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Local franchise environment inviting

Franchising is becoming a popular business format in Thailand, among both consumers and entrepreneurs. One reason is that the legal environment for franchisers in Thailand is more open to and protective of franchisers' operations than in most of the western world.

The franchiser's principal assets are its trade name, trade secrets, know-how and other intellectual property rights developed through marketing and/or research. By licensing these rights through a franchise agreement, a franchisee begins day one with the advantage of a well-recognised trade name, trademark, and operational experience. These are significant rights/assets and a franchisee is willing to pay handsomely for them.

In many cases, when a franchise is very popular, franchisers will receive interest from many applicants for franchises in Thailand. This gives large, popular franchisers significant bargaining power over their franchisee. It is this potentially unequal bargaining position that has prompted western nations such as the US to enact legislation specifically addressing franchises and restricting what a franchiser can or cannot do.

In the US, such restrictions on franchisers have been enacted at both the federal and state level. These "franchise relationship" regulations usually mandate that franchisers: (a) register and disclose information about their franchises; (b) guarantee against unfair termination; (c) protect a franchisee's right to renew or sell the franchise.

Thailand has not enacted such franchise regulations, leaving franchisers free to contract with and manage their franchisees as they wish. While domestic franchisers may be subject to the general restrictions contained in laws such as the Trade Competition Act (TCA), foreign franchisers may not be subject to these laws. The TCA expressly bars "business operators" from incorporating various restrictive terms into their agreements. Terms such as price fixing (maximum or minimum), identifying exclusive suppliers, and limiting purchases or sales geographically are expressly prohibited between any two business operators.

This law is intended to only govern Thailand and has no express extra-territorial effect. As such, it would appear to have no application if one such business operator (the franchiser) were a foreign entity without any presence in Thailand and the other business operator (the franchisee) were a Thai entity.

The only TCA provision that expressly refers to foreign business operators appears in Section 28. This provision bars domestic operators with business relationships with foreign business operators from taking any action to prevent Thailand buyers from buying goods or services directly from abroad. In other words, setting up a Thai company as an exclusive distributor or sub-franchiser may subject the Thai company to penalties under the TCA. Yet the TCA does not expressly make the foreign

business operator liable in such circumstance, only the Thai business operator is expressly barred from such conduct.

Other bodies of law aimed at consumer protection in Thailand are also not necessarily applicable in the franchiser-franchisee situation. The Unfair Contract Terms Act (1997) (UCTA) does restrict parties from incorporating "unfair" terms into their contracts. However, the law does not expressly address franchise agreements. More particularly, the law focuses on consumer contracts, standardised form agreements and security/redemption agreements. Consumers, as defined in the UCTA, are persons entering into a contract to purchase property or services, provided such purchases/services are not acquired for trade.

The UCTA offers protection for consumers who enter into agreements with operators having unequal bargaining strength. So, depending on the particular circumstances, a franchisee may or may not fall within the scope of the UCTA.

From a litigation perspective, the Thai courts are much more conservative in granting damages as compared to their counterparts in the US and the UK. In particular, claims of lost profits are frequently dismissed or limited in sum, based on the argument that such damages are too remote. While the Thai courts are likely to award some damages for unilateral terminations, such damages are most likely to be limited to the loss of marketing costs expended, wasted products, and other easily defined monetary damages. Even these can potentially be waived if the franchise agreement is drafted properly.

Newly enacted intellectual property laws also favour franchisers, giving them strong protection against trade-name, trademark and trade-secret infringement. The Trademark Act (1991) requires that a license of a registered trademark must itself be registered to take legal effect. If this process is not carried out, such license would be void.

The Trade Secrets Act (2002) offers protection for trade secrets without the need for registering same. Franchisers can protect themselves against franchisees who are terminated or seek to initiate their own franchise by copying their former franchiser's Intellectual Property (IP). Thailand's specialised IP and International Trade Court will act quickly to enjoin former franchisees from infringing on their former franchisers' trademarks, trade names and trade secrets.

In short, the limited restrictions applicable to franchisers, especially foreign franchisers, coupled with the strong IP laws protecting franchisers' IP rights, creates in Thailand an optimal legal environment for franchise expansion.

Written by John Fotiadis, consultant, and Piyanuj Ratprasatporn, partner and head of Commercial Department, Tilleke & Gibbins International Ltd. Please send comments and suggestions to Marilyn Tinnakul at marilyn@tillekeandgibbins.com.