

The Experiences of Franchise Business Regulations in the United States, the European  
Union and South Korea: Lessons for Thailand

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ประสบการณ์การกำกับดูแลธุรกิจแฟรนไชส์ ในสหรัฐอเมริกา สหภาพยุโรป และเกาหลีใต้: บทเรียน  
สำหรับประเทศไทย



วิทยานิพนธ์นี้เป็นส่วนหนึ่งของการศึกษาตามหลักสูตรปริญญานิติศาสตรมหาบัณฑิต

สาขาวิชากฎหมายธุรกิจ

คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย

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By	Miss Premica Chevitsophon
Field of Study	Business Law
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เปรมิกา ชีวิตโสภณ : ประสบการณ์การกำกับดูแลธุรกิจแฟรนไชส์ ในสหรัฐอเมริกา สหภาพยุโรป และเกาหลีใต้: บทเรียนสำหรับประเทศไทย (The Experiences of Franchise Business Regulations in the United States, the European Union and South Korea: Lessons for Thailand) อ.ที่ปรึกษาวิทยานิพนธ์หลัก: ศักดา ธนิตกุล, 106 หน้า.

ธุรกิจแฟรนไชส์เป็นระบบธุรกิจที่มีจำนวนเพิ่มขึ้นและได้รับความนิยมเพิ่มขึ้นทั้งในประเทศไทยและต่างประเทศ โดยการทำให้ธุรกิจแฟรนไชส์เกิดขึ้นผ่านสัญญาแฟรนไชส์ระหว่างคู่สัญญา ได้แก่ ฝ่ายผู้อนุญาตให้ใช้สิทธิ หรือ แฟรนไชส์ซอร์ และผู้ได้รับอนุญาตให้ใช้สิทธิ หรือแฟรนไชส์ซี แฟรนไชส์ซีจะดำเนินกิจการโดยอาศัย ความรู้ในการบริหารธุรกิจ และเครื่องหมายการค้าของแฟรนไชส์ซอร์ และต้องจ่ายค่าแฟรนไชส์แก่แฟรนไชส์ซอร์ในลักษณะสัญญาต่างตอบแทน แต่ในความเป็นจริงแล้ว สัญญาแฟรนไชส์มักจะเกิดการเสียเปรียบกันเนื่องจาก สัญญาแฟรนไชส์เกิดขึ้นด้วยหลักแห่งเสรีภาพในการแสดงเจตนา แฟรนไชส์ซอร์มีอำนาจเหนือแฟรนไชส์ซี โดยการกำหนดข้อสัญญาที่ไม่เป็นธรรม และมีพฤติกรรมการต่อต้านการแข่งขันที่ผิดกฎหมายขึ้น

จากการศึกษาพบว่าในปัจจุบันประเทศไทยไม่มีกฎหมายเพื่อกำกับดูแลธุรกิจแฟรนไชส์ โดยเฉพาะ ประเทศไทยใช้หลักทั่วไปในประมวลกฎหมายแพ่งและพาณิชย์ พระราชบัญญัติข้อสัญญาไม่เป็นธรรม และกฎหมายการแข่งขันทางการค้าเป็นหลักในการกำกับดูแล จากการศึกษาประสบการณ์การกำกับดูแลธุรกิจแฟรนไชส์ต่างประเทศ อาทิ สหรัฐอเมริกา และสาธารณรัฐเกาหลี นั้นสามารถกำกับดูแลธุรกิจแฟรนไชส์ได้อย่างมีประสิทธิภาพ เนื่องจากมีบทกฎหมายที่รัดกุม อาทิ มาตรการกำหนดให้แฟรนไชส์ซอร์เปิดเผยข้อมูลที่สำคัญของตัวเองก่อนเพื่อให้แฟรนไชส์ซีตัดสินใจเข้าร่วมธุรกิจ สิทธิหน้าที่ระหว่างคู่สัญญา และ ข้อห้ามในการกำหนดข้อสัญญาที่ไม่เป็นธรรมแก่คู่สัญญา อีกทั้งยังมีหน่วยงานที่กำกับดูแลโดยเฉพาะ ในส่วนกฎหมายการแข่งขันทางการค้านั้น สหรัฐอเมริกา สหภาพยุโรป และสาธารณรัฐเกาหลี ล้วนให้ความสำคัญกับกฎหมายฉบับนี้ อีกทั้งธุรกิจแฟรนไชส์ตกอยู่ภายใต้บทบังคับของกฎหมายนี้ เพื่อคุ้มครองผลประโยชน์ของคู่สัญญา และไม่เป็นการขัดกันของนโยบายส่งเสริมเศรษฐกิจของประเทศ

เพื่อเป็นการพัฒนา การกำกับดูแลธุรกิจแฟรนไชส์ในประเทศไทยอย่างมีประสิทธิภาพมากขึ้น ในระหว่างที่กฎหมายแฟรนไชส์ของประเทศไทยกำลังได้รับการพัฒนา ผู้เขียนได้นำเสนอการจัดทำแนวทาง ระเบียบข้อบังคับ ที่จะเป็นประโยชน์ในการกำกับดูแลธุรกิจแฟรนไชส์ทั้งหมด รวมถึงอธิบายขยายความบทมาตราที่ยังมีความไม่ชัดเจน อาทิการกระทำหรือข้อสัญญาที่เป็นการต่อต้านการแข่งขัน เพื่อความเป็นธรรมและสมควรแก่กรณีต่อไป

สาขาวิชา กฎหมายธุรกิจ

ลายมือชื่อนิสิต .....

ปีการศึกษา 2558

ลายมือชื่อ อ.ที่ปรึกษาหลัก .....

# # 5786358034 : MAJOR BUSINESS LAW

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PREMICA CHEVITSOPHON: The Experiences of Franchise Business Regulations in the United States, the European Union and South Korea: Lessons for Thailand. ADVISOR: SAKDA THANITCUL, 106 pp.

Franchise is a business system which is increasing and becoming popular in both Thailand and foreign countries. Franchise business occurs through franchise agreement to distribute goods and services between franchisor and franchisee. Franchisee conducts his business by franchisor's knowledge and trademark then pays franchise fee in return. Generally, franchisor has more bargaining and market power to impose such the unfair contract terms in the franchise agreement. Those terms may take too many advantages from other party and becomes illegal.

It has been found from the study that currently Thailand has no specific law regulating franchise business. Thailand regulates franchise business by the Civil and Commercial Code, the Unfair Contract Term Act and the Competition Act. Through this study, the experiences of franchise business regulations in the United States and South Korea are effective in the aspect of the specific law regulating franchise business. Franchisors are required to disclose the substantial information. Moreover, both countries have the commission to look after the fairness in franchise business particularly. As for the competition law in the United States, the European Union and South Korea are effective and franchise businesses are applicable.

In order to improve the franchise business regulation in Thailand. While the franchise specific law is in the developing process, making guideline for franchise business in Thailand is recommended. This guideline contains all essential information and in the respect of clarifying the unfair contract term provision. The guideline will play the substantial role by combining franchise specific law and competition law together.

Field of Study: Business Law

Student's Signature .....

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Premica Chevitsophon

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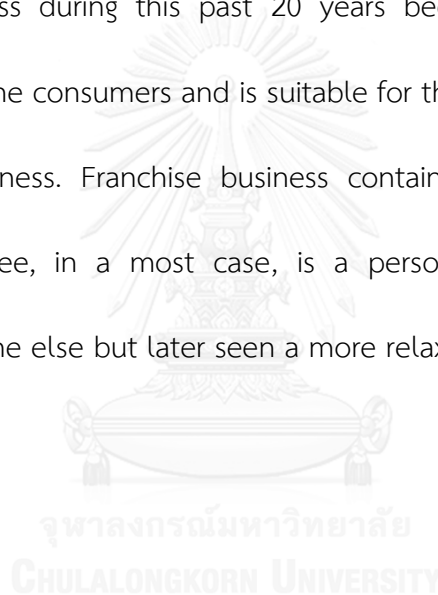
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# Chapter 1

## Introduction

### 1.1. Background and Statement of the Problem

Nowadays, franchise<sup>1</sup> business has become a substantial part of the world economic system. In Thailand, for example, the Thai government has been trying to promote this business during this past 20 years because of its reputation as a business-friendly to the consumers and is suitable for the investors who are willing to start their own business. Franchise business contains 2 parties: Franchisor<sup>2</sup> and Franchisee<sup>3</sup>. Franchisee, in a most case, is a person who has previously been employed by someone else but later seen a more relaxed opportunity of making the



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<sup>1</sup> “Franchise” means a continuous business relationship in which Franchisor allows Franchisee to sell goods or service under certain quality standards using its trademarks, service marks, trade name, signs and other business marks, and supports, educates and controls Franchisee as regards relevant management and operating activities, and in which Franchisee pays Franchise fee to Franchisor in return for using of Business Marks and the support and education concerning the management and operating activities.

<sup>2</sup> Franchisor means a business entity that grants franchise management rights to franchisee in connection with a franchise

<sup>3</sup> Franchisee means a business entity to whom franchise management rights are granted by franchisor in connection with franchise

transition from working for an employer to being self-employed.<sup>4</sup> The risk factor of a proven business is also seen as a better option than breaking totally ground.<sup>5</sup>

Franchise business is not only becomes a huge success but also offers an opportunity for new investors. Additionally, franchise business also has a low-rate of risk because most of the franchisors already have a good reputation which makes the operation easier when running the business. Franchise business was first started in the United States, then it widespread to Thailand first as a gas station.<sup>6</sup> Currently, franchise business can be seen everywhere and become part of our daily life: for example as fast food restaurant or convenient store under the names: such as Macdonald's, KFC, Burger's King, Pizza Hut, 7 eleven, Lawson 108, Family Mart etc. According to the annual report by the Department of Business Development in 2013 reported that Thailand has 477 of franchise business units which can be divided into 452 domestic units and 25 international units with the value of 184,120 million baht.<sup>7</sup>

The advantages of franchise business are as follows: First, it does not require huge fund for investment while business itself can expand rapidly. Second, it creates an inspiration because franchisee themselves operate business so it become

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<sup>4</sup> "Franchising and Licensing- What Are They? And How Can You Benefit from Them?"

<http://www.wipo.int/export/sites/www/sme/en/documents/pdf/franchising.pdf> (accessed March 1 2016).

<sup>5</sup> *Ibid.*, *supra* note 4.

<sup>6</sup> อรุณรัตน์ ยอสินธุ์, "วิเคราะห์ร่างพระราชบัญญัติการประกอบธุรกิจแฟรนไชส์ พศ.." (มหาวิทยาลัยธรรมศาสตร์, 2551).

<sup>7</sup> สถาบันระหว่างประเทศเพื่อการค้าและการพัฒนา, รายงานวิจัยการพัฒนากลยุทธ์การตลาดธุรกิจแฟรนไชส์สู่สากลภายใต้โครงการพัฒนาและสร้างโอกาสทางการตลาดธุรกิจแฟรนไชส์ (กรุงเทพมหานคร: คณะกรรมการดำเนินการจ้างที่ปรึกษา กรมพัฒนาธุรกิจการค้า กระทรวงพาณิชย์, 2556).

motivations regarding to the successful of their business. Last, franchise business can get more supplies in a lower cost. This is because when business is growing, goods supplies and equipment will in turn become cheaper from the supplier's discount as franchisees buy a lot of supplies in each time.<sup>8</sup>

Nevertheless, franchise business is considered as a growing business but there are also unavoidable disadvantages as follows: First, the lack of controlling power by the franchisor since the franchise branches belong to different franchisees. Second, the possibility to find sufficient franchisee is not always easy. Third, more possible conflict between franchisor and franchisee might be increased.

Because of the expansion of business activities using the franchise system, a number of problems have arisen from business transaction between head office (franchisor) and members (franchisee). In particular, there are many problems have occurred in relation to the Antimonopoly Act.<sup>9</sup> In order to avoid such problems, Franchise law, regulation and guideline is necessary for when it entering into a franchising contract.

At the moment, Thailand has no specific law regulating franchise business. Thus, all franchising agreements in Thailand need to comply with the provisions of

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<sup>8</sup> ประยูร บุญประเสริฐ, "สภาพโดยทั่วไปของธุรกิจแฟรนไชส์ในประเทศไทย," รัฐเพื่อรวม..โอกาสสร้างธุรกิจด้วยตนเอง, (2542).

<sup>9</sup> Fair Trade Commission, "Guidelines Concerning the Franchise System under the Antimonopoly Act," ed. Fair Trade Commission (2002).

the Civil and Commercial Code, the legislations of the Intellectual Property (Trademark Act, Copyright Act, Trade Secret Act and Trade Competition Act.)<sup>10</sup>

Generally, Franchisor needs to protect his or her intellectual property rights, reputation, standards and pleasant images of his or her goods and services. Before enter into a franchise business, franchisor needs to determine various aspects of the contract<sup>11</sup>, such as know-how clauses, tie-in sale clauses, exclusivity dealing, exclusivity territories, franchise fee and contract termination. Because of having market power or at least bargaining power over a franchisee, a franchisor tends to abuse the market power by impose anti-competitive (restrictive) clauses and non-compete covenants upon a franchisee.<sup>12</sup> Although, the essence of non-compete clauses is undeniable, Thai court seems to take various factors into consideration when determining the enforceability of such non-compete clauses, namely: (i) reasonableness of the duration; (ii) reasonableness of the geographic area; and (iii) reasonableness of nature of things.<sup>13</sup> In the other words, the Thai court applies the

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<sup>10</sup> Rawat Chomsri and Tatchaporn Natprasertkul, "Franchise Business and Lessons for Foreign Entrepreneurs," (2013). <http://siampremier.com/franchise-business-and-lessons-for-foreign-entrepreneurs/> (accessed February 3, 2016).

<sup>11</sup> สำนักงานคณะกรรมการแข่งขันทางการค้า กระทรวงพาณิชย์, "ธุรกิจแฟรนไชส์ภายใต้กฎหมายการแข่งขัน," มองโลกการแข่งขัน 2015.

<sup>12</sup> ศักดา ธนิตกุล, การศึกษาเปรียบเทียบธุรกิจแฟรนไชส์กับข้อสัญญาจำกัดสิทธิห้ามผู้รับอนุญาตแข่งขันในสหรัฐอเมริกา ฝรั่งเศส เยอรมัน ญี่ปุ่น และเกาหลีใต้: บทเรียนสำหรับประเทศไทย (จุฬาลงกรณ์มหาวิทยาลัย, 2549).

<sup>13</sup> *Ibid.*, *supra* note 10.

provisions of the Unfair Contract Terms Act when considering the reasonableness of any restriction of a non-compete clauses.<sup>14</sup>

Trade Competition Commission of Thailand (TCC) released a guideline<sup>15</sup> for franchise business for not making the vertical restraints contract terms against Section 29 of the Competition Act.<sup>16</sup> In addition, contract terms can be against other sections as well. Franchisor and franchisee do not sufficiently know their rights or scope of their rights because there is no specific law or any complete guideline available.

## 1.2. Thesis Objectives

1. To understand and analyze franchise business, its history and evolution, importance to economic systems and regulations for franchise business in Thailand.
2. To examine the legal problems of franchise business regulation concerning Thai law with emphasis on unfair contract terms and anti-competitive terms in a franchise contract.
3. To examine the franchise regulations in other jurisdictions for example the United States, the European Union and South Korea.

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<sup>14</sup> *Ibid.*

<sup>15</sup> สำนักงานส่งเสริมการแข่งขันทางการค้า กรมการค้าภายใน, "แนวปฏิบัติพหุติกรรมการค้าที่ไม่เป็นธรรมตามมาตรา 29 แห่งพระราชบัญญัติการแข่งขันทางการค้า พศ. 2542."

<sup>16</sup> Section 29 "A business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business."

4. To examine regulations in Thailand in comparison to with foreign regulations and suggest appropriate guidelines for regulating franchise business.

### **1.3. Thesis Hypothesis**

Since a franchisor normally has far more bargaining power than a franchisee, a franchisor abusively imposes unfair and anti-competitive contractual terms on a franchisee. In order to prevent or minimize those abusively practices, it is recommended that the offices of the Competition Commission, by virtue of Section 18(2), to issue “rules” regulating franchise business in Thailand.

### **1.4. Thesis scopes**

The scope of the thesis will examine the generalization of franchise business in Thailand, history of franchise business, category of franchise, the franchise bill, the example of a franchise contract used in Thailand and emphasis legal issues of unfair contact terms, anti-competitive terms as well as unfair practices in franchise business which might be contrary to the Competition Act of B.E. 2542. Moreover, franchise business regulations in other jurisdictions including their relating laws will also be discussed. The law relating of successful jurisdictions such as the United States, European Union and South Korea will be a good examples for Thailand to adopt into a guideline in order to enforce the competition law of Thailand.

### 1.5. Thesis Methodology

This thesis will mainly use documentary researches about franchise business regulation of Thailand, the United States, the European Union, and South Korea.

franchise business regulation textbook, antitrust or competition law textbook, contract and unfair contract terms textbook, the Civil and Commercial Code of Thailand, the Competition Act of Thailand, the Unfair Contract Terms Act of Thailand, relating theses, relating articles, court's decisions, web sites and news

### 1.6. Benefits of the Thesis

1. To understand the regulations of franchise business in Thailand
2. To understand the unfair contract terms and anti-competitive terms in franchising contract
3. To draw lessons from the regulations of franchising business in other successful jurisdictions for an improvement to Thailand as lessons
4. To provide the recommendations concerning to the guideline of prevent the anti-competitive terms in franchising contracts by Office of the Competition Commission



## Chapter 2

### Franchise Business

#### 2.1. What Franchising Is?

Franchising may be defined as a business arrangement which allows for the reputation, (goodwill) innovation, technical know-how and expertise of the franchisor to combined with the energy, industry and investment of franchisee to conduct the business of providing and selling goods or services.<sup>17</sup>

According to the commercial definitions of franchising that has been adopted by the British Franchise Association<sup>18</sup>, "Business format franchising is the granting of a license by one person (the franchisor) to another (the franchisee) which:

(a) Permits or required the franchisee to carry on during the period of the franchise a particular business under or using specified name belonging to or associated with the franchisor;

(b) Entitles the franchisor to exercise continuing control during the period of the franchise over the manner in which the franchisee carries on the business which is the subject of the franchise;

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<sup>17</sup> *Ibid.*, *supra* note 4.

<sup>18</sup> British franchise association, "What Franchising Is?" <http://www.thebfa.org/about-franchising> (accessed April 17 2016).

(c) Obliges the franchisor to provide the franchisee with assistance in carrying on the business which is the subject of the franchise (in a relation to the organization of the franchisee's business, the training of staff, merchandising, management or otherwise);

(d) Requires the franchisee periodically during the period of the franchise to pay the franchisor sums of money in consideration for the franchise or for goods or services provided by the franchisor to franchisee; and

(e) Which is not a transaction between a holding company and its subsidiary (as defined in s.154 of Companies Act 1948, now s.736 of the Companies Act 1985 as amended by the Companies Act 1986) or between subsidiaries of the same holding company or between an individual and a company controlled by him.”<sup>19</sup>

The franchisee receives initial training and ongoing support, comprising all the elements necessary to establish a previously untrained person in the business. The legal contract or franchise agreement between the two parties sets out the obligations and rights of both franchisor and franchisee, and determines how long the franchise arrangement will last (including renewal options).<sup>20</sup> There are basic benefit principles about owning franchise business rather than developing the

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<sup>19</sup> Martin Mendelsohn, *Franchising Law* (Richmond, United Kingdom: Richmond Law and Tax Ltd., 2004).

<sup>20</sup> *Ibid.*, *supra* note 18.

businesses or companies themselves, franchise business expand rapidly by granting a franchise to sell the products and/or services:

- Franchisor already started up a business for a while with ideas and reputation so it is not necessary for a franchisee to come up with any single idea for franchise business.
- The advantage of owning a franchise business is a freedom of being a self-employed. This freedom is tempered with the knowledge that the owner has invested in a proven system and has the training, support and encouragement of other franchisees and the franchisor.<sup>21</sup>
- By being a part of a franchise ensures the franchisee is a part of an instantly recognizable brand.<sup>22</sup>

There are 2 factors which make the business which owned by the franchisee different from the business which owned by a non-franchised. First, the franchisee must operate under the franchisor's name, us his/her system and operate within the terms of the franchise agreement. Second, the franchisee's rights to operate a business is not infinite but limited to the terms of franchise agreement or lesser period as may be appropriate if the agreement is terminated.<sup>23</sup>

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<sup>21</sup> *Ibid.*, *supra* note 4.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, *supra* note 19.

Each franchise business unit is owned and operated by the franchisee. However, the franchisor retains control over the way in which products and services are marketed and sold, and controls the quality and standards of the business.<sup>24</sup> The franchisor will receive an initial fee from the franchisee, payable at the outset, together with ongoing management service fees – usually based on a percentage of annual turnover or mark-ups on supplies. In return, the franchisor has an obligation to support the franchise network, notably with training, product development, marketing and advertising, promotional activities and with a specialist range of management services.<sup>25</sup>

#### International Franchise Association

The International franchise association (IFA) offers explanations in material provided to the media as a definition of franchise business. The most complete is expressed in the following way<sup>26</sup>:

“Franchising is a method of doing business. It is a method of marketing a product and/or service, which has been adopted and used in a wide variety of industries and businesses. The word “Franchise” literally means to be free. In this sense, franchising offers people the freedom to own, manage, and direct their own business. However, as with any freedom, there are

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<sup>24</sup> *Ibid.*, *supra* note 18

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, *supra* note 19, p. 7.

responsibilities have to do with the franchisee's commitments and obligations – usually spelled out in a franchise agreement or contract – to the franchisor.

The franchisor is the one who purchases the right to use the trademark and system of the business.

There are 2 types of franchise arrangements: (i) product distribution arrangements in which the dealer is to some degree, but not entirely, identified with the manufacturer/supplier; and (ii) business format franchise in which there is a complete identification of the dealer with the buyer.

Business format franchises offer the franchisee not only a trademark and logo, but a complete system of doing business. Indeed the word “system” is the key concept to franchising. A franchisee receives assistance with site selection of the business, personnel training, business set-up, advertising and product supply. For these services the franchisee pays an up-front fee and on-ongoing royalty, which enables the franchisor to provide training, research and development and support for the entire business. In a nutshell the franchisee purchases someone else's expertise, experience and method of doing business.”<sup>27</sup>

### FTC Franchise Rule

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<sup>27</sup> *Ibid.*

Under the FTC Franchise Rule<sup>28</sup>, there are 3 elements of a franchise including trademark, significant control or assistance and required of payment.<sup>29</sup>

#### 1.) Trademark

The franchisee is given the rights to sell goods or services dual to franchisor's trademark, service mark, trade name, logo, or other commercial symbol.<sup>30</sup>

#### 2.) Significant Control or Assistance

The franchisor has significant control of, or provides significance to the franchisee's method of operation for example approval of the site, requirements for site design or appearance, designated hours of operation, specified production techniques, required accounting practices, required participation in promotional campaigns, training programs and providing an operation manual.<sup>31</sup>

#### 3.) Required Payment

The franchisee is required to pay the franchisor at least 500 USD either before or within 6 months after opening for business.<sup>32</sup> The payments are include the payments of right to be a franchisee as franchise fees, training fees, service fees, royalties and payments from the sale of products.

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<sup>28</sup> U.S. Franchise Federal Law

<sup>29</sup> "U.S. Franchise Law Basics", Vinson Franchise Law Firm

<http://franchiselaw.net/startups/usfranchiselawbasics.html> (accessed April 18 2016).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

The first formal legal definition contained in the Financial Service Act of 1986;

“The franchise arrangements, that is to say, arrangements under which a person earns profits or income by exploiting a right conferred by the arrangement to use a trade name or design or other intellectual property or the goodwill attached to it.”<sup>33</sup>

Also, there is a franchise definition appears in EC Commission Regulation No.4087/88 of 30 November 1988. The regulation had an extensive definition which is worth considering: it defines a franchise in the following terms:

““Franchise” means a package of industrial or intellectual property rights relating to trade marks, shop signs, utility models, designs, copyrights, know how or patents to be exploited for the resale of goods or the provision of service to end users.”<sup>34</sup>

When franchisor and franchisee enter into an agreement, to transfer rights to manage a business such as know-how, intellectual property, the agreement must be explicit with details and obligations of the parties. This type of contract can be called franchise agreement.

“franchise agreement means an agreement whereby one undertaking, the franchisor, grants the other, the franchisee, in exchange for a direct or indirect

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<sup>33</sup> *Ibid.*, *supra* note 19, p. 9.

<sup>34</sup> *Ibid.*, *supra* note 19, p. 10.

financial consideration, the right to exploit a franchise for the purpose of marketing specified types of goods and/or services; it includes at least obligations relating to:

- The use of common name or shop sign and uniform presentation of contract premises and/or means of transport;
- The communication by the franchisor to the franchisee of know-how;
- The continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement”<sup>35</sup>

State laws in the United States define the definition of franchise in a slightly different ways. But there are also common themes:

“In 12 states<sup>36</sup>, the 3 elements of the legal definition are:

- Marketing plan. The franchisee is granted the right to engage in the business of offering, selling, or distributing goods or service under a marketing plan or system substantially prescribed by the franchisor.

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<sup>35</sup> *Ibid.*, *supra* note 19, p. 11.

<sup>36</sup> These states are California, Illinois, Indiana, Iowa, Maryland, Michigan, North Dakota, Oregon, Rhode Island, Virginia, Washington, and Wisconsin.



- Association with trademark. The operation of the franchisee's business is substantially associated with the franchisor's trademark, trade name, service mark, etc.
- Required fee. The franchisee is required to pay a fee, directly or indirectly.”<sup>37</sup>

“In other 5 states<sup>38</sup>, the 3 elements of the legal definition of a franchise are;

- Trademark license. The franchisee is granted the right to engage in the business of offering, selling or disturbing goods or services using the franchisor's trademark, trade name, service mark, etc.
- Community interest. The franchisor and franchisee have a community of interest in the marketing of goods or services.
- Required Fee. The franchisee is required to pay a fee, directly or indirectly.

In Thailand, there is no commercial or legal definition available in laws. Also there is no word to use in Thai to call a franchise business. Thus, Thai people use the word “Franchise” to call this kind of business which is similar to English. Some people defined a franchise as concession. Concession is government term which

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<sup>37</sup> *Ibid.*, *supra* note 29.

<sup>38</sup> These 5 other states are Hawaii, Minnesota, Mississippi, Nebraska, and South Dakota.

concedes to a private sector. The type of private sector will pay a fee back in return to a government also known as a “Private Franchise”.

In a conclusion even though other jurisdictions defined definitions of franchise in a different ways and different words but those definitions have in common in a significance of franchise business. Franchise is a business which franchisor gives a right to a franchisee for doing business under a market plan, intellectual property, know-how, trademarks, etc. Franchisee has a continuing right in a franchise business as long as to the validity of a franchise agreement. Moreover, franchisee is required to pay fees to franchisor in return.

## 2.2. History and Development of Franchise Business

This thesis is mainly focus on a business format franchise which the form of its recent development. Both business format franchise is existing but also the license technique which is a heart of franchising has been related to a business for many centuries. Throughout the history there have been systems under which rights were granted or powers delegated in return for payment.<sup>39</sup> There was an example of an ancient franchise, the boronial system in England, where the king granted rights to

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<sup>39</sup> *Ibid.*, *supra* note 19, p. 21.

barons who collected an accounted for taxes.<sup>40</sup> Lords allowed peasants certain rights on part of their land in a return for fee.<sup>41</sup>

“Franchise” is an English word but rooted from French as “Franchir” which means free from servitude (free from slavery) but meanwhile in English, franchise means privilege or privilege that has been granted by the kings of an ancient time.<sup>42</sup> The concept of an ancient franchise was when someone offer or granting someone else a license permitting to other person and to carry out some function.

### 2.2.1. The History and Development of Modern Franchising

Franchising has been developed and used in the United States as a form of the government granted rights to privates or industrial sections in order to do businesses related to public interests. Then this franchising form has been developed in a form of railway, public buses and bank, etc. Due to an industrial revolution, things were getting more complicated. The rapidly growth on populations and the form of government grants were developed into a business format franchise.

The modern franchising in business is widely believed to have first seen in 1851, by Isaac Merrit Singer, the owner of a company named “Singer Sewing Machine Co,” who is considered as “developed what may have been the first commercial

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<sup>40</sup> *Ibid.*

<sup>41</sup> British Franchise Association, "The History of Franchising" <http://www.thebfa.org/about-franchising/the-history-of-franchising>.

<sup>42</sup> ปรีศนา จีรวัดนพร, “มาตรการทางกฎหมายในการกำกับดูแลธุรกิจแฟรนไชส์” (จุฬาลงกรณ์มหาวิทยาลัย, 2546). P. 5.

application of franchising.”<sup>43</sup> He had achieved the ability to mass-produce his famous sewing machines, but had no economically viable way of repairing and maintaining them across a country as geographically vast as the United States.<sup>44</sup> He began to license his servicing and repairs to local merchants around the country, who were later permitted to become regional salesman for machines too.<sup>45</sup> Singer’s use of a contract for this arrangement introduced the earliest franchise agreement, and thus, the first modern franchise agreement was born<sup>46</sup>. Even though this singer sewing machine business was not successful enough but still be it counted as a beginning of a business format franchise, which give others rights under a format and get fees in return. In the early period of development, a manufacturer introduced the franchised “agency” or “dealer”.<sup>47</sup> At that time, it was apparently common practice in the United States to refer to retailers as agents even when there was a clear buyer-seller relationship with an independent retailer.<sup>48</sup> At that time the franchising of gas station commenced around 1930 in the United States: at around the same time as automobile industry was established.

Between the ends of 18<sup>th</sup> century to the beginning of the 19<sup>th</sup> century, franchising has been adopted with a soft drink industry named Coca Cola; the basic

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<sup>43</sup> Robert Rosenburg, *Profit from Franchising* (McGrow Hill, 1969).

<sup>44</sup> *Ibid.*, *supra* note 41

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*, *supra* note 19, p. 23.

<sup>48</sup> *Ibid.*

arrangement was that the company manufactured the syrup or syrups which form the basis of the drink. The company sold the syrups to the bottlers who mixed as directed and placed the resulting drink into the appropriate containers for distribution and sale.<sup>49</sup>

Post the World War II, the United States gained many business forms as chain stores and super stores instead of a business which was owned by a single owner. Then franchising was introduced to the food service industry later on; for example Burger King, Dairy Queen<sup>50</sup>, Dunkin Donut or even McDonald's.<sup>51</sup> Then franchising was later introduced to non-food companies. Many companies which commenced business in the 1930s did not franchise until much later. Examples include Choice Hotels; Sheraton Hotels and Travelodge.<sup>52</sup>

Table 1 the emergence of franchise business<sup>53</sup>

Year 1851	Singer Sewing Machine	Service franchise
Year 1898	General Motors	Automobile franchise
Year 1903	Coca Cola	Soft drink franchise
Year 1911	Thomson's	Chocolate franchise in England
Year 1937	McDonald's	Hamburger franchise
Year 1946	Hertz	Rental cars franchise
Year 1976	Body Shop	Beauty and health franchise

<sup>49</sup> *Ibid.*

<sup>50</sup> International Dairy Queen commenced business and franchising in 1940.

<sup>51</sup> *Ibid., supra* note 42, p. 6

<sup>52</sup> *Ibid., supra* note 19, p. 24

<sup>53</sup> *Ibid., supra* note 42, p. 7.

### 2.2.2. The Occurrence of Franchising in Thailand

Franchising in Thailand started from decades ago. Most of franchise businesses in Thailand related to foods especially fast food restaurants from foreign countries for example, Mister Donut, Dunkin Donut, KFC and A & W, etc. Thai franchise businesses which start to expand their business by using franchise are as follows:

Table 2: franchise business that use policy to expand their businesses using franchise in Thailand<sup>54</sup>

Year 1989	7-eleven (convenient store)
Year 1992	Gold Master, Buds
Year 1993	Black Canyon (coffee shop), World media

Currently, there many franchise businesses which owned by Thai business man. Thai franchisor and franchisee have been received more support from Thai government. As both franchisor and franchisee are Thais, it is therefore necessary to enact the laws to protect both parties.

Franchising has a long history and development until today. Not only food franchise but also other services business such as hairdressing, pet care and photography and everything are run in a form of franchise business. Franchise

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<sup>54</sup> *Ibid.*, *supra* note 42, p. 8.

business is a growing business where franchise membership and any associations were established to support franchisor and franchisee. “Franchisee, for the first time, has an opportunity for direct representation on the board of the BFA,<sup>55</sup> and therefore be able to contribute to the future evolution and governance of their industry. It is the first membership scheme of its kind for any franchising association in the world.”<sup>56</sup>

### 2.3. Benefits of Franchise Business

Franchises have become the fastest growing of doing business in many countries including Thailand. Franchisees are previously been employed by others but they are seeking a new way of doing business that may offer more opportunity, relax and being a self- employed. Because franchise is a personal investment, not only required an equity invested in the business but also in the time and energy in order to achieve its success, it is important when choosing a franchise to take that a few commonsense precautions.<sup>57</sup> Even one of the most important advantage to own a franchise business is a freedom to be self-employed of franchisee but still there are others reasons why franchise business is so attractive and growing rapidly in every year. This freedom is tempered with the knowledge that the owner has invested in a

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<sup>55</sup> *Ibid.*, *supra* note 41.

<sup>56</sup> *Ibid.*, *supra* note 18.

<sup>57</sup> *Ibid.*, *supra* note 4.

proven system which has the training, support, and encouragement of other franchisee and the franchisor.<sup>58</sup>

More importantly, being part of a franchise ensures the franchisee is part of an instantly recognizable brand, the product or service expectation that a brand brings, and the reputation gained by the brand over time.<sup>59</sup> Some of the advantages offer by a franchise offers are:

- Less money on investment

Franchise is a business system, which can be rapidly expand without much money for investment comparing to other type of business. Franchise business is well-known for benefiting for a person who is willing to start a small but effective business.

- Inspirations

If a person is a manager of a business, even though he conducts a business very well, he is not a business owner. Franchisee or franchisor in franchise business has a high responsibility of any risks in return as the owner. He is likely to have more inspiration and motivation for a higher business success when compare to whose non-owners.

- Rapid expansion

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<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*



The process of expanding a franchise business is also relying on franchisee's money in order of the expansion. Not only help expanding circulations but also help expanding an extensively territorial, both domestic and international levels.

- Reduced risk of failure

In case of loss in business failure, franchisee will share the loss with franchisor.

There also other advantages in franchise business such as freedom of employment, proven products or service outcome, proven brand, trademark, recognition, bulk buying advantages, industry know-how and shared marketing, advertising, as well as business launch campaign costs, etc.

One of the major attractions for the franchisee is that the franchisee will receive various trainings from the franchisor whose has an expertise in a business aspect, such as accounting, marketing and promotional campaign. As a result of the franchisor's experience, the franchisee's capital investment should be used in the most cost-effective way.<sup>60</sup> Also the franchisee will receive a special promotion, effective advertising campaign, services, and benefits which no individual trader could earn. Meanwhile, for the advantages of the franchisor is to use the financial and manpower resources of the franchisee.

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<sup>60</sup> *Ibid.*, *supra* note 19, p. 33-34.

## 2.4. Category of franchise business

The types of business franchise can be divided into many different ways such as the following;

- Market Characteristics<sup>61</sup>: this character can be found in Australia which can be divided into 4 sub-categories; (i) product franchise, (ii) business system franchise, (iii) a processing or manufacturing franchise, and (iv) group trading franchise.
- Distribution methods<sup>62</sup>: this category division can be found in the United States which can be divided into 4 sub-categories; (i) manufacturer-retailer franchise system, (ii) manufacturer – wholesaler franchise system, (iii) wholesaler-retailer franchise system, and (iv) trade name franchise system.
- Method of implementation:<sup>63</sup> the first method is product and trade name franchising. The second method is a “business format franchise” which is a format that has been developed in a modern time and also this format is recently a most used method recently. The method is starting from franchisor to provide essential equipment for franchisee at the beginning of a business

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<sup>61</sup> นางสาวพรรณพิไล อิศริยะพฤกษ์, “ปัญหาทางกฎหมายเกี่ยวกับข้อสัญญาจำกัดสิทธิแข่งขันในการประกอบธุรกิจของผู้ได้รับอนุญาตให้ใช้สิทธิตามสัญญาแฟรนไชส์” (จุฬาลงกรณ์มหาวิทยาลัย, 2553). P. 16.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, *supra* note 42.

until the termination or ends of franchise contract. Business format franchise is also known as “Package Franchising”

- Types of company: these types are roughly divided into franchise business of product and service. Franchise that sell products;
  - Foods: Black Canyon coffee, Barbeque plaza, Mk restaurant and Fuji Japanese restaurant.
  - Fast Foods: McDonald’s, Burger King and KFC.
  - Bakeries: Dunking Donut, Mister Donuts, Milk Plus and Bread Talk.
  - Beverages and Ice-cream: Baskin Robins, Swensen’s, Starbuck’s and Amazon.
  - Convenient stores: 7-eleven, Lawson and Family Mart.

Franchise businesses that offer services;

- Educations: Kumon, ECC, English First, Smart Brain and KPN musical school.
- Beauty: Wuttisak, Pornkasem and Ratchatewee Clinic.
- Entertainment: Tzutaya, Mang Pong and Video Ezy.
- Source of franchise business, can be divided into, (i) franchise business that bought from foreign counties as famous franchise store: McDonald’s, KFC, Burger King, etc. And (ii) franchise business that owned by Thai people or Thai company: S&P, Amazon café and MK restaurant.

## 2.5. The Relationship of the Parties

“A Franchise agreement is the basic contract of the operation of a franchised unit. The person who grants the franchise rights is described as the “franchisor”. The person who operates the franchised unit is described as the “franchisee”.<sup>64</sup> The franchise relationship is created by contract between two independent business people.<sup>65</sup> The proficient relationship between the parties will lead to a successful business but there are potential dangers existing if the contracts are not properly structured. The relationships which are claimed or alleged to exist in franchising fall into three categories which are:<sup>66</sup>

- 1) The traditional relationship which are invariably found in a franchise: those buyer and seller and of distributorship.
- 2) The relationships which can be confused with franchising: licensing, agency, employer, employee and partnership.
- 3) Relationships which some have sought to assert as existing as a matter of law: shadow directorships; fiduciary relationships.<sup>67</sup>

The relationship of buyer and seller, “The creation of the franchise relationship inevitably involves the sale by the franchisor of the franchise package

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<sup>64</sup> *Ibid.*, *supra* note 19, p. 65.

<sup>65</sup> *Ibid.*, *supra* note 19, p. 45.

<sup>66</sup> *Ibid.*

<sup>67</sup> The (3) relationship is not part of franchising but might be claimed by those who seek some advantage by asserting that category of relationship.

and its purchase by the franchisee.”<sup>68</sup> The relationship continues during the term of franchise agreement. Thailand does not have a specific regulation imposed in franchising as other countries such as the United States, Australia, Canada, Brazil, Indonesia and Malaysia. In order to understand the legal relationship between the parties in Thailand, some analogies from the above mentioned countries should be taken into consideration.

Rights and obligations of the franchisor usually defined into 2 periods of time, “pre-opening obligation” and “ongoing obligation”<sup>69</sup>

#### A.) Pre-opening obligation

In this period the franchisor has obligations to prepare such a disclosure document, franchise agreement and other document which state all kind of necessary information such as history of franchisor, market policy, financial information and management, etc. In the United States, the pre-opening obligation for franchise agreement is governed by the rules of the Federal Trade Commission: FTC (FTC Rule) called “Disclosure Requirements and Prohibitions Concerning Franchising & Business Opportunity Ventures” and State laws as well.

#### Disclosure Statement for franchisor

1. Identifying information as to the business opportunity seller;

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<sup>68</sup> *Ibid.*, *supra* note 19, p. 46.

<sup>69</sup> *Ibid.*, *supra* note 42, p. 57.

2. Business experience of the business opportunity seller's directors and executive officers.
3. Business experience of the business opportunity seller.
4. Litigation history.
5. Bankruptcy history.
6. Description of business opportunity.
7. Initial funds required to be paid by a business opportunity purchaser.
8. Recurring funds required to be paid by a business opportunity purchaser.
9. Affiliated persons the business opportunity purchaser is required or advised to do business with by the business opportunity seller.
10. Obligations to purchase.
11. Revenues received by the business opportunity seller in consideration of purchases by a business opportunity purchaser.
12. Financing arrangements.
13. Restriction on sales.
14. Person participation required of the business opportunity purchaser in the operation of the business opportunity.
15. Termination, cancellation, and renewal of the business opportunity.

16. Statistical information concerning the number of business opportunity purchasers (and company-owned outlets).

17. Site selection.

18. Training programs.

19. Public figure involvement in the business opportunity.

20. Financial information concerning the business opportunity seller.<sup>70</sup>

#### B.) Ongoing Obligation

The relationship between franchisor and franchisee is undeniable close to each other so they compare this relationship to a marriage relationship.<sup>71</sup> During the franchise agreement franchisor and franchisee must help each other since franchisee enter into franchise agreement until the end of business agreement. The ongoing obligation of franchisor for example, includes developing the franchised business, operating problems encountered, marketing advice, advertising support, inventory control, visit the stores, annual meeting, etc.<sup>72</sup> Moreover, franchisor has an obligation to examine the operation of franchisee whether or not franchisee follow the rules or policy given by franchisor. If not, the default of a contract terms may leads to a termination of a contract. Regarding to the rights and obligation of franchisee, there is

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<sup>70</sup> "Federal Trade Commission 16 Cfr Parts 436 and 437

Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities"  
<https://www.ftc.gov/sites/default/files/070330franchiserulefrnotice.pdf> (accessed May 1 2016).

<sup>71</sup> *Ibid.*, *supra* note 42, p. 64.

<sup>72</sup> *Ibid.*, *supra* note 42, p. 64.

no specific regulation for rights and obligation of franchisee in Thailand. The rights between two parties must be applied by the Civil and Commercial code or the Unfair Contract Term Act of Thailand. On the contrary, as in the United States for example, the right and obligation are also defined in the FTC rules and obligations are as follows:

#### Franchisee Obligation

- a. Site selection and acquisition/lease
- b. Pre-opening purchases/leases
- c. Site development and other pre-opening requirements
- d. Initial and ongoing training
- e. Opening
- f. Fees
- g. Compliance with standards and policies; operating manual
- h. Trademarks and proprietary information
- i. Restrictions on products/services offered
- j. Warranty and customer service requirements
- k. Territorial development and sales quotas
- l. Ongoing product/service purchases
- m. Maintenance, appearance and remodeling requirements
- n. Insurance
- o. Advertising



- p. Indemnification
- q. Owner's participation/management/staffing
- r. Records and reports
- s. Inspection and audits
- t. Transfer
- u. Renewal
- v. Post-termination obligations
- w. Noncompetition covenants
- x. Dispute resolution<sup>73</sup>

Franchisee has obligation for disclosure information to franchisor for pre-opening also franchisee has to follow the rules and policy given by franchisor, protect a reputation of franchisor and maintain the quality of goods or services. Franchisee has rights to be protected by a franchisor and obligation to follow instructions and pay fee in return.

## 2.6. Franchise Business in Thailand

As mentioned earlier, the franchise agreement in Thailand has no specific law and regulations.<sup>74</sup> Such agreement needs to comply with the provisions of the Civil and Commercial Code. Franchise business is considered one of a fast growing

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<sup>73</sup> Andrew J. Sherman, *Franchising and Licensing*, 3 ed., The Powerful Ways to Grow Your Business in Any Economy (New York: American Management Association, 2003). P.83-84

<sup>74</sup> May, 2016

significance compare to other types of business. Most of franchise business in Thailand brought from foreign countries. These franchises earn more than 10000 million baht per year. As of 2011, there were over 11,000 franchisees in Thailand with more than 250 franchises.<sup>75</sup> Not only famous franchise from abroad but also the numbers of Thai people who own franchise business are increase every year. Hence, franchise business becomes a substantial part of Thai society.

Resulting from absence of specific legislation, Thailand as a civil law jurisdiction pays much attention to the freedom of contract and the true intent of the contracting parties, particularly in the absence of specific statutory address as in the case of franchising.<sup>76</sup> The Thai Ministry of Commerce has long been anticipated to introduce the specific legislation in order to apply with Thai franchising, but it is remains to be seen. "At present, a clear, accessible regime for franchise is still lacking, but the recent dispositions of the franchising climate in Thailand is estimated to persuade a clear, accessible legal and business regime for franchising in Thailand"<sup>77</sup> Notwithstanding, no specific legislation for franchise but governing legislation relating to franchise are as following:

- The Civil and Commercial Code (CCC)
- The Unfair Contract Terms Act B.E.2540 (A.D. 1997)

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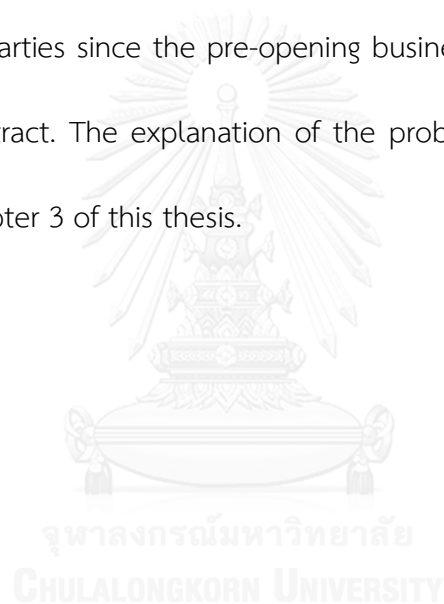
<sup>75</sup> Joel Loo Sean EE, "Franchising in Thailand - Chapter 1: Things to Consider before Buying into / Selling a Franchise in Thailand."

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

- Trade Competition Act B.E. 2542 (A.D.1999)
- Trade Secrets Act B.E. 2545 (A.D. 2002)
- Trade Secret Act B.E. 2534 (A.D. 1991)
- Patent Act B.E. 2522 (A.D. 1979)
- Product Liability Act B.E. 2551 (A.D. 2008)

Although, these legislations govern franchise business but still problems arose between the parties since the pre-opening business until post the termination of the franchise contract. The explanation of the problems and regulations will be discussed in the Chapter 3 of this thesis.



## Chapter 3

### Experiences of Franchise Business Regulations in Thailand and Advanced Economies

#### 3.1. Franchise Business Regulations in the United States

##### 3.1.1. Federal Regulation

Franchise law is complicated. There are both federal laws governing franchising and state laws governing franchising. Since 1970, when California enacted the first law, 15 States and the federal Trade Commission have adopted franchise disclosure, registration or notice laws or regulations.<sup>78</sup> On July 1, 2007, an amended version of the Federal Trade Commission's Rule on Disclosure Requirements and Prohibitions Concerning Franchising came into effect. First adopted in 1978, the FTC Rule requires that presale disclosure be provided to prospective franchisees in the United States and its territories. A franchisor attempting to sell franchises in the United States must comply with both federal and state laws. These involve detailed disclosure of the franchise opportunity at the federal level, as well as registration or notice filing requirements and additional disclosure obligations at the state level.<sup>79</sup>

Several states had already begun law regulating franchises, the Federal Trade Commission promulgated its "Disclosure Requirement and Prohibitions

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<sup>78</sup> John R F Bear, "Overview of Federal and State Laws Regulating Franchises, Distributorships, Dealerships, Business Opportunities and Sales Representatives," (2012).

<sup>79</sup> Faegre and Benson, "Demystifying Us Franchise Disclosure and Registration Laws," *Newsletters*, (2011).

Concerning Franchising” 16 C.F.R. Part 436, and this has become known as the FTC Franchise Rule.<sup>80</sup>

#### 3.1.1.1. *The FTC Franchise Rule*

As of July 1, 2007, the Federal trade commission amended version of its Franchise Rule became effective and the rule became a mandatory on July 1, 2008. The FTC Franchise Rule applied with sale of franchise systems in all 50 states, Washington DC and the US territories. It does not apply with the sale of franchises internationally.

The FTC Franchise Rule defines a “franchise” as a business relationship with including 3 elements;

1. Trademarks: Any continuing commercial relationship or arrangement as the franchisee is given the right to distribute goods and services or the franchisee seller promises or represents, orally or in writing that the franchisee will obtain the right to operate a business that is identified or associated with the franchisor’s trademark or trade name.
2. Significant degree of Control or Assistance: The franchisor has significant control of, or provides significance assistance method of operation. Examples of significant control or assistance include:<sup>81</sup>

- Approval of the site

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<sup>80</sup> "An Overview of Franchising Regulation in the United States", Kern and Hilman, LLC (accessed may 31 2016).

<sup>81</sup> *ibid.*, supra note 29.

- Requirements for site design or appearance
  - Designated production techniques
  - Required accounting practices
  - Required participation in promotional campaigns
  - Training programs
  - Providing an operations manual
3. Payment or Franchise Fee: The franchisee is required to pay a franchise fee to the franchisor as a condition of obtaining or commencing operation of the franchise. At least \$600 USD either before (or within 6 months after) opening for business. Required payment include any payments the franchisee makes to the franchisor for the right to be a franchisee. These include franchise fees, royalties, training fees, payments for services, and payments from the sale of products.<sup>82</sup>

#### Disclosure Requirement

Under the FTC Franchise Rule, a franchisor must provide a prospective franchisee with a copy of its franchise disclosure document or FDD at least 14 calendar days before the franchisor receives any consideration from the franchisee or

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<sup>82</sup> *Ibid.*

the parties sign a binding agreement.<sup>83</sup> The FDD contains 23 sample tables of contents which are divided into the following categories:

1. The Franchisor and Any Parents, Predecessors, and Affiliates.

This item required disclosure about the franchisor, its parents, its affiliates that provide products or services to the franchisee or that offer franchises in any line of business and predecessors.<sup>84</sup> Including the explanation of franchisor about general market and described the business being franchised. This will help the prospective franchisee understand the costs and risks they are likely to take on if they purchase and operate the franchise.

2. Identity and Business Experience of Key Persons.

This item includes 5 years employment histories for the principal officers of the franchisor, directors, general partners, trustee in order to describe franchise system and their experiences.

3. Litigation History.

This section discusses prior and pending litigation weather franchisor involving fraud, violations of franchise law or unfair law. Also disclosure

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<sup>83</sup> Will K. Woods, *Fundamentals of International Franchising*, 2nd ed. (Uniter States: ABA Publishing).

<sup>84</sup> *Ibid.*, *supra* note 83, p. 339.

information about whether franchisor sued franchisee over last year as a consideration of a type in franchise business's problem.

4. Bankruptcy.

This item includes bankruptcy histories from the past 10 years both inside the United States and other countries. This information helps to ensure the franchisor's finance stability.

5. Initial Franchise Fee.

This section describes the all costs franchisee must pay for goods and services received from the franchisor.

6. Other Fees and Expenses.

This items include other expense that franchisee need to pay for the franchisor. They include fees that the franchisor collects for payment to third parties.<sup>85</sup>

7. Franchisee' Estimated Initial Investment.

8. Restrictions on Sources of Products and Services.

This disclosure includes any restrictions on a franchisee's ability to purchase or lease goods, services, supplies and etc. Also from whom franchisee may purchase goods.

9. Obligations of the Franchisee.

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<sup>85</sup> *Ibid.*, *supra* note 83, p. 340.



10. Franchisor's Financing Arrangements.

11. Obligations of the Franchisor.

The disclosure divided between preopening obligation and during the course of the franchise relationship.

12. Territory.

Information about the territorial rights granted to a franchisee, and any restrictions on them.<sup>86</sup>

13. Trademarks.

14. Patents, Copyrights, and Proprietary Information.

15. Obligation of the Franchisee to Participate in the Actual Operation of the Franchise Business.

16. Restrictions on Goods and Services Offered by the Franchisee.

17. Renewal, Termination, Repurchase, Modification and/or Transfer of the Franchise Agreement, and Dispute Resolution.

This item spells out the condition or obligation of both franchisor and franchisee after the termination or expired of the contract.

18. Public Figures

19. Financial Performance Representations.

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<sup>86</sup> *Ibid.*

It is not required but it defined as a representation that states or implies a specific level or range of actual or potential sales, income, gross profits or net profits.

#### 20. List of Franchise Outlets

This item has very important information about current and former franchisees. With many franchisees in an area of sales may refer to more competition for customers. In addition the list of franchisee includes currently and those who have left must be included in the list.

#### 21. Financial Statements

The disclosure document gives important information about the company's financial status, including audited financial statements. These financial statements must be prepared by an independent certified public accountant using US generally accepted auditing standard.<sup>87</sup>

#### 22. Contracts

#### 23. Acknowledgment of Receipt.

The mandated form of receipt must be signed by the franchisee and returned to the franchisor contained information about the franchise sellers involved in the transaction and may need to be updated if additional franchise sellers become involved in the sales process.<sup>88</sup>

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<sup>87</sup> *Ibid.*, supra note 83, p. 341.

<sup>88</sup> *Ibid.*

On July 1, 2007, there was the amendment to the Franchise Rule, which was originally promulgated since 1978. The Franchisors must follow the Amended Franchise Rule. A goal of this amended was to harmonize the federal rule together with state franchise laws. The Commission also updated the rule to adapt with the technologies i.e. internet and the changing of its modern world, reducing compliance costs when it possible and addressing complaints voiced of the franchisees about they experience with franchisors after they signed in an agreement. The Franchise Rule Compliance Guide was released by the Federal Trade Commission and approved on January 22, 2007. The guide is intended to help franchisors comply with the Federal Trade Commission's amended Franchise Rule. As a result, in case of the franchisor as July 1, 2008 all franchisors must only use the amended Franchise Rule. "The guide explains the requirements of the amended rule. Moreover, it does not exhaustively cover every requirement contained in the amended rule, but focuses on amended Rule provisions that depart from the familiar UFOC. The Guide also includes sample disclosures that illustrate the new provisions and will be useful in preparing complaint disclosures.

### 3.1.2. State Regulations

#### *3.1.2.1. Laws Regulating offer and Sale of Franchises*

The FTC Rule purely requires pre-sale of franchise business disclosures information but does not provide the registration of a franchise with the Federal

Trade Commission. Hence, the states laws go a step further provide more in details for franchisor and franchisee in order of the registration. While, franchisor follows the federal law in disclosure of the information, franchisor can also be subject with the State laws according to the following criteria:

- “A prospective franchisee resides in a state that regulates the offer and sale of franchises;
- A franchise will be located or operated in such a state; or
- The offer or sale of the franchisor takes places in such a state.”<sup>89</sup>

It is possible that the sale of one franchise can trigger the franchise laws of multiple states. States that regulate the offer and sale of franchise can generally be organized into 2 categories;

- Pre-offer and pre-sale registration states; and
- States that require notice filling.<sup>90</sup>

California’s Franchise Investment Law was the first law which has adopted in the United States to regulated franchise business back in the early 1970s. This law defined the definition of a franchise as an agreement by which a franchisee is granted the right to engage in a business under a marketing plan prescribed in substantial part by the franchisor. The business must be substantially associated with the

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<sup>89</sup> *Ibid.*, *supra* note 79.

<sup>90</sup> *Ibid.*

franchisor's mark or commercial symbol, and the franchisee must be required to pay a franchise fee.<sup>91</sup>

#### A.) Disclosure Requirements

All of the States that regulate the sale of franchise required presale disclosure. The state of California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin have disclosure and registration in a state laws. The amended of the FTC Rule does not preempt the state disclosure law, except to the extent that the state laws are inconsistent.<sup>92</sup> The waiting time after disclosure before a franchisee can pay consideration or sign an agreement varies. Shorter waiting times are preempted by the FTC Rule's 14-day requirement, but longer waiting times will not be affected by the federal law. Michigan and Washington require that disclosure be provided 10 business days before the payment of consideration or execution of an agreement. New York and Rhode Island add the requirement that disclosure be made at the first personal meeting of the parties to discuss the possible purchase of a franchise if that is earlier than the 10 business-day period.<sup>93</sup> Law in a dozen of states requires franchisors to provide a similar disclosure document because the FTC format does not satisfy their state law requirements. Most franchisors choose to use

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<sup>91</sup> *Ibid.*, *supra* note 83, p. 342.

<sup>92</sup> *Ibid.*, *supra* note 78.

<sup>93</sup> *Ibid.*, *supra* note 83, p. 343.

the UFOC (Uniform Franchising Offering Circular) format which is acceptable in all registration states.<sup>94</sup>

#### B.) Registration Requirements

All of these states require franchisor to be registered with the state authorities before selling a franchise.<sup>95</sup> There is no federal law for registration so the various states require the franchises, business opportunities and seller assisted marketing plan must be registered with the state before they can be sold in the state. The states maintain laws requiring registration of a franchise offering before the offer or sale of a franchise. Michigan, Wisconsin, South Dakota, and Hawaii require registration through filling of a disclosure document and the registration is effective as of the date of the application and filling is made. The remaining states require a franchisor to obtain approval of a disclosure document from the state, and the state may request or require changes to the document before approving it.<sup>96</sup> The registration process in every state generally requires a franchise to pay a fee and submit an application for registration. In most states, the registration of the offering becomes effective with a certain period of time (around 15-30 days).<sup>97</sup> When the offering is registered, it is generally effective for 1 year and must be renewed on an

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<sup>94</sup> *Ibid.*, *supra* note 81.

<sup>95</sup> *Ibid.*, *supra* note 78.

<sup>96</sup> Babatte Marzheuser-Wood and Brian Baggot, "Franchise Law in the United States" (accessed May 31 2016).

<sup>97</sup> *Ibid.*

annual basis. For the rest of the states which no registration required for franchising, franchisor only have to prepare the disclosure information as FDD format according to the FTC Franchise Rule is acceptable<sup>98</sup>.

### 3.1.2.2. State Relationship Laws

The following U.S. States and its territories regulate the relationship between franchisor and franchisee: Alaska, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Rhode Island, South Dakota, Virginia, Washington, Wisconsin, Puerto Rico, and the Virgin Islands. The scope of the law is generally focusing on a distribution relationship, including franchise. Typically, these laws restrict a franchisor's ability to terminate a franchise relationship, often mandating good cause and notice requirements and providing for the ability of the franchisee to cure a default after receiving notice. They also restrict the circumstances under which a franchisor can decide not to renew the franchise.<sup>99</sup> In all 19 states except for North Dakota, it is illegal for a franchisor to terminate a franchise agreement without good cause. "Good Cause" including thing like the franchisee is insolvent or bankrupt, voluntarily abandons its operations, convicted a

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<sup>98</sup> นางสาววิไลทิพย์ วัฒนวิชัยกุล, "ข้อสัญญาไม่เป็นธรรมในสัญญาแฟรนไชส์ระหว่างประเทศ ศึกษาเฉพาะกฎหมายสหรัฐอเมริกาและไทย" (มหาวิทยาลัยธรรมศาสตร์, 2550).

<sup>99</sup> *Ibid.*, *supra* note 91, p. 344.

crime relating to the franchise operations and finally fails to substantially comply with its material obligations under the franchise agreement.<sup>100</sup>

Other aspects of the franchise relationship that may be covered by these laws include the right of a franchisee to associate with other franchises, the location and governing law for dispute resolution, and competition by the franchisor. Several states also prohibit discriminatory actions by the franchisor with respect to franchisees.<sup>101</sup>

### 3.1.3 The Antitrust Law

In the United States, the antitrust laws (competition law) subject all competition questions to the same legal standards. The principal provisions of the federal antitrust statutes that may be applied to challenge anticompetitive restrictions in franchising agreements are;

- Section 1 and 2 of the Sherman Act
- Section 3 of the Clayton Act
- Section 5 of the Federal Trade Commission Act<sup>102</sup>

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<sup>100</sup> *Ibid.*, *supra* note 81.

<sup>101</sup> *Ibid.*, *supra* note 91, p. 344.

<sup>102</sup> Steven Brenner Oecd Secretarait, Charles River, Patrick Rey, "Competition Policy and Vertical Restraint: Franchising Agreements." p. 81



### 3.1.3.1. The Sherman Act

This Act in 1890 was the first legislation from the government that fully supported the free market economy. The Section 1 of the Sherman Act<sup>103</sup> generally proscribes any “contract, combination, or conspiracy” that unreasonably restrains the interstate or foreign commerce of the United States.<sup>104</sup> Section 2 of the Sherman Act<sup>105</sup> makes it an offence to monopolise, attempt to monopolise, or combine or conspire to monopolise any part of the nation’s interstate or foreign commerce.<sup>106</sup>

### 3.1.3.2. The Clayton Act

The Clayton Act is part of the Sherman Act in order of the fulfilling and clarification for the Sherman Act. The purpose of this act is to prevent anticompetitive practices. Section 3<sup>107</sup> of the Clayton Act prohibits the sale or lease

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<sup>103</sup> 15 U.S. Code § 1 - Trusts, etc., in restraint of trade illegal; penalty

Section 1 “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

<sup>104</sup> *Ibid.*, *supra* note 102, p. 81.

<sup>105</sup> 15 U.S. Code § 2 - Monopolizing trade a felony; penalty

Section 2 “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

<sup>106</sup> *Ibid.*, *supra* note 102, p. 81.

<sup>107</sup> § 3 Clayton Act, 15 U.S.C. § 14

“commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition,

of a “commodity” on a condition, agreement, or understanding” that the purchaser or lessee refrain from dealing with the seller’s or lessor’s competitors, if the effect may be to “substantially lessen competition or tend to create a monopoly in any line of commerce”<sup>108</sup>

### 3.1.3.3. *The Federal Trade Commission Act*

The Federal Trade Commission Act 1914 is a law provision about anti-competitive of the franchisee. This act is a federal law and legislated by the Federal Trade commission. Section 5<sup>109</sup> of the Federal Trade Commission Act declares unlawful “Unfair Method of Competition” and “Unfair or deceptive acts or practices in or affecting commerce.” The Federal Trade Commission also held the responsibility to take an action against unfair trade practice of a form of civil liability. The Federal Trade Commission released a guideline named “Antitrust Guidelines for the Licensing of Intellectual Property.”<sup>110</sup> It was become effective since the year of 1995. The guideline is a collection of the judgements about the intellectual property issues.

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agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.”

<sup>108</sup> *Ibid.*, *supra* note 102, p. 81.

<sup>109</sup> 15 U.S. Code § 45 - Unfair methods of competition unlawful; prevention by Commission

<sup>110</sup> "Antitrust Guidelines for the Licensing of Intellectual Property," ed. U.S. DEPARTMENT OF JUSTICE and AND THE FEDERAL TRADE COMMISSION (the United States: 1995).

### 3.1.4. Cases

Most franchising restrictions, other than resale price maintenance and certain tying arrangement, are classified as non-price vertical restrictions and analysed under the rule of reason. RPM and certain tying arrangements are treated as per se violations of the Sherman Act, as are certain horizontal restraints agreed upon by competitors, e.g., price-fixing, collective refusals to deal and division of markets or customers.<sup>111</sup> Until 2007, it was illegal for a franchisor to require or coerce its franchisee to resell good at a specified price or above a certain minimum price; that is, it was illegal to prevent franchisees from discounting.

#### A.) *Leegin Creative Leather Products, inc. v. PSKS, Inc.*,<sup>112</sup>

In 2006, the Supreme Court held that such a vertical price fixing agreements or also known as Resale Price Maintenance is no longer per se illegal. They will be governed by a Rule of Reason in which legality or illegality is dependent upon whether the RPM program causes an unreasonable restraints of trade. Despite this new, relaxed standard, many franchisors have been reluctant to embrace Leegin and implement RPM in their franchise systems.<sup>113</sup>

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<sup>111</sup> *Ibid.*, *supra* note 102, p. 81.

<sup>112</sup> 551 U.S. 877 (2007)

<sup>113</sup> Robert T. Joseph and Courthney L. Seely Steven B. Feirman, *Antitrust Law Developments in Franchise System Pricing-Legal Principles and Best Practices* (Chicago, IL: International Franchise Association, 2014).

Leegin Creative Leather Products, a manufacturer of woman's accessories, entered into vertical minimum price agreements with its retailers and required the retailers to charge no less than certain minimum prices for Leegin products according to the "Brighton Retail Pricing and Promotion Policy" in 1997. PSKS, one of the retailer discounted Leegin products below the minimum as agreed, Leegin dropped the retailer. PSKS sued, arguing that Leegin was violating Section 1 of the Sherman Act by engaging in anticompetitive vertical price fixing or also known as Resale Price Maintenance. At the trial, the District Court found that Leegin's policy constituted a violation of Section 1 of the Sherman Act under the previous case of *Dr. Miles Medical Company V. John D. Park and Sons Co.*,<sup>114</sup> but the Leegin showed a precompetitive uses and effects of minimum price fixing that benefit consumer and enhance inter-brand competition which is the main purpose of the Sherman Act. The Leegin decision did not merely subject RPM traditional Rule of Reason analysis. It encouraged more experimentation with, and development of, Rule of Reason analysis.<sup>115</sup> The court pointed out that RPM is not always or almost always restrict to the trade competition.

B.) In the case of *Siegel V. Chicken Delight, Inc.*<sup>116</sup>

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<sup>114</sup> 220 US. 373 (1911)

<sup>115</sup> *Ibid.*, *supra* note 113.

<sup>116</sup> *Siegel V. Chicken Delight, Inc.* 488F2d 43 (9<sup>th</sup> Cir 1991), cert denied, 405 US 955 (1972)

The case took place in California, April 6, 1970. Chicken Delight's (franchisor) contractual requirements that franchisees have to purchase certain essential cooking equipment, dry-mix food items, and trademark bearing packaging exclusively from Chicken Delight, as a condition of obtaining a Chicken Delight trademark license. The Court has decided that that equipment has no relation to maintain a trade mark license. These requirements are asserted to constitute a tying arrangement, per se illegal under Section 1 of the Sherman Act without consideration the further reasons.<sup>117</sup> The issue of this case is whether there is a tying arrangement but rather the issue of whether the tying arrangement is justifiable.

### 3.2. Franchise Business Regulations in the European Union

Association of European nations formed in 1993 for the purpose of achieving political and economic integration. Incorporating the European Community, the European Union's member states are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.<sup>118</sup> The European Union was established by the Treaty of Rome in 1957 but later on The EU has been developed in many aspects including member states, and purpose of expanding its

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<sup>117</sup> *Ibid.*, *supra* note 98, p.71.

<sup>118</sup> <http://www.dictionary.com/browse/european-union>

economy. The latest of the development was by the Treaty of Lisbon or the Reform Treaty in 2009, effecting by form European countries into one and change the name of the Treaty of Rome to the “Treaty of the Functioning of the European Union or TFEU”<sup>119</sup>

### 3.2.1. The European Union Competition Law

Franchise agreements are subject to competition laws in the same way as other commercial relationships.<sup>120</sup> Therefore, it is important to consider the competition law both at the stage of drafting a contract and during a franchise operation of the agreement.

Within the European Union two sets of competition laws apply: those that are contained in the European Union’s own legislation of each member state. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are the primary sources of the European Union competition law.<sup>121</sup> These rules have been applied specifically to franchise agreement in a series of decision by the Court of Justice and by the Commission of the European Communities. Article 101<sup>122</sup> deals

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<sup>119</sup> วีระกัณฑ์ แก้วนอกเขา, “มาตรการทางกฎหมายเพื่อควบคุมการขายพ่วง” (มหาวิทยาลัยธรรมศาสตร์, 2554). 126

<sup>120</sup> *Ibid.*, *supra* note 19, p. 281.

<sup>121</sup> *Ibid.*, *supra* note 83, p. 265.

<sup>122</sup> Article 101

(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

with anticompetitive agreement, decisions, and concerted practices - and is the article that has the greatest impact on franchising.<sup>123</sup> Article 102 regulates abuses of a dominant position and has, so far, not been applied to franchising within the European Union.<sup>124</sup>

Article 101(1) prohibits “all agreements between undertakings, decisions by associations of undertaking and concerted practices which may affect trade between member states and which have their object or effect the prevention, restriction or distortion of competition within the internal market ..” the key concept of article 101 (1) (formerly Article 81 (1)) only applies to arrangements entered into between two or more independent “undertaking”. The term undertaking includes any natural or legal person capable of carrying on commercial or economic activities relating to the

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(a) directly or indirectly fix purchase or selling prices or any other trading conditions;  
 (b) limit or control production, markets, technical development, or investment;  
 (c) share markets or sources of supply;  
 (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;  
 (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

<sup>123</sup> *Ibid.*, *supra* note 83, p. 265.

<sup>124</sup> *Ibid.*

supply of goods or services regardless of its legal status.<sup>125</sup> Article 101(2) makes it clear that “Any agreements or decisions prohibited pursuant to this Article shall be automatically void” and Article 101(3) provides that Article 101(1) may be declared inapplicable in the case of any agreement - which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not;

(a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In other word, when the franchise agreement doubts of having a vertical restraints term contain in a franchise agreement but such a conspiracy can be applied with the exemption in Article 101 (3) of TFEU then Article 101 (1) of TFEU is non-applicability. In a contrary, if an agreement is under Article 101 (1) and receive no benefit from Article 101 (3) such agreement will be void under an Article 101 (2)

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<sup>125</sup> *Ibid.*, *supra* note 19, p. 283.



*3.2.1.1. The Commission Regulation on the Application of Article 101 (3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices.*

This regulation released by the EU commission No 330/2010 of 20 April 2010<sup>126</sup>. The purpose of this regulation was to avoid having to deal with large number notifications of franchise parties that seek for an exemption of article 101 (3). Therefore, the European Commission or EC initially published a block exemption for franchise agreement. This current block exemption is using as a replacement of the Commission Regulation (EC) No 2790/1999 of December 1999 on the application of Article 81 (3) of the Treaty to Categories of Vertical Agreements and Concerted Practices.<sup>127</sup> Vertical agreements are agreements between entities at a different level of trade, such as franchisors and franchisee, and generally do not give rises to serious competition law issues unlike horizontal agreements, which often contain market-sharing or price-fixing provision. The purpose of block exemption is to indicate is to indicate the conditions under which agreement will be treated as complying with Article 101 (3) and is, therefore, exempted from the prohibitions set out in Article 101 (1).<sup>128</sup> Not only the regulation but also the commission released the Guidelines on the application of Article 101 (3) TFEU (formerly 81 (3) TEC) to clarify Article 101 (3)

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<sup>126</sup> "Commission Regulation (Eu) No330/2010 on the Application of Article 101 (3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, " Brussel.

<sup>127</sup> *Ibid.*, *supra* note 119, p. 135.

<sup>128</sup> *Ibid.*, *supra* note 83, p. 266.

which become relevant when an agreement is found to be restrictive of competition, to determine the pro-competitive benefits produced by that agreement and to assess whether these pro-competitive effects are conducted exclusively within the framework laid down by Article 101 (3) TFEU. The guidelines examine the four conditions of Article 101 (3) TFEU:

- Efficiency gains;
- Fair share for consumers;
- Indispensability of the restrictions;
- No elimination of competition

Given that these 4 conditions are cumulative, it is unnecessary to examine any remaining conditions once it is found that one of them is not fulfilled.<sup>129</sup>

### 3.2.1.2. *The Guidelines on Vertical Restraints*

Since the Commission published the block exemption, they also released a Guidelines on Vertical Restraints in order to supplement the block exemption regulation. The guideline contained detailing the commission's policy concerning aspects of the block exemption. As a result, to identify the vertical restriction, the guideline should be used with the regulation as well. The guidelines are structured in 6 sections with 229 paragraphs. By issuing these guidelines the Commission aims to

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<sup>129</sup> "Guidelines on the Application of Article 101(3) TFEU", ed. The Commission.

help the companies to make their own assessment of vertical agreements under the EU competition rules. The standard set forth in these guidelines cannot be applied mechanically but must be applied with due consideration for the specific circumstances of each case.<sup>130</sup>

### 3.2.2. Cases

#### A.) Pronuptia de Paris GmbH v Pronuptia de Paris Irngard Schillgalis<sup>131</sup>

In 1986, Mrs Schillgalis entered into a franchise agreement in Germany to sell wedding dresses and other wedding items under the trade mark Pronuptia de Paris. Her franchise appointment covered three separate areas (Hamburg, Hanover and Oldenburg) and contained restrictions on both her and Pronuptia.

When Mrs Schillgalis was later sued for substantial royalty arrears by Pronuptia, she argues that the agreement was void under Article 81(1) (currently 101(1)) and that she was therefore not required to pay the arrears. In consideration whether a franchise agreement restricts competition, the European Court identified market sharing, the tying of products and price fixing as restrictive of competition under Article 101 (1). The European Court also indicated that restrictions for the protection of the franchisor's confidential information, restrictions for the protection of the franchisor's branding, and the imposition of the use of systems are not

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<sup>130</sup> "Guidelines on Vertical Restraints," ed. European Commission (Brussels: 2010).

<sup>131</sup> "Prouptia" 161/84; [1986] 1 CMLR 414

restrictive of competition to the extent that they are essential for the protection of franchisors from competition preservation of the identity and reputation of the network, as the case may be.<sup>132</sup> In summary, the court held that Article 101 (1) did apply to franchise agreements but drew attention to the beneficial elements of franchising and, as a result, stated that “Article 101(1) cannot apply unless the franchise agreements involve restrictions on the freedom of the contracting parties which go beyond those demanded by the nature of the franchise systems.”<sup>133</sup> The court also stated that the clause which controls the franchise network does not constitute the purpose of Article 101 of the EC Competition law and such as price recommendation is allowed.

B.) Care Watch Care Services Ltd. V. Focus Caring Services Ltd.<sup>134</sup>

In July 2014, the case was about the anti-competition covenant between Care Watch as franchisor and Focus as franchisee. Franchisee started up a competitor business against franchisor. When the franchise agreement was up to a renewal, franchisee complained about the franchisor’s way of conducting a business and arguing that franchisor was the one who breach the contract so franchisee may have an opportunity to escape from the anti-competition covenant post the termination of franchise agreement. As applying to the Pronuptia case, the court analyzed that

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<sup>132</sup> *Ibid.*, *supra* note 19, p. 29.

<sup>133</sup> *Ibid.*, *supra* note 83, p. 267.

<sup>134</sup> [2014] EWHC 2313 (Ch)

the know-how and all of the assistance granted by franchisor to franchisee in this case may turn franchisee into one of the competitor against franchisor. Focus as franchisee had taken the franchisor's know-how without any prior knowledge or experience about the care industry. It was all about the know-how and assistance from the franchisor. The result was the court agreed with franchisor, insisted that non-competition covenant post termination of agreement is applicable and permitted the franchisor the injunction against franchisee about operating the competing business.

### 3.3. Franchise Business Regulations in South Korea

The Republic of Korea (hereafter, Korea) has established a reputation of achieving a high rate of economic growth and has shown a rapid economic growth for the past 60 years since the Korean War. According to the Korean Fair Trade Commission (KFTC) as the end of 2014, there were over 3,500 franchise brands registered franchisors in Korea accounting for nearly 4,300 franchise brands.<sup>135</sup> The Korean Fair Trade Commission (KFTC) has a department related to franchise and the authority to impose administrative measures to those who engage the unfair trade practices or transactions.

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<sup>135</sup> Sun Chang and Maureen A. O'brien Robert A. Smith, "Franchising in South Korea " *Wiley Rein LLP*, (2016).

### 3.3.1. The Monopoly Regulation and Fair Trade Act

The Monopoly Regulation and Fair Trade Act (MRFTA) is the competition law of Korea. The purpose of this Act stated in the Article 1 that “the purpose of this Act is to stimulate the creative initiative of enterprisers, to protect consumers, and to strive for the balanced development of the national economy by promoting fair and free competition through the prevention of the abuse of market dominance and excessive concentration of economic power by enterprisers and through regulation of improper concerted practices and unfair trade practices.” The enactment of this Act first in 1980 and went into effect in 1981. The applicable legal sources that can be used in order of vertical restraints in franchising also can be found in this Act further, the Enforcement Decree to the MRFTA and together with the specific guidelines provided by the Korea Fair Trade Commission (KFTC). The main regulations concerning vertical restraints can be found in the following regulations and specific competitive acts:

The Unfair Trade Practices contained in Article 23 of the MRFTA, the Enforcement Decree. The KFTC Guideline for Unfair Trade Practices and resale price maintenance (RPM) contained in Article 29 of the MRFTA and the Enforcement Decree.

### 3.3.2. The Fair Transactions in Franchise Business Act

Korea has amended the specific laws governing franchise relationships by passing the Act on Fairness in Franchise Transactions or the Franchise Act which went

into effect on November 1, 2002, and thereafter, was substantially amended in 2008, 2010, and recently 2014.

The Franchise Act is divided into 6 chapters; Chapter 1 provides the purpose of the Act and its definitions of various terms used throughout the Act. Chapter 2 deals with the basic principles that govern the franchise transactions, Chapter 3 has to do with fairness in franchise transactions, which, among other requirement, places a disclosure requirement on the franchisor also provides a list of basic provisions that needs to be included in franchise agreement. Chapter 4 provides information and numbers of the member dispute mediation committee regulated by the KFTC and the roles of “franchise consultant.” Chapter 5 is about the Fair Trade Commission’s procedures of handling cases. Chapter 6 imposes civil and criminal liabilities on the person(s) who violates the Act.<sup>136</sup> The provision about the unfair practice can be found in a few provisions such as article 12 “Prohibition of Unfair Transactions” The Franchise Act has been amended recently on 2014. These legislative went into effect on August 2014. Additionally, the Monopoly Regulation and Fair Trade Act (MRFTA), Korean Commercial Act, and various regulations promulgated by the KFTC are also generally applicable. Finally, general principles of tort and contract law that exist within the Korean Civil Code are also applicable.<sup>137</sup>

The major purposes of the Amendment are:

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<sup>136</sup> Tae Hee Lee, "South Korea."

<sup>137</sup> Robert A. Smith, "Franchising in South Korea ".

1. To strengthen the rights of franchisees;
2. To remedy unfair practices of franchisors; and
3. To strengthen the obligation to provide information.<sup>138</sup>

The brief of the amendment is as following;

#### A.) The Disclosure Requirement

Under the pre-amendment Franchise Act, franchisors are required to allow franchisees or potential franchisees to access information related to sales forecast only at their request.<sup>139</sup> The following information is an example requirement that must be disclosed;

- Description of the franchisor's general status;
- Description of any legal violations of the franchisor and/or its executives;
- Description regarding to the obligations of the franchisee;
- Description regarding of the conditions of, and restrictions on, the franchised business operations;
- Description regarding to current status of franchise of the franchisor;
- Detailed description of the procedure and period required to commence the franchised business; and

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<sup>138</sup> Shin and Kim, "Recent Development in South Korean Franchise Laws," (2013).

<sup>139</sup> *Ibid.*



- Description of the franchisor's support, education, and training with respect to management and operation of the franchised business.<sup>140</sup>

Since the franchisor prepare for the documents in order for a disclosure and file it to the KFTC, the KFTC will conduct and review before the registration.

This review may take approximately 2 months from the file process completed.

#### B.) The Prohibition of Unfair Transactions by franchisor

The new amendment added a new provision regarding to the Unfair Trade Practices of the Enforcement Decree of the Fair Transaction in Franchise Business Act in 2014

The new amendment was also states about the Protection of business area (Article 12-4) before this there was no specific regulation about the area of business. The new amended of the Franchise Act now provides that, when executing an agreement, the franchisor is obligated to define and stipulate the business area for a franchisee in the agreement.<sup>141</sup> Moreover the franchiser is prohibited to set up another franchisee of the same kind of the trade or otherwise operated directly by the franchisor in a same business are without the justifiable reasons. The Franchise Act also included certain provisions of the MRFTA regarding general fair trade principles and prohibits some certain action causes by a franchisor. "In particular, a

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<sup>140</sup> *Ibid., supra* note 137.

<sup>141</sup> *Ibid., supra* note 138.

franchisor may not whether directly or through another enterprise, commit any act which may obstruct fair trade in the franchised business, including;

1. An unreasonable refusal to transact;
2. A transaction with restrictive terms; or
3. An abuse of bargaining power.”<sup>142</sup>

Under the amended of the Franchise Act, franchisor is prohibited to refuse the renewal of the franchise contract with franchisee. If the franchisee requests a renewal between 180 days and 90 days prior to the expiration of the agreement, the franchisor may not refuse to renew the franchise agreement without just cause. However, there are the exceptions that allow franchisor to refuse a renewal in following circumstances;

- the franchisee has failed to perform its payment obligations of the franchise fee under the franchise agreement;
- the franchisee has not accepted the terms and conditions of the franchise agreement or business policy that are generally accepted by other franchisees; or
- the franchisee has failed to observe the following important business policies of the franchisor that are deemed necessary for maintaining the franchise business<sup>143</sup>

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<sup>142</sup> *Ibid.*, *supra* note 142.

### 3.3.3. The Guidelines for Review of Unfair Trade Practices

The guidelines<sup>144</sup> were released by the Korea Fair Trade Commission or KFTC. The purpose of this act is preventing the violations of the Act if business and it includes the Franchise Act by providing examples of the unfair trade practices, clearly and concretely regulating the “Types of and Criteria for Unfair Trade Practices” as per paragraph (1), Article 23 (Prohibition on unfair trade practice) of Monopoly Regulation and Fair Trade Act (MRFTA).<sup>145</sup> The guidelines are mainly clarified and make criteria for illegality examination as an Article 23 may be failed or too broad to provide such specific information. The Guidelines clarify such the meaning of the words in Article 23 and in paragraph (1) of the Article 36 (Attach Table 1) for a better understanding such as unfairly, without a justifiable reason, may possibly. Moreover, the guidelines provided criteria for Illegality Examination by Individual Act that may risk for all of unfair trade practices such as refusal to deal, price discrimination, unfair dumping. The current guideline has been criticized for

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<sup>143</sup> Jae Hoon Kim and Sun Chang, "South Korea," in *Getting The Deal Through*, ed. Philip F Zeidman (2013).

<sup>144</sup> Korean Fair Trade Commission, "Guidelines for Review of Unfair Trade Practices," (2009).

<sup>145</sup> Article 23 (Prohibition on unfair trade practices)

① No enterpriser shall commit any of the following acts that are likely to impede fair trade (referred to as “unfair trade practices” hereinafter) or make an affiliated company or other enterprisers perform such acts: <Amended on December 30, 1996, February 5, 1999, April 13, 2007>

1. Act of unfairly rejecting any transaction or discriminating against a certain transacting partner
2. Act of unfairly excluding competitors
3. Act of unfairly inducing or coercing customers of competitors to deal with the enterpriser in question
4. Act of engaging in a trade with a transacting partner by unfairly taking advantage of its own position in the transaction
5. Act of trading under conditions that unfairly restrict the business activities of a transacting partner or disrupt the business activities of another enterpriser
6. Deleted <February 5, 1999>
7. Act of assisting a person with special interest or other companies by providing advanced payment, loans, manpower, real estate, stocks and bonds, goods and services, intangible assets and such, or by transacting under substantially favorable terms

failing to provide such detailed and practical standard. Hence, the review of the guidelines has been done by the KFTC. The KFTC issued a notice to amend its substantive review guidelines on Unfair Trade Practices on November 2015.

The general unfair trade practices can be divided into 9 categories first, unfairly refusing a transaction; second, discriminating against transacting party; third, unfairly coercing customers; fourth, unfairly soliciting customers; fifth, unfairly coercing customers; sixth, trading with a party and taking unfairly advantages by using a bargaining power; seventh, trading under terms and conditions which unfairly restrict business activities of transacting party; eighth, disrupting business activities of another enterprise, and lastly under provision of capital assets and etc.

#### 3.3.4. The Guidelines for Review of Resale Price Maintenance

The Korean Fair Trade Commission drafted the amendment to the Guidelines for Review of Resale Price Maintenance and now begins the public comment period. The RPM guidelines prescribe specific review criteria for the enforcement of Article 29 (1) of the MRFTA Article 29 (Restrictions on Resale Price Maintenance)

1. No enterpriser shall engage in resale price maintenance. Note, however, that this provision shall not apply to cases wherein there are justifiable reasons in terms of the maximum price maintenance preventing the transactions of goods or services at above specified prices. Amended on January 16, 2001”

The reasons behind this guideline are the Supreme Court of Korea held that minimum PRM is acceptable and permitted if there are reasons existed. The purpose of the guidelines seeks to enhance the consistency and efficiency in the manner by which cases are handled by clarifying and specifying the examination criteria for the Restriction on RPM in paragraph 1, Article 29 of the MRFTA.

### 3.4. Franchise Business Regulations in Thailand

#### 3.4.1. Overview

As mentioned in the last chapter, franchise has no specific law regulating franchise business in Thailand. In general, the Civil and Commercial code has been used to regulate franchise contracts. Since Thailand is classified as a civil law jurisdiction. Thai law gives much recognition to the freedom of contract.<sup>146</sup> However the freedom of contract may cause restriction in those contracts, the legislation which control the restriction in contract terms is Thailand's Unfair Contract Terms Act B.E. 2540 (A.D. 1997) ("UCTA"). The court will enforce this act when franchisor and franchisee already has conflict or dispute and bring that dispute to the court. The Trade Competition Act 1999 (TCA 1999) has been playing a significant role on Thai agreement concluded in Thailand especially to franchise agreements.<sup>147</sup> Trade

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<sup>146</sup> *Ibid.*, *supra* note 75.

<sup>147</sup> *Ibid.*

competition disputes may be resolved at first-instance by the Trade Competition Board.<sup>148</sup>

### 3.4.2. Relating Laws

#### 3.4.2.1. *The Civil and Commercial Code*<sup>149</sup>

The principle of contract including formation, penalty, effects, and rescission, void and voidable is stipulate in the Civil and Commercial Code. The Civil and Commercial Code shall be applied to franchise contract. The parties can agree to follow the principles set forth in the Civil and Commercial Code as follows;

1. Autonomy of Will. According to this principle, all people were born freely and we are freely to make an action by their satisfaction. Thus, the state or government must intervene only in certain inevitability cases or limited by that person desire. As a result, the obligation in the contract should form by an intention of the person which is acceptable and enforceable by the law.

2. Freedom of Contract. If the person uses a freedom of contract principle, this will be a beneficial to the economy systems. The freedom of contract principle comes from an economic liberalism since the in 18th century. In 18th century Adam Smith wrote in the book called “The Wealth of Nations” stating that “Everyman

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<sup>148</sup> *Ibid.*

<sup>149</sup> "The Civil and Commercial Code of Thailand," (Thailand).

should be free to pursue his own interest in his own way.”<sup>150</sup> However, at the end of 19th century, the freedom of the person was declined because of the status relations, an absolutely freedom of contract is an ideal. The status between parties is unequal dual to social and economic status of each party. The stronger own more power for bargaining and creating the contract terms.<sup>151</sup>

Freedom of contract can be divided into 4 significantly principles as follows;

2.1. Freedom to make a contract; contracts can be form within a freedom of the 2 parties' in the form of an offer and acceptance so as long as to a subject of that obligation is not contrary to a public order or good morals.

2.2. Freedom to select the other party; it is an absolutely freedom of the parties to select who they would like to make a contract with. However, some people can be restricted by their abilities to make a contract according to the law.

2.3. Freedom to decide the contract terms

2.4. Freedom to form a form; it is a freedom of the person to make a contract in any form and that contract is enforceable. Even though, some of the contracts are compulsory under the form's rule unless that contracts can be void or unenforceable.

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<sup>150</sup> จำปี โสคติพันธุ์, คำอธิบายหลักกฎหมาย นิติกรรม-สัญญา, ed. 6 ปรับปรุงใหม่, vol. 6 (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2543). p. 212.

<sup>151</sup> *Ibid.*

The freedom of contract principle is a basic and one of the most important principle in the law of contract. There was a proverb saying that “Pacta Sunt Servanda” meaning that “agreements must be kept.” From the freedom of contract, the contract causes obligations and obligation comes from the parties’ intention and agreed. The parties must follow its obligations in the contract terms. Even though the obligation maybe unfair to one party, that agreements must be kept and even if one party (mostly franchisor) get more advantages in a contract than other party (franchisee). The contract is still enforceable under the law. This principle can be found in Section 151 of the Civil and Commercial code

Section 151, the contract is not automatically voidable unless it is against the public order or good morals.

“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 moral.”

However, in that aspect the contract terms which form by the parties maybe differed from any provisions of the law and still enforceable whereby the parties must keep in mind that any contracts including the contract terms must not contrary with the public order or good moral. Even if any contract terms or the subject of the contract are prohibited by the law, but it is impossible to follow any contract terms or they are against to the public order or good moral, that contract terms or the



whole contract must be defined as void. This principle can be found in Section 150 of the Civil and Commercial Code,

Section 150 stated that void acts means “An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals.”

Not only Section 150 and Section 151 are essential principles in contract law but also Section 152<sup>152</sup> whereby juristic act law and obligation law are also use as a regulation for the franchise business in Thailand.

### 3. Disclosing Information

In general, the parties must disclose the facts that needed to be told or the essence of the agreement before doing the agreement. The mistake in a disclosure of intention may lead to a voidable act. Hence, franchise agreement needs to be based on true intention of the parties.

### 4. Good Faith

“Good Faith” in Thai law can be found in Section 5 of the Civil and Commercial Code;

Section 5, stipulated that “Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith.” This Section 5 is a heart of the civil

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<sup>152</sup> Section 152 an act which is not in a form prescribed by law is void.

law in Thailand in a way that any legal action must be based on a good faith between the parties. The court applies this good faith principle to determine public order and fairness to the parties.

#### 5. Equity

The equity principle under the Unfair Contract Term Act of Thailand states that the unfair contract terms or the agreement to exploit opposite parties too much maybe unenforceable or enforceable in whole or in part. The Unfair Contract Term Act will be examined in the next chapter of this thesis.

Lastly, the Civil and Commercial is one of the most important principles for drafting a franchise contract. Nevertheless, the Civil and Commercial is too broad in every little detail for terms in the franchise contract. For example, according to Section 150 and Section 151 the franchisor and franchisee agreed with the contract term in the franchise agreement in which its terms are not contrary with the public order or good moral but the franchisor takes too much of advantages from the franchisee by using a higher bargaining power over franchisee without any fairness. For example, the franchisor can terminate the contract at any time depending on a franchisor's desire, and the franchisor does not disclose important information to franchisee. The franchisor is discriminates between each of franchisees or franchisor offer too much burden for franchisee or using any others unfair terms. None of the mentioned terms are against or contrary with the public order or good moral

according to the spirit of law in the Civil and Commercial Code. This, however, against the Unfair Contract Terms act and the Competition act of Thailand.

#### 3.4.2.2. *The Unfair Contract Terms Act B.E. 2540*

The Unfair Contract Terms Act has been using to regulate the unfair contracts in Thailand since B.E. 2540 (A.D. 1997). In B.E. 2533 (A.D.1990), the Ministry of Justice viewed that the social and economic systems were becoming more complicated. The gap of powers between parties had increased the party which owned more power and over in expertise would take too many advantages from other party who had less bargaining power by using the gap of law of freedom of contract principle in the Civil and Commercial code. Therefore, the Unfair Contract Terms Act has been enacted and announced in the Royal Thai Government Gazette on November 16, 1997 and came into force on May 15, 1998 or 180 days after the announcement.<sup>153</sup>

Franchise contract is defined as one type of a business contract under the Civil and Commercial Code. Thereby, the franchise contract is regulated under the Unfair Contract Terms Act. It is important to examine which contract term is fair or enforceable.

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<sup>153</sup> *Ibid.*, *supra* note 61, p. 29.

“Section 5 stipulated that “The terms restricting the right or freedom or an execution of a juristic act related to the business, trading or professional operation which are not void, but being the terms that cause the person whose right or freedom has been restricted to bear more burden than that could have been anticipated under normal circumstances, shall only be enforceable to the extent that they are fair and reasonable according to such circumstances.

In determining whether the terms under paragraph one cause the person, whose right or freedom has been restricted, to bear more burden than that could have been anticipated, consideration shall be taken to the scope of the area and the period of restriction of right or freedom, including whose ability and opportunity to profess occupation or to execute juristic act in other form or with other person, as well as all legitimate advantages and disadvantages of the contracting parties.”<sup>154</sup>

Such the contract terms are governed by Section 5 and are restricted the right or freedom of occupation or restricted the right or freedom of the parties. Meanwhile, the contract terms or subject of the contract which is not related to right or freedom in professing and occupation in the business field is not under the controls of the Section 5 of the Unfair Contract Terms act. The 3 basic elements of the Section 5 are as follows;<sup>155</sup>

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<sup>154</sup> "The Unfair Contract Terms Act," (1997).

<sup>155</sup> *Ibid.*, *supra* note 61, p. 30.

1. The terms must be related to the restriction of right or freedom or an execution of a juristic act related to the business, trading or professional operation.
2. The terms must not void.
3. The terms that cause the person whose right or freedom has been restricted to bear more burden than that could have been anticipated under normal circumstances.

In order to determine Section 5, scope of the area and the period of restriction of right or freedom should be taken into consideration, including whose ability and opportunity to profess occupation or to execute juristic act in other form or with other person, as well as all legitimate advantages and disadvantages of the franchisor and the franchisee according to the franchise agreement.<sup>156</sup>

Under Section 5 paragraph 2, the court will consider whether this restricting contract terms cause the person, whose right or freedom has been restricted, to bear more burden than that could have been anticipated regarding the above 3 elements;<sup>157</sup>

1. The consideration according to the territories and duration of the restricting right and freedom. In others word, the court will consider whether this terms restricted duration is too long and whether the restricted territories include too many

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<sup>156</sup> *Ibid.*, *supra* note 12, p. 92.

<sup>157</sup> *Ibid.*, *supra* note 61, p. 39.

area. If yes, the court will believe that the franchisee bears more burdens beyond the expectation. On a contrary, if those restrictions, both duration and territories are limited, fair and reasonable for protecting the benefit of franchisor, this will be considered as a fair and reasonable restrictions which are not causing too much burden for franchisee.

2. The consideration according to an ability and career opportunity or, juristic act in other from or with other person. The court will consider regarding to the ability or opportunity of the restricted party as to whether or not that person has an ability or opportunity to continue with other business opportunity or continue the juristic act with others. If yes, the court will believe that the restrictions cause no burden beyond the expectation.

3. The consideration of lawful interest of the parties. This is a general principle which helps with the court's discretion. The lawful interest is flexible, and may changes from time to time, from place to place and it must decent adapted with the latest state of the society. Also, it provides more opportunity for the court to use the wider discretion to prescribe the fairness in a restricted contract term.

According to these considerations, the court will determine all of the determination together based on normal person's expectation and point of view assumingly to be under the restricted circumstances but not only the restricted party's expectation. However, this guideline is a question of fact. Franchisee bears

with the burden of proof. He/she must claim and prove to the court himself/herself in case where the court believes that franchisee bear more burden than that could have been anticipated and beyond the expectation.

The unfair contract terms may be effective only under the circumstances of fair and reasonable. The consequence is obviously different from the Civil and Commercial Code which only rule the contract void. The consideration of the Unfair Contract Terms Act, establishes guidelines for the court in Section 10 as follows,

Section 10 stated that in determining to what extent the terms be enforceable as fair and reasonable it shall be taken into consideration all circumstances of the case, including:

1. Good faith, bargaining power, economic status knowledge and understanding, adeptness, anticipation, guidelines previously observed, other alternatives, and all advantages and disadvantages of the contracting parties according to actual condition
2. Ordinary usages applicable to such kind of contract;
3. Time and place of making the contract or performing of the contract;
4. The much heavier burden borne by one contracting party when compared to that of the other party.

In general, franchisor has more bargaining power compared to franchisee. Franchisor mostly imposes the contract terms in advance and makes a proposal ready by offering the contract form to the franchisee immediately without any negotiation opportunity. As a result of the Unfair Contract Term Act B.E 2540, the court will determine and control the restricted contract terms to be fair and reasonable depending on case by case basis. However, the Unfair Contract Term Act is applied only when the parties commence the litigation.

#### 3.4.2.3. *The Competition Act B.E. 2542*

The advanced economies countries view that it is important to the government to intervene in a market mechanism in certain and necessary circumstances for over hundreds years.<sup>158</sup> Canada was the first country enacted the competition law in 1889 called “The Act for the Prevention and Suppression of Combination in Restraint of Trade. The United States was a second country enacted the Sherman Act. Next the United States enacted two of the relating laws namely the Federal Trade Commission Act and The Clayton Act in 1914.<sup>159</sup>

In Thailand, not only the competition act but also the consumer protection was drafted in order to protect the right of customers in the way which they know or

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<sup>158</sup> ศักดา ธนิตกุล, คำอธิบายและกรณีศึกษา พระราชบัญญัติ การแข่งขันทางการค้า พ.ศ. 2542 (กรุงเทพมหานคร: วิญญูชน, 2553).

<sup>159</sup> *Ibid.*, p. 18.



being informed accurate information about the products or services. The significance of the consumer protection act was to protect the consumer sovereign and also help to control the action of competitors from wrong doing action for such as overload or false advertisement. Therefore, the year of 1979 was the starting point that rights of consumers are protected.

The government of Prime Minister: Anant Panyarachun (1990-1991) had a vision and policy to abolish the action that leads to the distortion of market mechanism. The government also encouraged private sectors to invest in public utilities especially in the communication systems and electric city. The policy affected the private sectors to be involved in the market mechanism and competitive circumstances. As a result, the government tried to comply with the international standards by drafting the Competition Act to protect and control the economic systems. The significance of the Competition Act 1999 is to improve from the 1979 Act and to prevent the action of anti-monopoly, reduce and restrict the unfair competition. The Competition Act affected on April 30, 1999. This act tried to pull of the strength of many other countries' competition law into Thai competition law and did not adhere to only a few countries.<sup>160</sup> The purposes of this act can be described as follows;<sup>161</sup>

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<sup>160</sup> *Ibid.*, p. 30.

<sup>161</sup> *Ibid.*, p. 31-34.

1. To encourage the free market mechanism of goods and services for the efficiency improvement.
2. Deconcentration of economic power, which is also the purpose of The Sherman Act<sup>162</sup>
3. Protection of market access and a fair opportunity to compete on the merits.
4. The promotion of consumer choice, considering price, quality and service.
5. To encourage and protect the industries.

Section 29 stipulated that “A business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business.”

Section 29 of the Competition Act has a wide scope. In other word, Section 29 can be defined as “catch-all provision.” This is, if any restrict or the suspect of unfair competition or restraint of trade action was made but the provisions such as Section 25, 26, 27 or 28 cannot punish that action for wrong doing, Section 29 can be a general provision for a punishment. The scope of Section 29, applies with business

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<sup>162</sup> The Sherman Act is Antitrust Law of the United States

operator(s) under the definition in Section 3 of this Act. This provision can apply to the anti-competition and unfair trade practices toward another business operator.

### 3.4.3. Unfair Trade Practices

#### 3.4.3.1. Noncompetition Covenants

Noncompetition covenants, Non-compete clauses or “Restrictive covenants in Franchising are very common in franchise, agency and distribution agreements.”<sup>163</sup>

They seek to protect goodwill and customer relationships by limiting the licensee’s right to operate a competing business both during the term and after the termination or expiry of the agreement.<sup>164</sup> The clauses are between two parties, franchisor and franchisee, where the franchisee agrees not to use information learned during franchise agreement in subsequent business efforts for a set period of time. Franchisor usually insist on non-compete covenants because of the possibility of a franchisee, upon termination or resignation, working for a competitor or starting their own business, and gaining competitive advantage by abusing confidential information about their former franchisor’s trade secrets or other information such as customer’s list, market plans or business practices.

For example, one restrictive covenant may state that the franchisee cannot operate another similar business that would compete with the franchised business during the term of the franchise agreement. These are called in-term non-

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<sup>163</sup> Gordon Drakes and Neil Johnston, "Restrictive Covenants in Franchising," (2014).

<sup>164</sup> *Ibid.*

competition covenants.<sup>165</sup> There may also be post-term non-competition covenants that prohibit the franchisee from operating a similar business even after the terms of the franchise have expired. Each state, however, has its own laws regarding the enforcement of non-competition covenants. Often, in-term covenants can be more readily enforced than post-term covenants.<sup>166</sup>

#### 3.4.3.2. *Exclusive Dealing*

Exclusive dealing is prohibited when occurs of the franchisor to impose restrictions toward the franchisee and its freedom to choose with whom, what, and where they deal, and to capture two types of anti-competition vertical transactions including the conditional supply of goods or services, or refusing to supply for specify reasons.<sup>167</sup>

Exclusive dealing is a term that both directly and indirectly force the franchisee to accept the restrictions, though the restrictions are irrelevant with the quality of goods or services. It is occurred because of the business reasons, the market is unsure and variable so exclusive dealing may be the term that ensures franchisor and franchisee that franchisee's goods will always be available.

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<sup>165</sup> Lee Ann Obringer, "How Franchising Works ", HowStuffWorks.com  
<http://money.howstuffworks.com/franchising4.htm> (accessed May 23 2016).

<sup>166</sup> *Ibid.*

<sup>167</sup> Matthew Murphy, "Issues in Competition Law and Franchise Agreement in Austrlia."

Meanwhile, franchisor's goods will always be released.<sup>168</sup> For example, franchisor will only supply goods or services or gives a particular price or discount on the condition that the franchisee buys the goods or services from a particular third party.<sup>169</sup> Other types of exclusive dealing is a dealing which involve the franchisor refusing to supply goods or services unless the franchisee agrees not to either buys goods of a particular kind or description from a competitor, or resupply goods of a particular kind or description from a competitor.<sup>170</sup>

#### 3.4.3.3. Exclusive Territories

Franchises grant an "exclusive territory" to their franchisees as part of the rights given under the franchise agreement contract. The purpose of doing this is to assure the franchisee that they will have some area in which they can market and operate under the franchise brand without any competition from another franchisee or even the franchise company itself. This territory is normally described in geographical terms though it can also be described as a specified radius originating from the actual location of your unit.<sup>171</sup> This restriction may be irrelevant with the quality or efficiently of goods or services. Hence, the exclusive territory leads to the

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<sup>168</sup> มนตรี ศิลปป์มหานัจฉิต, "มาตรการทางกฎหมายเกี่ยวกับข้อตกลงฟร้งขายในสัญญาแฟรนไชส์" (จุฬาลงกรณ์มหาวิทยาลัย, 2535). p. 21.

<sup>169</sup> *Ibid.*, *supra* note 167

<sup>170</sup> *Ibid.*

<sup>171</sup> Jeff Elgin, "How Do Franchise Territories Work?" <https://www.entrepreneur.com/answer/222280> (accessed 24 2016).

state of no competition between intra-brand or under the same franchising brand but still the competition between outside brands is exists.

#### 3.4.3.4. *Tying Arrangement*

Tying Arrangement or Tie-ins sale is an agreement in which franchisor imposes conditions the sale of a particular product to franchisee in order to purchase an additional, unrelated product. The franchisor refuses to sell only the wanted products to franchisee but impose a franchisee to purchase tied product.<sup>172</sup>

In a tying arrangement, the product that the franchisee wants to purchase is known as the "tying product," while the additional product that the franchisee must purchase to complete an agreement is known as the "tied product." Typically, the tying product is a desirable good that is in considerable demand by franchisee. The tied product is normally less desirable or otherwise difficult to sell.

Not all of the tying arrangement is prohibited; the 4 elements must be proved to establish that a particular tying arrangement is illegal.

1. The tying arrangement must involve two different products. Manufactured products and their component parts, such as an automobile and its engine, are not considered different products and may be tied together without violating the law.
2. The purchase of one product must be conditioned on the purchase of another product. A buyer need not actually purchase a tied product in order to bring

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<sup>172</sup> *Ibid.*, *supra* note 168, p.22.

a claim. If a vendor refuses to sell a tying product unless a tied product is purchased, or agrees to sell a tying product separately only at an unreasonably high price, the court will declare the tying arrangement illegal. However, if a buyer can purchase a tying product separately on nondiscriminatory terms, there is no tie.

3. A seller must have sufficient market power in a tying product to restrain competition in a tied product. Market power is measured by the number of buyers the seller has enticed to enter a particular tying arrangement. Sellers expand their market power by enticing additional buyers to purchase a tied product. However, sellers are prohibited from dominating a given market by locking up an unreasonably large share of prospective buyers in tying arrangements.

4. A tying arrangement must be shown to appreciably restrain commerce. Evidence of anticompetitive effects includes unreasonably high prices for tied products and unreasonably low prices for competing products in a tied market. A plaintiff need not establish that a business has actually controlled prices through a tying arrangement, as is required to establish certain monopolistic practices, but only that price and other market conditions have been significantly influenced.<sup>173</sup>

Other than this, if the tying arrangement facilitates the more effective sale, it is necessary to use tying and tied product together for a better result or

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Tying Arrangement (n.d.) West's Encyclopedia of American Law, edition 2. (2008). Retrieved May 23 2016 from <http://legal-dictionary.thefreedictionary.com/Tying+Arrangement>

accommodate to a customer. The restriction may be usable under the law of unfair competition

#### 3.4.3.5. Resale Price Maintenance

Resale price maintenance or vertical price-fixing is the term when franchisor imposes the price restriction in a franchise agreement to fix the resale price, minimum price, maximum price toward a franchisee or any other action relate directly to the price. A franchisee is not allowed to sell goods or services at a lower or higher price. By the restriction of resale price maintenance leads to less competition among franchisee. Normally, franchise business must maintain their price and standard of goods or services. Practically, franchisor must determine about prices of goods or services in order to maintain an identical standards throughout a franchise systems.<sup>174</sup>

#### 3.4.3.6. Refusal to Deal

In general circumstances of any business the party may choose other business partner by their choice result from the freedom of contract. However, under certain circumstances, there may be limit on this freedom for a firm with market power.<sup>175</sup> Sometimes the refusal to deal is with customers or suppliers, with the effects of preventing them from dealing with a rival: "I refuse to deal with you if you

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<sup>174</sup> *Ibid.*, *supra* note 42, p. 135.

<sup>175</sup> Federal Trade Commission, "Refusal to Deal" <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal> (accessed May 24 2016).



deal with my competitor.”<sup>176</sup> Refusal to deal can be harm to the market by one party attempt to control the market by doing a business with certain parties, boycott or isolate others. Even though, businesses granted freedom to use discretion for choosing the business partner but once this freedom has used in a form of conspiracy. It will be refusal to deal which breaking the law.



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<sup>176</sup> *Ibid.*

## Chapter 4

### Analysis on Franchise Business Regulations of the United States, the European Union, South Korea and Thailand

#### 4.1. The United States

The United States Franchise Regulations are included the Federal Regulation and the States Laws. The United States has specific franchise regulations both in the level of federal and local law in each state or state laws. They both can be used in franchise agreement at the same time. The Federal Regulation required the franchisor for the disclosure information. This federal law is mandatory and used in the United States and its territories. The Federal regulation of the United States named the “*Disclosure Requirements and Prohibitions Concerning Franchising*” concerns with the preparation of the disclosure documents but unrelated with the registration and the relationship between franchisor and franchisee. Not only Franchise Rule and the Amended Franchise Rule but the FTC also provided a guide for the franchise rule in order to clarify and make the FTC Franchise Rule more understandable. The States Laws provided more in details of the registration and the relationship between franchisor and franchisee. Most of the States required the registration of the franchisor before offering or selling franchise. Not only franchisor has to follow the federal rule but also required to follow the States law as well if met with the criteria required by those states. As for a competition law of the United States, the Antitrust Law plays a very important role. The Antitrust Law in the United

States will make the same legal standard about the prohibition of the unfair trade practices, reduce or prevent the cartel or the uses of a bargaining power. The Sherman Act, the Clayton Act are subjected to regulate the vertical restraint in franchise business.

In conclusion, the United States franchise regulations are effective and sufficient to protect the unfair trade practices since the United States have the Antitrust Law and the specific franchise rules regulating franchise business. There are also many franchise cases in the United States, containing not only the laws but also as the legal procedures under the common law system country. The Federal Trade Commission and the courts themselves have a lot of experiences regarding to a lot of franchise cases. The common law country follows the judgment from the previous cases as a source of law but franchise business's circumstance may changes from time to time, the result may leads into the different result. Consequently, there will be the challenges for the court to make a new standard decision because sometimes the judgments from previous cases are outdated.

#### **4.2. The European Union**

The European Union or EU is not a single country but an association between member states. Hence the regulation will beneficially harmonize the differences between member states into one regulation. The European Union uses the European Union Competition Law in order to regulate franchise business in EU. In the stage of drafting a franchise contract and during the agreement, this competition

law has to be considered. Articles 101 and 102 of the Treaty on the Functioning of the European Union are the primary source of the European Union competition law. The Article 101 has been applied to a franchise agreement as a decision by the Court of Justice and the Commission of the European Communities. The purpose of the Article 101 is prohibited the agreement which may be void if not met the criteria according to Article 101 (3). The Commission Regulation on the Application of Article 101 (3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices is the regulation which helps explain the agreement or trade practices if met the criteria of the Article 101 (3) if yes the Article 101 (1) will be non-applicability.

The negative of franchise regulations in European Union is they are lacking of the franchise specific law. In order to apply with the European Union Competition Law is maybe too broad since franchise is a unique business. Somehow, the European Commission has attempted to fulfill the practices of the European Union Competition Law Article 101 by released the regulation and the guideline for a better understanding and performances for the competition law. Moreover, the court tends to use the decision of previous cases, law and guidelines to make the decision in newer cases to avoid the gap of law.

### 4.3. South Korea

South Korea is a country which earned many success in business growth in past years and until recent. Many franchise business has occurred within these years. The Korean Fair Trade Commission or KFTC realized the importance of the specific law to regulate franchise business in Korea. Hence, Korea legislated to the specific franchise regulation called the “Fair Transactions in Franchise Business Act” or the Franchise Act and it went into effect in 2002. This act aims to balance the power between franchisor and franchisee and the details of franchise business such as franchise license, franchise fee, disclosure requirement and the obligation of both franchisor and franchisee. In other word, the Franchise Act is pretty much complete for regulating franchise business within Korea. Somehow, the Franchise Act may be fail in practical but the KFTC revised the amendment to the Franchise Act several times.

Furthermore, the Franchise Act states the action which may become a prohibition under the “Monopoly Regulation and Fair Trade Act” and which ones that may become an exception. Even though, Korean Franchise Act is a complete satisfaction of franchise regulations but, KFTC also released guidelines to clarify the Monopoly Regulation and Fair Trade Act in order to guide the party to avoid committing the unfair trade practices. To sum up, Korea has a specific law regulating franchise for many years as “The Fair Transactions in Franchise Business Act” since franchise business has arising in Korea for many years. In addition, the KFTC also

released the guidelines for unfair trade practices to guide and complete the franchise business in Korea.

In addition, through the brief studies of franchise business regulations of other countries in Asia such as Japan and Taiwan, they also provide the guidelines relating to franchise. In Japan, the guideline is named “Guidelines Concerning the Franchise System under the Anti-monopoly Act of 2002. The guidelines refer to the franchise business or kind of business between head office and members by the uses of trademark and trade name and the management of the head office. Then members pay fees in return. The guidelines also state about the abuse of a position of strength cases which the head office occupies a stronger position than the members, to avoid the difficulty of the members the guideline provides a range of factors for determining whether the head office occupies the stronger position. “The Fair Trade Commission Disposal Directions (Policy Statements) on the Business Practices of Franchisers” is a franchise guideline in Taiwan, the purpose of this act is to maintain trading order in the franchise market and ensure fair competition between franchise businesses; the FTC has therefore analyzed and complied with patterns of conduct of franchisor that might be considered in a violation of the Fair Trade Act.

In conclusion, the countries in Asia such as South Korea, Japan and Taiwan are most a civil law country. The civil law country will focus more on statues rather

than cases. The written laws should cover almost all possibility conflicts. They released a guideline as a direction concerning to their Anti-monopoly Acts and prohibited the conducts of competition restriction or impediment to fair competition. The franchise businesses are applicable with the guidelines but the guideline does not include all of the required information in order to start up the franchise business.

#### **4.4. Thailand**

Thailand has no specific law regulating franchise business. Additionally, there is no franchise business case in the court while this business system is still ongoing without the proper regulated protection and sometimes without the fairness. The court is not an expertise in business area compare to the Trade Commission. Trade Competition Commission of Thailand (TCC) should pay more attention to franchise business in Thailand since the numbers of franchise business has been rising in each year. Drafting for the Franchise Act is complicated and takes a long time. Thailand has attempts to draft an act about franchise but it has been years and the drafting is still in a developing process. Meanwhile, the franchise business agreement was drafted based on a contract law of Thailand but franchise business has more complicated details when compared to a general principle of the contract law in the Civil and Commercial Code.

The contract should follow the general principles of the contract law and the unfair trade practices otherwise it may be void according to Article 150 of the

CCC. The Unfair Contract Terms Act which decided which contract term is restricted or prohibited is used in accordance with the court's discretion. According to Section 5 "the terms restricting the right or freedom or an execution of a juristic act related to the business, trading or professional operation which are not void, but being the terms that cause the person whose right or freedom has been restricted to bear more burden than that could have been anticipated under normal circumstances, shall only be enforceable to the extent that they are fair and reasonable according to such circumstances. In determining whether the terms under paragraph one cause the person, whose right or freedom has been restricted, to bear more burden than that could have been anticipated, consideration shall be taken to the scope of the area and the period of restriction of right or freedom, including whose ability and opportunity to profess occupation or to execute juristic act in other form or with other person, as well as all legitimate advantages and disadvantages of the contracting parties." In this aspect, the franchise party especially franchisee can be protected by the Unfair Contract Terms Act in case of the unfair trade practices but the contract has to be brought as a lawsuit. The protection will not be fully provided because in franchise agreement, the parties must realize their right and obligation including pre-agreement, during agreement and post-agreement.

Lastly, the Competition Act of Thailand also plays an important role for the regulation on a business including franchising. The competition law aims to reduce



the cartel, market dominance and balancing the uses of the business powers as well as protecting the right of the consumers. Especially, Section 29 of the act is prohibiting all kind of the unfair trade practice but this section is too broad and the strictly interpretation is needed as it called catch-all provision. Unfortunately, the Competition law has been enacted for years but not a single case has been reach up to the court trail. In other word, the Competition law in Thailand has been defined as a total failure in practices. The Trade Commission has released the guideline in Thai to use with the Section 29 but this guideline aimed to use with all types of business not only franchise which more unfair trade actions in franchise business must be more clarified. Moreover, in order to own a specific regulation for franchise business, the competition law can be only just a guideline for not doing unfair trade practices of Section 29 but still not sufficiently for a satisfaction of the complete regulation for franchising.

## Chapter 5

### Conclusion and Recommendation

#### Conclusion

Franchise business has its own regulation in some jurisdictions. Franchisor occupies a stronger position and mostly use bargaining power over franchisee including false disclosure information, take too much of advantages, conduct of competition restriction or the unfair trade practices and etc. Meanwhile, franchisee usually agrees to those unfair contract terms because of the exchanges in the right of trademark and support from franchisor. As a result, franchisees are rather to bear too much burden in the agreement than in normal circumstances. Thailand has no specific law for regulating franchise business but the laws relating franchise business in Thailand are Section 5, 150 and 151 of the Civil and Commercial Code, Section 5 and 10 of the Unfair Contract Terms Act and Section 29 of the Competition Act. While the United States has both franchise law and antitrust law regulating franchise, the European Union uses the competition law regulating franchise and guidelines for its competition law were added. South Korea also has franchise law, competition law and guidelines to use with their competition law.

#### Recommendation

Through the study, some jurisdiction has their own franchise law but in Thailand, the Department of Business Development in the Minister of Commerce has attempting to draft the Franchise Act. However, the draft is still in a developing

process. Then the Franchise guideline will be an excellent option regarding to use instead of the pending Franchise Act and wait until it is finalized. According to Thailand Competition Act, Chapter 2 Office of the Competition Commission, Section 18 stated that “There shall be established the office of the Competition Commission in the Department of Internal Trade, Ministry of Commerce, with the Director-General of the Department of Internal Trade as Secretary-General, who shall be the superior official responsible for the official affairs of the Office, with the powers and duties as follows:

(2) to prescribe regulations for the purpose of the work performance of the office of the Competition Commission.”

Trade Commission should release the guideline for Thai franchisor and Thai franchisee or the franchise business which conduct in Thailand jurisdiction as a guidance. Not only it will be beneficial to franchisor and franchisee but will also help the Trade Commission as a standard regulation to their works and better performances. Moreover, the guideline can be used as an evidence for the court’s judgment in order to determine the provision of Section 5 of the Unfair Contract Terms Act. The guideline will be a combination of the experiences from other jurisdictions. First, it contains the information about franchise business which contained in the specific laws of the United States and South Korea. Second, experiences from the guidelines of unfair trade practices in franchise business such as

the guideline on vertical agreement of the European Union's competition law and guideline on Unfair Trade Practices of Korea's Monopoly Act. The guideline will contain with both franchise specific law and the explanation of the unfair trade practice provision as Article 29 of the Competition law. It should be composed with these following recommendations;

- The information Disclosure Statements of franchisor
- The registration requirement of the franchisor and franchisee
- The obligations of franchisor and franchisee
- The relationships between franchisor and franchisee
- Franchise fees
- The conducts of the unfair contract terms and exceptions
- Renewal of franchise agreement
- Limitations on termination of franchise agreement
- The mediation of disputes.
- Etc.,

This franchise guideline recommendation will be useful to the franchisor and franchisee. Even though, the guideline is usable but still unable be fully

enforced as a law. Thailand still should have its own specific franchise law in order to complete the franchise business regulation and its enforcement.



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