

THE FRANCHISE LAW  
REVIEW

TENTH EDITION

Editor  
Alan H Silberman

THE LAWREVIEWS

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# PREFACE

The term franchise, used without contextual reference or an accompanying definition, is extraordinarily plastic and uncertain. As Humpty Dumpty explained to Alice in *Through the Looking Glass*: ‘When I use a word, it means just what I choose it to mean – neither more nor less.’ One hundred-plus years ago, you would expect it was part of a discussion about stringing electrical lines or laying streetcar tracks along urban streets, or later, the sale of equipment or machinery with a manufacturer’s brand name and possibly some territorial exclusivity. If a non-business question was involved, the franchise topic was a women’s ability to vote or the age a person had to attain to have a right to vote. Reduced to its lowest common denominator, franchise referenced a right involving a business or a transaction whose terms (and government-imposed limitations, if any) were typically a matter of freedom of contract.

By the middle of the 20th century, franchising took on a different, more complex meaning and grew exponentially. Commonly used terms such as partnership, dealer, distributor and agent did not capture the full scope of the intended relationship and were often inapplicable. In addition, most entrepreneurial innovators in franchise concepts were focused principally on brand, broader elements of brand identity, uniformity and the means of achieving those results. These goals, often reflected in restrictions, controls and allocation of function between franchisor and franchisee, were used to frame provisions in franchise contracts and associated documents. They were accepted by prospective franchisees as part of the pathway to success. Less evident was the fact that many franchisees needed support on an ongoing basis and that the franchisor – as the ‘creator and keeper of the flame’ – was the expected and essential source of that guidance and direction, which may not have been supplied.

A franchise, on the franchisor’s side, did not simply mean contract, fees, royalties, expansion and certain profit; it involved much more, including compliance, authority to impose system changes and broad reservations of rights to engage in future conduct. On the franchisee’s side, the belief in mutually aligned objectives and financial success was sometimes difficult to maintain. The franchise contract, which often grew in complexity to address each new problem, was, and is, essential, but it is not sufficient. The keyword for successful franchising is no longer only rights; at its core is an ongoing relationship.

Of course, success usually breeds imitation with less qualified and responsible players on both sides. While the number and variety of franchise offers and locations continues to grow, the promise of franchising as an engine of economic growth and benefit is often questioned by franchisees, their lawyers, legislators, regulatory agencies and others. A variety of statutory and administrative solutions to actual, perceived and sometimes created problems abound. Some are useful. However, in some jurisdictions, the result is a crazy quilt of requirements,

exemptions and efforts at insufficient or uncritical probing of the nature and extent of any significant issue, the source or sources of complaint, and the long-term impact of legislative or regulatory solutions.

That said, there are responsible individuals who seek reconsideration of the premise that structured disclosure of franchise agreement terms and related information (as in the grandfather of regulatory effort, the 1978 US Federal Trade Commission Franchise Disclosure Rule), without mandating specific contract provisions, provides a sufficient basis for an informed decision, while others point to the enactment of added relationship laws (such as California's 1981 Franchise Relations Act and its subsequent amendment) to argue that it demonstrates benefits without adverse effects on franchising and that the approach should be adopted and enlarged.

What seems to be without question is that just as departures from basic contract law principles to fashion franchise-specific rules raise serious questions, existing legal rules of general applicability in a jurisdiction should also usually apply to franchise agreements (unless pre-empted by law).

It is also essential to recognise that laws and regulations often have unintended effects. When Schwinn determined that effective marketing of its bicycles by franchised dealers required out-of-the-box personalised set-up as a brand-defining element, it became an issue in US antitrust litigation that went to the US Supreme Court. Surprisingly, the Court applied the ancient rule against restraints on alienation, and held that independent dealers could not be restricted in the sale of items they had purchased – but consignees could be fully controlled. Did the decision strike a blow for franchisee freedom? The result: independent dealers who valued the Schwinn product became consignees, with attendant cost and status changes.

Many business transactions have asymmetric features, franchises among them. Legislation or regulation that aim to create a level playing field do not change the facts. If consumer demand for a franchise is created by the franchisor, the potential franchisee may accept the terms even if he or she preferred a modification. If the franchisee negotiates and walks away from the offer, is it always a sound choice? If the franchisor adopts the change and it increases the franchisor's costs, who pays? The franchisees (including those who did not care) in higher fees? The franchisor's shareholders? Deductions from managements' salaries?

Asking, and answering, these questions in a careful and forthright manner is the challenge for today and tomorrow. But it must be placed in context. Notwithstanding legislation and regulation and the risk of new or enhanced requirements, new franchise offerings are ubiquitous in almost every jurisdiction; the pool of potential franchisees has not diminished; and the number of newly opened franchised locations reflects continual net growth. In sum, it is reasonable to conclude that the foundational elements of modern franchising are – and will continue to be – sound.

Remember, this review is intended as a broad, first-level survey of principles and practices in a substantial number of jurisdictions. It will, we hope, be useful in helping to identify issues and shape further enquiry. Its scope will also help to underscore the fact that effective franchise law compliance programmes are an essential element of risk management and client education (as well as having potential salutary effects in affecting the sanctions imposed when companies and individuals find themselves under scrutiny). The review is not a compendium of answers to actual problems that arise in the course of business activity. Answers require detailed review and evaluation. Franchise laws are not only complex as

written and interpreted; they often call for fact-intensive enquiry and analysis by experienced counsel. Those caveats notwithstanding, it is a body of information of value to anyone concerned with franchise questions that arise on a regular basis.

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July 2023

# TAIWAN

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## I INTRODUCTION

Franchising in Taiwan has continued growing in the past few years, especially in the food service and retail businesses. International franchise brands have developed steadily, such as Starbucks, Pizza Hut, McDonald's, MOS Burger, Watsons and World Gym. Local franchisors have also endeavoured to scale up their brands, such as Chatime, TTK, Louisa Coffee, 85°C Bakery Cafe and COSMED, while mainly focusing on developing in the Asian markets.

Statistics show that franchising in Taiwan managed to overcome the challenges imposed by the covid-19 pandemic, indicating the strong potential of the business model. According to statistics from the Taiwanese Chain Stores and Franchise Association (TCFA),<sup>2</sup> which was founded in 1987 by franchisors, in 2022, the total number of franchise brands increased by 1.7 per cent to a total of 2,290, and the number of franchising stores increased by 4.1 per cent to a total of 121,162. Additionally, according to statistics from the Taiwan Fair Trade Commission (FTC), in 2020, franchising convenience stores of the top five brands increased by 4.86 per cent compared to the previous year, resulting in a total number of 11,985 stores.<sup>3</sup>

In addition to the TCFA, franchisors also founded the Association of Chain and Franchise Promotion, Taiwan (ACFPT) in 1995, and both of these associations aim to promote franchising in Taiwan. The TCFA and ACFPT provide varied functional services, such as hosting exhibitions to boost the Taiwan franchise industry, offering educational training programmes for franchisees and franchisors, and acting as an information exchange platform.

## II MARKET ENTRY

### i Restrictions

With respect to the principle of freedom of contract and with the intention of attracting foreign investment, Taiwan generally imposes no restrictions on foreign franchisors entering the Taiwan market, although if a foreign investor (including investors from China, Hong Kong or Macau) acquires shares in a Taiwanese company or establishes an entity in Taiwan, advance approval of the foreign investment is required.<sup>4</sup> To franchise in Taiwan, foreign

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2 See statistics from the TCFA, [http://www.tcfa.org.tw/announce\\_detail.asp?id=9205775](http://www.tcfa.org.tw/announce_detail.asp?id=9205775).

3 See statistics from the FTC, <https://data.gov.tw/dataset/145232>.

4 See Articles 2, 3, 4 and 8 of the Statute for Investment by Foreign Nationals; see also Articles 2, 3, 4 of the Regulations Governing Permission of Investment in Taiwan from the Mainland Area and Article 31 of the Laws and Regulations Regarding Hong Kong & Macao Affairs

franchisors are neither required to establish joint ventures nor give management power to Taiwanese citizens. Other than the basic law governing business in Taiwan, including the Civil Code, the Company Act and the Tax Code, there is no specific law regulating franchise businesses, except for the Fair Trade Commission Disposal Directions on the Business Practices of Franchisers (FTC Directions). The FTC Directions primarily regulate disclosure obligations and other behaviour in an attempt to prevent unfair competition.

## **ii Foreign exchange and tax**

There is no regulation specific to franchise businesses with respect to foreign exchange, and there are no tax regulations specific to franchising. A foreign investor may apply for exchange settlement against the annual interest accrued or the profit surplus distributed from his or her investment. Further, when the investor is approved to transfer his or her shares, or to withdraw or decrease his or her investment, or when he or she obtains the capital gain realised from his or her investment, a foreign investor may also apply for exchange settlement in a lump sum against the total amount of his or her investment as approved.<sup>5</sup> The same rule applies to investment in Taiwan by a Chinese investor or a company funded by a Chinese, Hong Kong or Macau investor.<sup>6</sup>

There are no tax regulations specific to franchise businesses either. General tax issues are discussed in Section V.

## **III INTELLECTUAL PROPERTY**

### **i Brand search**

There is no governmental institution that is specifically responsible for gathering information regarding franchise businesses in Taiwan. Notwithstanding this, trademark search is a useful tool for obtaining an understanding of brand activity in Taiwan. The Taiwan Intellectual Property Office (TIPO) maintains and provides an online database with a very functional search tool for public use. Through the TIPO website trademark search system,<sup>7</sup> the public can find comprehensive information for a registered trademark in Taiwan using keyword searches. Useful queries include searching for the identity of an applicant for a trademark, the words used in a trademark and the status of pending or granted (registered) trademarks.

### **ii Brand protection**

Taiwan's trademark registration system is based on the first-to-file principle. According to the Taiwan Trademark Act, any person who wishes to obtain trademark rights may apply for registration.<sup>8</sup> An application must be submitted to TIPO containing the applicant's information, a reproduction of the trademark and a list of identified goods or services for

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5 See Article 12 of the Statute for Investment By Foreign Nationals.

6 See Article 12 of the Regulations Governing Permission of Investment in Taiwan from the Mainland Area and Article 31 of the Laws and Regulations Regarding Hong Kong & Macao Affairs.

7 See the Trademark Search system page of the website of the Intellectual Property Office of Taiwan: [https://twtmsearch.tipo.gov.tw/OS0/OS0302.jsp?l6=zh\\_TW&isReadBulletinen\\_US=&isReadBulletinzh\\_TW=true](https://twtmsearch.tipo.gov.tw/OS0/OS0302.jsp?l6=zh_TW&isReadBulletinen_US=&isReadBulletinzh_TW=true); for English version: [https://twtmsearch.tipo.gov.tw/OS0/OS0101.jsp?l6=en\\_US&isReadBulletinzh\\_TW=true](https://twtmsearch.tipo.gov.tw/OS0/OS0101.jsp?l6=en_US&isReadBulletinzh_TW=true).

8 See Article 2 of the Trademark Act.



the registration.<sup>9</sup> By obtaining a registration, an applicant will have the exclusive right to the use of the trademark from the date of publication of registration for a period of 10 years,<sup>10</sup> and the registration can be renewed to extend the protection period (the duration of each renewal period shall be 10 years), as long as the business continues and the trademark is used on or with the goods or services identified in the registration for the trademark. Furthermore, applications to register intangibles such as sounds or smells as trademarks can be filed to obtain protection under Taiwanese law.

Taiwan's Trademark Act also emphasises the protection of famous trademarks and seeks to prevent trademark 'squatting'. The existence of a well-known unregistered mark precludes later registration of identical or similar marks without the permission of the owner of the well-known mark<sup>11</sup> where a likelihood of confusion with respect to the relevant public or a likelihood of dilution of the distinctiveness or reputation of the well-known mark would arise should the later identical or similar mark be registered or used, or in a way that may cause confusion or dilution of the distinctiveness or reputation of the well-known trademark.<sup>12</sup> Well-known unregistered marks are also protected under Taiwan's Fair Trade Act. No enterprise may use a commonly known trademark in the same or a similar manner for the same or a similar category of merchandise or services.<sup>13</sup>

The main actions available to brand owners to prevent trademark squatting are invalidation or opposition procedures against the squatter at TIPO to revoke the offending registration. The Trademark Act clearly identifies the conditions for registration and prohibits an applicant from registering a mark where the applicant intends to imitate an earlier used trademark and is aware of the existence of the earlier used trademark through contractual, regional or business connections, or any other relationship with the proprietor of the earlier used trademark.<sup>14</sup> The statute of limitations for invoking these administrative remedies is five years from the publication of the trademark. Where well-known marks are squatted in bad faith, this time limitation is waived.<sup>15</sup>

### iii Enforcement

Taiwan continues to strengthen protection for intellectual property (IP) rights. Taiwan has an IP court and Intellectual Property Rights Police (IPRP), both of which assist in enforcing IP rights, especially for trademarks and patents. In 2021, the IPRP made seizures in a total of 2,710 IP rights infringement cases.<sup>16</sup> If a registered trademark is infringed, the trademark owner is entitled to demand that the infringer cease the infringement or prevent the infringement, and to obtain compensation for damage.<sup>17</sup> The trademark owner can also demand the destruction of infringing articles and the materials or implements used in infringing the trademark under the Trademark Act.<sup>18</sup> The infringer will also be subject to

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9 See Article 19 of the Trademark Act.

10 See Article 33 of the Trademark Act.

11 See Article 30.1.11 of the Trademark Act.

12 See Article 68.1 and 70.2 of the Trademark Act.

13 See Article 22 of the Fair Trade Act.

14 See Article 30.1.12 of the Trademark Act.

15 See Article 58 of the Trademark Act.

16 See the Enforcement & Prosecution Related Statistics page of the website of the Intellectual Property Office of Taiwan: <https://www.tipo.gov.tw/en/lp-304-2.html>.

17 See Article 69 of the Trademark Act.

18 See Article 69 of the Trademark Act.

imprisonment for a period not exceeding three years or a fine not exceeding NT\$200,000, or both of these penalties.<sup>19</sup> Additionally, the owner of a well-known or famous but unregistered trademark can seek civil relief under the Fair Trade Act in Taiwan.<sup>20</sup>

#### **iv Data protection, cybercrime, social media and e-commerce**

Enacted in 2010, the Personal Data Protection Act (PDPA) is the statute regulating data protection issues in Taiwan. According to the PDPA, personal data refers to a natural person's name, date of birth, ID card number, passport number, features, fingerprints, marital status, family information, educational background, occupation, medical records, healthcare data, genetic data, data concerning the person's sexual life, records of physical examinations, criminal records, contact information, financial records, data concerning the person's social activities, and any other information that may be used to directly or indirectly identify that natural person.<sup>21</sup> The PDPA regulates the collection, processing and use of personal data. Any non-compliance with the obligations set out in the PDPA is subject to civil and criminal liability.

In the course of dealing with legal issues in relation to cybercrime in Taiwan, the Criminal Code, Trademark Act, Copyright Act and PDPA and related legislation can be applied. To prevent cybercrime, the Criminal Code provides a specific chapter on illegal acts that harm or attack computer security, such as illegally accessing others' accounts and obtaining or deleting records held in magnetic storage on computers.<sup>22</sup>

With respect to e-commerce, the government has enacted specific legislation, such as the Act Governing Electronic Payment Institutions and the Electronic Signatures Act, to deal with related issues.

## **IV FRANCHISE LAW**

### **i Legislation**

There is no law that specifically regulates franchising in Taiwan (see, however, Section IV.ii on pre-contractual disclosure and the FTC Directions). Taiwan's civil law greatly respects the principle of freedom of contract and this principle also applies to franchise contracts. Taiwan's courts will consider the nature of a franchise contract, and its provisions, when deciding on the application of the Civil Code to a particular franchise contract.

### **ii Pre-contractual disclosure**

According to the FTC Directions, franchisors must provide their franchisees with the following important franchise information in writing at least 10 days prior to entering into the franchise operation relationship, or within a reasonably determined time frame in a specific case, or within a time agreed upon by both parties:

- a* startup costs;
- b* operating expenses;

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19 See Article 95 of the Trademark Act.

20 See Articles 22, and 29 to 33 of the Fair Trade Act.

21 See Article 2 of the Personal Data Protection Act.

22 See Articles 358 to 363 of the Criminal Code.

- c* the licensed IP, periods of validity, scope of licensing and any restrictions on the use of relevant trademarks, patents and copyrights;
- d* methods and nature of operational assistance, training and guidance;
- e* plans for setting up other franchisees in the same franchise system in a franchisee's existing area of operation;
- f* restrictions applied to the franchise relationship during the contract period; and
- g* conditions and process for alteration, termination and cancellation of a franchise contract.<sup>23</sup>

However, those who withhold important information with justification can be exempted from these obligations; justifications include:

- a* the continuation or expansion of an existing franchise operation relationship;
- b* the franchisor actually lacks the information concerned; or
- c* other circumstances where there is no information asymmetry between the franchisors and the trading counterparties.<sup>24</sup>

### **iii Registration**

There is no requirement to register the franchise agreement or the disclosure document in Taiwan. Corporate registration and tax registration are required if the franchisor establishes an establishment or entity such as a representative office, a branch or a subsidiary in Taiwan.

### **iv Mandatory clauses**

There are no prescribed clauses that must be included in franchise agreements. However, the FTC Directions require the franchisor to disclose important business information and terms before entering into a franchise relationship. According to the FTC Directions, when entering into franchise contracts, franchisors shall not engage in obviously unfair acts such as the following:

- a* prior to entering into a written contract regarding a franchise operation, the franchisor fails to provide at least five days, or a reasonable time frame determined in line with each specific case, for the trading counterparty to review the contract; or
- b* the contract document is not given to the trading counterparty within 30 days after the contract is signed (unless the delay is caused by circumstances not attributable to the franchisor).<sup>25</sup>

### **v Guarantees and protection**

In a franchise contract, franchisors usually require franchisees to guarantee the confidentiality of the information provided and refrain from using the information for purposes other than those set out in the franchise contract. These guarantees from franchisees are enforceable as they are not deemed to constitute obviously unfair practices. There are several articles in the Civil Code regarding the principle of good faith and unconscionability arising from a standard form contract. These rules will be applied by the courts when determining the effect of these types of guarantee clauses (see Section VI.i for more information).

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23 See Article 3.1.1 to 3.2.6 of the FTC Directions.

24 See Article 3.2 of the FTC Directions.

25 See Article 4 of the FTC Directions.

## V TAX

### i Franchisor tax liabilities

The primary taxes relevant to business entrepreneurs in Taiwan are the profit-seeking enterprise income tax (PSE income tax), value added business tax (VAT), individual income tax and customs duties.

Company income is charged with PSE income tax on income from each fiscal year.<sup>26</sup> If a franchisor is a Taiwanese company, it has a duty to pay PSE income tax on all income generated in and outside Taiwan, while a foreign company franchisor only has to pay this tax on domestic-sourced income.<sup>27</sup>

VAT is levied on the sale of goods or services in Taiwan and on the import of goods by the Value-Added and Non-Value-Added Business Tax Act.<sup>28</sup> If services are provided by a foreign company that has no fixed place of business in Taiwan, service purchasers from Taiwan are required to pay VAT;<sup>29</sup> if the services are electronic, the foreign company is the taxpayer.<sup>30</sup>

### ii Franchisee tax liabilities

If a franchisee is a company, the tax rule indicated in Section V.i applies. Otherwise, if a franchisee is a natural person, the main tax issue will be income tax levied on the person's business income. A resident or a foreign national who has no domicile but resides in Taiwan for over 183 days during a taxable year must pay income tax on all income generated in and outside Taiwan.<sup>31</sup> A non-resident must pay income tax on domestic-sourced income,<sup>32</sup> such as salaries paid in Taiwan<sup>33</sup> and the income from buildings and land transactions in Taiwan.<sup>34</sup>

### iii Tax-efficient structures

There is no optimal tax-efficient structure existing specifically for franchise businesses, as the pros and cons depend on the particular business entity and business structure.

## VI IMPACT OF GENERAL LAW

### i Good faith and guarantees

The Civil Code stipulates that a right shall be exercised and a duty shall be performed in accordance with the principle of good faith.<sup>35</sup> Further, a party is obliged not to harm the economic interests of the other party during negotiations, and the victim can claim compensation for damage caused by a misplaced reliance on the good faith of the other party. The Civil Code also stipulates that even where the contract is not concluded, one of the

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26 See Article 24 of the Income Tax Act.

27 See Article 3 of the Income Tax Act.

28 See Article 1 of the Value-Added and Non-Value-Added Business Tax Act.

29 See first sentence in Article 2.3 of the Value-Added and Non-Value-Added Business Tax Act.

30 See Article 2-1 of the Value-Added and Non-Value-Added Business Tax Act.

31 See Article 2 and 7 of the Income Tax Act.

32 See Article 2 and 7 of the Income Tax Act.

33 See Article 8 of the Income Tax Act.

34 See Article 14-4 of the Income Tax Act.

35 See Article 148 of the Civil Code.

parties is responsible for injury caused to the counterparty who, without negligence, believed the contract to be concluded when, to prepare or negotiate for the contract, the party has done any of the following:<sup>36</sup>

- a* concealed in bad faith or dishonestly explained a material term in the contract when the other party enquired about the term;
- b* intentionally or through gross negligence disclosed a secret of the counterparty known or held by the party that the counterparty had explicitly requested be kept secret; or
- c* any other action obviously against good faith, although there is no specific regulation that addresses good faith in commercial relationships governed by the terms of a contractual agreement.

In Taiwan, most franchise agreements are standard form contracts. Where there is any ambiguity regarding the terms and conditions, interpretations are made in favour of the other party (i.e., the franchisees). The effect of the clauses in standard form contracts is regulated by the Civil Code, which stipulates that agreements that include provisions with the following purposes, and that are obviously unfair under the given circumstances, are void:<sup>37</sup>

- a* to release or to reduce the responsibility of the party who prepared the entries of the contract;
- b* to increase the responsibility of the other party;
- c* to make the other party waive his or her right or to restrict the exercise of his or her right; and
- d* other matters gravely disadvantageous to the other party.

A non-compete clause in a franchise agreement might be deemed unfair and invalid depending upon the specific facts of the case (see Section VI.vi for additional information).

## ii Agency distributor model

According to the FTC Directions, the term franchise relationship refers to an ongoing relationship in which a franchisor licenses a franchisee through a contract to use its trademarks or operational techniques, and assists or counsels the franchisee to manage the business, while the franchisee pays the corresponding charges for these services. A simple purchase of products or services at wholesale or lower rates for resale or leasing does not constitute a franchise relationship.<sup>38</sup>

According to this definition, the FTC does not limit the business model of the franchise but excludes the application of the pure resale or rental model. Thus, both the agency model and the distributor model exist in Taiwan, and franchisors and franchisees may freely contract into an agency or distributor business model. In an agency model, the franchisees sell the franchisor's products to customers on behalf of the franchisors, and the product ownership remains with the franchisors. In contrast, in a distributor model, the franchisees operate the business for themselves after purchasing the products from and being licensed by the franchisors.

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36 See Article 245-1 of the Civil Code.

37 See Article 247-1 of the Civil Code.

38 See Article 2.3 of the FTC Directions.

### iii Employment law

According to the Taiwan Labour Standards Act (LSA), a worker is defined as a person who is hired by an employer to work for wages.<sup>39</sup> All employee–employer relationships are mandatorily regulated by the LSA. However, a franchisee may not have an employment relationship, and as such the LSA will not apply to a franchisee who merely uses the trademarks or operational techniques licensed by the franchisor, or who receives assistance or counsel from the franchisor and pays the franchisor the corresponding charges for those services.

As a side note, there are some judgments that also clearly declare that only natural persons can be viewed as employees, and legal persons cannot.<sup>40</sup>

### iv Consumer protection

According to Taiwan's Consumer Protection Act, a consumer is any person who is acting for the purposes of consumption to make transactions in exchange for goods or services in relation to a commercial practice, and a consumer relationship is the legal relationship arising between consumers and traders for the sale of goods or the provision of services.<sup>41</sup>

The Supreme Court in a judgment has emphasised that the purpose of the Consumer Protection Act is to protect the interests of unspecified consumers in society, rather than to regulate the trading activities between traders (merchants), and therefore only end consumers fall under the protection of the Act.<sup>42</sup> A franchisee may be deemed a trader who intends to conduct business with consumers and the Act cannot be applied to the franchise agreement.<sup>43</sup>

### v Competition law

Competition issues are primarily governed by the Fair Trade Act in Taiwan. The Act's prohibition of the following acts is particularly relevant in a franchise relationship:

*a* imposing restrictions on resale prices of goods or services without justification;<sup>44</sup>

*b* engaging in any of the following acts that is likely to restrain competition:<sup>45</sup> or

- causing another enterprise to discontinue supply, purchase or other business transactions with a particular enterprise for the purpose of injuring that particular enterprise;
- treating another enterprise discriminatorily without justification;
- engaging in transactions with improper restrictions on its franchisees' business activities, including improper product ties, exclusive dealing, or restrictions in regards to territory, customers, use or other aspects of business activities;<sup>46</sup> and
- engaging in any deceptive or obviously unfair conduct that can affect the trading order.<sup>47</sup>

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39 See Article 2 of the Labor Standards Act.

40 See Taoyuan District Court Judgment 2014 Su Zi No. 688; Taoyuan District Court Judgment 2011 Zong Su Zi No. 45; Pingtung District Court Judgment 2010 Jian Zi No. 5.

41 See Article 2 of the Consumer Protection Act.

42 See Supreme Court Judgment 2002 Tai Shang Zi No. 1001.

43 See High Court Civil Judgment 2012 Zhong Shang Zi No. 128.

44 See Article 19 of the Fair Trade Act.

45 See Article 20 of the Fair Trade Act.

46 See Article 28.1 of the Enforcement Rules of Fair Trade Act.

47 See Article 25 of the Fair Trade Act.

The Enforcement Rules of the Fair Trade Act list factors that will be considered when determining whether the justification or proper consideration as used in the above provisions exist in a specific case. These factors include the intent, purposes and market positions of the parties, the structure of the market to which they belong, the characteristics of the goods or services, and the impact that carrying out such restrictions would have on market competition.<sup>48</sup> While the FTC reviews these factors on a case-by-case basis, it should be noted that there have been cases where the FTC regards the mere fact of being in a franchise relationship insufficient to justify a restriction on the franchisee's resale prices.<sup>49</sup>

The FTC may order any enterprise that engages in any of the above acts to cease the acts, rectify its conduct or take necessary corrective action within a specified time; in addition, the FTC may impose upon such enterprises an administrative penalty of up to NT\$50 million, depending on the nature of the violation (see also the discussion of the Fair Trade Act in Section IV).<sup>50</sup>

#### **vi Restrictive covenants**

There is no law expressly regulating whether a non-compete clause can be included as part of a franchise relationship. According to the principle of freedom of contract, there are court precedents holding that franchisors may prohibit franchisees from engaging in the same or similar business during or after the contract period.<sup>51</sup> Further, franchisors may also forbid franchisees from recruiting other franchisees within a certain geographic range of the original business location.<sup>52</sup>

However, as indicated in Section VI.i, a non-compete clause cannot violate the principle of public order and good morals.<sup>53</sup> The courts usually consider several factors, including whether the franchisors have a legitimate interest to be protected, such as whether:

- a* there is special knowledge or trade secrets that need such protection;
- b* the franchisee has acquired or become aware of such information through the franchise relationship;
- c* the restricted period is too long;
- d* the restricted area and the scope of business are too broad;
- e* the franchisee's constitutional right to work is seriously harmed; and
- f* compensation is given to the franchisee.<sup>54</sup>

To prevent franchisees from circumventing their non-competition obligations, it may be regarded as a breach of contract if the franchisee's spouse or representative engages in the restricted competing business.<sup>55</sup>

48 See Article 25, 26 and 28 of the Enforcement Rules of Fair Trade Act.

49 See Fair Trade Commission Gong Chu Zi 096010 Disposition; see also Fair Trade Commission 2000 Gong Chu Zi 71 Disposition.

50 See Articles 40 and 42 of the Fair Trade Act.

51 See Taoyuan District Court Judgment 2018 Su Zi No. 2106.

52 See High Court Kaoshiung Branch Court Civil Judgement 2002 Shan Yi Zi No.165.

53 See Articles 72 and 247-1 of the Civil Code.

54 See Taichung District Court Civil Judgment 2017 Su Zi No. 1377. See also High Court Tainan Branch Court Civil Judgement 2012 Shan Yi Zi No.289; New Taipei District Court 2019 Ban Jian Zi No. 2038.

55 See High Court Tainan Branch Court Civil Judgment 2010 Shang Yi Zi No. 196.

### **vii Termination**

As there is no special law governing franchises in Taiwan, the termination of a contract will be regulated by the Civil Code.

In response to a breach of a non-compete obligation, a franchisor may file a lawsuit seeking liquidated damages or performance of the obligation from the franchisee concerned, or a combination of these.<sup>56</sup> Further, according to the Code of Civil Procedure, to prevent more damage, a franchisor may file for an ‘injunction maintaining a temporary status quo’ (i.e., injunctive relief) before filing such a lawsuit.<sup>57</sup>

Whether a franchisor can take back or take over a franchisee’s business will be determined by the particular contract, and provisions to this or similar effect have been permitted by several judgments.<sup>58</sup> However, to avoid disputes, this matter should be explicitly addressed in the contract.

### **viii Anti-corruption and anti-terrorism regulation**

In Taiwan, as there are no regulations specifically applicable to franchises, in general, relevant regulations that may be applicable to certain situations include the Criminal Code, the Money Laundering Control Act, the Anti-Corruption Act and the Counter-Terrorism Financing Act.

### **ix Dispute resolution**

At present, there is no exclusive dispute resolution mechanism adapted specifically for franchising disputes under Taiwan law. Generally, litigation and alternative dispute resolution (mediation, arbitration) are the available means used to resolve disputes, and they have the same effect. The law does not mandate that a franchise dispute be preceded by a mediation procedure,<sup>59</sup> so the parties may choose which dispute resolution mechanism they want to adopt in their contracts. In our experience, the parties to a franchise agreement tend to resolve disputes by litigation.

Pursuant to the Civil Code, compensation is limited to the injury actually suffered and the interests that have been lost.<sup>60</sup> However, liquidated damages as a penalty are usually requested and, after considering the actual cost of the damage, the social economy, the seriousness of the breach of contract and other factors, the court may reduce the liquidated damages penalty to a reasonable amount. For violations of the non-compete clause or violations of trademark rights or other IP rights, franchisors are entitled to file for preliminary injunctive relief.<sup>61</sup>

Once a lawsuit has been filed, a plaintiff first has to pay a court fee. After the judgment has been issued, the court may order the court fee to be borne by one party or by both parties

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56 See IP Court Civil Judgment 2014 Min Ying Shang Zi No. 4.

57 See Article 538 to 538-4 of the Code of Civil Procedure.

58 See High Court Civil Judgment 2014 Shang Yi Zi No. 267; High Court Civil Judgment 2019 Shang Yi Zi No. 550.

59 See Article 403 of the Taiwan Code of Civil Procedure.

60 See Article 216 of the Civil Code.

61 See Article 538 to 538-4 of the Code of Civil Procedure.



in certain proportions. The court fee is calculated according to the ratio of the alleged claims, and therefore there is no upper limit. If the amount of the claim exceeds NT\$1.5 million, the judgment may be appealed through three levels of courts.<sup>62</sup>

Taiwan is not a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention); however, unless the country where the arbitral award is made or whose laws govern the arbitral award clearly states that it does not recognise Taiwan's arbitral awards,<sup>63</sup> a foreign arbitral award will be binding and enforceable on the parties after an application for recognition has been granted by the courts, and it will have the same force as a final judgment of a Taiwan court.<sup>64</sup> Further, if the parties explicitly agree to select a foreign court as the exclusive international court, the jurisdiction of the court in Taiwan may be excluded.<sup>65</sup> In addition, the applicable law regarding the formation and effect of a juridical act (e.g., a contract) can be determined by the intention of the parties.<sup>66</sup>

Taiwan's courts have different opinions as to whether franchisors undertake joint liability for wrongful acts committed by the employees of their franchisees. This legal issue is determined according to whether an employee of a franchisee and the franchisor are in a 'de facto employment relationship'.<sup>67</sup> In 2015, a High Court judgment declared that even if the franchisor had the right of audit and examination of the franchisee, as long as the employee is not objectively supervised in the course of providing his or her services, the franchisor was not jointly liable.<sup>68</sup> However, a district court judgment expressed a different opinion in 2017.<sup>69</sup> As such, this issue has not been clearly decided and requires more observation.

## VII CURRENT DEVELOPMENTS

According to data from the Directorate General of Budgets, Accounting and Statistics, under the Executive Yuan, the ratio of the output value of Taiwan's service businesses to the national gross domestic product in 2022 was 60.8 per cent (NT\$13,751 billion),<sup>70</sup> indicating that service businesses are of great importance to Taiwan's economic development. In recent years, domestic franchise industries have grown rapidly, which has resulted not only in a change to the business model of Taiwan's service businesses, but also in franchising becoming one of the primary modes of Taiwan's modern commercial operations.

Many franchise businesses have developed overseas. As to the overseas distribution of brands, the huge Chinese market is still a most-coveted region. According to ACFPT statistics on food industry members, 26 Taiwanese brands are currently established in China and 12 in the United States and Canada.<sup>71</sup>

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62 See Article 466 of the Code of Civil Procedure.

63 See Supreme Court Civil Judgment 2004 Tai Shang Zi No. 1943; Supreme Court Civil Ruling 1986 Tai Kang Zi No. 335.

64 See Article 47 of the Arbitration Law.

65 See Supreme Court Civil Ruling 2019 Tai Kang Zi No. 373.

66 See Article 20 of the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements.

67 See Supreme Court Civil Judgment 1956 Tai Shang Zi No. 1599; Article 188 of the Civil Code.

68 See High Court Civil Judgment 2015 Shang Zi No. 567.

69 See Kaohsiung District Court Civil Judgment 2016 Su Zi No. 1699.

70 See [https://eng.stat.gov.tw/News\\_Content.aspx?n=2317&cs=230928](https://eng.stat.gov.tw/News_Content.aspx?n=2317&cs=230928).

71 See statistics from ACFPT, foodNEXT, <https://www.foodnext.net/news/newstrack/paper/5975323036>.

Recently, the government has promoted the New Southbound Policy, enhancing and encouraging economic investment in and exchanges with South East Asian countries, which have enticed many Taiwanese food service franchising businesses to develop southward. In some Southeast Asian countries, there is a significantly large population of Chinese ethnic groups, which has facilitated acceptance of Taiwanese brands; for instance, ethnic Chinese groups account for more than 20 per cent of the population in Malaysia, and, as at mid-2019, 12 ACFPT-established store brands exist in Malaysia. In addition, there are seven brands in Macau, and six Taiwanese brands in Hong Kong.<sup>72</sup>

Through long-term development, the Taiwanese franchise industry has evolved into a fairly mature business model. As long as raw materials overseas are properly controlled, other planning for the establishment of stores can be copied and spread rapidly in a standardised manner. However, among the potential brands planned for development overseas, there are a few small and medium-sized enterprises that lack the necessary funds and professional support. These franchise businesses still need support from the government or the private sector to operate successfully overseas.

Last but not least, many franchise businesses have flourished in this era of globalisation and accelerated technological development, with emerging technologies such as big data, the internet of things and artificial intelligence, and they will have to face head on the challenge of keeping up with these modern trends and developing their own characteristics in their future operations.

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72 See statistics from ACFPT, foodNEXT, <https://www.foodnext.net/news/newstrack/paper/5975323036>.