distribute proprietary products of the franchisor territory. The size of the territory that the franchisor grants to the franchisee must be discussed specifically and tied to the privilege. This provision stipulates that the size of the territory is a specific area (city or country) and the limited company has the right to operate its own locations and grant additional business rights in the territory there. Any right to opt-out of additional locations, restrictions on advertising, territory-related operating norms, territory-related franchisor policies are set forth in this provision of franchising contract.
- v. Products/services provided by the franchisor. The franchise contract should clearly define the products and services that the franchisor or its subsidiaries will provide to the franchisee from the time the franchise relationship is established. Trade secrets and licensing of use and personnel training, standard accounting and bookkeeping systems, technical specifications of equipment, goods and discounted quantities, construction regulations, equipment interior design, advertising support and product promotion when opening a franchise. Most product-based franchising systems have one or more licensed products manufactured or controlled by the franchisor. The franchisee is obligated to purchase this product or resell it to a customer or use it for the provision of a service. Under current U.S. Antitrust and Commercial Law, the franchisor is obligated to deliver these products on time, of good quality, and at a reasonable price.
- vi. Franchise fee, trademark rental, related fees of the franchise system. In fact, conducting legal procedures often does not bring victory to any party. Therefore, the parties often prefer to use the method of resolving conflicts and disputes through negotiation and mediation out of court. However, settling disputes peacefully and amicably is not simple and extremely complicated.
- vii. The main cause of conflicts between franchisors and franchisees is the gap between expectations and reality. When trying to choose a franchisee, some franchisors often overestimate their level of training, support, and other important aspects. This results in franchisees becoming frustrated when the franchisor's real capabilities are revealed. It is important for the franchisor to understand the issues that often lead to legal disputes and work to avoid these risks to minimize or eliminate them.

In the event of a dispute, if the franchisor or franchisee decides to resolve the dispute in court, the company needs to develop certain plans and strategies such as obtaining adequate documentation useful evidence, develop specific goals and notify legal counsel, review the terms of the insurance policy to determine whether it is possible to pay the risks or to rule on the law. management or not,

develop a system to manage legal cases to manage and control all kinds of costs.

CONCLUSION AND RECOMMENDATION

In Vietnam, there are legal documents governing commercial franchising such as the Commercial Law, the Law on Technology Transfer, Decree 35/2006/ND-CP and Decree 08/2018/ND-CP (The Decree amends a number of decrees related to business investment conditions under the state management of the Ministry of Industry and Trade). However, the above documents are still lacking and not really effective in managing franchising activities, failing to protect the legitimate rights and interests of both the franchisor and the franchisee when there is a problem. disputes arise.

From the above studies, some lessons can be drawn to further improve the policies and laws on franchising in Vietnam as follows:

- In the next period, the competent authorities of Vietnam need to study and issue a unified legal document that comprehensively regulates activities related to franchising.
- Develop policies to support companies to build brands and develop franchise systems not only within the territory of Vietnam but also reaching out to regional countries and the whole world.
- Training, propagating and disseminating the law related to commercial franchising to individuals and business organizations so that the parties can better understand and comply with the law on franchising. From there, you can best protect your rights and interests and increase your income and develop your business more effectively.
- Encourage the parties to use effective dispute resolution methods such as negotiation, conciliation or arbitration in addition to the previous dispute resolution in court.

REFERENCES

1. Vietnam National Assembly, (2015). Civil code
2. Vietnam National Assembly, (2005). Commercial law
3. Vietnam National Assembly, (2017). Law on Technology Transfer
4. Vietnam National Assembly, (2018). Competition law
5. Vietnam Government, (2006). Decree No. 35/2006/ND-CP detailing the Commercial Law on commercial franchising activities
6. Vietnam Government, (2018). Decree 08/2018/ND-CP amending a number of decrees related to business investment conditions under the state management of the Ministry of Industry and Trade
7. Vietnam Government, (2018). Decree 76/2018/ND-CP detailing and guiding the implementation of a number of articles of the law on technology transfer
8. Vietnam Government, (2019). Decree No. 75/2019/ND-CP Regulations on sanctioning of administrative violations in the field of competition
9. Hanoi Law University, (2006). Textbook of International Judicial Law. Judicial Publisher
10. Bui Ngoc Cuong, (2007). Completing the legal framework on franchising. Legal Research Journal No. 103, August 2007.
11. Imed Eddine Bekhouche SoheybKahlessenaneSoheybKahlessenane, (2018). An Overview of Franchising Law: Why is it Important? June 2018 International Journal of Law and Public Administration 1(1):41. DOI: 10.11114/ijlpa.v1i1.3355
12. James A. Meaney, (1991). Ohio: The Unknown Franchise Law James P. Melican Jr (1978). State franchise law developments. Antitrust Law Journal 47(3):929-939
13. Andrew J. Sherman, (2004). Franchising and Licensing.
