

SELLING AND DEBT COLLECTION

DIRECT SALES

Direct sales are now governed by a specific statute, the Direct Sales and Direct Marketing Act B.E. 2545 (A.D. 2002) as amended by No. 2 B.E. 2550 (A.D. 2007) (DSA). This DSA supplements other pieces of legislation which may also affect direct sales such as the Thai Civil and Commercial Code, the Act on the Price of Goods and Services B.E. 2542 (A.D. 1999), and consumer protection-related laws.

The purpose of the DSA is to protect consumers from business operators who appear to be taking “willful advantage” of them through such undefined means as deception or coercion and thus are depriving consumers of their freedom of choice. The majority of the DSA focuses on restricting who can do direct sales or direct marketing business and the ways that business can be carried out.

Definition

In the DSA, the term “direct sales” refers to the presentation and offer of goods or services for sale directly to consumers in their dwelling or at any place other than in a retail shop specifically visited by the consumer through direct sales agents or independent distributors engaged in either a one-level or multi-level sale.

The DSA defines “direct sales agent” as an agent of a direct sales business operator who offers the operator’s goods or services for sale directly to the public (a one-level sale). An “independent distributor” is defined as a person who buys the goods or services from the business operator and then resells these to the public (multi-level sales).

A direct sales business operator must register with the Registrar before conducting his/her business. The application to the Registrar must be accompanied by various requested documents providing information on the business as well as a description of the offered goods/services, the procedure for selling the goods or services, and a remunerative plan.

The remunerative plan should detail the remunerative payment calculations and shall contain such other details as shall be prescribed by the Direct Sales and Direct Marketing Board (the Board). Other instructions on the nature of the plan include restrictions on the methods of describing payment calculations and unreasonable persuasion of an independent distributor to buy products.

A business operator is further required to enter into a written agreement with its independent distributors or direct sales agents. The agreement must contain details of the remunerative payments and details of the fees payable to the business operator, including the membership admission fee and promotion material costs (which shall not exceed rates to be fixed by the Board). In the independent distributor’s case, the agreement must allow for and further state the procedure and timeline for reselling a product and the promotion materials back to a business operator.

Direct Marketing

The DSA defines “direct marketing” as marketing goods and services by way of communicating a long-distance message to promote goods/services directly to consumers, with the expectation that the consumers will respond by purchasing goods/services.

In order to conduct this type of marketing business, an operator must be registered under the DSA’s requirements for a direct sales business (see above), provided that no remunerative plan is required and must follow all applicable Ministerial Regulations. The DSA further specifies that the

message communicated by the direct marketing operator shall also comply with consumer protection laws relating to advertising.

Consumer Protection

The DSA provides consumers with better protection in many ways.

The DSA requires that all sales documents be in the Thai language and contain the following information:

- The seller's and buyer's names.
- The purchase date.
- The delivery date of goods or services.
- Information describing the consumer's right to terminate (this last item must be printed more prominently than the other data).

Warranties for goods and services must also be written in Thai and clearly outline the consumers' rights under those warranties. For specific products (to be determined in future regulations), the sales documents must also contain additional information.

The consumer is entitled to and must be provided with a copy of the goods or services sales documents or else he/she is not bound by the particulars therein.

More importantly, the DSA provides consumers with a "cooling-off period," in that a direct sales agreement is only legally binding seven days after the goods or services are delivered. Before the expiration of those seven days, a consumer is given the right to change his/her mind by terminating the agreement and returning the product(s). A full refund shall be given within 15 days of when the termination notification was received, provided that if the goods are damaged by the consumer, he/she shall take financial responsibility for such damage. A description of the goods and services to be excluded from this seven-day delay will be provided by future regulations, as will be the general procedures for returning goods.

Pyramid-like direct sales and direct marketing, where the consumer pays for goods or services and is granted some sort of benefit or business interest if they solicit further customers for the business operator, are prohibited. It is also prohibited to offer a nonemployee agent or independent distributor benefits for the solicitation of other individuals to act as agents or independent distributors. So, for example, a customer could not receive a discount for bringing a second consumer to buy a product from a Web site.

In addition to the above protection, the DSA protects consumer privacy by prohibiting independent distributors or sales agents from approaching a dwelling for the purpose of solicitation unless he/she has already been granted permission to do so by the dweller.

Recording of Direct Sales and Direct Marketing

The Director-General of the Consumer Protection Board acts as Registrar under the DSA and is responsible for reviewing and registering direct sales and direct marketing applications. In reviewing applications, the Registrar may request further explanations or documents for examination.

Pursuant to the DSA, complete applications must be processed and registered within 45 days following receipt of such application, whereas incomplete applications must be altered or changed within a "reasonable time." Upon receipt of such alterations or changes, the applications must then be processed and registered within 30 days following receipt of the application.

A business operator has 30 days to appeal either a rejection of his/her application or a cancellation of his/her registration under the DSA. The appeal is made to the Board, and the Board's decision is final.

Direct Sales and Direct Marketing Board

A Direct Sales and Direct Marketing Board (the Board) is to be created consisting of a Chairman appointed by the Cabinet; four ex officio members (i.e., the Director-General of the Internal Trade Department, the Director-General of the Industry Promotion Department, the Chief of the Royal Thai Police, and the Secretary-General to the Food and Drug Board); four appointed members coming from associations related to direct sales, direct marketing, and consumer protection; and four suitable appointed members, two of whom must come from the private sector. The Secretary-General to the Consumer Protection Board shall be both a member and Secretary.

The Board will consider consumer complaints, supervise direct sales and direct marketing operators, judge appeals against the order of the Registrar, advise the Cabinet on direct sales and direct marketing issues, oversee the performance of competent officials and government agencies in the area, lay down rules and notifications, and suggest regulations to assist in the execution of the DSA.

Furthermore, the Board is empowered to apply settlements and conditions as it sees fit. It also, importantly, has the power to warn the public away from certain goods and services that may be "detrimental or prejudicial" and to disclose the identity of the direct sales business operator, direct marketing operator, agent, or distributor offering such products or services. No further discussion of these terms is provided, meaning that the Board has a great deal of discretion.

The Office of Consumer Protection Board is to act as an advisor, administrator, and general overseer.

Penalties

The DSA provides penalties for any violations of its rules. The penalties vary depending on the offense. The maximum imposable sentence is five years of imprisonment, and fines cannot exceed THB 500,000. Such penalties may be applied not only to the enterprises but also to managers, legal representatives, or persons in charge of operations, unless the offense was committed without their knowledge.

LEASING BUSINESS

Thailand has no regulatory framework and/or specific governmental authority to govern leasing business in general. Leasing business can be established in the form of commercial enterprises without restriction on the business structure of the leasing company. However, in the case of a financial institution established under the Financial Institution Business Act B.E. 2551 (A.D. 2008) (FIBA) wishing to operate and engage in "credit-like transaction," such financial institution is required to obtain permission from the Bank of Thailand (BOT) and to comply with certain rules and regulations announced by the BOT under the FIBA. Under the FIBA, "financial institution" means (1) a commercial bank, (2) a finance company, and (3) a credit foncier company. Leasing business is defined as one of the "credit-like transactions" governed by the BOT. "Credit-like transaction" means a factoring transaction, hire-purchase out transaction, leasing out transaction, and other credit-like transactions as announced and prescribed by the BOT.

Under the VAT law, which replaced business tax, leasing of movable properties is subject to 7% VAT. Order No. Thor Por 4/2528 excludes leasing businesses of both movable and immovable property from the burden of 5% withholding tax. To qualify as a leasing business under the Revenue Code, the lessor company or registered partnership must have a registered and paid-up capital of at least THB 60 million and must also be a 7% VAT registrant. The lessee must be a juristic person, and the lease period must be at least three years. These laws are believed to make the business of leasing movables more competitive.

FRANCHISING BASICS IN THAILAND

Definition

A franchise agreement is simply a contract that governs duties, rights, and obligations between parties to a transaction. The franchisor is generally the owner or holder of title to certain rights and the franchisee is the party who has contracted to use some or all of the rights held by the franchisor, with or without certain restrictions.

Franchise agreements arise in many contexts in Thailand. For example, some arise as the result of a party's wish to grow or develop by acquisition of rights to new technologies, know-how, trade secrets, trademarks, and other intellectual property, content, or other valuable assets.

Industry research discloses that there are currently more than 200 franchisors (majority foreign-owned) and more than 10,000 franchisees in Thailand, with the most popular franchise operations occupying the food and restaurant sector, followed by services, education, and retailing according to the Thai Department of Business Development and Franchise and Thai SMEs Business Association. The Ministry of Commerce has been reported to be considering a draft of new legislation to ensure that franchisors and franchisees are protected fairly. It has been said that regulations are required to prevent fraud and cheating, particularly because there is no requirement in Thailand that a franchisor prove the viability of its business model by showing a three-year track record of profitability before selling a franchise contract to a franchisee. The lack of this requirement is different from franchising regimes in other countries, including, for example, the United States.

This chapter shall address several issues that commonly arise in franchising in the Thai context. As demonstrated below, franchise terms may be dictated by legislation, negotiation, or by practical considerations that have critical importance in Thailand. Specifically, although Thailand is generally a "freedom of contract" jurisdiction, some provisions are absolutely required in certain franchise agreements, while other terms are not permissible or advisable in such agreements. We begin with the present legislative framework underpinning the drafting and interpretation of franchise terms. As stated above, it is expected that there will be additional legislation governing the creation of franchise relationships in the future.

Relevant National Legislation

Thailand is a civil law jurisdiction. No specific legislation yet offers a comprehensive guide to franchising in general. Instead, a practitioner confronted with instructions to draft or interpret a franchise agreement in Thailand will generally need to be familiar with the following sources of law:

- Civil and Commercial Code.
- Trademark Act B.E. 2534 (A.D. 1991) as amended by Trademark Act (No. 2) B.E. 2543 (A.D. 2000).

- Patent Act B.E. 2522 (A.D. 1979) as amended by Patent Act (No. 2) B.E. 2535 (A.D. 1992) and Patent Act (No. 3) B.E. 2542 (A.D. 1999).
- Copyright Act B.E. 2537 (A.D. 1994).
- Trade Secrets Act B.E. 2545 (A.D. 2002).
- Unfair Contract Terms Act B.E. 2540 (A.D. 1997).
- Trade Competition Act B.E. 2542 (A.D. 1999).
- Act Relating to Price of Merchandise and Service B.E. 2542 (A.D. 1999).
- Revenue Code B.E. 2481 (A.D. 1938).

Each Act cited above is implemented by a set of Ministerial Regulations. The legislative sources cited above touch on only a few basic aspects of franchise arrangements. The parties must negotiate most of the terms of a given agreement. A bargain at arm's length will generally not be disturbed by the Thai courts unless there is a clear public policy reason to do so.

Basic Premises

A franchise agreement must protect the rights of the franchise system. There is no absolute requirement that the agreement must be truly balanced, as some franchisee advocates have urged. In our view, it is preferable that the franchisor have clear authority to enforce the standards of the franchise system decisively. As an obvious example, consider what might happen if a franchisor cannot compel a franchisee to operate its unit in accordance with the applicable health standards. The entire franchise system is thus placed in jeopardy in the event that a customer or a public health agency learns of the substandard condition of the unit. One must also be careful to protect against a franchisee's theft of trade secrets and know-how. A franchisee who does not satisfy the provisions of the agreement should not be permitted to close its unit without justification, then reopen under a changed name and compete against the franchise with the know-how obtained through exposure to the franchise system.

Balancing the Agreement

Any practitioner drafting a franchise agreement must contend with two basic issues: how much protection is required for the franchisor to achieve the desired result and to what extent market/commercial considerations affecting franchise sales and the past success of the franchisor's business model should be taken into account in building the franchise agreement.

Franchising in its infancy was often built on very short basic contracts. The earliest known agreements in franchise operations such as Kentucky Fried Chicken and Dairy Queen were based on one-page agreements. With added complexity (and less trust), the agreements have required more comprehensive treatment. Territoriality, supply requirements, technology, genetically modified food, e-commerce—all of these factors have created the need for contractual controls never before imagined when franchise systems were first created.

As disputes over franchise agreements have made their way through the court system, drafters of agreements have had to adapt to judicial precedent to cover issues which might never have otherwise been considered. For example, in the landmark U.S. case *Scheck v. Burger King Corp.*, the U.S. Supreme Court fashioned a common sense remedy to an issue that was probably never considered by the franchisee: what exactly does "territoriality" mean? Here, the Court held that the franchisor's refusal to grant the franchisee a right to territoriality did not then mean that the franchisor could set up a restaurant right next door to an existing franchised unit and thereby

destroy the franchisee's business. Following this decision, agreements were drafted (or amended) expressly acknowledging the franchisor's right to build anywhere—even right next door. Of course, U.S. case law precedent does not apply in Thailand, but the U.S. case is instructive on the need to be aware of local case law precedent when drafting franchise agreements.

Common Drafting Pitfalls

Despite the tendency of some franchise agreement drafters to go overboard in trying to provide strong protection to the franchisor, some terms are generally forbidden by law in Thailand. For example, an agreement made in advance exonerating a debtor from his/her own fraud or gross negligence is void as a matter of law (Civil and Commercial Code Section 373). Other examples of terms that may run afoul of the Thai Unfair Contract Terms Act are:

- A term that exempts or restricts liability arising from breach of contract.
- A term that allows contract termination without reasonable grounds or without any material breach by the other party.
- A term that allows one party to delay or not to comply with its contractual obligations without reasonable grounds.
- A term that allows one party to enforce further obligations upon the other party than those agreed to on the date of contract execution.
- A term that allows for confiscation of deposits (or liquidated damages) that are excessively high in relation to the damages arising/resulting from a contract under which said deposit was placed. The Court will have the power to reduce the confiscation level to that of the actual damages incurred.
- A provision that constitutes terms, notices, or statements made in advance that restrict or exempt liability for infringement or breach of contract with respect to injury to life, body, or health of a third person caused by a deliberate or negligent act committed by the party who sought to restrict or be exempted from such liability, or by other persons to whom said party must also be liable. These terms, notices, or statements will be considered ineffective, as will agreements or consents of the injured parties restricting or exempting the liability for wrongful acts arising from unlawful action contrary to public order or good morals.

Unlike most laws enacted regarding civil court jurisdiction in Thailand, the Unfair Contract Terms Act gives the courts great discretionary power in determining whether contract terms are generally unfair and unreasonable. However, the Act does provide general guidelines under which the Court is to consider whether certain terms are unfair or unreasonable. For example, the Court is to consider:

- The time and place of making the contract or compliance therewith.
- Whether one party shoulders a much heavier burden than the other.
- The normal practice within the industry concerned.
- The integrity, bargaining power, economic positions, and adeptness of the parties.

In this regard, the Act allows for the use of expert testimony during court hearings.

In certain situations, a franchisor must be reasonable in setting terms, or the term may be held unenforceable as an unfair limitation on competition. For example, in the context of a franchising arrangement involving use of technology, a "tying arrangement" may be prohibited under the Ministerial Regulations B.E. 2540 (A.D. 1997) dated February 14, 1997, issued under the Copyright

Act B.E. 2537 (A.D. 1994). In a tying arrangement, the franchisor establishes a requirement that the franchisee must purchase from the franchisor (or his/her agent) materials for use in the production of a particular item. This type of tying arrangement might be seen as anticompetitive and might be unenforceable.

Interplay between Franchising and Trademark Licensing

In the franchising context, very often one of the most important components of the franchise is the trademark portfolio of the franchisor. Trademarks and branding are always associated with the notion of quality control and serve as an indicator to the consuming public that goods or services bearing a particular trademark will have a consistent level of quality, no matter when or where the goods and services are purchased.

The rights to a trademark application or registered trademark are transferable and inheritable. The proprietor of a registered trademark may grant a license to other persons to use his/her trademark for any or all of the goods for which it was registered. The license agreement may either be contained within the franchise agreement or it may be a separate stand-alone agreement. According to the Notice of the Department of Intellectual Property B.E. 2543 (A.D. 2000), a trademark license agreement shall at least provide:

- Conditions and terms of the agreement between the trademark proprietor and the person applying to be an authorized licensee which enable the former to control the quality of the goods manufactured by the latter.
- The goods for which the licensed trademark is to be used.
- Provision specifying that only the authorized licensee has the right to use the trademark, or that the proprietor shall authorize any person in addition to the authorized licensee to use it.

What one must consider in drafting a franchise agreement with trademark licensing provisions is that a trademark license agreement must be in writing and registered with the Department of Intellectual Property. Trademark or service mark license agreements are governed by the provisions of the Trademark Act (Sections 68 to 79), the Ministerial Regulations, and the general laws of contract under the Civil and Commercial Code. A trademark shall be deemed registrable if it is distinctive, not forbidden under the Act (essentially, nothing making reference to the monarchy of the Kingdom and no official emblems or documents), and not identical or similar to those already registered by others.

The trademark license agreement must be made in writing and registered with the Trademark Office Registrar. The Registrar may issue an order accepting the license agreement, imposing conditions or limitations as he deems suitable for the wellbeing of the public.

License provisions are used in Thailand primarily for quality control purposes and, therefore, fit quite nicely within the functional scheme of a franchise arrangement. The quality level indicated in the agreement enables the licensor to monitor and control the quality of the goods manufactured or of the services rendered by the licensee. Registering a trademark allows the owner to have exclusive right to the use of the mark in respect of the goods or services registered and to prevent any unauthorized use of an identical or confusingly similar mark. A license to use a registered trademark allows the licensee to use the mark without subjecting himself to infringement liability.

The use of the trademark or service mark by the licensee will be deemed as use of the mark by the licensor, which can be raised as a defense in the event of a cancellation action for nonuse (Section 70). Both the licensor and the licensee may take action against infringers, although the

licensee's ability to take action is restricted by the terms of the agreement. Since Thailand is a freedom of contract jurisdiction, the contracting parties can adopt any terms or conditions they deem appropriate and agreeable, as long as the terms and conditions are not expressly prohibited by law or are impossible, or are contrary to public order or good morals.

Patents and Franchising

Another important component of the franchise is the patented technology of the franchisor. In Thailand, the law of patents is primarily enshrined in the Patent Act B.E. 2522 (A.D. 1979), as amended by the Patent Act (No. 2) B.E. 2535 (A.D. 1992) and (No.) 3 B.E. 2542 (A.D. 1999) together with various ministerial regulations. Section 41 of the current Patent Act contains a mandatory requirement that a patent license agreement should similarly be registered with the DIP.

The requirements to register patent licenses are as onerous as those applicable to trademarks, and the foregoing discussion in relation to trademark requirements can be equally extended to patents (i.e., failure to comply with the registration requirement renders the agreement unenforceable pursuant to Section 152 of the CCC). Similarly, there is no clear definition as to what will be regarded as a patent license—presumably any contractual relationship which contains provisions directed to the license of any of the rights conferred on a Thai patentee. In theory, a technology transfer agreement that incorporates license provisions as to know-how plus exclusive rights under a patent would be liable to registration.

One major area where patent licenses may be subject to even greater scrutiny than trademarks before being permitted to be registered is in the area of competition law.

There are certain procedural hurdles to be surmounted in the registration process. It is a requirement under Section 39 of the Patent Act, and the Ministerial Regulation No. 25 B.E. 2542 (A.D. 1999), issued on September 24, 1999, that the license agreement does not contain any provisions that unfairly restrict competition; hence, upon receipt of the application for registration, the Patent Examiner will examine the license agreement to ensure that it does not contain any anticompetitive provisions. The presence of such anticompetitive provisions will have the effect of barring the agreement from registration.

The 1999 Ministerial Regulation therefore expounds further on the various prohibited restrictions. There is no concept of a block/category exception under Thai law as for example exists under E.U. law. However there are categories of restricted provisions—a type of “gray list” of provisions that may be prohibited, and a hard-core “black list” of provisions that are entirely prohibited with no chance of exception.

In respect of the gray list, it will be open to the Director General of the Department of Intellectual Property upon analysis of the agreement to determine if there is an unauthorized unfair restriction. The Director General will consider “the object or intent of the parties” as to whether they intended to cause unfair practice or not, including the result which may occur. Therefore, there is scope for a certain “rule of reason” type of approach to be employed in the analysis of the relevant patent license and its background. The gray list generally may include such questionable activities as tying obligations, obligations on the licensee to hire specific persons for production of the invention except where the person to be hired is required to work the patent, restrictions on sales and distributions and on production quantities. Resale price maintenance and unfair royalty rates are also open to scrutiny.

“Black list” clauses are per se anticompetitive and their presence in a patent license will automatically cause the registration of that license to be refused. There is no opportunity for the

Director General to apply a rule of reason type analysis to these clauses such as those. These clauses include the following:

- Requiring the licensee to use another patent/technology of the licensor upon payment of a royalty, except where it can be shown that this additional patent is required so that the product to be produced by the licensee under the patent conforms to the invention in the main licensed patent (form of tie-in).
- Prohibiting the licensee from challenging the validity of the licensed patent of the licensor.
- Requiring the licensee to disclose and allow the licensor to take advantage from the improvements the licensee has made without suitable remuneration.
- Requiring that royalties be paid after expiration of the patent.
- Requiring the licensee to act in a manner that has been determined by the Courts or other competent competition law officials to be anticompetitive.

Trade Secrets and Franchising

Trade secrets in Thailand are protected under the Trade Secret Act B.E. 2545 (A.D. 2002) (TSA), which came into force on July 22, 2002. The TSA contains provisions to protect against unauthorized disclosure of trade secrets, including a framework that enables the Court to issue injunctive relief against disclosure of trade secrets.

A franchisor must be vigilant to identify and carefully control use and disclosure of its proprietary trade secrets such as secret know-how, formulas, recipes, inventions, client lists, and sales data. This can be done either in a separate nondisclosure or confidentiality agreement or with an airtight confidentiality provision within the franchise agreement itself, or preferably both.

The new TSA provides far broader protection and more severe penalties for trade secret infringement than the Penal Code provides. However, one can resort to the TSA for enforcement only if careful steps have been taken (and can be demonstrated) to maintain the secrecy of whatever proprietary information is in dispute. The expansion of such protection should be viewed as a benefit for a trade secret owner in seeking remedial action for unauthorized disclosure of secrets.

Taxation Issues

The Thai withholding tax imposed on royalties paid by Thai entities to foreign franchisors/licensors not carrying on business in Thailand is 15%. The franchisee or licensee, as the payer of royalties, has the duty to withhold 15% income tax and remit the tax to the Revenue Department no later than the seventh day of the month following the month of payment. The 15% withholding tax may be reduced under some double tax treaties (DTT) that Thailand has with various countries. The 15% withholding tax paid to the Thai Revenue Department may be used as a credit against the licensor's income tax payable on such royalties in the resident country (credit method). It should be noted that under some DTTs, the exemption method is applied instead of the credit method. Under the exemption method, royalties subjected to tax in Thailand are exempt from income tax in the resident country.

There is no requirement to inform the Revenue Department of the payment of royalties. The Thai franchisee or licensee will file a withholding tax return and remit the tax to the Revenue Department no later than the seventh day of the month following the month of payment. However, the withholding tax certificate issued by the Thai Revenue Department may be required as evidence for a

tax credit in the resident country . In this regard , the foreign licensor generally appoints the Thai licensee as its appointee on an application for a withholding certificate . Documents required for submission to the Thai Revenue Department for the said application include a license agreement , a copy of the withholding tax return , the receipts issued by the Revenue Department, and a Power of Attorney.

Royalties paid by Thai entities to Thai franchisors/licensors or Thai branches of foreign companies are subject to 30% corporate income tax on net profit . The Thai franchisees or licensees , as the payers of royalties , have the duty to withhold 3% income tax and remit the tax to the Revenue Department no later than the seventh day of the month following the month of payment . This 3% withholding tax is regarded as an advance tax payment , which can be used as a credit against the 30% corporate income tax payable of the franchisors/licensors.

There is VAT imposed on payment of royalties to foreign franchisors or licensors . The Thai licensee, as a payer of royalties , is required to self-assess and remit 7% VAT to the Thai Revenue Department no later than the seventh day of the month following the month of payment . The VAT paid to the Thai Revenue Department can subsequently be used by the Thai licensee as a credit against its VAT payable or claimed as a refund. Therefore, the tax cost for the licensee is only the time value of money.

For payment of royalties between Thai entities, the Thai licensee does not have to self-assess and remit 7% VAT to the Revenue Department. Instead, the Thai branches of foreign companies or Thai licensors have the duty to issue tax invoices and charge 7% VAT on royalties to the Thai licensee. The Thai licensee can use the VAT in this case in the same manner as the Thai licensee stated above.

In some franchising arrangements, the franchisor from a foreign country will commit to sending or “dispatching” an employee to the franchisee in Thailand for purposes of training or teaching the practice of the operation. This may create a tax liability for the franchisor in certain circumstances.

Under Thai tax law, a foreign corporation may be deemed as carrying on business in Thailand if it has in Thailand an employee, a representative, or a go-between whose activities generate income or gains in Thailand for the corporation. One needs to be wary in this circumstance, as the Thai Revenue Department may claim that the employee so dispatched is generating revenue for the foreign franchisor in the form of the royalty stream. Such corporation might then be subject to Thai income tax (30% corporate income tax on net profit).

The relevant regulation under the Thai Revenue Code is Section 76 *bis*, which states, “If a juristic company or partnership organized under a foreign law has in Thailand for carrying on its business an employee, a representative, or a go-between, and thereby derives income or gains in Thailand, such juristic company or partnership shall be deemed carrying on business in Thailand, and such employee, representative, or go-between, whether a natural or a juristic person, shall, insofar as the said income or gains are concerned, be deemed to be the agent of the said juristic company or partnership, and shall have the duty and liability to file a return and pay tax under the provisions of this Division.”

Conclusion

The Thai Department of Internal Trade is on record as favoring growth of small and medium-sized entities through franchising as a business model in Thailand. Workshops are held from time to time in Bangkok and other urban areas to promote franchising as a mechanism for growth. Any practitioner that is asked to guide a franchise development project must be aware of the existing and future legislation in place to draft an appropriate agreement that will create a win-win situation

for both the franchisor and franchisee. Over and above solid draftsmanship, a practitioner must also be prepared to counsel the franchise operators in respect of the legal issues that often may have a direct commercial impact on the viability of the operation. Franchise participants who are new to the business clearly need firm legal counsel and should not seek to use a standard boilerplate contract, because each franchise operation presents unique issues requiring skilled draftsmanship from professional counsel.

DEBT COLLECTION

In Thailand, written and verbal contracts are accepted as a basis for almost any transaction, as contracts provide an irrefutable reference for all parties. Before finalizing any contracts in Thailand, however, one should carefully scrutinize financing and payment procedures and include a dispute resolution clause to protect both the buyer and seller should a dispute arise.

In Thailand, payment procedures tend to follow international norms. Standard credit terms allow 30 days before payment is due and interest begins to accumulate. Monthly payments are generally accepted for regular customers and those with good reputations. If credit terms are not discussed or invoicing is not standard procedure, cash or check payment is usually due within one week. Some establishments, however, will demand payment up front or upon delivery of goods, giving the customer no choice but to make a direct payment at that time.

In Thailand, although debtor insolvency is not punishable by imprisonment, insolvent debtors may be imprisoned for writing bad checks. Post-dated checks, a payment form commonly used to allow more time to make payment, frequently bounce when presented to banks.

Loan agreements, overdrafts, promissory notes and other negotiable instruments, sales agreements, etc. are the most common instruments used to create debt in Thailand. Debts in excess of THB 2,000 are not enforceable unless made in writing and signed by the borrower.

Parties may agree to have their debt expressed in foreign currency. However, payment may be made in Thai currency according to the rate of exchange current at the place and time of payment. It should be noted that payment in a specific currency can be made essential, and lawsuits can be filed in foreign currencies. Registered collateral security, even if denominated in foreign currency, must be expressed in Thai currency to register with the relevant authorities.

Arrest of Vessels Act

The Arrest of Vessels Act B.E. 2534 (A.D. 1991) provides a legal means for a Thai creditor to bring an action against a foreign ship owner or at least have the subject vessel arrested until the merits of the claim are decided. There are several grounds on which a creditor can request that the Court issue a warrant for the arrest of a vessel, including contracts for use of the vessel, contracts for the carriage of goods by sea, charges for port facilities, and mortgage of the vessel. In order to seek the arrest of a vessel in Thailand, the complainant must be domiciled in Thailand and the vessel must be either already in or about to enter Thai waters.

An application for the arrest of a vessel is brought by ex parte motion. This allows for the timely arrest of the vessel, often on the same day the motion is filed. The arrest procedure provides the creditor with some security for his claim while the case is argued on its merits and something to collect if his complaint is found valid. When ordering the arrest of a vessel, the Court is required to stipulate an amount the ship owner can pledge in lieu of having the vessel arrested. The vessel can be released against a bond issued by the Bank of Thailand or a bank guarantee. The Court may require that the complainant post funds as well to guard against frivolous actions.

The Government as a Debtor

There is no sovereign immunity in Thailand except for the royal family. However, suit may not be brought against Thailand or the Kingdom of Thailand but must be brought against each individual ministry, department, or state enterprise, since they are considered to be juristic persons, like companies. State enterprises are generally defined as follows:

- Government organizations or business units owned by the government.
- Limited companies or registered partnerships of which more than half of the shares in the capital are owned by ministries, sub-ministries, departments, or public bodies of equal status, and/or state enterprises under the above category.
- Limited companies or registered partnerships of which two-thirds of the shares in the capital are held by ministries, sub-ministries, departments, or public bodies of equal status, and/or state enterprises under the two foregoing categories.

State enterprises are defined differently under various statutes, such as the Budget Procedure Act B.E. 2502 (A.D. 1959) as amended, the National Economic and Social Development Act B.E. 2521 (A.D. 1978), the Act on Qualification Standards for Directors and Officials of State Enterprises B.E. 2518 (A.D. 1975) as amended, and the Public Debt Management Act B.E. 2548 (A.D. 2005).

The problem, however, lies not in suing but in collecting. State lands and certain state properties cannot be attached. Debts, therefore, must be paid out of appropriated money (i.e., budgeted).

The Public Debt Management Act B.E. 2548 (A.D. 2005) as amended by No. 2 B.E. 2551 (A.D. 2008) (PDMA) was enacted to repeal and replace seven major laws governing the public debt in the past [i.e., the Treasury Bill Act B.E. 2487 (A.D. 1944), the Act Prescribing the Authority of the Ministry of Finance to Issue Guarantees B.E. 2510 (A.D. 1967), the Act on Borrowing Money for the Protection of the Country B.E. 2519 (A.D. 1976), the Act Authorizing the Ministry of Finance to Borrow Money from Foreign Countries B.E. 2519 (A.D. 1976), the Act Empowering the Ministry of Finance to Raise Loans from Foreign Governments for the Purchase of Military Weapons B.E. 2524 (A.D. 1981), the Royal Proclamation Empowering the Ministry of Finance to Adjust the Structure of Foreign Loans B.E. 2528 (A.D. 1985), and the Royal Proclamation Empowering the Ministry of Finance to Borrow Money from Foreign Countries for Economic Rehabilitation B.E. 2541 (A.D. 1998)] by consolidating all said laws into one Act with added flexibility for authorizing the Ministry of Finance to manage and administer public debt. Under the PDMA, “public debt” means any debt incurred by the Ministry of Finance, a state agency, or a state enterprise through the raising or guaranteeing of loan by the Ministry of Finance, but does not include a debt incurred by a state enterprise which undertakes money lending business and such debt is not guaranteed by the Ministry of Finance. “Public debt management” means an incurring of debt through the raising or guaranteeing of loan, debt repayment, debt restructuring, and any act related to public debt. According to the PDMA, the Ministry of Finance is empowered to raise loan for the following purposes:

- (1) Financing budget in the case of deficit or where the expenditure exceeds the revenue.
- (2) Economic and social development.
- (3) Restructuring public debt.
- (4) On-lending to other government agency.

Thai baht or foreign currency received from the raising of loan under (2) to (4) shall be used in accordance with the purpose of loan raising or the approval of the Council of Ministers without

having to remit to the Ministry of Finance under the law on budgetary procedure and the law on treasury balance.

Subject to some overall limitations, the Ministry of Finance shall have the power to guarantee, in whole or in part, loans raised by a state agency, state enterprise, or state financial institution under rules, procedures, and conditions specified by the Minister as approved by the Council of Ministers. In each fiscal year, the Ministry of Finance shall guarantee loans not exceeding 20 percent of the existing annual budget appropriation and the additional budget appropriation.

UNFAIR CONTRACT TERMS

The principles of Thai contractual law are based on the importance of freedom of contract. Traditionally, therefore, the government did not intervene in mutually agreed-upon expressions of private parties, unless the intentions of such parties were clearly prohibited by law or were contrary to public order or good morals. Presently, however, due to injustices caused by parties with greater bargaining power taking advantage of those less fortunate, the government considers it necessary to provide guidelines for the courts in evaluating whether any terms found within a contract are unfair, and to give the courts the power to intervene in contractual arrangements between parties by voiding or limiting any unfair terms that courts find to exist in such arrangements. The Unfair Contract Terms Act B.E. 2540 (A.D. 1997) was thus implemented, allowing parties to refer to the courts for a decision as to whether terms within a contract are unfair (i.e., whether the terms burden one party while giving excessive advantage to the other) and are, therefore, subject to limitation or avoidance.

Contracts Subject to the Unfair Contract Terms Act

The Unfair Contract Terms Act, which went into effect on May 15, 1998, is applicable only to contracts executed after such date. All such contracts are immediately subject to the Act, Section 11 of which specifically voids any contract terms that prohibit the applicability of the Act, whether wholly or in part. Contracts subject to the Act include those discussed below.

Consumer Contracts

The Act will protect consumers from unfair terms present in contracts entered into for noncommercial purposes by consumers with trading companies or professional business operators.

Consumer contracts governing the payment of a debt through the delivery of real property to a consumer by a trading company or professional business operator may not contain terms exempting or restricting the liability of the trader or professional business operator for a defect of said property or for eviction therefrom, unless the consumer knew at the time of the contract formation about the defect or the cause of eviction, in which event such terms exempting or restricting the liability shall be enforceable to the extent that they are fair and reasonable in such circumstances.

Standard Form Contracts

Standard form contracts which are prescribed by one party and which give said party certain advantages are considered unfair and, in case of doubt, will be interpreted in favor of the other party.

Sale with Right of Redemption Contracts

The terms of such contracts which, among other things, fix the redemption price to be higher than the selling price plus interest at a rate exceeding 15% per annum are considered unfair.

Hire-Purchase Contracts

Among the terms which the Act deems unfair in such type of contracts are those that prescribe an excessive hire-purchase price or unduly burden the hire purchaser.

Credit Card Agreements

As one example of unfair contract terms, the Act cites those within such an agreement that obligate the consumer, in default of payment circumstances, to pay unreasonably high interest, penalties, expenses, or other benefits.

Employment Contracts and Covenants Not to Compete

The Act specifically prohibits terms in such contracts which infringe on a person's right to enter into juristic acts and unreasonably restrict a person's right and/or freedom to pursue his/her profession or trade. In determining whether terms limiting a person's professional pursuit are unreasonable, the Court is to consider the type of profession being restricted, the length of time of the restriction, and whether the party being restricted has other available occupational opportunities, along with other factors.

Further Examples of Unfair Terms

Further terms applicable to all contracts falling under application of the Act include those which:

- Exempt or restrict liability arising from breach of contract.
- Allow contract termination without reasonable grounds or without any material breach by the other party.
- Force one party to shoulder more obligations and/or liabilities than those prescribed under the law.
- Allow one party to delay or not to comply with its contractual obligations without reasonable grounds.
- Allow one party to enforce further obligations upon the other party than those agreed to on the date of contract execution.
- Prescribe a method of compound interest computation that causes the consumer to shoulder an excessive burden.
- Allow for confiscation of deposits that are excessively high in relation to the damages arising/resulting from a contract under which said deposit was placed. The Court will have the power to reduce the confiscation level to that of the actual damages incurred.
- Constitute terms, notices, or statements made in advance that restrict or exempt liability for infringement or breach of contract with respect to injury to life, body, or health of a third person caused by a deliberate or negligent act committed by the party who sought to restrict or be exempted from such liability, or by other persons to whom said party must also be liable. These terms, notices, or statements will be considered ineffective, as will agreements or consents of the injured parties restricting or exempting the liability for wrongful acts arising from unlawful action contrary to public order or good morals.

Guidelines for the Court

Unlike most laws enacted regarding civil case jurisdiction, the Unfair Contract Terms Act gives the courts great discretionary power in determining whether contract terms are unfair and

unreasonable. However, the Act does provide general guidelines under which the Court is to consider whether certain terms are unfair or unreasonable. For example, the Court is to consider:

- The time and place of making the contract or compliance therewith.
- Whether one party shoulders a much heavier burden than the other.
- The normal practice within the industry concerned.
- The integrity, bargaining power, economic positions, and adeptness of the parties.

Court Proceedings

In this regard, the Act allows for the use of expert testimony during court hearings. Experts giving such testimony are also entitled to compensation as well as travel and accommodation expenses.

Action to be Taken

After May 15, 1998, certain types of contracts as indicated under the Act should be carefully reviewed for compliance with the Act. In particular, terms should be reviewed in light of whether they burden one party while excessively giving advantage to the other.

CONTRACTS WITH SUPPLIERS

Generally, Thai law freely allows persons to enter into contractual agreements which establish the rights and obligations of the parties involved. General principles which apply to all kinds of contractual agreements are reflected in the Thai Civil and Commercial Code (CCC), Book I. Basically, the CCC prohibits any juristic act which is unlawful or contrary to public policy. Section 150 provides that an act is void if its object is expressly prohibited by law or is impossible or is contrary to public order or good morals.

If the purpose of a contract does not violate Section 150 of the CCC, the contract is usually enforceable under Section 151, which provides that an act is not void on account of its differing from a provision of any law, if such law does not relate to public order or good morals.

The Unfair Contract Terms Act provides for voiding contracts or provisions that unfairly benefit one party where the parties do not have equal bargaining power (e.g., consumer contracts).

The rules mentioned above are only basic principles for the formation and enforcement of contracts. Any person considering entering into a business agreement should check Book III of the CCC to determine if there are specific rules which govern the transaction in question. If the subject of the agreement is not included in Book III of the CCC, either directly or implicitly, then general contract principles will apply.

When drafting a contract, it is customary to put all terms in writing: volume, design specifications, delivery time and mode, quality control, packaging, and finance terms. Special clauses may be needed, such as price escalation, environmental issues, insurance, and arbitration. Some contracts need to include the International Rules of Trade (INCOTERMS). The intent of a contract is to reflect the common understanding of all parties involved.

INCOTERMS are a set of trade terms and conditions used internationally by those selling or buying goods and commodities across borders. They were created by the International Chamber of Commerce and approved by the United Nations in 1936. The mandate behind the project was to create a language of trade terms and laws that every nationality could use and understand, making

the exchange of goods and payment easier. There are 13 INCOTERMS that are referred to using three-letter abbreviations.

INCOTERMS are included in a contract in order to eliminate possible misunderstandings between importers/exporters and buyers/sellers. However, special provisions can override them, and the use of such terms does not necessarily guarantee a legal position.

GOVERNMENT CONTRACTS

Generally, government contracts cover a wide variety of activities, including hire of work, supply of goods, provision of services, and construction and engineering projects, in relation to which various procedures and bureaucratic requirements must be complied with before any activity can be commenced. Primarily, important procedures concerning government contracts are contained in the following laws and regulations:

- Act Governing Permission to Allow Private Bodies to Join or Operate State Businesses B.E. 2535 (A.D. 1992), sometimes called the Concessions Act.
- Regulations of the Office of the Prime Minister on Procurement B.E. 2535 (A.D. 1992) as amended.
- Relevant Cabinet resolutions.

It is difficult for the government to bear solely the responsibility of providing and constructing all infrastructures (in transport, electricity, and other public utilities) based on its own budgets. Support from the private sector is essential for construction of such infrastructures and public utilities sufficient for the needs of the country. Thus, in 1992 the new Concessions Act was enacted requiring all concessions of joint venture projects involving government and the private sector worth THB 1 billion or more to comply with the procedures as stated in the Concessions Act. If a project is worth more than THB 5 billion, the proposing agency must commission feasibility studies and detailed project analyses to be conducted by independent consultants. Also, the projects must be endorsed by a committee composed of the other agencies concerned.

The Regulations of the Office of the Prime Minister on Procurement B.E. 2535 (A.D. 1992) as amended provide sample forms for government contracts and documents. The contract documents must be submitted to the Office of the Attorney General for revision if any of the following conditions apply:

- The contract differs from the sample contract in ways in which the relevant government agency considers the differences disadvantageous to itself.
- The sample contract is inappropriate or ineffective for the specific purpose of the project.

Contracts with state enterprises which are not subject to the said Regulations generally do not require approval from the Office of the Attorney General unless they either involve a foreign party or are not considered a part of the particular enterprise's normal operating procedures. Once a contract has been approved by the Office of the Attorney General, it is not necessary to resubmit it for review upon renewal.

Government Procurement Contracts

Provisions of the Civil and Commercial Code applicable to ordinary contracts also apply to government contracts. However, more particular procedures concerning methods of procurement set forth in Regulations of the Office of the Prime Minister on Procurement B.E. 2535 (A.D. 1992) as

amended and/or certain relevant Cabinet resolutions must be complied with. Generally, government contracts are awarded on the basis of competitive bidding, and performance bonds must be posted. Most government contracts must be finally approved by the Office of the Attorney General. State enterprises have their own rules of procurement which are similar to those applicable to government agencies.

The Regulations of the Office of the Prime Minister on Procurement B.E. 2535 (A.D. 1992) are applied to every government agency that handles procurement by using budget monies, loans, and subsidies from foreign governments, international organizations or international financial institutions, etc., and the government agency is required to follow the procurement procedure as stated in the Regulations.

In considering a procurement contract and procedure, the Regulations require that a Procurement Committee shall be set up. Such Committee shall be composed of a chairman, who is the Permanent Secretary of the Ministry of Finance, plus representatives from the Ministry of Defense, the Office of the Auditor-General, the Office of the Attorney General, the Bureau of the Budget, the Office of the Council of State, the Office of the Counter Corruption Commission, the Office of the Permanent Secretary for the Office of the Prime Minister, the Comptroller-General's Department, the Public Debt Management Office, the Thai Industrial Standard Institute, and not more than five qualified persons appointed by the Prime Minister. An official of the Comptroller-General's Department will be a committee member and secretary. The Procurement Committee will also appoint not more than two assistant secretaries.

There are six procurement methods for purchasing and employment:

- Price agreement.
- Price inquiry.
- Bidding.
- Special methods.
- Special case methods.
- Auction through electronic system pursuant to the procedures prescribed by the Ministry of Finance.

Under Clause 15 *bis* of the Regulations, in procurement procedures the person in charge of each step of the procurement has to carry out the procurement openly and transparently and provide an opportunity for fair competition, taking into consideration the qualifications and capabilities of the tenderers or bidders for work, except in a specific case constituting an exception under these Regulations. Such person must record as evidence the actions taken and indicate the reasons for the issuance of orders.