



FRANCHISE LAW IN THAILAND: DISCLOSURE
REQUIREMENT

BY
MISS MINSUTHRA KITTIPADAKUL

AN INDEPENDENT STUDY PAPER SUBMITTED IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTER OF LAWS
(BUSINESS LAW)

GRADUATE SCHOOL OF LAW
ASSUMPTION UNIVERSITY

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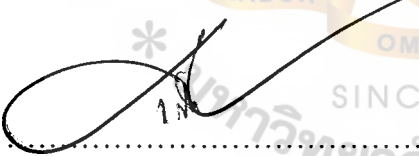
Advisor : Asst.Prof.Dr.Poom Moolsilpa

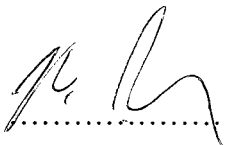
Faculty of Law, Assumption University approves this Independent Study Paper as the partial fulfillment of the requirement for the Degree of Master of Laws.

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ABSTRACT

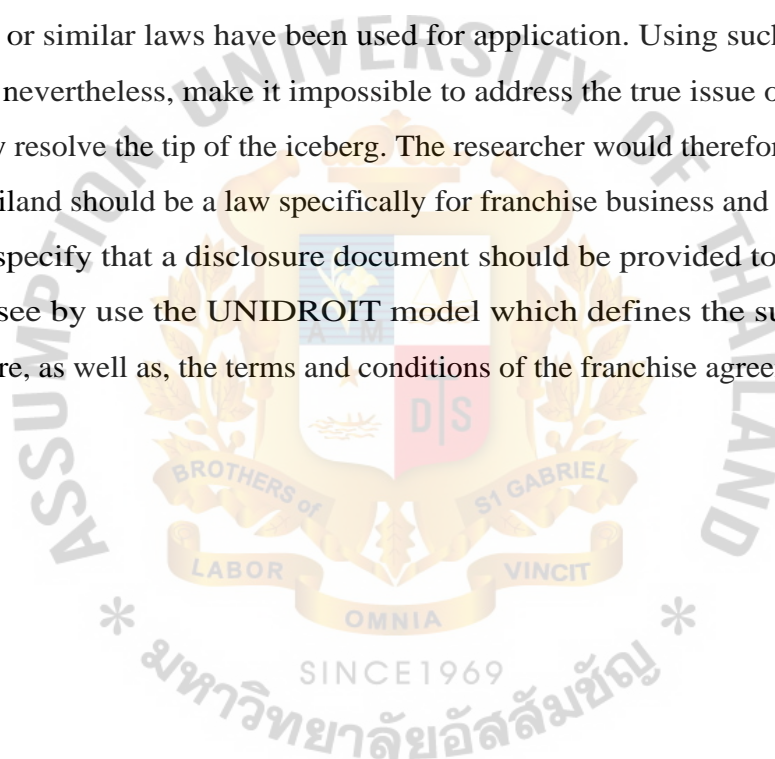
Nowadays, franchise is a popular option for business owner or entrepreneurs who are running to expand their own businesses. An important thing when entering a franchise business is the franchise contract. The consideration between the parties under the franchise agreement is subject to the relevant laws such as the provisions on juristic and contract act under the Civil and Commercial Act, Intellectual Property Law, Trade Secret Law, Unfair Contract Terms Act, and Competition Law. The various issues related to franchise business arise in Thailand because there is no specific law available which lead to contracting parties not being able to follow a guideline of practices. Consequently, relevant laws have been used to resolve disputes. The current draft franchise business bill still contains insufficient provisions on the definition of rights and obligations of the franchisor especially in terms of disclosure before entering a franchise agreement because franchisor in Thailand generally have higher negotiation power over the franchisee since there are no rules. If Thailand allows for information to be disclosed to the franchisee before entering into an agreement, it will reduce the chance for the franchisee to be exploited.

When considering the law of America and Australia, it can be concluded that in order to supervise the franchise business in the country better, one will need to realize that other countries gives importance to disclosing information before entering a contract. Whereas they specify the period of time in advance, as well as, set exceptional conditions when not to disclose information.

There is also another interesting international law which is the model law by the International Institute for the Unification of Private Law (UNIDROIT). On the UNIDROIT Model Franchise Disclosure Law which is a model law that requires franchisors to disclose information before entering into a franchise agreement. The

model law determines the type of information that must be disclosed and that can affect the decision of prospective franchisee in entering into an agreement such as, background information about the franchisor, franchise business, business experience, financial statements, collection of fee, intellectual property, bankruptcy background, revenue, branch, etc. The intention of the UNIDROIT is to be applicable to any franchise agreement in the present or in the future because UNIDROIT's intention is to assist and protect franchisee from bad franchise business with no potential.

When analyzing the problem of franchise business in Thailand, the researcher acknowledges that whenever a dispute related to franchise business in Thailand arise, relevant or similar laws have been used for application. Using such laws to solve a dispute, nevertheless, make it impossible to address the true issue of the problem; it will only resolve the tip of the iceberg. The researcher would therefore like to propose that Thailand should be a law specifically for franchise business and the franchise law should specify that a disclosure document should be provided to the prospective franchisee by use the UNIDROIT model which defines the subject matter of disclosure, as well as, the terms and conditions of the franchise agreement.



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Minsuthra Kittipadakul

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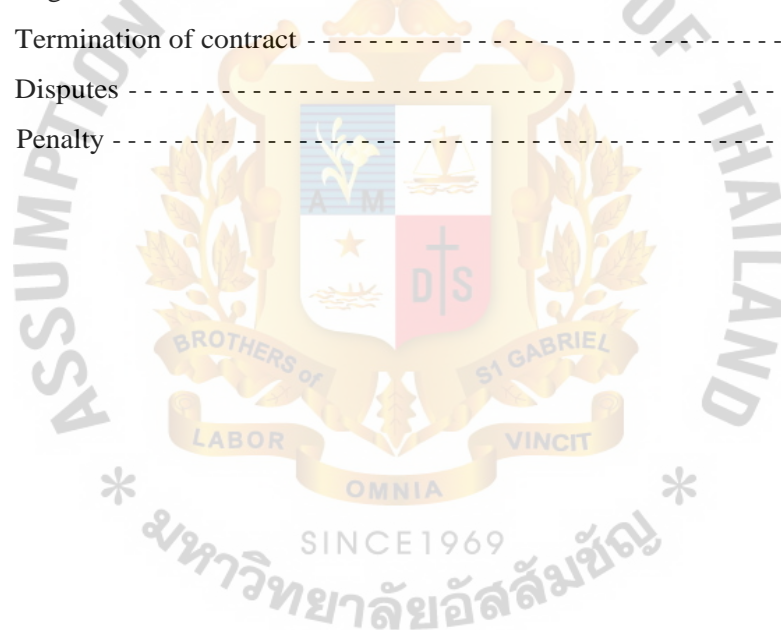
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Chapter 1

Introduction

1.1 Background and General Statement of the Problems

Currently, franchise is a popular option for business owner or entrepreneurs who are running their own businesses to expand within a supportive structure.' This is very convenient for entrepreneurs who do not have research knowledge or long-term experience of a business. Entrepreneurs can use the know-how of the franchisor to operate the franchise business.²

Franchising is a long-term cooperative relationship between two entities, where a franchisor and one or more franchisees agree to enter an agreement whereas the franchisor provides licensed privilege to the franchisee to do business.³ The characteristic of franchise business is the relationship between the franchisor and the franchisee, the condition that the franchisee will be helped, and that the right in intellectual property will be granted to the franchisee for a fee in return. Franchise is a very effective strategy of expanding business. Business owners may have great knowledge and be successful but often lack fund. Business can be expanded with other people. Other person who expressed interest and wants to operate a business is known as franchisee. The reason franchise has become successful is because there is the advantage that an existing business is looking to expand and provides image of

5 things you need to know about Franchising. (Australia), at <https://legalvision.com.au/franchising/?keyword=%2Bfranchising%20%2Blawyer&matchtype=b&gclid=CjOKEQiAlaelBRCU2qaz2t9IIBEiQAKRGDVS04WvB1kN4CAroGE3QS2JFCX18MYnSta0JV8sfI9fAaAqeZ8P8HAQ>, (last visited 30 January 2016).

² Sirivan Sareerat, Supada Sirigudta, Apirat Tangkagang, Pimpa Hirunkitti, Kriangkai Chamnanpaisarn, Chuchart Meejinda, Retailing Management, (Thailand: Thammasarn Co., 2003), p.47.

³ Definition of franchising., at <http://www.franchise.com/franchise-information-guide/what-is-franchise/definition-of-franchising>, (last visited 1 February 2016).

business and work system to the franchisee. The established business gives us the trademark and permission for the smaller businesses to operate in the same system.⁴

The development of Franchise business in Thailand goes back 30 years. The first product that expanded in the form of franchise were food and minimart store.⁵ Franchise businesses in Thailand come in the forms of a contract between the franchisor and franchisee where the franchisor draft the details of the contract and propose it to the franchisee. The details in each contract vary based on the type of franchise business and a franchise agreement that usually consists of many legal terms and principles under the Thai law. Currently, no legislation related to franchise is available. The franchisor could abuse the agreement which would be unfair to the franchisee. In addition, high number of cases remains in the court to be decided, an example can be seen in the judgment of the Supreme Court.⁶

"The Franchise contract included a term where the plaintiff (franchisee) would invest money into a Family Mart Store. The plaintiff signed the franchise contract and used the trade and service mark of the defendant (franchisor). The plaintiff had to transfer the income from the sale of the goods to the defendant and the defendant paid profit including monthly dividends in return as agreed in the contract. The Franchise contract between the plaintiff and the defendant was reciprocal under Section 369 of the Thai Civil and Commercial Code.

The plaintiff breached the contract without transferring the income from the sale of goods to the defendant. The Franchise contract of the parties was deemed reciprocal when the plaintiff breached the contract. The plaintiff could not ask the defendant to send the Store back and the defendant did not ask for the Store back as well. In addition, the plaintiff neither claimed for the termination of the contract nor could he call for compensation from the defendant".

"In another judgment of the Supreme Court, the defendant (franchisee) terminated the contract with the plaintiff (franchisor) by rescission of the contract.

⁴ History of Franchise. (Thailand), at <http://www.franchiseb2b.net/index.php?p=resume>, (last visited 4 February 2016).

⁵ What is franchise?. (Thailand), at <http://www.yesspathailand.com.html>, (last visited 4 February 2016).

⁶ The decision of the Supreme Court no. 9753/2551

According to the Thai Civil and Commercial Code, Section 386 — If by contract or by the provisions of law one party has the right of rescission, such rescission is made by a declaration of intention to the other party. The agreement of the plaintiff did not have the term that the defendant could terminate the contract. Therefore, the defendant could not exercise the right of rescission".⁷

From both judgments, the judges applied the general laws of franchise contract, and the legal provisions about juristic acts and contract under Thai Civil and Commercial Code. The main problems of the cited judgments were the details of the terms in the contracts or agreements. Both drafted franchise contracts did not have the same terms or same. When the franchisor and franchisee encounter a problem which ends up in court, the court will make a decision based on the legal provisions related to the contract. Each provision is not always clear and broad enough to cover all the issues of a franchise business and contract. Because the courts decide disputes based on the analogy of the law, the result cannot always eliminate disputes effectively.

In addition to what is already mentioned above, other additional problems related to franchise business is the contract term on the scope of area to operate a franchise business. Sometimes, the franchisor does not think about whether the contract he made with his franchisee is fair to his other franchisees. Because the franchisor does not oversee the business or set clear terms, other franchisee could operate similar business nearby which would be disadvantages to the previous franchisee as he will have to compete with another franchisee of the same product in the same area of business. For example, Franchisee A and Franchisee B both have the same Franchisor C or the same company. If the contract has no clear terms stating that A and/or B are only permitted to operate in a specific area which should not cross the other's franchisee's area, A and B would have to compete among themselves. Because there is no specific law to control this particular issue available, it can become a problem between the franchisees and the franchisor as well.

Because there is no specific franchise related law available, each type of franchise business may fall under other provisions related to that specific type of business. It cannot fall under the provisions related to juristic act and contract but there is a standard contract form, trade mark, and service mark for entering a franchise

⁷ The decision of the Supreme Court no. 233/2540

business which all depends on specific details, for example, a food franchise business will also include formula. Therefore, when it comes to a franchise business, the laws that apply include Unfair Contract Terms Act, B.E. 2540, Trademark Act, B.E. 2534 and Trade Secrets Act, B.E. 2545 (2002).

Section 3 of the Unfair Contract Terms Act, B.E. 2540 (1997) states the definition of "Standard form contract" to mean a written contract in which essential terms have been prescribed in advance, regardless whether being executed in any form, and is used by either contracting party in his business operation.⁸ Franchise contract have types and forms that may fall under the meaning of standard form contract. The standard form contract has 3 elements: 1. Contract must be in writing. 2. There must be essential terms that have been prescribed in advance. 3. The essential terms are used by either contracting party in the business.

The Trademark Act, B.E. 2534⁹ regulates that the owner of a registered trademark may license another person to use his trademark for all or some of the goods for which the trademark is registered. When franchisor and franchisee considered signing the contract, the franchisee had to have a license from the franchisor under Section 68 paragraphs 2 which states that a license to use a trademark under paragraph one shall be in writing and registered with the Registrar. The right in intellectual property will consequently be granted to the franchisee, for this reason the franchisor and the franchisee have to make a licensing agreement according to the law.

According to the Trade Secrets Act, B.E. 2545 (2002), Trade Information means any medium which conveys statement, story, fact or any other medium to convey the mentioned and irrespective of the form it is in. It shall mean formula, form, compilations or assembled works, programs, methods, techniques, or processes. The owner of trade secrets shall have the right to disclose.¹⁰

Based on the judgments of the Supreme Court, it can be seen that there are a lot of problems in applying the provisions of the laws as they are when implicating it

⁸ Unfair Contract Terms Act, B.E. 2540 (1997). (Thailand), at <http://www.thailawtoday.com/component/content/article/94-consumer-protection/611--2540.html?tmpl=component&print=1&page=>, (last visited 5 February 2016).

⁹ Trademark Act B.E. 2534 (1991) Section 68 paragraph 1 and 2

¹⁰ Trade Secrets Act, B.E. 2545 (2002) Section 3 and 5

with franchise-related issues. Although there are many laws that can be applied for issues revolving a franchise contract but those laws serve other purposes, mainly, it is difficult to make decision in these cases as there is no specific franchise business law. Consequently, this is leading to unfair contracts between franchisor and franchisee due to no equitable treatment that can be applied. For this reason, the researcher is in the view that proposing a specific franchise business law for Thailand is most appropriate. Because Thailand has no specific law on controlling franchise businesses, contracting parties could easily enter an agreement that is not fair. For example, franchisors generally have higher bargaining power than franchisees as they draft the agreement and set the conditions. A franchisor could conceal information from the franchisee and such information could be of significant in the sense that it could change the decision of the franchisee in entering the contract with the franchisor. Thailand, presently, has no law indicating that a franchisor must reveal information about their business operation which has lead to many disputes that eventually ended up in courts and because Thailand has no specific law, disputes or problems that arise cannot be reduced or properly addressed. The contracting parties will set conditions as they please. Based on this issue, the researcher sees the importance of revealing franchise information before entering a franchise agreement with a franchisor. If looking at the foreign laws, the USA, Australia and the UNDRIT model law all require for such information to be disclosed to the prospective franchisee. For this reason, the researcher is in the view that the foreign law can be used as a guideline to apply it into the Thai law where a document that reveal relevant information should be provided to the franchisee for the protection of the franchisee, to reduce the current existing problems, and to adopt a fair procedure for franchise operations when it comes to contracting parties wanting to enter a franchise agreement.

1.2 Hypothesis of the Study

There are plenty problems regarding making a franchise contract in Thailand because there is no specific franchise law enacted. The laws that have been applied in case of a franchise dispute includes regulations such as the Civil and Commercial Code on Juristic Acts and Contract include juristic acts and contract, Unfair Contract

Terms Act, Trademark Act, Trade Secrets Act and Trade Competition Act. In the past, Thailand has used other relevant laws which cannot solve all the issues that arise. Because there is no specific substantive law that the parties who wish to enter a franchise agreement can based their actual intention on, parties who want to oblige themselves in any franchise contract would write down the contract according to their own intention, Franchisor and Franchisee, no matter in what type of franchise business, should be subjected to a uniformed standard of law. It is therefore recommended for Thailand to implement a franchise law that would set a standard, gives both parties equal rights when entering into an agreement and clarifies the term that the two parties will have to comply to.

1.3 Objectives of the study

1. To study the franchise business and its problems in Thailand.
2. To examine the meaning, development, concept and characteristic of franchise.
3. To study the franchise laws in Thailand and to compare the terminology with those of other countries.
4. To analyze the legal problem of franchise business in Thailand.
5. To propose a guideline for a franchise law in Thailand and disclosure document.

1.4 Study Methodology

The methodology of this research is based on documentary research from many different legal sources including Thai law, foreign law, articles, journals, textbooks, theses that have been written in Thai, case studies, as well as, Internet browsing related to franchise, in-depth interview with franchisors and the franchisees in order to push for the recommendation to be of help in resolving and development legal legislation.

1.5 Scope of the Study

This research will focus on examining the meaning, the concept, characteristic of franchise business, and the development of franchise in Thailand and foreign countries. It will also study the legal principles of franchise such as juristic acts and contracts according to the Unfair Contract Terms Act, B.E. 2540, the Trademark Act, B.E. 2534, the Trade Secrets Act, B.E. 2545, the Consumer Protection Act, B.E.2522, the Trade Competition Act B.E.2542 and the Draft Franchise Act of Thailand. The researcher will also study the relevant laws of the United States of America which use specific legislation on disclosure requirements and prohibitions concerning franchising, The Australian uses the Competition and Consumer (industry codes—franchising) Regulation 2014 and UNIDROIT uses the Model Franchise Disclosure Law. Additionally, this research will analyze the problems of legal principles related the franchise contract in Thailand in order to set guidelines to legislate the franchise law in Thailand, for this, the researcher will compare the Thai laws with the laws of the United States of America, Australia and UNIDROIT.

1.6 Expectations of the Study

1. To understand the franchise business and its problems in Thailand.
2. To acknowledge the meaning, development, concept and characteristic of franchise business
3. To recognize the franchise laws used in Thailand and in other countries.
4. To comprehend the legal issues relating to franchise in Thailand.
5. To recommendations to solve the legal issues related to franchise business in Thailand.

Chapter 2

The definition, development, concepts of franchise, and the business and governing laws of franchise in Thailand

2.1 The definition and development of franchise

2.1.1 Definition of franchise

A franchise is a type of license where the trademark owner or the owner of a trade permits another person to sell product or service under that specific name or mark. More broadly stated, a "franchise" initiates from an agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with the methods and procedures prescribed by the franchisor, and the franchisor undertakes to assist the franchisee from advertising, promotion and other services that requires advisory assistance."

The word "franchise" derived from the French term "affranchir" and means freedom, sic, to free¹² or to free from servitude¹³. Franchise was the right or privilege that the king gave to the people to hold activities such as fairs or set up markets.

An example of franchise from the history of Europe would be when William I of England or William the Conqueror who during his reign governing the Kingdom of England gave franchises to the noblemen. The noblemen governed in their own areas and collected duties and taxes. Shares of those duties and taxes were to

¹¹ Urarak Yorsin, "Analysis of franchise bill," (LL.M Thesis, Graduate school, Thammasat University, 2008), p.20.

¹² Trikanok, Franchise Business of Thailand (Thailand: Siam Inter Book Publishing Co., 2004), pp.28.

¹³ Thanee Pitusuk, Franchise (Thailand: Nanmeebook co., 2000), pp.16.

give to the king. Therefrom, the term, "royalty" arises which means a fee collected by and for the government.¹⁴

According to International Franchise Association (IFA)¹⁵ Franchising is simply a method for expanding a business and distributing goods and services through a licensing relationship. In franchising, franchisors (a person or company that grants the license to a third party for the conducting of a business under their marks) not only specify the products and services that will be offered by the franchisees (a person or company who is granted the license to do business under the trademark and trade name by the franchisor), but also provide them with an operating system, brand and support.

In simple terms, a "franchise" is an agreement between two parties which allows one party that is the franchisee, to market product or services using the trademark and operating methods of the other party that is the franchisor.¹⁶

Franchise in Thailand has followed the rules from other countries. The definition and meaning of the term "franchise" in Thailand comes from other countries because the Thai law did not provide any definition.

The Department of Business Development (DBD) defines the meaning of franchise to be a process of a business where successful business owners provide opportunity to franchise by providing knowledge to another person about their business regarding their product, service or trademark."

In Kasarm Pipatsareethum's opinion, a Franchise is the process where tips and tricks of a business owner will be transferred to another person, offering another person the right to use the name, trademark and system operation. The owner

¹⁴ Franchise National Association, Franchise&Licenseguide's1998-1999, (Thailand: franchise today2franchise&license guide co.), pp.32.

¹⁵ International Franchise Association, "An Introduction to franchising," What is a franchise?, at <http://www.franchise.org/what-is-a-franchise>, (last visited 14 July 2016).

¹⁶ What is franchising?, (United Kingdom: 2016), at <http://www.whichfranchise.com/resources.cfm>, (last visited 3 August 2016).

¹⁷ Urarak Yorsin, "Analysis of franchise bill," (LL.M Thesis, Graduate school, Thammasat University, 2008), p.24.

of the franchise (the franchisor) will have to take great care, provide assistance and monitor the franchisee in order to make the business become successful as well.¹⁸

Licensing therefore means a business that gives another person the right to produce a product by using that trademark for marketing for business. The person who has been given the right or the license will have to pay a fee in return.

Franchise is a business cooperation where an enterprise that is successful in business wants to expand their business and someone else wants to start a business. The business owner will show the franchisee the terms of the product or service, or the operational procedures under the same standard. Both parties are gaining benefits from this. The franchise owner (Franchisor) will be expanding his product in market, and the franchise obtainer (Franchisee) is expecting to become as successful as the franchisor. Franchise is the right in trademark, business management and concession in trade branch within the limitations of the service area. "Licensing" or "Franchise" have the same meaning. Many businesses have high competitions in order to survive in the business, expanding business by relying on business collaborative arrangement to solve the problem of extinction of healthy competition.⁹

2.1.2 The development of franchising

The first signs of franchising can be traced back to feudal England, when lords allowed peasants certain rights on part of their land in return for a fee (to perform tasks such as operating wells for water provision or running a market, for example). Components of a franchise system could also be found in the provision of resources for an army by local lords and chiefs in return for tax-collecting privileges.²⁰

¹⁸ Kasarm Pipatsareethum, Plang `Kunn' Pen 'Tang', 1ST ed. (Thailand: Matichon Publishing co., 2003), pp. 14.

¹⁹ Retail And Wholesales Management (Thailand), at <https://sites.google.com/site/pmtech320720072/hn-thi-8-thurkic-samphan-fae-rn-chis>, (last visited 3 August 2016).

²⁰ British Franchise Association, The history of Franchising (United Kingdom)., at <http://vvvvw.thebfa.org/about-franchising/the-history-of-franchising>, (last visited 3 August 2016).

The originator of franchising is Isaac Singer. After the United States Civil War in the 1860s, Singer 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 State.

He began to license out servicing and repairs to local merchants around the country, who were later permitted to become regional salesmen for the machines too. Singer's use of a contract for this arrangement introduced the earliest form of franchise agreements, and the first modern franchise system was born.

Over the following century, forms of franchising became more widely used in the United States as a way to standardize products and standards from one coast to another. First was the car dealership model pioneered by General Motors in the early 1900s, granting exclusive rights and territories; then oil companies and grocery stores began to take advantage of a business model that offered them a route of fast growth towards national distribution with reduced risk.²¹

Franchise is the system of business that occurred after World War II. The investor is the franchisee. The franchisee has the right to use the brand name, trademark, logo decorating store, goods or service as well as the formula, the taste of the product and services, and the owner of franchise is called the franchisor. The franchisee will invest with the franchisor in other areas. The customer or the consumer will experience the product or receive the satisfaction in the same standard and atmosphere as of the originator or the same location of the franchisor in the United States.²²

The franchise business developed a clearer image in the United States after World War II when the production of goods and the production of weapons for the war battles stopped. Soldiers returned to their homeland from war and the Economy started to recover enabling factories to resume the production of goods to

²¹ British Franchise Association, The Singer Effect (United Kingdom), at <http://www.thebfa.org/about-franchising/the-history-of-franchising>, (last visited 3 August 2016).

²² Franchise National Association, Franchise&Licenseguide's 1998-1999 (Thailand: franchise today2franchise & license guide co.), pp. 31.

the market. Business network (Chain Store) started emerging which consequently leads to a franchise system.²³

2.2 The concepts and characteristics of business franchise

2.2.1 Concepts

1. The concepts of sharing

Franchising involves two parties where on the one side, the franchisor; give the right of business to another side, the franchisee. Generally the objective of the franchisor is to expand business. In a franchise contract the terms and conditions will be laid out but the most important thing is that the franchisee will have the right to use the intellectual property (IP) of the franchisor to run business for a set period. The rights of intellectual property (IP) include trademark, service mark, name of brand and formula. If for example the business is a restaurant the franchisor will also share his formula to the franchisee as well. In the contract it will be specified that the franchisee has to use the product of the franchisor and run the business at the same standard that the franchisor runs his business. Moreover, the franchisor will also transfer his concept of the business, for example, if the concept of a restaurant is red and black in modern style, the franchisee will have to follow the exact concept. He will have to run the business just like the franchisor does. Transferring franchise business right from franchisor to franchisee includes trademark, service mark, brand name, formula and the concept of the business.

2. The concepts of royalty

A royalty is a payment to an owner for the use of property, especially patents, copyrighted works and franchises. A royalty payment is made to the legal owner of the property, patent, copyrighted work or franchise by those who wish to make use of it for the purposes of generating revenue.²⁴

²³ Franchise National Association, Ibid., p. 32.

²⁴ Wholly owned by IAC (NASDAQ: IAC), What is a royalty.. at <http://www.investopedia.com/terms/r/royalty.asp>, (last visited 20 August 2016).

When entering a business deal the franchisor will collect a franchise fee (Entrance fee) from the franchisee. When a franchisee runs the business he will have to pay royalty fee to the franchisor. The royalty fee is collected for managing the team workers or improving the product and service.²⁵ Whether the franchisor will collect royalty fee depends on the terms and conditions in the contract. Royalty fee is mostly collected on a monthly basis based on the income, profit or orders in total.

3. The concepts of Disclosure

Before entering into a franchise agreement between the franchisor and the franchisee, the franchisor must disclose information related to his business by preparing a document disclosing information for the prospective franchisee. The reason that the law regulate for such information to be disclosed is so that the prospective franchisee receive all various information of the franchisor. In addition, it will protect the franchisee because if the franchisor withholds important information regarding the franchise business, it could affect the decision of the franchisee in investing in that business. In general, the details of a document to disclose information should include details about the franchisor's background, business, investment, right to intellectual properties, area, product and/or service, interest, collection fee, internal operational management system, how the franchisee will be supported, etc. All information provided in the document should be important and necessary because an investment is not only about capital grant but one will have to be aware of the source of the investment that one will be entering into. For example, whether the franchisor had any bad past records such as whether he has been declared bankruptcy, or is facing any legal allegation, which can be one of the major factors in the decision making of the franchisee. If such information have not been revealed or the truth has been distorted it will not be fair to the franchisee. Foreign laws that regulate for such disclosure prior to entering a franchise contract therefore gave importance in revealing such information to reduce the issue that may be arising in the future. It can also

²⁵ Jakawan Intaramongklong and franchise focus Co., Ltd, Royalty fee (November 2006), at <http://www.thaifranchisecenter.com/document/show.php?docuID=28>, (last visited 20 August 2016).

become a guideline for anyone who wants to do a franchise business, for both the franchisor and franchisee.

2.2.2 The Characteristics of Franchise Business

The elements of business franchise comprises of the following:

1. An agreement where a franchisor gives the franchisee the right of intellectual property of a business for a period of time
2. The promoting and operation of business of the franchisee must be under supervision of the franchisor
3. The franchisee must pay a fee to the franchisor in return.

In general, franchise comprises of the following characteristics:

1. Relationship between the Contracting Parties

A franchise contract comes into force through the relationship between two contracting parties, referring to the (Franchisor) and (Franchisee) who decided to enter a business together. The franchisor has a product, service, business operation model, trademark, and service mark that the franchisee is entitled to obtain for business. Both sides agree to enter the agreement under certain terms and conditions.

2. Terms of Business Assistance

The Franchisor has the duty to assist the franchisee with the operation even before the franchisee can operate the business, throughout the term period of the contract. Because the franchisor has the knowledge, expertise, and the experiences of such business, he can support the franchisee, give advices, provides marketing cooperation and trainings in order to maintain the same standard for the franchise business.

3. Rights to Use Intellectual Property

When both contracting parties agree to do business together, the franchisee will be able to use the trademark. The franchisor will make an agreement which will give the franchisee permission to use the trademark and service mark of the

franchisor, as well as, get the right to operational process, copyright, patent, trade secret which will form the business and set the same system for such business.

4. Fees

When a franchisor invent the idea to start a business eventually he will want to expand his business which sometimes comes in the form of a franchise by giving the rights and operational process model to the franchisee. In return, the franchisee must pay a fee in return known as franchise fee.

A franchisor will collect certain fee from the franchisee including Franchise or Entrance Fee when first starting the business. Generally the entrance fee will be collected when starting the business and will be collected once only. Then there is a Royalty fee for continuing the business, a royalty fee will be paid throughout the contract or as indicated in the contract. Other fees shall include management fees, equipment fees, training fees, marketing fees, and etc.

2.3 Governing laws of franchise in Thailand

2.3.1 Development of franchise in Thailand

The beginning of franchising in Thailand is different when comparing with other countries. Anyone who wanted to have more knowledge about a business will have to be trained. One who has gained enough knowledge about a business will open up a business using the name of brand or business as that that he learned from by using similar brand or business name. During the period of learning, the business operator will not have to pay royalty fee most franchisee were descendant of franchisor.²⁶

In the past businesses bought or sold only products; no disclosure of formula or after-sale service would be provided. Business only included quantity trading and advertisement but no duties or rights were transferred with this.²⁷

²⁶ Kasarm Pipatsareethum, Plang `Kuhn' Pen 'Tang', 1ST ed. (Thailand: Matichon Publishing co., 2003), pp. 16.

²⁷ Franchise National Association, *Franchise & Licenseguide's 1998-1999*, (Thailand: franchise today2franchise & license guide co.), pp. 32.

In Thailand franchise business has started to become more known in 1983. The first type of business that uses franchise to transfer rights were convenience stores (mini marts) and restaurants. Foreign investors opened franchises in Thailand to expand their market franchisee will have to pay franchise fee in return. The standard of the product and service would be controlled and monitored by the franchisor.²⁸

The first business that introduced the concept of franchise was the selling of oil from foreign investors to gas station companies in Thailand. Then there was the Shoe brand Bata which gives right to the seller. Then there are also the fast-food chains such as Kentucky fried chicken, Pizza Hut, and McDonald. As the demand for goods and service with quality and good standard grows franchise is the most convenient way to expand markets and it can be applied to almost any type of business.²⁹

2.3.2 Laws relating to franchise contract in Thailand

Thailand does not have a specific franchise law which causes problems to businesses where no law is available to define franchise or controls the same standard for businesses in Thailand. Franchisor and franchisee weren't equal under a franchise contract. Franchise contracts had different terms and agreements depending on the type of business. This is because franchise in Thailand covers many categories of businesses such as food and restaurant, drink and beverage, education and beauty etc. Franchise related regulations can be found in several laws, the researcher will elaborate this below:³⁰

²⁸ Anittaya Mabua, "Legal problems relating to franchise business: with specific reference to franchise contract," (LL.M. Thesis, Graduate school, Dhurakij Pundit University, 2012), p.11.

²⁹ Tavinwong Tayaping, "Legal Characteristics of Franchise Contract," (LL.M. Thesis, Graduate School, Chulalongkorn University, 1992), p. 7-8.

³⁰ Business Development, "Thai franchise center," The law related to franchise business of Thailand (30 September 2015)., at <http://www.thaifranchisecenter.com/document/show.php?doculD=920>, (last visited 2 September 2016).

1. Juristic Acts and Contract

Practically, franchise contracts can be made both orally and in writing. A juristic act is a lawful and voluntary act for an immediate purpose to establish a juristic relation, between persons to create, modify, transfer, preserve or extinguish right.³¹ The contract is in writing, the franchisor prepares the contract. If the franchisee is interested in the franchisor's business, both sides agree and sign the contract. Although, Thailand has no franchise law, a franchise contract will have to comply with Section 150 of the Thai Civil and Commercial Code.³²

A franchise contract usually includes the following terms and conditions;³³

- 1) Definition of franchise, franchisor, franchisee, trademark and customer.
- 2) License marks
- 3) Rights of the franchise, duration, the fees, transfer of the rights
- 4) Duties of the franchisor
- 5) Duties of the franchisee
- 6) The standard and technique of business
- 7) Royalty fee
- 8) Advertising and promotion
- 9) Insurance
- 10) Annual report
- 11) Termination, consequences of termination
- 12) Supporting documents to the contract
- 13) Jurisdiction

³¹ Section 149 Thai Civil and Commercial Code

³² An act is void if it objects is expressly prohibited by law or is impossible, or is contrary to public order or good moral.

³³ Department of business development, Franchise agreement (October 2014):2-3.,at <https://www.google.co.th/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEWji17agzrfVAhXCX5QKHOATDrEOFgg1MAA&url=https%3A%2F%2Fwww.dbd.go.th%2Fews%2Fdl%2Flink.php%3Fnid%3D9685&usg=AFQjCNEkTnfqvUceuOdMrH3TDaWcEfsyXA>, (last visited 12 September 2016).

14) Appendix

The provisions in the Civil and Commercial Code on juristic acts and contracts have been applied for franchise agreements in Thailand. There is no fixed form of how such agreement can come into force; it can come in the form of a contract, declaration of intention, effect of contract, rescission of contract and termination of contract. For example, there are different ways the termination of a franchise could be agreed upon; 1. The contract specifies the fixed period of time, 2. The parties agree that the contract shall be terminated through declaration of intention, therefore, no specific time period would be put into the contract, 3. If one party does not perform obligation as agreed, the other party has the right of rescission, in other words, by contract or by the provision of the law one party has the right to rescission, and such rescission shall be made in the form of a declaration of intention to the other party.³⁴ There are both general and specific provisions available in relation to this. Section 387 of the Thai Civil and Commercial Code regulates that if one party does not perform the obligation, the other party may fix a reasonable period and notify him to perform within that period. If he does not perform within that period, the other party may rescind the contract. If the object of a contract according to its nature or to an intention declared by the parties can be accomplished only by performance at a fixed time or within one of the parties having performed, the other party may rescind the contract without the notification mentioned in the foregoing section.³⁵ And if performance becomes wholly or partly impossible by a cause attributable to the debtor, the creditor may rescind the contract.³⁶ An example of the relevant Specific Provisions can be Section 548 of the Thai Civil and Commercial Code where in case of delivery of the property hired in a condition not suitable for the purpose for which it is let, the franchisee (the hirer) may terminate the contract.³⁷

³⁴ Section 386 Thai Civil and Commercial Code

³⁵ Section 388 Thai Civil and Commercial Code

³⁶ Section 389 Thai Civil and Commercial Code

³⁷ Urarak Yorsin, Ibid., p.41-42,44.

2. Unfair Contract Terms Act, B.E. 2540 (1997)

In the case where the franchisor takes advantage of the franchisee, the franchisee will be left with heavier duties than regulated by the law since there can be terms and conditions of a contract can be deemed unfair. . The problem is apparent since the franchisor generally already drafted up a contract that he will be using once a franchisee express interest and generally a franchisee cannot negotiate any conditions. The agreement comes in a standard form of a written contract that indicates the essential terms that are prescribed in advance, regardless whether being executed in any faun, and is used by either contracting party in his business operation.³⁸ A standard contract comprises of 3 main elements: 1.It has to come in a written form. Verbal agreement where evidence of tape or video tape is available does not verify to meet the standard.³⁹ 2. Terms of conditions are prescribed in advance. 3. The contracting parties have to comply with the essential terms.

For clearer understanding the researcher would like to give some examples of standard terms and conditions set in contracts below;⁴⁰

1. A franchise contract will indicate the franchisee has to pay for the legal fees and other related costs in case of criminal and/or civil proceedings. If a case arises in court for breaching the contract, the franchisee or the representative of that franchisee shall be liable; this shall only be applied where such fault was not caused by the franchisor. This is in accordance to Section 4 No. 2 of the Unfair Contract Terms Act, B.E. 2540(1997) which stipulates that the terms rendering the other party to be liable or to bear more burden than that prescribed by law.⁴¹

2. The franchisor has the right to terminate the contract if the franchisee breaches any term and condition of the contract. The cause of the breach

³⁸ Section 3 Unfair Contract Terms Act, B.E. 2540 (1997).

³⁹ Pairot Agrusa, The consumer protection of contract, 2nd ed. (Thailand: Winyuchon publishing Co., 2004), pp. 22.

⁴⁰ Thiangtham Ponnalok, The unfair tem" of franchise contract (Thailand: The Office of SMEs Promotion (OSMEP))., at <http://www.sme.go.th/Lists/EditorInput/DispF.aspx?List=15dca7fb-bf2e-464e-97e5-440321040570&ID=1741>, (last visited 21 August 2016).

⁴¹ Section 4(2) Unfair Contract Terms Act, B.E. 2540 (1997)

committed by the franchisee is not the main point and may not be specified in the contract. . Most franchisors use minor causes as reason to terminate the contract with the franchisee. The terms rendering the contract to be terminated without justifiable ground or granting the right to terminate the contract despite the other party is not in breach of the contract is not considered an essential part.⁴²

3. The franchisee has to comply with all the terms and conditions in the franchise contract. The contract generally states that the franchisor has the right to change the terms and conditions at any time. This will benefits franchisor rather than the franchisee. The unconscionable terms with characters or effects in a way that the other party is obliged to comply or bear more burden than that could have been anticipated by a reasonable person in normal circumstance may be regarded as terms that render an advantage over the other party.⁴³

From the three given examples, it can be seen that they are standard terms, nevertheless, they are also unfair conditions as stated in the Unfair Contract Terms Act, B.E. 2540 (1997) under Section 4. The franchisor and the franchisee must be cautious because any contract terms that prohibit the applicability of the Unfair Contract Terms Act, B.E. 2540 (1997), either partly or wholly, shall be void.⁴⁴ But the Unfair Contract Term Act shall not be applied when juristic acts or contracts were made prior to the date of entry into force (The Act shall be applied to contracts made after 15 May 1998)⁴⁵.

3. Trademark Act, B.E. 2534(1991)

Franchise is a special form of licensing where the franchisor licenses its intellectual property to the franchisee in the form of trademark and service mark. Such license will have to be registered with the registrar.

The difference between a franchise contract and intellectual property licensing agreement is that in a franchise contract, the franchisee will have to pay franchise fee for co-working the business, but in an intellectual property licensing

⁴² Section 4(3) Unfair Contract Terms Act, B.E. 2540 (1997)

⁴³ Section 4 paragraph 3 Unfair Contract Terms Act, B.E. 2540 (1997)

⁴⁴ Section 11 Unfair Contract Terms Act, B.E. 2540 (1997)

⁴⁵ Section 12 Unfair Contract Terms Act, B.E. 2540 (1997)

agreement the licensee may not have to pay any fee depending on the details of the contract.

"Trademark" means a mark used or is to be used on or is in connection with goods to distinguish the goods with which the trademark of the owner of such trademark is used from goods under another person's trademark;⁴⁶

"Service mark" means a mark used or is to be used on or is in connection with service to distinguish the service with which the service mark of the owner of such service is used from services under another person's service mark;⁴⁷

"Licensee" under the Trademark at, B.E. 2534 means a person licensed by the owner of a registered trademark or service mark to use such trademark or service mark;⁴⁸

The application process for registration of a license to use a trademark and service mark is prescribed in the announcement of the Department of Intellectual Property which complies with the Trademark Act B.E. 2534 and regulates the following⁴⁹: The franchisor and the franchisee (licensee) shall submit a (Koh. 05) form and other supporting documents including a trademark licensing agreement, and if the parties do not wish to disclose some text in the agreement, the parties can submit a copy of trademark licensing agreement only as regulated in Section 68 Paragraphs 1 of the Trademark Act B.E. 2534.⁵⁰ The signature of the parties must appear in the copies of such documents as well including in another form called (Tor Por.01).

If the trademark licensing agreement is in a foreign language, the licensee has to attach the Thai translation of that document and the translator must certify that the translation of the document is correct. The trademark licensing

⁴⁶ Section 4 paragraph 2 Trademark act, B.E. 2534(1991)

⁴⁷ Section 4 paragraph 3 Trademark act, B.E. 2534(1991)

⁴⁸ Section 4 paragraph 6 Trademark act, B.E. 2534(1991)

⁴⁹ Director of general of intellectual property, "Announcement of the Department of intellectual property," The registration of license to use the trademarks and service marks (30 June 2000)., at <http://onestopservice.ditp.go.th/download/file/40dip.pdf>. (last visited 2 September 2016).

⁵⁰ The owner of a registered trademark may license another person to use his trademark for all or some of the goods for which the trademark is registered.

agreement according to Section 68 Paragraph 1 of the Trademark Act B.E. 2534 shall be in writing and registered with the registrar⁵¹ and if the agreement is not in writing and registered with the registrar, it shall be considered void.⁵²

The trademark licensing agreement shall illustrate at least the followings:

1. Conditions or terms between the owner of the trademark and the person applying to become the licensee in order to ensure that the owner of the trademark has control over the quality of the goods;
2. The goods for which the trademark is to be used.⁵³
3. The text shown that the licensee is the only person who get the permit to use the trademark or the owner of the trademark grant a license to another person other than the licensee to use the mark.⁵⁴

The owner of a trademark (franchisor) permits another person to use his trademark whereas he will be using the same goods or products as permitted, such permission shall be registered with the registrar. If the owner of a trademark permits two or more people to use his trademark as stipulated in Section 77 of the Trademark Act, all such permits must be registered to the registrar as well.

If not otherwise provided in the license agreement, the licensee shall not transfer the license to a third nor sub-license to others to use the trademark.⁵⁵ If the license agreement regulates that the right can be transfer, such license shall be in writing and registered with the registrar.

In the case where the registrar sees that a license to use the trademark under Section 68 will not confuse or mislead the public and is not contrary to public order or good morality or to public policy, the registrar shall make an order to register such license.⁵⁶ When the registrar makes one of the orders under paragraph one, he shall notify, the owner of the trademark and the person applying to be

⁵¹ Section 68 paragraph 2 Trademark act, B.E. 2534(1991)

⁵² Section 152 Thai Civil and Commercial Code

⁵³ Section 68 paragraph 3 Trademark act, B.E. 2534(1991)

⁵⁴ Section 77 Trademark act, B.E. 2534(1991)

⁵⁵ Section 79 Trademark act, B.E. 2534(1991)

⁵⁶ Section 69 paragraph 1 Trademark act, B.E. 2534(1991)

registered as a licensee, of the order in writing without delay,⁵⁷ as well as notify that a fee of 1,000 baht for register within 30 days since they receive the letter shall be paid.

The registration process of a trademark shall also be applied to service mark.

Therefore, registering a trademark or service mark is permitted under the Trademark Act. The use of the trademark of a licensee (franchisee)'s business shall be deemed as the use by the trademark owner.⁵⁸ In the case where there is a revocation of a trademark registration, the licensing of such trademark shall also be ceased to have effect.⁵⁹

4. Trade Secrets Act, B.E. 2545(2002)

Trade secret of a franchise business can be for example the formula of a food or drink, guide manual or list of customer's details. This type of information generally requires protection. The franchisee shall not disclose any confidential information or use that information to compete with the franchisor.

Before the Trade Secret Act, B.E. 2545 came into force the following procedure was used to solve issues related to disclosure or the usage of confidential information, as following: 1. the owner of the trade secret (the franchisor), the lawyer or a representative negotiates with the other party that disclosed information (the franchisee). They negotiate with the other party to stop the action. 2. The owner of the trade secret (the franchisor), the lawyer or the representative of the owner will take the case to the intellectual property and international trade court. 2.1 If the franchisees have disclosed the information, they will be sued for breaching of the contract since the contract includes a confidentiality clause. 2.2 If the other side disclosed the information they could be sued for wrongful act. Moreover, the franchisor can be sued for criminal offenses as well.⁶⁰

⁵⁷ Section 69 paragraph 2 Trademark act, B.E. 2534(1991)

⁵⁸ Section 70 Trademark act, B.E. 2534(1991)

⁵⁹ Section 76 Trademark act, B.E. 2534(1991)

⁶⁰ Somchai Rattanasuesakul, "Franchised exclusive franchise ranking," Journal franchise law chapter 1 (16 December 2012): 1., at <http://www.franchisedd.com>, (last visited 11 September 2016).

Trade secret is an intellectual property. The condition is that confidential information shall be protected, for example:

(1) Trade information which has not yet widely been spread or is not yet accessible to the wider public.

"Trade Information" means any medium which conveys statement, story, fact or any other medium to convey the mentioned and irrespective of the form it is in. It shall mean formula, form, compilations or assembled works, programs, methods, techniques, or processes.⁶¹ "Trade Secrets" means trade information which is not widely known or not yet accessible amongst the persons who are related to such information. It is the information which is useful commercially as it is a secret and it is the information which a commercially trade secret controller uses appropriate measure to maintain its secrecy⁶² Therefore, in order to be a trade secret; it has to be trade information.

For example; normally, people working related to trade information will not know whether such information is trade information or not but if it is known as trade information, it deems to be known widely as trade information which is not a secret. . For example, in a franchise business, there are many levels of employments such as executive level and management level. Each different level knows different types of information. Although, they are working in the same place they don't know the same information.⁶³

(2) It is the information which is useful commercially as it is a secret.

It is the information which is useful commercially as it is a secret, such secret information have to be useful for the business in order to be trade secret.

(3) It is information where the owner of the trade secret shall uses appropriate measures to maintain its secrecy.

⁶¹ Section 3 paragraph 2 Trade secrets act, B.E. 2545(2002)

⁶² Section 3 paragraph 1 Trade secrets act, B.E. 2545(2002)

⁶³ Somchai Rattanasuesakul, "Franchisedd exclusive franchise ranking," Journal franchise law chapter 1 (16 December 2012): 1., at <http://www.franchisedd.com>, (last visited 11 September 2016).

The owner of the trade secret has to set up appropriate measures to keep the information secrecy. For example, in the case where the information is a document, the owner will seal it in an envelope or..... put it into a safe. If the information is electronic data, it will be encrypted in order to access to data.⁶⁴ Trade secret may be industrial or commercial information data.⁶⁵

Infringement of right under the Trade Secret Act, B.E. 2545(2002), shall mean the act of disclosure, deprivation of use or use of trade secrets without being given consent by the owner of trade secrets. Such manner is contradictory to honest commercial practice. The infringer must know or has a reasonable ground to know that such act is contradictory to the mentioned practice.⁶⁶

The manner which is contradictory to the honest commercial practice under paragraph one includes breach of contract, infringement or any other act which is an inducement to infringe confidentiality which is based on trust, bribery, intimidation, coercion, fraud, theft, receiving of stolen property or espionage through electronics or other means.⁶⁷ For example, a breach of contract by an employee means that he/she will not disclose the trade secret (the formula) of the employer. Another example would be a competing company bribing an employee of another company for that employee to disclose the trade secret of their own company.⁶⁸

Nevertheless, Section 7 of the Trade Secret Act, B.E. 2545 (2002)⁶⁹ also regulates exceptions of infringement of rights.

⁶⁴ Siriwit Suraniwong, "Protection of trade secret against unlawful acquisition or access," (LL.M. independent study, Graduate school, Bangkok university, 2013), p. 1.

⁶⁵ Suchart Thammakitakul, Trade secret, (Bangkok: The Thai bar under the royal patronage, 2012), pp. 165.

⁶⁶ Section 6 paragraph 1 Trade secrets act, B.E. 2545(2002).

⁶⁷ Section 6 paragraph 2 Trade secrets act, B.E. 2545(2002).

⁶⁸ Arkarapat Pisitsangakarn , Tranfer of trade secret under Trade secrets act, B.E. 2545(2002), pp.63-64.

⁶⁹ Any of the following acts conducted on trade secrets shall not be deemed to be an infringement of rights in trade secrets:

When reliable evidence shows that any person has infringed trade secret rights, the controller of trade secrets⁷⁰ shall have the following rights:

- (1) To request the court for an interim injunction or to temporarily stop such infringement;
- (2) To file a case before the court for an injunction and file for compensation from the person who infringes the right in trade secrets.

(1) disclosure of use of trade secrets which a person has received it through a juristic act without knowing or without a reasonable ground to know about such trade secrets that another party to the contract has infringed the right in trade secrets of others;

(2) disclosure or use of trade secrets by a governmental agency which supervise the maintenance of trade secrets in the following cases:

- (a) when it is necessary to protect health or safety of the public or;
- (b) when it is necessary for the benefit of the public where its purpose is not for a commercial one and in such case, the governmental agency which supervise the maintenance of such trade secrets or a governmental agency or a person involved who has the trade secrets has proceed in accordance with the procedure to protect such trade secret from being used in unfair trading activities;

(3) a free discovery which means a discovery of trade secret of others by which a person discovers use invention or making it from his or her knowledge and skills or;

(4) a reverse engineering which means a a discovery of trade secret of others by which a person discovers assesses and critically studies a generally known product in order to find a process which such product was invented, produced or developed. However, in such case, the person who assesses and critically studies must obtain that product in good faith.

An act under (4) may not be referred to if a person who conducts a reverse engineer has expressed entered into an agreement as otherwise with the owner of trade secret or seller of the reverse engineered product.

⁷⁰ Section 3 paragraph 8 Trade secrets act, B.E. 2545(2002) "Controller of Trade secrets" means owner of trade secrets and it shall include a person who possesses, controls or maintains trade secrets.

Rights under (1) may be acted prior to a file of a case before the court under (2).⁷¹

Before exercising the rights under Section 8, a controller of trade secrets whose right has been infringed may agree to submit a petition to take the dispute concerning trade secrets to the Board for Conciliation or Mediation. However, such submission shall not prejudice the right of either party to resolve the dispute through arbitration or litigation in court should the conciliation or mediation fail to settle the dispute.⁷²

The prescription of infringement of right in trade secrets, no case shall be filed concerning an infringement of rights of trade secret when the limitation of three years has lapsed. The time limitation begins from the day the controller of trade secrets infringed know of the infringement and knows the identity of the wrongdoer. However, this shall not exceed ten years from the day of infringement.⁷³

5. The Consumer Protection Act, B.E.2522(1979)

No matter whether the franchisor or the franchisee runs the business, there will be customers or "consumers" who want to purchase goods and/or services.⁷⁴ The franchisor and the franchisee are known as business man.⁷⁵ They sell⁷⁶ the

⁷¹ Section 8 Trade secrets act, B.E. 2545(2002)

⁷² Section 9 paragraph 1 Trade secrets act, B.E. 2545(2002)

⁷³ Section 10 Trade secrets act, B.E. 2545(2002)

⁷⁴ Section 3 paragraph 6 The consumer protection act, B.E.2522(1979)

"Consumer" means a person who buys or obtains services from a business man or a person who has been offered or invited by a businessman to purchase goods or obtain services and includes a person who duly uses good or a person who duly obtains services from a businessman even he/she is not a person who pays the remuneration.

⁷⁵ Section 3 paragraph 7 The consumer protection act, B.E.2522(1979)

"Business man" means a seller, manufacturer or importer of goods sale, or purchaser of goods for re-sale, person who renders services, and includes a person who operates the advertising business.

⁷⁶ Section 3 paragraph 2 The consumer protection act, B.E.2522(1979)

goods⁷⁷ and /or service.⁷⁸ In the business, the franchisor and the franchisee have to plan and run the business following the franchise business. One of the marketing of the franchise business is advertisement. Advertisement includes any act which, by whatever means, causes the statement to be seen or known by an ordinary person for trading purposes.⁷⁹ A statement includes an act expressed in the form of letters, pictures, cinematographic film, light, sound, sign, or any act enabling the public to understand its meaning.⁸⁰ Advertising media means a thing as advertising media, such as newspaper, printed matter, radio, television, post and telegram, telephone or sign board.⁸¹ Moreover, the consumer has the following rights of protection:

- (1) The right to receive correct and sufficient information and description as to the quality of goods or services;
- (2) The right to enjoy freedom in the choice of goods or service
- (3) The right to expect safety in the use of goods or services;
- (3 bis) The right to receive a fair contract
- (4) The right to have the injury considered and compensated in accordance with the laws on such matters or with the provision of this Act.

Section 3 defines "Consumer" as a person who buy or obtains services from a business man or a person who has been offered or invited by a businessman to purchase goods or obtain services and includes a person who duly uses

"Sale" includes let, sell by hire-purchase or procure by whatever means, for which monetary consideration or other value is demanded, and also includes offer or invitation to do as afore said.

⁷⁷ Section 3 paragraph 3 The consumer protection act, B.E.2522(1979)

"Goods" means articles produced or possessed for sale.

⁷⁸ Section 3 paragraph 4 The consumer protection act, B.E.2522(1979)

"Service" Means an undertaking to accomplish a work, grant of any right or permission to use or conferring benefit in any property or business, for which monetary consideration or other value is demanded, excluding hire of services under the labor laws.

⁷⁹ Section 3 paragraph 9 The consumer protection act, B.E.2522(1979)

⁸⁰ Section 3 paragraph 8 The consumer protection act, B.E.2522(1979)

⁸¹ Section 3 paragraph 10 The consumer protection act, B.E.2522(1979)

good or a person who duly obtains services from a businessman even he/she is not a person who pays the remuneration. "Business man" means a seller, manufacturer or importer of goods sale, or purchaser of goods for re-sale, person who renders services, and includes a person who operates the advertising business. The definition of Consumer and business man under the Consumer Protection Act, B.E.2522(1979) refers to the franchisor and the franchisee. A franchisee is not a customer under this Act. Due to the fact that franchisee refers to a person who gets the right in a franchisor's business, he has the right to run the business according to the franchise business. Therefore, any dispute between a franchisor and a franchisee does not fall under the Consumer Protection Act. However, the Consumer Protection Act, B.E.2522 shall be applied to business man of a franchise business which is about advertising, labeling and contract.⁸²

6. Trade Competition Act B.E. 2542 (1999)

When entering into an agreement the franchisor and franchisee lay out detailed terms in a form of contract. The contract will give details about the fees; generally the franchisor will set a very high franchise fee (entrance fee), royalty fee, marketing and advertising fee which may seem unfair for the franchisee.⁸³ The trading, purchasing or selling of goods is only toward a group or any one person.⁸⁴ The fixation of a good or the limitation of the production can impact the decision of a franchisee. Franchisor could raise the price of a good,⁸⁵ when the same franchise business opens another branch in a near area, it could affect the volume of the sale. The franchisee may breach the contract.⁸⁶

Normally, a franchisor would like to protect the intellectual property right of a good or service which includes maintaining the quality, popularity, and

⁸² Juntima Kongjaroensuk and Sirapa Champathong, "RSU national Research Conference 2015," Legal Problems Regarding the Foreign Franchise Business in Thailand (Pathumtani: Rangsit University, 2015): 835.

⁸³ Section 25(1) Trade competition act B.E.2542(1999)

⁸⁴ Section 25(2) Trade competition act B.E.2542(1999)

⁸⁵ Section 25(3) Trade competition act B.E.2542(1999)

⁸⁶ Section 25(4) Trade competition act B.E.2542(1999)

image of such goods or service. A franchisor owns intellectual property such as trademark, service mark and patent. Those rights are exclusive rights which give franchisor bargaining power over the use of such right. . The issue in term of contract that could be considered unfair includes setting an area for sale, tie-in and exclusive dealing.⁸⁷

Franchise business under the Trade Competition Act B.E.2542(1999) covers businesses in fields such as agriculture, industry, commerce, finance, insurance and service.⁸⁸ The franchisor and the franchisee shall comply with the provisions under this Act; however they cannot have market dominance unless reasons and necessity of such action is provided. In that case an application must be submitted to the Trade Competition Commission.

One of the issues that a franchisee will raise when entering the contract with a franchisor is based on the terms of the contract which set a limitation of rights of unfair trade. For example, limitation of the trading and business area, the terms of tie-in and setting fixed prices for goods.⁸⁹

In relation to franchise contracts in Thailand besides the already mentioned laws there are other laws or acts which can be used for franchise businesses, for example, the Food Act B.E. 2522(1999), the Cosmetics Act B.E.2558(2015), the Drug Act B.E.2510(1967) and the Thai Revenue Law, etc. It can be concluded that because Thailand has no particular franchise law when a dispute arise the analogy of the law will have to be applied. As a result, it is visible that the current law cannot control or reduce disputes related to franchise that arises in Thailand.

2.3.3 Franchise Act Draft of Thailand

The beginning of the Draft Franchise Act of Thailand or Franchise Bill) first initiated 10 years ago where the Legal Division of the Department of Internal

⁸⁷ Department of internal trade, "Franchise business under the competition law," Competition focus 29 (May 2015): 2.

⁸⁸ Section 3 Trade competition act B.E.2542(1999)

⁸⁹ Juntima Kongjaroensuk and Sirapa Champathong, "RSU national Research Conference 2015," Legal Problems Regarding the Foreign Franchise Business in Thailand (Pathumtani: Rangsit University, 2015): 832.

Trade of the Ministry of Commerce made a legal development plan as per government's policy back then. At the time it was not a draft but a development plan that focus on developing the franchise law only. When the purpose of the Department of Internal Trade was simply to oversee the trading business, the Department of Internal Trade forwarded the development plan to the Department of Business Development.^{9°}

When the Department of Business Development under the Ministry of Commerce only has a policy to promote trade, the plan was revised and put into a draft bill on franchise business due to the increasing sale of products/service of one's own idea or from bringing business ideas in from other countries, and permitting other people to operate. Presently, there is no such law that protect franchise business and for this reason a law has been drafted, The content of the draft bill on franchise set the definition of relevant terms including franchise, franchisor, franchisee, and intellectual property, as well as defines the duties of the committee and the regulatory office on franchise, registration of a franchise business, how to appeal and the penalties.

When the Department of Business Development completed the draft, the draft has not been pushed forward to be enacted into an Act. On 11 August 2016, the National Legislative Assembly has proposed such a draft to be deliberated in the Parliament. Currently it is in the first session of the parliamentary deliberation. The draft bill of the Ministry of Commerce was used as a legal base, and further studies of relevant laws from other countries such as USA, South Korea, Malaysia, Vietnam and Indonesia were conducted for revision of the draft version.

1. Definition of Franchise

Section 4 of this Act provides definitions of 13 terms of franchise comprising of franchise, franchisor, franchisee, intellectual property, business, remuneration, disclose information, council, committee, director-general, registrar, competent authority and minister.

The researcher however will only raise the main definition of franchise.

^{9°} Interview with Kanokpong Anansantiwong, Legal Officer Professional Level, Department of Internal Trade, Ministry of Commerce, 11 January 2017.

Franchise means (1) a business whereby a person, called the franchisor, agrees to another person, called the franchisee, in using the intellectual property of the franchisor or the franchisor give the right to franchisee to use the intellectual property for the business within the period or the area or both. The business has to promote and operate under the business plan of the franchisor and the franchisee has the duty to pay remuneration to the franchisor. (2) Other businesses as regulated under the ministerial regulations.

Franchisor is the person who gives the right in a business to another person.

Franchisee receives the right to operate the business.

2. The Council of Franchise Business

The Chairman of the Council of Franchise Business is the Permanent Secretary of the Ministry of Commerce. The members of the council are appointed by positions.⁹¹ The Prime Minister will appoint the council 2 members from the Associations,⁹² and another 10 experts which make it a total of 12-person Council.⁹³ The persons under Section 6 (3) (4) shall hold office for a 4-year term period per time.⁹⁴

3. Registration of Franchise Business

Franchisors in Thailand are required to register for a Franchise License.⁹⁵ The Franchisor will have to submit the necessary registration forms such as the franchisor's name, type of business, location of operation, proof of intellectual property ownership, operation manual, information used for advertisements and the original copy of the contract form, etc.⁹⁶ Franchisors who run business in another country and have no address in the jurisdiction of Thailand shall include their address

⁹¹ Section 6 (1)(2) Franchise Act

⁹² Section 6(3) Franchise Act

⁹³ Section 6(4) Franchise Act

⁹⁴ Section 7 Paragraph 1 Franchise Act

⁹⁵ Section 18 Franchise Act

⁹⁶ Section 19 Franchise Act

of operation in Thailand otherwise they will not be able to proceed with legal enforcement.⁹⁷

The agreement between the Franchisor and Franchisee must be done in writing and include the following details; date, duties of the contracting party, time period, area of operation, compensation or fees that the Franchisee must pay for, terms of termination, continuance, or transfer.⁹⁸

4. The Rights and Duties of the Franchisor and the Franchisee

The Franchisor must disclose necessary information to the Franchisee⁹⁹ and provide practical trainings and manuals that are clear, accurate and complete.¹⁰⁰ Annual performance must also be submitted to the Registrar. ¹⁰¹ The franchisor cannot force the franchisee to buy, rent, and lease products or service from the franchisor unfairly.¹⁰² The franchisor is also forbidden to compete with the franchisee in the area of operation.¹⁰³

Franchisee shall not disclose trade secrets of the franchisor as indicated in the contract.¹⁰⁴ The franchisee has the right to decide whether the contract shall continue or be terminated where the franchisor transfer the business or the right in intellectual property to another,¹⁰⁵ and even where the franchisor has been removed or has not received a renewal of the permit.¹⁰⁶

⁹⁷ Section 21 Franchise Act

⁹⁸ Section 27 Franchise Act

⁹⁹ Section 29 Franchise Act

¹⁰⁰ Section 32 Franchise Act

¹⁰¹ Section 35 Franchise Act

¹⁰² Section 30 Franchise Act

¹⁰³ Section 33 Franchise Act

¹⁰⁴ Section 34 Franchise Act

¹⁰⁵ Section 31 Franchise Act

¹⁰⁶ Section 36 Franchise Act

5. The Appeal

Applicant or Franchisee has the right to appeal in writing to the Committee in the case where the Registrar has ordered to not register, not make any changes to the registration, not renew the certificate of registration, the revocation or the order does not allow for the termination of the business within thirty days from the date of receiving the letter of notification and final decision of the Board of Directors.¹⁰⁷

6. Penalties

There are three main forms of penalties:

1. Fine Penalty only such as in the case where the franchisor does not submit the annual report or not obliged with the form of the contract or the franchisor did not provide the manual for the franchisee, etc.
2. Imprisonment and light fine penalty (imprisonment of 1 month and fines of THB 10,000) such as where order of officials or franchise business committee has not been obliged too.
3. Imprisonment and heavy fine penalty (imprisonment between 1-3 years and fines between THB 100,000 — THB 300,000) such as for advertising or falsifying to be the franchisor, or in the case where the franchisor advertise false or exaggerated messages.

2.4 Models of Franchise

There are three forms of Franchise, as following:

2.4.1 Product and brand franchising

This type of franchise occurred during the earlier ages, over 100 years ago, it is a type of business where the franchisees are involved in delivering or distributing products for the franchisor. The franchisee will benefit from the franchisee's trade reputation. It is a type of franchise which seems similar to a dealer rather than creating a business model. The franchisor will appoint a person or a company to have the power to sell products under the name of the trademark within a certain territory.

¹⁰⁷ Section 40 Franchise Act

The franchisee must comply with the terms and conditions. This type of franchise is usually used in businesses related to automobiles, soft drinks, and fuels where distributing of products is more important than the form of service that is provided.

2.4.2 Business format franchising

This type of business has been used for more than 50 years where the franchisor is providing the franchisee with everything that is needed to run the business. The franchisor will not only give the right of the product and dealership to the franchisee but also provide him with the successful business model from the beginning stage, throughout the time period of the contract. This type of business has been developed at a later stage but is considered to be an important part of increasing franchise expansion. Examples of this type of franchising include McDonald and Seven Eleven.

2.4.3 Conversion franchising

This type of franchise has evolved from the second type of franchise (business format franchising) which has been around for more than 30 years. The approach is similar to the second franchising type but a system has been added that gives independent merchants who are in the same business the opportunity to adjust into such a franchise business. This type of franchise is attractive for people who own their own business and want to expand.

2.5 Samples of franchise business

Some of the examples of franchise businesses include convenience stores, food-related businesses and restaurants e.g.; 7- Eleven,¹⁰⁸ Gala Noodle Yentafo Tee Lung ga¹⁰⁹, Coffee Today¹¹⁰ and T-Bone Steak Box."

¹⁰⁸ CPALL, at <http://www.cpall.co.th/Franchise>, (last visited 6 Feb 2016).

¹⁰⁹ Thaifranchisecenter, at <http://www.thaifranchisecenter.com/directory/detail.php?fcID=f0000000880>, (last visited 16 November 2016).

¹¹⁰ Thaifranchisecenter, at <http://www.thaifranchisecenter.com/directory/detail.php?fcID=f0000000076>, (last visited 16 November 2016).

2.5.1 7- Eleven

There are 2 types of 7-Eleven franchise businesses. In term of investment, a prospective franchisee will have to invest money for the rights and cash collateral. However, for equipment for sales, investment into the products throughout the contract period is required, including investing into the interior and exterior of the shop where CP Company (the franchisor here) generally pays for.

Type 1 — Cost for obtaining right is THB 480,000 and cash collateral is THB 1,000,000 which total to THB 1,480,000 for a 6-year contract.

Type 2 — Cost for obtaining right is THB 1,730,000 and cash collateral is THB 900,000 which total to THB 2,630,000, for a 10-year contract.

The collateral cash of the franchisee will be returned upon termination of the service. The franchisor will still provide expertise, knowledge, and technical support in managing the business by providing both theoretical and practical trainings. Providing service throughout the contract term shall include sending personnel to assist with various duties in the beginning of the operation, sending personnel to give advice to help resolving problems regularly or depending on each case, regularly delivering good quality products, assist with inventory inspection, help checking the standard of the branch on various aspects, provide knowledge and new technique that can develop and improve the business, and help with advertisement and public relation in many outreach and regular promotions as per company plan.

2.5.2 Gala Noodle Yentafo Tee Lung Ga

There are 3 sizes for this type of franchise businesses. The difference varies in location, budget, business concept and the size of the shop. For each business there are standard costs and expenses for equipment such as kiosk, signboard and menu.

1. Normal Size: This includes 6 tables and chairs. The cost to bear includes a franchise fee of 120,000 Baht, 8,000 Baht for entry fee per year, 3,000 Baht for training fee and 2,500 Baht for the fish balls which totals to 135,000 Baht.

¹¹¹ Thaifranchisecenter, at <http://www.thaifranchisecenter.com/directory/detail.php?fcID=f000001128>, (last visited 16 November 2016).

2. **Big Size:** This would add 1 additional menu. The franchise fee is 230,000 Baht, entrance fee is 12,000 Baht per year, training of business fee is 8,000 Baht and the fish ball products are 2,500 Baht. The total is 252,500 Baht.

3. **Premium Size:** The model is the same as the normal size but no tables and chairs are provided. The franchise fee is 79,000 Baht, entrance fee 6,000 Baht per year, training of business fee is 3,000 Baht and the fish ball product is 2,500 Baht. The total cost would be 90,500 Baht.

2.5.3 Coffee Today

The investment of Coffee today includes a franchise fee of 30,000 baht for 3 years (possibility for renewal where the fee will be collected in the 4th year), royalty fee of 30,000 baht per year, deposit fee of 50,000 baht (deposit will be returned upon termination of contract), construction, decoration and equipment cost which cost between 450,000 to 750,000 baht depending on the size and style of shop.

The franchisee will be receiving free coffee brewing training, 1 complimentary coffee equipment checkup, and the management skills for running the business.

2.5.4 T-Bone Steak Box

There are 4 different sizes of investment; all include kiosk, shop equipment and products to run the business including roaster, uniform and menu. In addition, a franchisee will also receive technique, theoretical and factual process explanation and workshop at the new obtained franchise.

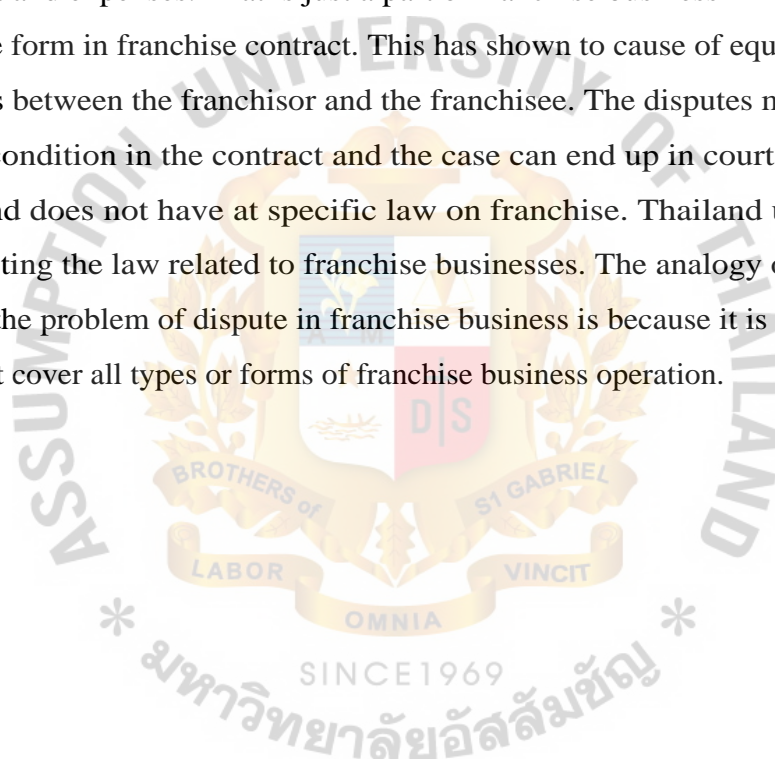
S size (Mobile box): The shop size is around 30-45 square meters. The number of seat is 20-40. The construction cost is 25,000 baht. The equipment cost is 60,000 baht. Franchise fee is 30,000 baht which total to 115,000 baht.

M size (Container box): The shop size is around 45-60 square meters. The number of seat is 40-60. The construction cost is 80,000 baht. The equipment cost is 60,000 baht. Franchise fee is 30,000 baht and the total is 170,000 baht.

L size (Food truck box): The shop size is around 30-45 square meters. The number of seat is 20-40. The construction cost is 180,000 baht. The equipment cost is 60,000 baht. And the franchise fee is 30,000 baht which all total to 270,000 baht.

XL size (Shop box): The shop size is around 45-60 square meters. The number of seat is 40-60. The construction cost is 350,000 baht. The equipment cost is 60,000 baht. Design cost is 10,000 baht. Franchise fee is 30,000 baht and the total is 450,000 baht.

It can be seen clearly from these examples that each business has different terms and conditions. The first business size provides one to pay for franchise fee, entrance fee and training fee. The second larger business includes the payment of franchise fee, royalty fee, insurance fee, cost and expense. The last refers to franchise fee, cost and expenses. That is just a part of franchise business in Thailand. There is no same form in franchise contract. This has shown to cause of equity and can cause disputes between the franchisor and the franchisee. The disputes may arise from an unfair condition in the contract and the case can end up in court. This is because Thailand does not have at specific law on franchise. Thailand uses analogy for interpreting the law related to franchise businesses. The analogy of the law cannot reduce the problem of dispute in franchise business is because it is not sufficient and does not cover all types or forms of franchise business operation.



Chapter 3

The Franchise Law in the United States of America, Australia and the UNIDROIT Convention

3.1 The United States of America

On December 21, 1978¹¹⁵, the U.S. Federal Trade Commission (FTC) issued the original franchising rule "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (from now on called the Franchise Rule)., Indicating under Title 16 Chapter I about the — disclosure requirements and prohibitions regarding franchising.

3.1.1 Definition of Franchise

The definitions given in Section 436.1 provide several definitions related to disclosure requirements and prohibitions concerning franchising, they have been laid out from 436.1(a) to (w). Some of the significant terms regarding franchise business include franchise, franchisor, franchisee, prospective franchisee, trademark and affiliate etc.

Franchise means any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:

- (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;
- (2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and

¹¹⁵ Eric H. Karp and Ari N. Stern, "A Proposal for a Mandatory Summary Franchise Disclosure Document," *FRANCHISE LAW JOURNAL* 35 (Spring 2016): 541.

(3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.¹¹⁶

Franchisee means any person who is granted a franchise.¹¹⁷

Franchisor means any person who grants a franchise business and participates in the franchise relationship. Unless otherwise stated, this shall include sub-franchising. The definition of a "subfranchisor" is a person who functions as a franchisor by engaging in both pre-sale activities and post-sale performance.¹¹⁸

Therefore, it can be said that the meaning of the term franchise according to the U.S. Federal Trade Commission (FTC) on the part of disclosure requirements and prohibitions concerning franchising shall include the relationship or management, verbally or in writing, the following; 1. The franchisee will get the right in the trade mark, goods and/or service of the franchisor's business. 2. The franchisor will have the right to control and shall help the franchisee throughout the business. 3. The franchisee will have to pay a fee to the franchisor or the representative or company of the franchisor.

3.1.2 Franchisors' Obligations

The franchisor is obligated to furnish documents to a prospective franchisee. A document is considered furnished if a copy of the document was hand-delivered, faxed, emailed or otherwise delivered or direct for accessing the document on internet or a paper or tangible electronic copy by the required date or at least 14 calendar-days. If the franchisor fail to furnish a prospective franchisee with a copy of disclosure document or at least seven calendar-days, or alter unilaterally and materially the terms and conditions of franchise agreement, the offer or sale the franchise business located in the United States of America or its territories, shall be of

¹¹⁶ Section 436.1(h) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹¹⁷ Section 436.1(i) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹¹⁸ Section 436.1(k) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act unless the transaction is exempted under subpart E of Section 436.2..¹¹⁹

3.1.3 Contents of a Disclosure Document

Section 436.3 requires for a cover page of the document, the franchisor's name,¹²⁰ a sample of the primary business trademark¹²¹ and a brief description of the franchised business¹²² are some of the item included in such document. The details or information will be given as a guideline that can be useful to the prospective franchisee. This section will elaborate on the procedure of drawing up a franchise disclosure document.

The table of content of a franchise disclosure document comprises of 23 items¹²³ as following:

1. The Franchisor, and any Parents, Predecessors, and Affiliates disclose the required details as elaborated in Section 436.5 (a)¹²⁴

2. Business experience

To disclose by name and position of the franchisor's directors, trustees, general partners, principal officers, and any other individuals who will have

¹¹⁹ Section 436.2 Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹²⁰ Section 436.3(b) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹²¹ Section 436.3(c) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹²² Section 436.3(d) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹²³ Section 436.4 Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹²⁴ Section 436.5 (a) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

management responsibility relating to the sale or operation of franchises offered by this document. For each person listed in Section 436.5 (b), his or her principal positions and employers during the past five years, including each position's starting date, ending date and location shall be stated.¹²⁵

3. Litigation

To disclose whether the franchisor; a predecessor; a parent or affiliate who induces franchise sales by promising to back the franchisor financially or otherwise guarantees the franchisor's performance; an affiliate who offers franchises under the franchisor's principal trademark¹²⁶ and any person identified here¹²⁷ has pending an administrative, criminal, or material civil action alleging a violation of a franchise, antitrust, or securities law, or alleging fraud, unfair or deceptive practices, or comparable allegations against any person¹²⁸ and has in the 10-year period immediately before the disclosure document's issuance date been convicted of or pleaded nolo contendere to a felony charge, or been held liable in a civil action involving an alleged violation of a franchise, antitrust, or securities law, or involving allegations of fraud, unfair or deceptive practices, or comparable allegations.¹²⁹

4. Bankruptcy

To disclose whether the franchisor; any parent; predecessor; affiliate; officer, or general partner of the franchisor, or any other individual who will have management responsibility relating to the sale or operation of franchises offered by

¹²⁵ Section 436.5 (b) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹²⁶ Section 436.5 (c) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹²⁷ Section 436.5 (c)(i) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹²⁸ Section 436.5 (c)(i)(A) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹²⁹ Section 436.5 (c)(iii) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

this document, has, during the 10-year period immediately before the date of this disclosure document.¹³⁰

5. Initial fees

To disclose the initial fees and any conditions under which these fees are refundable. If the initial fees are not uniform, disclose the range or formula used to calculate the initial fees paid in the fiscal year before the issuance date and the factors that determined the amount.

"Initial fees" means all fees and payments, or commitments to pay, for services or goods received from the franchisor or any affiliate before the franchisee's business opens, whether payable in lump sum or installments.¹³¹

6. Other fees

To disclose all other fees that the franchisee must pay to the franchisor or its affiliates, or that the franchisor or its affiliates impose or collect in whole or in part for a third party.¹³² There are 4 columns. In column 1, list the type of fee (for example, royalties, and fees for lease negotiations, construction, remodeling, additional training or assistance, advertising, advertising cooperatives, purchasing cooperatives, audits, accounting, inventory, transfers, and renewals). In column 2, state the amount of the fee. In column 3, state the due date for each fee. In column 4, include remarks, definitions, or caveats that elaborate on the information in the table. If remarks are long, franchisors may use footnotes instead of the remarks column¹³³

¹³⁰ Section 436.5 (d) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹³¹ Section 436.5 (e) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹³² Section 436.5 (f) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹³³ Section 436.5 (0(1)(2)(3)(4) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

7. Estimated Initial Investment

This Item table comprises of 5 columns. In column 1: List each type of expense, beginning with pre-opening expenses such as the initial franchise fee, training expenses, real property whether purchased or leased, equipment, fixtures, other fixed assets, construction, remodeling, leasehold improvements, and decorating costs, whether purchased or leased, inventory to begin operating, security deposits, utility deposits, business licenses, and other prepaid expenses.¹³⁴ In column 2, state the amount of the payment.¹³⁵ In column 3, state the method of payment.¹³⁶ In column 4, state the due date.¹³⁷ And in column 5, state to whom payment will be made.¹³⁸

8. Restrictions on Sources of Products and Services

To disclose the franchisee's obligations to purchase or lease goods, services, supplies, fixtures, equipment, inventory, computer hardware and software, real estate, or comparable items related to establishing or operating the franchised business either from the franchisor, its designee, or suppliers approved by the franchisor, or under the franchisor's specifications. Include obligations to purchase imposed by the franchisor's written agreement or by the franchisor's practice.¹³⁹

¹³⁴ Section 436.5 (g)(1)(i)(A)(B)(C)(D)(E)(F) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹³⁵ Section 436.5 (g)(2) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹³⁶ Section 436.5 (g)(3) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹³⁷ Section 436.5 (g)(4) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹³⁸ Section 436.5 (g)(5) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹³⁹ Section 436.5 (h) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

9. Franchisee's Obligations

This item comprises of three columns. The first column shall list the obligation, the second will state the Section in the agreement and the last column will define the disclosure document item. The details of the obligations are site selection and acquisition/lease, pre-opening purchase/leases, site development and other pre-opening requirements, initial and ongoing training, opening, fees, compliance with standards and policies/operating manual, trademarks and proprietary information, restrictions on products/services offered, warranty and customer service requirements, territorial development and sales quotas, ongoing product/service purchases, maintenance, appearance, and remodeling requirements, insurance, advertising, indemnification, owner's participation/management/staffing, records and reports, inspections and audits, transfer, renewal, post-termination obligations, non-competition covenants, dispute resolution and other.¹⁴⁰

10. Financing

To disclose the terms of each financing arrangement; including the leases and installment contracts, which the franchisor, its agent, or affiliates offers directly or indirectly to the franchisee. The franchisor may summarize the terms of each financing arrangement in tabular form."

11. Franchisor's Assistance, Advertising, Computer Systems, and Training.¹⁴²

1) Disclose the franchisor's pre-opening obligations to the franchisee, including any assistance in locating a site and negotiating the purchase or lease of the site, whether it is for constructing, remodeling, hiring and training of employees.

¹⁴⁰ Section 436.5 (i) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹⁴¹ Section 436.5 (j) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹⁴² Section 436.5 (k) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

2) Disclose the typical length of time between the earlier of the signing of the franchise agreement or the first payment of consideration for the franchise and the opening of the franchisee's business.

3) Disclose the franchisor's obligations to the franchisee during the operation of the franchise, including any assistance such as developing products or services and in the franchise business and establishing prices etc.

4) Describe the advertising program for the franchise system.

5) Disclose whether the franchisor requires the franchisee to buy or use electronic cash registers or computer systems.

6) Disclose the table of contents of the franchisor's operating manual provided to franchisees as of the franchisor's last fiscal year-end or a more recent date.

7) Disclose the franchisor's training program as of the franchisor's last fiscal year-end or a more recent date. In the table, there are 4 columns; the subjects, the hours of classroom training, the hours of on-the-job training and the location of the training.

12. Territory

The territory or the location of the franchise to be operating the business shall be disclosed. The rule has to specify the territory of the franchisee. For example, a specific radius, a distance sufficient to encompass a specified population, or another specific designation¹⁴³ and the conditions under which the franchisor will approve the relocation of the franchised business or the franchisee's establishment of additional franchised outlets.¹⁴⁴ This part shall also require disclosing territory that is considered exclusive territory.

¹⁴³ Section 436.5 (1)(2) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹⁴⁴ Section 436.5 (1)(3) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

13. Trademark

Disclose each principal trademark to be licensed to the franchisee. Principal trademark means the primary trademarks, service marks, names, logos, and commercial symbols the franchisee will use to identify the franchised business and it may not include every trademark the franchisor owns. The registration of the trademark will be registered with the United States Patent and Trademark Office and the date, identification number, whether the franchisor has filed all required affidavits and whether any registration has been renewed shall be disclosed.

14. Patents, Copyrights, and Proprietary Information¹⁴⁵

This item requires the franchisor to disclose whether the franchisor owns rights in, or licenses to, patents or copyrights that are material to the franchise. It shall also be disclosed whether the franchisor has any pending patent applications that are material to the franchise. If so, the franchisor shall also disclose for each patent duration, type, number and date of the patent.

15. Obligation to Participate in the Actual Operation of the Franchise Business.¹⁴⁶

Disclose the franchisee's obligation to participate personally in the direct operation of the franchisee's business and whether the franchisor recommends participation. This shall include obligations arising from any written agreement or from the franchisor's practice. The limitations or any restrictions that the franchisee must place on its manager or that shall be agreed upon such as maintain trade secrets, and covenants that are not completed shall also be disclosed.

16. Restrictions on what the franchisee may sell

Any franchisor-imposed restrictions or conditions on the goods or services that the franchisee may must be disclosed whether the franchisor has the right

¹⁴⁵ Section 436.5 (n) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹⁴⁶ Section 436.5 (o) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

to change the types of authorized goods or services and whether there are limits on the franchisor's right to make changes.¹⁴⁷

17. Renewal, Termination, Transfer, and Dispute Resolution.

This item comprises of a table foiiii that defines the franchise relationship. The first column lays out the provisions; there are 23 items in total (a-w) which include items such as length of the franchise term, termination by franchisee, by franchisor without cause and with cause, modification of the agreement and dispute resolution by arbitration or mediation.¹⁴⁸

18. Public figures

A public figure means a person whose name or physical appearance is generally known to the public in the geographic area where the franchise will be located.¹⁴⁹ When the franchisor is a public figure he shall disclose such position and duties in the franchisor's business structure.

19. Financial performance representations

The franchisor has to disclose the information, if he does not disclose required information, he shall be deemed breaching the rule.

20. Outlets and franchisee information

The objective of this rule is for the franchisor to disclose the total number of franchised and company-owned outlets for each of the franchisor's last three fiscal years¹⁵⁰ and changes in the number and ownership of outlets located in

¹⁴⁷ Section 436.5 (p) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹⁴⁸ Section 436.5 (q) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹⁴⁹ Section 436.5 (r)(4) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹⁵⁰ Section 436.5 (t)(1) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

each state during each of the last three fiscal years.¹⁵¹ This shall include the number of transfers of outlets from franchisees to new owners, status of franchised outlets and status of company-owned outlets. A system-wide outlet summary will be indicated in the form of a table format.

21. Financial Statements

The financial statements shall be prepared according to United States generally accepted accounting principles, as revised by any future United States government mandated accounting principles, or as permitted by the Securities and Exchange Commission.¹⁵² For example, the franchisor's balance sheet, statements of operations, stockholders equity, and cash flows for each of the franchisor's previous three fiscal years.

22. Contracts.

A copy of the all proposed agreements regarding the franchise offering, including the franchise agreement and any lease, options, and purchase agreements shall be attached.' 53

23. Receipts

There are two copies of the receipts. An example of the disclosure document would indicate the name, principal business address, telephone number, the issuance date, provide space for the prospective franchisee's signature and date and franchisors may include any specific instructions for returning the receipt.¹⁵⁴

¹⁵¹ Section 436.5 (t)(2) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹⁵² Section 436.5 (u) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹⁵³ Section 436.5 (v) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹⁵⁴ Section 436.5 (w) Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

3.1.4 Instructions

All required information clearly, legibly, and concisely in a single document using plain English. The disclosures must be in a form that permits each prospective franchisee to store, download, print, or otherwise maintain the document for future reference. For each completed franchise sale, franchisors shall retain a copy of the signed receipt for at least three years.¹⁵⁵

All information in the disclosure document shall be current. After the close of the fiscal year, the franchisor shall, within 120 days, prepare a revised disclosure document. The franchisor shall, within a reasonable time after the close of each quarter of the fiscal year; each prospective franchisee shall receive the disclosure document.¹⁵⁶

3.1.5 Exemptions

The provisions of part 436 shall not apply if the franchisor can establish any of the following:

When the franchisor can establish that the total of the required payments or commitments that are made any time from before to within six months after commencing operation of the franchisee's business is less than \$570. The franchise relationship is a fractional franchise or a leased department. The franchisee is an entity that has been in business for at least five years and has a net worth of at least \$5,715,500.¹⁵⁷

3.1.6 Prohibitions

This part was an additional prohibition where¹⁵⁸ the violation acts of Section 5 of the Federal Trade Commission Act for any franchise seller covered by

¹⁵⁵ Section 436.6 Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹⁵⁶ Section 436.7 Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹⁵⁷ Section 436.8 Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

¹⁵⁸ Section 436.9 Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission.

part 436 where claims that orally, visually, or in writing contradicts with the disclosure information. Leading to misrepresentation that any person:¹⁵⁹ could disseminate any financial performance to prospective franchisees unless the franchisor has a reasonable basis and written substantiation.

3.1.7 Other Provisions

The commission does not approve any disclosure any opinion on the legality of any matter a franchisor may be required to disclose by part 436. The franchisor may have additional obligations to impart material information to prospective franchisees outside of the disclosure document.

The FTC (Federal Trade Commission) does not intend to preempt the franchise practices laws of any state or local government, except to the extent of any inconsistency with part 436.¹⁶⁰

If any provision of this part is stayed or held invalid, the remainder will stay in force.¹⁶¹

3.2 Australia

On 1 January 2015, the old Franchising Code was repealed and replaced with a new Franchising Code of Conduct in the Competition and Consumer (Industry Codes—Franchising) Regulation 2014. The new Code applies to conduct on or after 1

¹⁵⁹ (1) Purchased a franchise from the franchisor or operated a franchise of the type offered by the franchisor.

(2) Can provide an independent and reliable report about the franchise or the experiences of any current or former franchisees.

¹⁶⁰ Section 436.10 Other laws and rules Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

¹⁶¹ Section 436.11 Severability Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission

January 2015.¹⁶² It applies to all conduct on or after 1 January 2015. If a franchise agreement has been entered into after 1 October 1998, but before 1 January 2015, the new Code still applies with certain exceptions. If such a franchise agreement is transferred or varied on or after 1 January 2015, the entire Code will then apply.¹⁶³ There are 4 parts in the Franchising Code of Conduct: introduction, disclosure requirements before entry into a franchise agreement, franchise agreements and resolving disputes.

3.2.1 Definition of Franchise

The code provides several definitions¹⁶⁴ of various words; the researcher will only raise the main words such as franchise, franchisor, franchisee, prospective franchisee and franchise agreement.

Franchise includes

- (a) The rights and obligations under a franchise agreement;
- (b) A master franchise;
- (c) A subfranchisor;
- (d) An interest in a franchise.

Franchisor includes

- (a) A person who grants a franchise;
- (b) A person who otherwise participates in a franchise as a franchisor;
- (c) A subfranchisor in its relationship with a sub franchisee;
- (d) A subfranchisor in a master franchise system;
- (e) A subfranchisor in its relationship with a franchisee.

Franchisee includes

¹⁶² Australian competition and consumer commission, Franchising Code of Conduct (Australia), at <https://www.accc.gov.au/business/industry-codes/franchising-code-of-conduct>, (last visited 1 November 2016).

¹⁶³ Margaret Ryan, "Phillips ormonde Fitzpatrick intellectual property," Civil penalties under the new Franchising Code of Conduct (April 2015), at <https://www.pof.com.au/civil-penalties-under-the-new-franchising-code-of-conduct/>, (last visited 8 November 2016).

¹⁶⁴ Clause 4 Franchising Code of Conduct

- (a) a person to whom a franchise is granted;
- (b) A person who otherwise participates in a franchise as a franchisee;
- (c) A subfranchisor in its relationship with a franchisor;
- (d) A sub franchisee in its relationship with a subfranchisor.

Prospective franchisee means a person who deals with a franchisor for the right to be granted a franchise.

Franchise agreement is an agreement that takes the form, in whole or part in a written agreement, an oral agreement, an implied agreement and in which a person (the franchisor) grants to another person (the franchisee) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor and under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol. And including the franchisee must pay or agree to pay to the franchisor or an associate of the franchisor such as an initial capital investment fee, goods or service and training fee.¹⁶⁵

3.2.2 Disclosure Requirements before Entry into a Franchise Agreement

The main purpose of disclosure documents are to inform the franchisee or the prospective franchisee when entering or renewing a franchise agreement, or, extend the term or scope of a franchise agreement. This shall also include informing the franchisee or prospective franchisee about current information. A disclosure document must be signed by the franchisor, or a director, officer or authorized agent of the franchisor.¹⁶⁶ After entering into a franchise agreement, the franchisor must update the disclosure document within 4 months after the end of each financial year.¹⁶⁷ However, there are exceptions which have been regulated in subclause 8(7) of the Franchising Code of Conduct¹⁶⁸

¹⁶⁵ Clause 5 Franchising Code of Conduct

¹⁶⁶ Subclause 8(4) Franchising Code of Conduct

¹⁶⁷ Subclause 8(6) Franchising Code of Conduct

¹⁶⁸ However, the franchisor need not update the disclosure document after the end of a financial year if:

A franchisor must give a copy of this code and a copy of the disclosure document as updated under the provision. If the franchisor or the franchisee would like to renew a franchise agreement or extend the term or scope of the franchise agreement, the franchisor will give the document to the franchisee at least 14 days before renewal or extension of the franchise agreement.¹⁶⁹

According to clause 10 Franchising Code of Conduct, the franchisee or prospective franchisee must to give advice to the franchisor before entering into franchise agreement. The franchisor must not enter into a franchise agreement or renew or transfer or extend the term or scope of a franchise agreement or enter into an agreement to enter into a franchise agreement or renew or transfer or extend the term or scope of a franchise agreement or including receives a non-refundable payment. Exceptions have been stipulated in subclause 10(1) (e) Franchising Code of Conduct¹⁷⁰

Before entering into a franchise agreement, the franchisor must have received a signed statement from the prospective franchisee that the prospective franchisee has been given advice by an independent legal adviser or an independent business adviser or an independent accountant. Apart from that the statement shall also indicate that the prospective franchisee has been given that kind of advice about the proposed franchise agreement or franchised business; or has been told that that kind of advice should be sought but has decided not to seek it.

The franchisor shall give the following information statement to prospective franchisee: Firstly, the franchisor must give a copy of the information statement set out in Annexure 2 to a prospective franchisee. Secondly, the information

(a) the franchisor did not enter into a franchise agreement, or only entered into 1 franchise agreement, during the year; and

(b) the franchisor does not intend, or if the franchisor is a company, its directors do not intend, to enter into another franchise agreement in the following financial year.

¹⁶⁹ clause 9 Franchising Code of Conduct

¹⁷⁰ Unless the franchisor has received from the franchisee or prospective franchisee a written statement that the franchisee or prospective franchisee has received, read and had a reasonable opportunity to understand the disclosure document and this code.

statement must be set out in size 11 font and be contained on no more than 2 pages. Thirdly, a copy of the information statement is to be given to a prospective franchisee as soon as practicable after the prospective franchisee formally applies or expresses an interest in acquiring a franchised business. Lastly, the requirements of this clause do not apply in relation to the renewal of a franchise agreement or the extension of the term or scope of a franchise agreement.¹⁷¹

In addition to the above mentioned methods, details and duties of the franchisor and the franchisee or prospective franchisee concerning the disclosure of documents, more descriptive details are provided in the Annexure 1 and 2 of the Franchising Code of Conduct. Annexure 1 prescribes issues such as form and order, heading numbering, and includes table of content related to disclosure document for franchisee or prospective franchisee. Annexure 1 and Annexure 2 follow Division 4 of this code.

Annexure 1 on disclosure of documents for franchisee or prospective franchisee describes 23 required items.

1. First page

The first page will prescribe the outline of the disclosure document which will include the topic in bold font letters, the name, address, phone number, preparation date and other details as well as the signature of the disclosure document.

2. Franchisor details such as name, address, business place, the kind of business and the number of year that franchisor run the business.

3. Business experience meaning a summary of the relevant business experience of each officer of the franchisor and/or the franchisor for the past 10 years.

4. Litigation shall include the disclosure of history or record in the details proceeding such as the name of parties, the name of court, tribunal or arbitrator, the case number, the general nature and the current of the proceedings. The details of current proceeding by a public agency, criminal or civil proceedings or arbitration relevant to the franchise, against the franchisor in Australia alleged; such as breach of agreement, contravention of trade practices law or the Corporations Act 2001. Also, the details of proceedings against the franchisor under section 12 of the Independent Contractors Act 2006; or a law of a State or Territory that regulates workplace

¹⁷¹ Clause 11 Franchising Code of Conduct

relations or independent contractors. This shall include franchisors who have been convicted of an offence or an equivalent offence outside Australia or bankrupt in Australia or elsewhere in the last 10 years or subject to final judgment in civil proceedings in the last 5 years.

5. Payments to agents

6. Existing franchise referring to the number, sorted by State, territory or region, of existing franchised businesses, existing franchisees and businesses owned or operated by the franchisor or an associate of the franchisor in Australia that are substantially the same as the franchised business. For each existing franchisees the address, phone number, and starting year of the franchise business must be provided. But if there are more than 50 franchises, the franchisor may instead give details in accordance to what will be indicated for existing franchisee.

7. Master franchise if the franchisor is a subfranchisor, the master franchisor's name, and address, principal place of business and Australian Business Number (ABN), Australian Company Number (ACN) or Australian Registered Body Number (ARBN) must be provided. For each officer of the master franchisor, the name position held and qualifications must be given. A franchise agreement shall be terminated by the master franchisor, franchisor, or that were not extended by the master franchisor shall be done so for each of the last 3 financial years. . For example, in the case where the franchise agreement has been renewed or extended or transferred, the scope of the franchise agreement has been extended, the ground on which the franchise agreement has been terminated or in the case where a franchise agreement was terminate how will this impact others does this affect sub franchisors.

8. Intellectual property is for any trade mark used to identify, and for any patent, design or copyright that is material to, the franchise system, which is described in the right and obligation of the franchisee clause. If the intellectual property is registered in Australia, the franchisor has to give in date, registration number, place of registration and any judgment or pending proceeding.

If the franchisor is not the owner of the intellectual property, the franchisor has to provide the name, agreement, rights, limitation, duration and the conditions of the owner.

9. Franchise site or territory

10. Supply of goods or services to a franchisee For the franchisor's requirements for supply of goods or services to a franchisee details of maintain a level of inventory or acquire, restrictions on acquisition of goods or services, the obligation of the franchisee to accept goods or services from the franchisor, the franchisor's obligation to supply goods or services to the franchisee, the conditions under which the franchisee can return goods, obtain a refund for service, the franchisor will receive a rebate or other financial benefit, including the name of the business.

11. Supply of goods or service by a franchisee shall include details of restrictions on the goods or services that the franchisee may supply and on the persons to whom the franchisee may supply goods or service.

12. Supply of goods or services - online sales include details of whether the goods or services are the same type or brand. If the franchisee make a good or service available online, they may be restricted in location, condition and include clauses addressing third party website.

13. Sites or territories include details of whether the territory or site to be franchised has, in the previous 10 years, been subject to a franchised business operated by a previous franchise granted by the franchisor and, if so, details of the franchised business, including the circumstances in which the previous franchisee ceased to operate.

14. Other payments shall include disclosure of details of cost to start operating the business such as cost of property, equipment, business license and insurance. All of the details must include a description of the payment, the amount, the formula and the refundable.

15. Marketing or other cooperative funds

16. Financing.

17. Unilateral variation of franchise agreement.

18. Arrangements to apply at the end of the franchise agreement shall depend on the circumstance of the franchisee or prospective franchisee or franchisor such as when renewing or extending the teinis of the franchise agreement, selling or purchasing stocks, or marketing of material, equipment or other asset. If the franchisee does not have the option to renew or extend the franchise agreement, Annexure 1 18.3, 18.4 and 18.5 shall apply.

19. Amendment of franchise agreement on transfer of franchise

20. Earnings information includes the historical earning data for the franchise business or the franchise system, and any other information from which historical or future earning information of the franchise business can be estimate.

Earnings information that is a projection or forecast must include the facts and assumptions, the extent of enquiries and research, the period, an explanation of the choice of the period, depreciation, salary for the franchisee and the cost of servicing loans and assumptions about interest and tax.

21. Financial details shall reflect the franchisor's position at the end of the last financial year or on the date of the statement, for example. It could also be a financial report for each of the last 2 completed financial years.

22. Updates shall refer to any given information under clause 17 must be reported.

23. Receipt

The Annexure 2 is about the information statement for prospective franchisee. It indicates the meaning of franchising, the advantage and disadvantage, the risk, how to invest and including the fund and expense, telling the fact that it will occur in the current and future in the franchise business, statistic, the right and the duties of the franchisee in the franchise business. This information statement can be a guideline for the prospective franchisee, however, more information can also be found on the websites.

3.2.3 Franchise Agreements

1. Franchisor's obligations

1) Copy of lease

If a franchisee leases premises from the franchisor or an associate of the franchisor, the franchisor or the associate must give to the franchisee a copy of the lease or a copy of the agreement to lease. The copy and details must be given within 1 month after the lease or agreement to lease is signed by the parties.¹⁷²

¹⁷² Clause 13 Franchising Code of Conduct

2) Copy of other agreements

The franchisor must give to the franchisee a copy of the agreement when a franchise agreement requires the franchisee or directors, shareholders, beneficiaries, owners or partners of the franchisee to enter into an agreement. The franchisor must give the franchisee a copy of agreement such as a lease or hire purchase agreement or intellectual property agreement which indicates that the franchisee gains the authorized ownership. The agreement must be given at least 14 days before the day on which the franchise agreement is signed.¹⁷³

3) Copy of financial statements

If in the franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the franchisor has to prepare in all of financial statement such as income and expenses for the franchisee within 4 months after the end of the last financial year. The franchisor then gives a copy of the statement and, a copy of the auditor's report to the franchisee within 30 days of preparing the statement.¹⁷⁴

4) Disclosure document

Upon receiving a written request from a franchisee, if subclause 8(8) applies, the franchisor must give to the franchisee a disclosure document within 2 months of the date of request. . However, a request can be made only once every 12 months. In any other case, the franchisor has to give the disclosure document to the franchisee within 14 days of the date of the request.¹⁷⁵

5) Disclosure of materially relevant facts

The franchisor must give a copy of the disclosure document to the prospective franchisee as soon as reasonably practicable before the franchisee enters into a franchise agreement with the franchisor. The details shall include breach of a franchise agreement, misconduct, an offence of dishonesty and a change in the intellectual property etc.¹⁷⁶

¹⁷³ Clause 14 Franchising Code of Conduct.

¹⁷⁴ Clause 15 Franchising Code of Conduct.

¹⁷⁵ Clause 16 Franchising Code of Conduct.

¹⁷⁶ Clause 17 Franchising Code of Conduct.

2. End of term arrangements

Whether the franchisor intends to extend or enter into a new agreement, the franchisor has to inform the franchisee in writing. The period of time for the franchisor to give notice must be reasonable compared to the duration of the term of agreement. If the term of the franchise agreement is 6 months or longer, the franchisor's notice must be given at least 6 months before the end of the term of the agreement and if the term of the franchise agreement is less than 6 months, the franchisor's notice must be given at least 1 month before the end of the term of the agreement.¹⁷⁷

3. Terms of franchise agreement

1) Prohibition on release from liability etc.

A franchise agreement must not require a franchisee to sign a general release of the franchisor from liability towards the franchisee or a waiver of any verbal or written representation made by the franchisor.¹⁷⁸

2) Jurisdiction for settling disputes

A franchise agreement may contain a clause that if a party to the agreement wishes to bring an action or proceedings in relation to a dispute under the agreement, requires the party to bring an action or proceedings in a State or Territory in which the franchised business is based; or wishes to refer a dispute under the agreement to mediation, requires the mediation to be conducted in a State or Territory in which the franchised business is based.

However, a franchise agreement must not contain a clause that requires a party to the agreement to bring an action or proceedings in relation to a dispute under the agreement in any State or Territory outside that in which the franchised business is based or in any jurisdiction outside Australia.¹⁷⁹

¹⁷⁷ Clause 18 Franchising Code of Conduct

¹⁷⁸ Clause 20 Franchising Code of Conduct

¹⁷⁹ Clause 21 Franchising Code of Conduct

3) Costs of settling disputes

Any clauses that require the franchisee to pay to the franchisor costs incurred by the franchisor in relation to settling a dispute under agreement, the clause is of no effect.¹⁸⁰

4) Effect of restraint of trade clause if franchise agreement not extended

A restraint of trade clause in a franchise agreement has no effect after the agreement expires if the franchisee had given written notice to the franchisor seeking to extend the agreement and the franchisee was not in breach of the agreement, not infringed any intellectual property of or a confidentiality agreement with the franchisor during the term of the agreement. It shall also have no effect where the either the franchisee claimed compensation for goodwill because the agreement was not extended or the agreement did not allow the franchisee to claim compensation for goodwill in the event that it was not extended.¹⁸¹

4. Transfer of franchise agreement

1) Request for franchisor's consent to transfer

In the event of transfer, a person must do such request in writing. . A request must be accompanied by all information that the franchisor would reasonably require and expect and if the franchisor requires further information, the franchisor may, in writing, request the person to provide specified information relevant for make the decision.¹⁸²

2) Franchisor's consent to transfer¹⁸³

The franchisor must advise, in writing, a person who has made a request under clause 24 for consent to the transfer of a franchise agreement.

¹⁸⁰ Clause 22 Franchising Code of Conduct.

¹⁸¹ Clause 23 Franchising Code of Conduct.

¹⁸² Clause 24 Franchising Code of Conduct.

¹⁸³ Clause 25 of Franchising Code of Conduct.

5. Termination of franchise agreement

1) Termination - cooling off period

The franchisee may terminate an agreement within 7 days after the earlier of entering into an agreement and making any payment. This shall not apply to the transfer or renew or the extension of the term or scope of an existing franchise agreement. If the franchisee terminates an agreement within 7 days after the earlier of entering into the agreement and making any payment, the franchisor must, within 14 days repay all payment made by the franchisee to the franchisor under the agreement."¹⁸⁴

2) Termination - breach by franchisee

This clause will apply if the franchisee breaches the franchise agreement and the franchisor proposes to terminate the franchise agreement. The franchisor has to give a reasonable notice in writing that the franchisor proposes to terminate the franchise agreement because of the breach, tell the franchisee what the franchisor requires to be done to remedy the breach and allow the franchisee a reasonable time to remedy the breach whereas the franchisor does not have to allow more than 30 days.¹⁸⁵

3) Termination - no breach by franchisee

The franchisor terminates a franchise agreement according to the agreement, before it expires and without the consent of the franchisee, at the same time, the franchisee has not breached the agreement. Before such termination, the franchisor must give a notice to the franchisee in writing with reasonable ground.¹⁸⁶

4) Termination - special circumstances

Despite clauses 27 and 28, a franchisor may terminate the franchise agreement without complying with either clause if the agreement gives the franchisor the right to terminate should the franchisee no longer hold a license that the franchisee must hold to carry on the franchised business or become bankrupt etc.¹⁸⁷

¹⁸⁴ Clause 26 Franchising Code of Conduct

¹⁸⁵ Clause 27 Franchising Code of Conduct

¹⁸⁶ Clause 28 Franchising Code of Conduct

¹⁸⁷ Clause 29 Franchising Code of Conduct

3.2.4 Resolving Disputes

A party to a franchise agreement (the complainant) who has a dispute with another party to the franchise agreement may take action under the agreement's complaint handling procedure or take action in accordance with the procedure set out in the Code.¹⁸⁸

When a party is taken to be trying to resolve a dispute, a party will be taken to be trying to resolve a dispute if the party approaches the resolution of the dispute in a reconciliatory manner and including attending and participating in meetings, not taking action during dispute and not refusing to take action during the dispute.¹⁸⁹

Clauses 38 to 41 of the Franchising Code of Conduct stipulate the internal and code complaint handling procedure elaborating on the notification of dispute and mediation. For both procedures, the complainant must tell the respondent in writing what the nature of the dispute is what outcome the complainant wants, and what action the complainant thinks will resolve the dispute. The parties should then try to agree how to resolve the dispute together. If the party cannot agree within 3 weeks, the party may refer the matter to the mediator under a franchise agreement or this code. Nevertheless, if the party really cannot agree, either party may ask the mediation adviser to appoint a mediator. The appointed mediator can decide the time and place for mediation. The mediation must be conducted in Australia. The party shall participate in the mediation with authorized representatives in order to attempt solving the dispute. The mediator must advise the mediation adviser, within 28 days of that fact.

Clause 42 of the Franchising Code of Conduct regulates the termination of the mediation. This clause applies to the mediation of a dispute if at least 30 days have elapsed after the day that mediation began and the dispute has not been resolved. The mediation can have two outcomes, either the mediator terminates the mediation at any time unless satisfied that a resolution of the dispute is imminent or if either party asks the mediator to terminate the mediation, the mediator must do so. . If the mediator terminates the mediation of a dispute under this clause, the mediator must issue a certificate stating the name of the parties, nature of the dispute, state that the

¹⁸⁸ Clause 35 Franchising Code of Conduct.

¹⁸⁹ Clause 36 Franchising Code of Conduct.

mediation has finished, and that the dispute has not been resolved. A copy of the certificate must be sent to the mediator adviser and to each sides of the party.

The costs of mediation include cost of mediator, room hire, any additional input and expert report. The parties must pay equally unless otherwise agreed. In addition, parties must pay their own cost to participate in the mediation.¹⁹⁰

3.2.5 The civil penalty

Pecuniary penalties are monetary fines imposed and collected by civil courts. The civil standard of proof is applied. A number of factors are taken into account by the Court in determining the appropriate fine or level of penalty. The calculation of the monetary amount of a penalty is dependent on 'penalty units'.¹⁹¹

In this code, several penalty have been prescribed in clauses such as clause 8(6),¹⁹² clause 39(3) and 41(3)¹⁹³

3.3 UNIDROIT

The UNIDROIT comprises of the Guide to International Master Franchise Arrangements whereas there are 2 editions and the Model Franchise Disclosure Law.

3.3.1 The UNIDROIT Guide to International Master Franchise Arrangements

The UNIDROIT Guide to International Master Franchise Arrangements¹⁹⁴ is the first instrument prepared by UNIDROIT on franchising and was first published in September 1998; a second edition in English was released in 2007.

¹⁹⁰ Clause 43 Franchising Code of Conduct

¹⁹¹ Australian competition and consumer commission, Fines and penalty (Australia), at <https://www.accc.gov.au/business/business-rights-protections/fines-penalties>. (last visited 8 November 2016).

¹⁹² (6) After entering into a franchise agreement, the franchisor must update the disclosure document within 4 months after the end of each financial year.

Civil penalty: 300 penalty units.

¹⁹³ The parties must attend the mediation.

Civil penalty: 300 penalty units.

The UNIDROIT Guide to International Master Franchise Arrangements offers a comprehensive examination of the whole life of master franchise arrangement, from the negotiation and drafting of the master franchise agreement and other associated agreements to the end of the relationship and its effects.¹⁹⁵ The Guide comprises of 20 Chapters and 3 Annexes.

3.3.2 Model Franchise Disclosure Law

Model Franchise Disclosure Law is a model law that specifies for franchisor to disclose documents to prospective franchisee before entering into an agreement or contract. The objective of this model law is for the protection of the franchisee before entering a franchise agreement.

The model law has a total of ten articles where the territorial scope of application of the Model Law is clearly specifies in the law. This model law applies to franchises to be granted or renewed for the operation of one or more franchised businesses within that country.¹⁹⁶

1. Definition

Franchise means the rights granted by a party (the franchisor) authorizing and requiring another party (the franchisee), in exchange for direct or indirect financial compensation, to engage in the business of selling goods or services on its own behalf under a system designated by the franchisor which includes know-how and assistance, a trademark, service mark, trade name or logotype designated by the franchisor. It includes:

(A) The rights granted by a franchisor to a sub-franchisor under a master franchise agreement;

(B) The rights granted by a sub-franchisor to a sub-franchisee under a sub-franchise agreement;

¹⁹⁴ UNIDROIT, "BACKGROUND TO THE GUIDE," at <http://www.unidroit.org/franchising-guide-first-edition-1998-overview>, (last visited 5 Feb 2016).

¹⁹⁵ UNIDROIT International Institute for the Unification of Private Law, Guide To International Master Franchise Arrangements (2nd ed., Executive Summary

¹⁹⁶ Article 1 Model Franchise Disclosure Law

(C) The rights granted by a franchisor to a party under a development agreement.¹⁹⁷

2. Information to be disclosed

In the disclosure document the franchisor shall provide the legal name, legal form, legal address of the franchisor and the address of the principal place of business of the franchisor.¹⁹⁸ The trademark, trade name, business name or similar name, under which the franchisor carries on or intends to carry on business in that country in which the prospective franchisee will operate the franchise business.¹⁹⁹ The address of the franchisor's principal place of business is the country where the prospective franchisee is located²⁰⁰ and where a description of the franchise to be operated by the prospective franchisee is provided.²⁰¹

A description of the business experience of the franchisor²⁰² and the names, business addresses, positions held, and business experience of any person who has senior management responsibilities for the franchisor's business must be disclosed.²⁰³

Also, any criminal convictions or any finding of liability in a civil action or arbitration²⁰⁴ and any bankruptcy, insolvency or comparable proceeding involving the franchisor for the previous five years and the court citation must also be revealed.²⁰⁵

The model law requires also the disclosure of the total number of franchisees and company-owned outlets of the franchisor granting franchises under

¹⁹⁷ Article 2 Model Franchise Disclosure Law.

¹⁹⁸ Article 6(1)(A) Model Franchise Disclosure Law.

¹⁹⁹ Article 6(1)(B) Model Franchise Disclosure Law.

²⁰⁰ Article 6(1)(C) Model Franchise Disclosure Law.

²⁰¹ Article 6(1)(D) Model Franchise Disclosure Law.

²⁰² Article 6(1)(E) Model Franchise Disclosure Law.

²⁰³ Article 6(1)(F) Model Franchise Disclosure Law.

²⁰⁴ Article 6(1)(G) Model Franchise Disclosure Law.

²⁰⁵ Article 6(1)(H) Model Franchise Disclosure Law.

agreement may be terminated by the franchisor²¹⁹ or by the franchisee and the effects of such termination,²²⁰ the initial franchise fee, whether any portion of the fee is refundable²²¹ other fees and payments,²²² restrictions or conditions imposed on the franchisee in relation to the goods and/or services that the franchisee may sell,²²³ the conditions for the assignment or other transfer of the franchise²²⁴ and any forum selection or choice of law provisions, and any selected dispute resolution processes.²²⁵

3. Remedies

If the disclosure document or notice has not been delivered within the required period of time stated in Article 3²²⁶ due to containing misrepresentation of a material fact or makes an omission of a material fact,²²⁷ the Model Franchise Disclosure Law specifies two ways of remedies for the franchisee. The franchisee has the right, on 30 days prior written notice to the franchisor to terminate the franchise

²¹⁹ Article 6(2)(D) Model Franchise Disclosure Law.

²²⁰ Article 6(2)(E) Model Franchise Disclosure Law.

²²¹ Article 6(2)(H) Model Franchise Disclosure Law.

²²² Article 6(2)(I) Model Franchise Disclosure Law.

²²³ Article 6(2)(J) Model Franchise Disclosure Law.

²²⁴ Article 6(2)(K) Model Franchise Disclosure Law.

²²⁵ Article 6(2)(L) Model Franchise Disclosure Law.

²²⁶ Article 3(1) A franchisor must give every prospective franchisee a disclosure document, to which the proposed franchise agreement must be attached, at least fourteen days before the earlier of

(A) the signing by the prospective franchisee of any agreement relating to the franchise, with the exception of agreements relating to confidentiality of information delivered or to be delivered by the franchisor; or

(B) the payment to the franchisor or an affiliate of the franchisor by the prospective franchisee of any fees relating to the acquisition of a franchise that are not refundable or the refunding of which is subject to such conditions as to render them not refundable, with the exception of a security (bond or deposit) given on the conclusion of a confidentiality agreement.

²²⁷ Article 8(1)(A)(B)(C) Model Franchise Disclosure Law

agreement and/or claim against the franchisor for damages suffered, unless the franchisee had known of the information as it was required to be disclosed but did not rely on the misrepresentation, or termination which would be a disproportionate remedy in the circumstances.²²⁸

Based on the study of the franchise laws used in the United States of America, in Australia and the UNIDROIT Model law, it is noticeable that all three laws prioritize the importance of disclosing information before entering a franchise agreement particularly toward "Prospective Franchisee". In Chapter 4 the researcher will further examine and comprehend the findings of the foreign franchise laws of this chapter with the present franchise laws used in Thailand for a more thorough and comprehensive analysis.



²²⁸ Article 8(1)(C) Model Franchise Disclosure Law

Chapter 4

Analysis the Problems of Applicable Laws to Franchise in Thailand, Comparison between the relevant Thai laws, Draft Franchise Business Bill, and Franchise Laws from Other countries and Analyzing the Issue Related to Disclosure of Information Before Making a Franchise Agreement

The concept of franchise business was introduced to Thailand from foreign countries and has been in Thailand since 1983. One of the most popular franchising businesses in Thailand is the food franchising. Nevertheless, the very first franchise business in Thailand was a petrol station franchise and then food franchises like Kentucky Fried Chicken, Pizza Hut and Mac Donald followed. When the trend of franchise business in Thailand expanded besides franchises that were brought in from other countries, more and more new establishments in Thailand also emerged. The growth rate of franchising business increases with each year, as following:

Table 1 Statistics of new franchise establishments from 2005 to 2017 (Data as of 3 March 2017)

Year	Amount
2005	71 companies
2006	86 companies
2007	96 companies
2008	119 companies
2009	147 companies
2010	187 companies
2011	215 companies
2012	267 companies
2013	315 companies
2014	381 companies

Year	Amount
2015	436 companies
2016	496 companies
2017	513 companies

The top three franchise businesses that grew rapidly in Thailand are food and beverage, education and ice-cream²²⁹. Although franchise businesses in Thailand are expanding but Thailand does still not has a specific law for these businesses. Currently, there is only a draft franchise business bill. For franchise businesses other relevant laws would be applied such as the Civil and Commercial Law, particularly on the juristic and contract act, Intellectual Property Law, Unfair Contract Terms Act, Competition law, and other related laws such as Tax Law. Once entering into a franchise the law that shall be applicable to both contracting party will need to be decided. Nevertheless, there is still no clarity and restrictions to solve the issues related to franchising directly. In order to find appropriate guidelines and principles for franchise businesses in Thailand, the researcher must therefore analyses and compares the guidelines or criteria of franchise business in Thailand with those of other countries.

4.1 The Problems of Applicable Laws to Franchise in Thailand

4.1.1 Factual issues

From studies, assessments and questions related to franchise business; the researcher is able to say that one of the issues related to the facts of franchise business is that there is no specific law available and therefore applies related laws to issues that are related to franchise businesses. Depending on the relationship of the franchisee and franchisor and whether the franchise business is of different or same type based on the four given examples, even if all of the four types are related to food

²²⁹ ThaiFranchiseCenter, The member of Franchise business in Thailand at http://www.thaifranchisecenter.com/stats/franchise_stats.php?year=2016, (last visited 3 March 2017).

businesses but the format and conditions of each business will vary in the contract such as the date the business has started, who shall be given what rights in that franchising business, fee collection, etc. It will therefore be difficult for franchisee and franchisor to comply with the same norms or guidelines as long as no specific law is regulated for them to follow.

When conducting questionnaires the researcher was able to determine that one of the issues that the franchisors have is that once the right of the franchisor has been transferred to the franchisee, the franchisee is not able to maintain the standard that the franchisor once had causing several problems such as the trust between the entrepreneur and customers, maintaining the quality of the product or service, etc., which can affect the relationship between the franchisor and franchisee in terms of contract breach, contract termination, and can even lead to prosecution in court.

For the franchisee, the franchise contract is not only binding in writing "But there are also cases where the franchisor gives the franchisee by means of an oral contract. The franchise model will be transferred through a verbal briefing, the sale model, products and equipment will also be given to the franchisee, once the franchisee understands and purchases the franchise, the franchisor's duty is deemed completed."²³⁰ In terms of franchising, there are a number of key issues; the relationship between the franchisor and franchisee, training support, marketing, permission to give right in intellectual property and fee collection. As a result, the franchisee does not receive continuing assistance, lacks supports from the franchisor, leading to business ineffectiveness, and not enough expertise due to the lack of true knowledge in the franchise system.

From this issue, the researcher analyses that the main cause of this issue is that the franchise system in Thailand does not have a standard franchise system which gives the franchisor the right to customize the format and provide information or study business franchises from abroad and apply it to their own franchise business without considering future problems that may arise. Consequently, the prospective franchisee will only receive information as much as the franchisor is willing to reveal. Also, the franchisor for different types of business may also determine different

²³⁰ Interview with Artiya Thangpong, The franchisee of Tea franchise business, 20 November 2016.

information which makes it difficult for a prospective franchisee to obtain information at the same standard which is a problem in the current franchise system in Thailand.

The researcher analyses the following 3 issues related to franchise businesses:²³¹

1. The business of the franchisor did not enroll into the franchise system correctly in term of unclear concept and the lack of knowledge about the franchise system due to lack of assessment of the readiness and appropriateness of the business before entering the franchise system.

2. Inefficient management system, poor franchise management and lack of ability to use digital information for benefits, as well as, lacking knowledge in intellectual property.

3. The franchise business is no system which lack circumspection in designing and setting up a franchise system. In addition, there is no coordination support team between the seller and buyer which leads to clear lack of communication and difficulty in conveying accurate concept and practices.

In addition, Khun Peerapong Kitiveshpokawat, President of the Franchise Association and SMEs Thailand commented on why no less than 100 franchise businesses have failed. He stated that "Doing business does not to sell and to buy. Franchisor must understand from the beginning that franchise business is a type of selling brand, know-how, and a supporting team for the franchisee to operate the business because the essence of the franchise businesses is the success of the franchisee which reflects the success of the franchisor. Therefore, choosing a franchise business based on the investment is not the right way".²³³

²³¹ Department of Business Development, Business structure and franchise business management, p.7., at [https://www.google.co.th/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjKuJD1277SAhVHWrwKHcWYBTYQFggaMAA&url=http%3A%2F%2Fwww.dbd.go.th%2Fdownload%2Fdoc%2F10Paper\(latest%2520edition\).doc&usq—AFQjCNEPRiQnP_SMa9zufVSMa0fKliKhNIA&sig2=8K6mTd-OmkLTuWlj_ZgogQ](https://www.google.co.th/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjKuJD1277SAhVHWrwKHcWYBTYQFggaMAA&url=http%3A%2F%2Fwww.dbd.go.th%2Fdownload%2Fdoc%2F10Paper(latest%2520edition).doc&usq—AFQjCNEPRiQnP_SMa9zufVSMa0fKliKhNIA&sig2=8K6mTd-OmkLTuWlj_ZgogQ), (last visited 3 March 2017).

²³³ Somjai Viriyabundhitkul, Tulakrit mankong hang yook (Thailand: People Media Co., 2006), pp.15.

Based on these facts, the researcher would like to analyses the problem as following; when a franchise is initiating a business into the franchise system but lack the information, he will study previous franchise businesses The franchisor therefore lacks the knowledge and understanding of the franchise system and when the franchisor gives the right to the franchisee it will eventually lead to problems in term of practice and know how. . When the system expands into more franchisees, it will lead to lack in improvements of personnel and staff.

Issues related to facts regarding franchise businesses in Thailand may vary. The researcher is in the view that, the main essence, this is happening because Thailand does not have a clear direction regarding the rights and duties for the franchisor and franchisee which leads to the franchisor not being able to verify which practice would be best to use for application and to propose to the prospective franchisee. This leads to the franchisee not knowing what exactly his right and duties are when agreeing to do a franchise business because no specific law is available to refer to.

4.1.2 Legal Issues

Because Thailand does not have a specific law on franchise business present when any dispute arises, relevant laws have to be applied such as the Civil and Commercial Code on the part of entering a contract, interpretation of a contract, and analyzing a franchise agreement between the franchisor and franchisee. When it comes to a disputes leading up to a lawsuit, the governing law over the franchise business will become an issue of consideration. For this reason, the law is needed to make the decision as following:²³⁴

"The two plaintiff sued the defendant to pay according to the franchise agreement. The defendant requested for the dismissal, asked the two plaintiffs to jointly take liability toward the defendant in the amount that was ordered from the defendant, and is still outstanding. Both plaintiffs counter the allegation by requesting for counterclaim.

²³⁴ The decision of the Supreme Court no. 377/2555.

The Central Court of Intellectual Property and International Trade ruled that the defendant must pay plaintiff 1, dismissed the claim of plaintiff 2 and dismissed the counterclaim of plaintiff 2, fees have been folded.

Defendant's Appeal to the Supreme Court

There are still problems that need to be interpreted in the appeal state of the defendant's defense where the defendant is the party breaching the agreement by giving permission to give rights. The defendant must return the entry fee for 5 branches to plaintiff 1 according to the agreement. In addition, he shall compensate for plaintiff 1 to be damaged by the business of plaintiff 1 as the Central Court of Intellectual Property and International Trade has decided or not. Plaintiff 1 has himself as witness to testify his statement confirming the facts. It can be seen that in mid-2003, the defendant advertised the franchise business to the general staff. The franchise business of the defendant is a business selling motorcycle parts of 4 popular brands including "Honda", "Suzuki", "Yamaha", and "Kawasaki". All models that have been launched, both genuine parts from the factory and substitute parts that are popular, with quality, and suitable for the price, both wholesale and retail, with a monthly sale ranging from THB 500,000 to 1,000,000. The average profit margin is 30 percent, deducting fees including employee's salary, utility fee and "Royalty Fee", good management, and the beneficiaries will benefit from various advertising promotions that the defendant held periodically, such as advertising in the "Billboard" magazine, activities managements on behalf of the defendant's company, buying products cheaper as the general market price and delivering products on time. The advertisements made plaintiff 1 believe in the ad campaign leading up to the decision to reserve the franchise right and enter agreement on 10th February 2004 giving permission for 5 branches within the area of Amphoe Trang, Amphoe Huai Yot, and Amphoe Kantang, of Trang Province and Amphoe Mueang Krabi and Amphoe Aoluek of Krabi Province. Therefore, the reason plaintiff 1 to enter into the franchise agreement with the defendant is because he believed in the defendant's advertisement. Even though the agreement permits the usage of the right to provide service of the defendant, it does not specify the price of the product, the variety of the goods and delivering of the good correctly as the defendant appealed. But the defendant's advertisements lead plaintiff 1 to the understanding that once he entered into the

agreement with the defendant, the defendant agrees to execute according to the advertisement in return for the plaintiff to enter the agreement which is the incentive of plaintiff 1 to enter into the agreement with the defendant. As such, it must be considered that the advertisement is part of the agreement between the plaintiff and the defendant, and the defendant is obliged to comply accordingly. Nevertheless, it appears that the defendant did not proceed in accordance with the advertisement which is considered to be a part of the license agreement. As a result, plaintiff 1 has been damaged. When plaintiff 1 has a lawyer submit a letter of termination permitting to give the right to the defendant according to the termination letter dated 14th February 2006. The defendant who is the contracting party must therefore allow plaintiff 1, the other contracting party, to return to the same status as before entering the agreement with the defendant. Plaintiff 1 has the right to claim for damages for breaching the agreement. According to the Civil and Commercial Code, Section 391, paragraph 1 and paragraph 4, the defendant must return the entry fee for the 5 branches including VAT to plaintiff 1.

The decision states that the defendant must pay plaintiff 1, the appeal court fee will be folded, and in addition, amend to be in accordance with the judgment of the Central Court of Intellectual Property and International Trade".

From the aforementioned judgment, the franchisor is KPN Plus Company Limited (defendant) and the franchisee is Mrs. Sunee Kanjanamanee (Plaintiff 1). The issue here is what effect does the contract has when plaintiff 1 is claiming such contract for termination. It turns out that the agreement between the contracting parties gave righteous permission to use the rights. When the defendant advertised the franchise, the plaintiff expressed interested and believed the advertisements. Later on, plaintiff 1 entered the franchise agreement and was given the rights by the defendant to exercise the right for business but the defendant was unable to comply with the advertisement. Plaintiff 1 therefore wanted to terminate the franchise agreement with the defendant. This was then for the Court of Intellectual Property and International Trade to decide, in which, the court decided that the franchise agreement to use right between the franchisor and franchisee is in accordance with the Civil and Commercial Code, Section 391, paragraph 1 and paragraph 4. Section 391 paragraph 1 regulates "If

one party has exercised his right of rescission, each party is bound to restore the other to his former condition; but the rights of third persons cannot be impaired."

Section 391 paragraph 4 regulates "The exercise of the right of rescission does not affect a claim for damages."

Although the advertisement is not stated in the franchise license agreement but the court decided that it is a condition to use the franchise. The defendant is considered to be in breach of contract with plaintiff 1. When plaintiff 1 to terminate the contract under Section 386 of the Civil and Commercial Code, the defendant must return plaintiff 1 to the former condition and give him the right to claim for damages.

It can be seen that when a dispute come to court regarding a franchise agreement, Thailand has no specific law. Therefore, relevant or similar laws have been applied to determine the dispute arising in court. Since the issue raised was about the termination of the franchise agreement, the Civil and Commercial Code have been chose to settle the dispute. The researcher is in strong opinion that Thailand needs a specific law on franchising where franchisors and franchisees can have standard guidelines that every franchise business can follow in term of entering a contract, throughout the contract and when it comes to terminating the contract or even renewing the contract.

4.2 Comparison between the relevant Thai laws, Draft Franchise Business Bill, and Franchise Laws from Other countries.

A franchise business requires a franchise agreement that set out various terms and conditions. This will also depends on the format and type of franchise business such as whether it is a restaurant business, education, beauty business, automotive related business, etc. The different terms and conditions of course also vary in details such as the obligation and rights of the contracting parties, terms of purchase — sale of goods, trademark rights, termination of contract, renewal of contract, dispute and remedy, etc. If there is no specific law to define a practice that can be used as a standard base, it will make the parties enter into a legal act with no set rules, principles and how to settle an issue if a dispute arises. There would be no law to oversee this

matter. The researcher would therefore like to compare the legal principles related to franchise law or relevant laws with the Draft Franchise Business Bill of Thailand, as well as the legal principles of other countries including of the United States of America (Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission), Australia (Franchising Code of Conduct Regulation 2014) and with the UNIDROIT (Model Franchise Disclosure Law). Also, the researcher will discuss the advantages and disadvantages by comparing the laws according to the following topics:

Table 2 Definition of franchise

Topic	Definition of franchise
Thai law	-
Draft Franchise Business Bill of Thailand	Section 4, Franchise means a business whereby a person, called the franchisor, agrees to another person, called the franchisee, use the intellectual property of the franchisor or the franchisor give the right to franchisee to use the intellectual property for the business within the period or the area. And the business has to promote and control under business planning of the franchisor and the franchisee has the duty to pay remuneration to the franchisor.
The United States of America	<p>Section 436.1(h)</p> <p>Franchise means any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:</p> <ol style="list-style-type: none"> (1) The franchisee will obtain the right to operate a business (2) The franchisor will exert or has authority to exert a significant degree of control over or provide significant assistance in the franchisee's method of operation and (3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make

	a required payment to the franchisor or its affiliate.
Australia	<p>In clause 4, franchise includes the following:</p> <ul style="list-style-type: none"> (a) the rights and obligations under a franchise agreement; (b) a master franchise; (c) a subfranchise; (d) an interest in a franchise. <p>And in clause 5 define that franchise agreement is an agreement that takes the form, in whole or part in a written, an oral, an implied agreement and in which the franchisor grants to the franchisee the right to carry on the business in Australia under a system or marketing plan, controlled or suggested by the franchisor and under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol. And including the franchisee must pay or agree to pay to the franchisor.</p>
UNIDROIT	<p>Article 2, franchise means the rights granted by a party (the franchisor) authorising and requiring another party (the franchisee), in exchange for direct or indirect financial compensation, to engage in the business of selling goods or services on its own behalf under a system designated by the franchisor which includes know-how and assistance, prescribes in substantial part the manner in which the franchised business is to be operated, includes significant and continuing operational control by the franchisor, and is substantially associated with a trademark, service mark, trade name or logotype designated by the franchisor.</p>

In the relevant Thai laws, there are no provisions that can be applied with others on the definition of a franchise business. In the draft franchise business bill, the law of the United States, of Australia and in the UNIDROIT model, however, the definition has been regulated whereas the give the definition of "Franchise" the closest meaning to be 1. There will be two contracting parties, one called the franchisor and the other party called the franchisee. 2. The contract can be made verbally or in writing. 3. Give the franchisee the right to use the intellectual property of the

franchisor 4. Franchisee must operate the business with the supervision, assistance and support of the franchisor. 5. Franchisee pays a fee to the franchisor.

Table 3 Disclosure of Information before entering a franchise agreement

Topic	Disclosure document
Thai law	-
Draft Franchise Business Bill of Thailand	<p>Section 27; In the franchise contract has to made in writing and has at least information and details as following;</p> <ol style="list-style-type: none"> 1. Date. 2. The right and duties of the franchisee. 3. The right and duties of franchisor. 4. The period and area that franchisor give the right to franchisee to use the intellectual property. 5. Earnest money, remuneration or the other money which franchisee must pay to franchisor. 6. Renew of contract, termination of contract, transfer and repay the fee when terminate the contract.
The United States of America	<p>Disclosure document to prospective franchisee to know before entry to franchise business.</p> <p>Section 436.5; The franchise disclosure document, there are 23 items.</p> <ol style="list-style-type: none"> 1. The franchisor, and any Parents, predecessors and affiliates. 2. Business Experience. 3. Litigation. 4. Bankruptcy. 5. Initial Fees. 6. Other Fees and with a sample of table. 7. Estimated Initial Investment and with a sample of table. 8. Restrictions on Sources of Products and Services. 9. Franchisee's Obligations and with a sample of table. 10. Financing.

	<ol style="list-style-type: none"> 11. Franchisor's Assistance, Advertising, Computer Systems, and Training and with a sample of training program table. 12. Territory. 13. Trademarks. 14. Patents, Copyrights, and Proprietary Information. 15. Obligation to Participate in the Actual Operation of the Franchise Business. 16. Restrictions on What the Franchisee May Sell. 17. Renewal, Termination, Transfer, and Dispute Resolution and with a sample of the franchise relationship table. 18. Public Figures. 19. Financial Performance Representations. 20. Outlets and Franchisee Information and with a sample of tables. 21. Financial Statement. 22. Contracts. 23. Receipts.
Australia	<p>Disclosure document to prospective franchisee to know before entry to franchise business.</p> <p>Clause 8 subclauses 3, 4 and 5 and information in a disclosure document must follow in Annexure 1 and Annexure 2.</p> <p>Annexure 1 is disclosure document for franchisee or prospective franchisee. There are 23 items.</p> <ol style="list-style-type: none"> 1. First page. 2. Franchisor details. 3. Business experience. 4. Litigation. 5. Payments to agents. 6. Existing franchises. 7. Master franchises. 8. Intellectual property. 9. Franchise site or territory. 10. Supply of goods or services to a franchisee.

	<ol style="list-style-type: none"> 11. Supply of good or services by a franchisee. 12. Supply of goods or services — online sales. 13. Sites or territories. 14. Other payments. 15. Marketing or other cooperative funds. 16. Financing. 17. Unilateral variation of franchise agreement. 18. Arrangements to apply at the end of the franchise agreement. 19. Amendment of franchise agreement on transfer of franchise. 20. Earning information. 21. Financial details. 22. Updates 23. Receipt <p>And Annexure 2 provides information statement for prospective franchisee.</p>
UNIDROIT	<p>Article 6 (1) In the disclosure document the franchisor shall provide the following information:</p> <ol style="list-style-type: none"> (A) the information about legal in name, form and address. (B) the trademark, trade name, business name or similar name, under which the franchisor. (C) the address of the franchisor's principal place of business. (D) the franchise to be operated by the prospective franchisee. (E) the business experience. (F) the names, business addresses, positions held, and business experience of any person who has senior management responsibilities for the franchisor's business operations in relation to the franchise. (G) any criminal convictions or any finding of liability in a civil action or arbitration. (H) any bankruptcy, insolvency or comparable proceeding. (I) the total number of franchisees and company-owned. (J) the names, business addresses and business phone numbers of the franchisees.

	<p>(K) information about the franchisees of the franchisor and about franchisees of affiliates of the franchisor that grant franchises under substantially the same trade name.</p> <p>(L) the franchisor's intellectual property to be licensed to the franchisee.</p> <p>(M) the information on the categories of goods and/or services.</p> <p>(N) financial matters.</p> <p>(O) a description of:</p> <p>(i) the state of the general market of the products or services</p> <p>(ii) the state of the local market of the products or services</p> <p>(iii) the prospects for development of the market.</p> <p>(P) anything else necessary to prevent any statement in the document.</p> <p>(2) The following information shall also be included in the disclosure document.</p> <p>(A) the term and conditions.</p> <p>(B) the initial and on-going training programmes.</p> <p>(C) the extent of exclusive rights to be granted.</p> <p>(D) the conditions terminated by the franchisor</p> <p>(E) the conditions terminated by the franchisee</p> <p>(F) the limitations imposed on the franchisee</p> <p>(G) in-term and post-term non-compete covenants</p> <p>(H) the initial franchise fee</p> <p>(I) other fees and payments</p> <p>(J) restrictions or conditions imposed on the franchisee in relation to the goods and/or services</p> <p>(K) the conditions for the assignment or other transfer of the franchise; and</p> <p>(L) any forum selection or choice of law provisions.</p>
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According to the Thai law, no law can be applied for this case. Section 27 of the Draft Franchise Business Bill used the wording "; In the franchise contract has to made in writing and has at least information and details as following ..." and

Section 29 regulates that "When the franchisee agrees to enter the agreement of franchise business with the franchisor, the franchisor or a representative have the duty to disclose all information necessary to the franchise business". The details shall be in compliance with Section 27 which stipulates for at least 6 items according to the table above. The researcher believes that the purpose of the franchise bill, specifically Section 27 and Section 29, is to disclose pre-contractual information whereas the topic defines that at least certain topics will need to be disclosed. Nevertheless, the draft does not explicitly stipulate disclosure of information as stipulated in the laws of the United States, Australia and the UNIDROIT law.

The U.S. Disclosure Requirements and Prohibitions concerning Franchising of Federal Trade Commission have set the topics and details to be disclosure into 23 items. The US law, in addition, provides some sample table for better understanding so that franchisors can follow the same guidelines.

The 2014 Franchising Code of Conduct in the Competition and Consumer (Industry Code—Franchising) Regulation of Australia, also stipulates that franchisor must disclose information to the prospective franchisee in advance. It has been regulated in Clause 8 where further details can be found in Annexure 1. It specifies that information for 23 items must be disclosed.

The UNIDROIT Model Franchise Disclosure Law specifies information to be disclosed under Article 6 (1) (A)-(P) with a total of 16 topics. The main details will be background information related to the franchisor and information related to the franchise business of the franchisor. Article 6 (2) (A)-(L) contains 12 topic headings which specifies for information to be included in the disclosure document. This would be primarily about the terms and conditions of the franchise agreement.

Besides the information that need to be disclosed the model law also provide further information for each provision to elaborate for better understanding for those who study the model law. The researcher considers the model law to be a good model because it truly understands the importance of the problem. Disclosing information in the case of the US and Australia are similar. The researcher considers for the US to be the first country to have franchise businesses. The rule of disclosing information regarding franchising and therefore is the role model for many countries who apply such principles. The law of both countries and the model law are consistent

in many areas but each country applies its own laws and code of conduct to its own franchise business regulations.

Table 4 Rights and obligations of the franchisor and franchisee

Topic	Rights and obligations of the franchisor and franchisee
Thai law	<p>Trademark Act, B.E. 2534(1991) – Section 68 paragraphs 2</p> <p>"Trademark license agreements under the first paragraph shall be in writing and registered with the Registrar."</p> <p>Trade Secrets Act, B.E. 2545(2002) — If the information that the franchisee is receiving while operating the business is a trade secret, the franchisee is legally obliged to, or has to promise not to disclose such trade secret of the franchisor.</p>
Draft Franchise Business Bill of Thailand	<p>Section 29 When the franchisee agrees to enter the agreement of franchise business with the franchisor, the franchisor or a representative have the duty to disclose all information necessary to the franchise business</p> <p>As announced by the Cabinet that the franchisee within sixty days from the contract date, if after date of expiration, the franchisor does not proceed accordingly, the franchisee will have the right to terminate the contract and the franchisor must reimburse the expenses, deposits, and all payment that he has received from the franchisee. This does not exclude the franchisee's right to claim for damages from the franchisor.</p>
The United States of America	<p>Section 436.2, franchisor has furnished the copy of disclosure document to prospective franchisee. A copy of the document was hand-delivered, faxed, emailed or otherwise delivered or direct for accessing the document on internet or a paper or tangible electronic copy by the required date; at least 14 calendar-days if the franchisor fail to furnish a prospective franchisee with a copy of disclosure document or at least seven calendar-days if franchisor alter unilaterally and materially the</p>

	terms and conditions of franchise agreement.
Australia	<p>Clause 13 to 19 in topic of Franchise agreement in Franchising Code of Conduct.</p> <p>Clause 16; The franchisor receives written request from a franchisee, in subclause 8(8); the franchisor has to give the disclosure document to franchisee within 2 months of the date of the request. However, a request can be made only once every 12 months. And in other case, the franchisor has to give the disclosure document to franchisee within 14 days of the date of the request.</p>
UNIDROIT	<p>Article 3 (1) A franchisor must give every prospective franchisee a disclosure document, to which the proposed franchise agreement must be attached, at least fourteen days before the earlier of</p> <p>(A) the signing by the prospective franchisee of any agreement relating to the franchise or</p> <p>(B) the payment to the franchisor or an affiliate of the franchisor by the prospective franchisee of any fees relating to the acquisition of a franchise.</p> <p>(2) The disclosure document must be updated within [X] days of the end of the franchisor's fiscal year.</p>

According to, the Trademark Act B.E. 2534(1991), trademark licensing defines clear duties to both contracting parties, if the franchisor permits the franchisee to use the trademark, such agreement, shall be in writing and registered with the Registrar to be legally completed. In the case where there are specific information that is not widely disclosed, the Trade Secret Act B.E. 2545(2002) state that the information shall be subjected to the rules of trade and is considered to be a trade secret. Thus, the franchisee is legally obliged to not disclose the trade secret of the franchisor to anyone else.

In the franchise bill, the franchisor has the duty to disclose information to the franchisee within the set time period required by the law. It also stipulates under Section 32 that trainings should be provided as well as manuals of the business operation. In addition, the franchisor is not allowed to force the franchisee to buy

equipment or goods unfairly under Section 30 and prohibited to compete within the area specified in the contract under Section 33. The duty of the franchisee is to not disclose any information about the franchise business of the franchisor which is specified in the contract under Section 34.

The US, Australian and UNIDROIT law specifies that the franchisor must deliver a disclosure document to the prospective franchisee within a 14 days period and is scheduled to be sent before the requested date as well, for example the prospective franchisee shall at the request of the franchisor acknowledge in writing the receipt of the disclosure document.²³⁵

Table 5 Registration of Franchise Contract

Topic	Registration of franchise contract
Thai law	-
Draft Franchise Business Bill of Thailand	<p>Section 18 Any person who wishes to operate a franchise business in the Kingdom must be registered under this Act.</p> <p>Section 19 The franchisor must file a registration form in the format prescribed by the Board which must at least include the following items and evidences for registration:</p> <ol style="list-style-type: none"> 1.Name of the type of franchise business 2. Location of the franchise business 3.Will operate the franchise business with at least 2 branches, not less than two years, and the business has profits of two consecutive fiscal years before filing for registration of the franchise business. Herewith, the proof of evidence of profits of the business shall be in accordance with the Registrar's declaration. 4. Applicants for franchise business must own or have intellectual property rights that can be used by others for franchise purposes. 5. Manuals of operation under Section 32 6.The original franchise contract shall be in accordance with Section 27

²³⁵ Article 7 Model Franchise Disclosure law

	<p>by specifying the prohibition of the use in the contract for the franchisee</p> <p>7. The business operation plan that the franchisor is using to promote and supervise the franchise business. 8. Evidence related to information that is used for advertising or persuading others engaging into the business under Section 25</p> <p>9. Documents and other evidences as prescribed by the Registrar.</p> <p>The franchisor must always update the registration information under paragraph 1</p>
The United States of America	-
Australia	-
UNIDROIT	-

This issue is only provided in the franchise bill whereas it is determined that if anyone wishes to operate a franchise business in the Kingdom he must register under this Act.²³⁶ Also, if there is a franchise agreement where the franchisor does not have a residence in the Kingdom, and he gave the right to the franchisee to operate the business in the Kingdom, the franchisor must register, or else he cannot enforce it legally.²³⁷ In addition, the draft law stipulates the list and evidence to be filed for a franchise business under Section 19 and set the qualifications and prohibitions under Section 20. There is no mention of registration in other countries' laws.

Table 6 Termination of contract

Topic	Termination of contract
Thai law	Thai Civil and Commercial Code of Thailand and Unfair contract terms act, B.E. 2540(1997)

²³⁶ Article 18 Draft Franchise Act

²³⁷ Article 21 Draft Franchise Act

Draft Franchise Business Bill of Thailand	-
The United States of America	There are in example of disclosure document but has no enact in the rule.
Australia	Clause 26-29 For example clause 26(cooling off period); a franchisee may terminate an agreement within 7 days after the earlier of entering into the agreement and making any payment under the agreement.
UNIDROIT	-

According to the relevant Thai law, we generally apply the Civil and Commercial Code on the part of juristic acts and contract, when it comes to the right of terminating the contract therefore, ending the contract. Termination can be by effect of the contract and effect of the law. When it comes to franchise agreement, one may have to consider whether the contracting party agreed to end the contract based on the agreement or according to the law. Any party may be in default of payment but this will need to be considered on a case to case basis. If, for example, the contract is terminated under the contract, section 386 shall be applied.

In most cases, the franchisor usually prepares the contract with the terms and conditions set in advance. The content of the contract may benefit the franchisor more than the franchisee in which the Unfair Contract Terms Act B.E. 2540(1997) can be applied. If the franchise agreement falls under the legal principles of readymade contract that deem unfair and unjust to the franchisee, the contract will be deemed void immediately according to Section 11 of the Unfair Contract Act B.E. 2540(1997) entered into law in term of unfair²³⁸

For the foreign laws there is only the law of Australia which regulates about the termination of the contract by deliberating the reason of ending the contract,

²³⁸ Any contract not governed by the provisions of this Act, whether wholly or in part, shall be void.

for example, breach by the franchisee, and no breach by franchisee, etc. Each case set the termination of the contract differently.

Table 7 Disputes

Topic	Disputes
Thai law	The consumer protection Act, B.E.2522(1979) and Trade Competition Act B.E.2542(1999) on implementing the principles of the mentioned Act and adjust it accordingly with the issue of the problem.
Draft Franchise Business Bill of Thailand	-
The United States of America	
Australia	Clause 34 to 45. The parties try to resolve the dispute, if the parties cannot settle the dispute; they can call upon a mediator to help resolve the dispute. There are two outcomes when settling a dispute through termination; either the mediator is able to settle the dispute and terminates it or the parties ask the mediator to terminate the dispute.
UNIDROIT	Article 8 (remedies) If the disclosure document or notice of material change has not been delivered within the period of time, contains a misrepresentation of a material fact or makes an omission of a material fact, the franchisee may on 30 days prior written notice to the franchisor terminates the franchise agreement and/ or claim against the franchisor for damages.

In the case of a dispute between contracting party, the consumer protection Act B.E. 2522(1979) can be applied as the franchisor and franchisee both can be considered business operator under the definition of the Consumer Protection

Act where franchisor and franchisee do not have to comply with the principles of the consumer protection act that aims to protect and eliminate disputes between the operator and the consumer.

The Australian law states that in case of dispute, if the contracting parties cannot resolve the issue by themselves, they can call a mediator to help resolve the dispute. There are two outcomes when settling a dispute through termination; either the mediator is able to settle the dispute and terminates it or the parties ask the mediator to terminate the dispute.

The model law states about the remedies where the franchisor cannot deliver the disclosure document in time to the franchisee within the period of time, or the franchisor disclose or omit of such fact. Remedies can be done in two ways, either by termination of the contract or by submitting a 30 days prior written notice.

For this case, the researcher is in the view that the tendency of disputes between disputes parties is very frequent which is visible by the amount of disputes judgments. Moreover, since Thailand has no specific law to apply to franchise business, there is no same standard that people can abide on. If the law does provide provisions which can resolve preliminary dispute to reduce the issue of bringing cases to court, the Australian law would be the most appropriate law to apply to the franchise law in Thailand.

Table 8 Penalty

Topic	Penalty
Thai law	-
Draft Franchise Business Bill of Thailand	Section 41-53 divides penalties into three types: 1.Fine Penalty only 2.Imprisonment and light penalty 3.Imprisonment and heavy penalty
The United States of America	-

Australia	Civil penalty. In this Code, it defines in some part such as clause 17(2); If a disclosure document does not mention a matter mentioned in subclause (3), the franchisor must tell a franchisee or prospective franchisee about the matter, in writing, within a reasonable time (but not more than 14 days) after the franchisor becomes aware of it. Civil penalty: 300 penalty units.
UNIDROIT	-

Penalty has been laid out in the draft franchise business bill and the Australian law whereas it divides penalties into the following: Fine Penalty only for not delivering the annual reports or not providing a franchise manual, for example. Then there is imprisonment and light fine (imprisonment of one month, fine of THB 10,000) which shall include failure to comply with the orders of the officer or the franchise business supervision committee, for instance. Then there is imprisonment with heavy fine (1-3 years imprisonment, fine between THB 100,000 — 300,000) which would apply for advertising or persuading others by using false or exaggerated messages.

According to the Australian law, civil penalty would apply such as clause 39 (3) of the Franchising Code of Conduct; The parties must attend the mediation session. (Civil penalty: 300 penalty units.)

By comparing the Thai laws with the foreign franchise laws, particularly on the topics that have been proposed by the researcher, it can be seen that even relevant Thai laws have been applied it does not cover franchise all issues related to franchise agreement and franchise businesses. Nevertheless, the advantage of using relevant laws is that it can be adapted and reinstated for cases where no specific laws cover such issues. However, there is also a downside in using relevant laws as it cannot achieve the purpose of the true meaning of such business or franchise agreement because every business or contract to apply the law will have different characteristics and circumstances such as the nature of the contract where there are two parties, the buyer and the seller, agreeing to trade business as prescribed by the law. For Franchise agreements, on the other side, there must be a franchisor and a franchisee where the franchisor agrees to give the licensing right to the franchisee

where the franchisee will be obliged to use the trademark and service and must pay fees as prescribed. The franchisor is entitled to assist the franchisee at the same time. This illustrates that the nature of each agreement is different when the applicable law must be appropriate to the nature and pattern of the business or the agreement as well.

For the draft franchise business bill, the researcher is in the view that the details for disclosing information to the franchisee are not clear and comprehensive enough when comparing it to the law of America, Australia and the UNIDROIT. However the researcher considers the section on franchise registration very beneficial. If all franchise businesses in Thailand register, the franchise system of Thailand would be able to monitor and check the background information of both the franchisor and franchisee. In addition, the researcher agrees that the term of penalties should be included where contracting parties have entered into an agreement and one party does not comply with the rule, he shall be taken responsible for his action. This could strengthen the franchise business system and assures that the same standard practical guidelines have been complied with under the law.

The laws of America and Australia have similar requirements when it comes to the definition and disclosing of information, particularly, disclosure of information to the franchisee. The researcher agrees with the content regarding disclosure of information which is very clear and detailed. Also, for the content that needs to be disclosed, sample table have been provided for all franchisors to document the disclosure in the same rules and manners. However, the Australian law adds one more part on dispute settlement and mediation where rules and alternatives options have been set for the contracting parties to take into consideration when a dispute arises. The researcher thinks that it is a good idea that the law takes into account to reduce initial disputes before going to court. In addition, civil penalties have been imposed in the case of non-compliance to certain laws.

The UNIDROIT model law is a prototype of disclosing information to prospective franchisees. The researcher sees the model law to understand the problem of franchise business and that has a franchise law that face different issues of problems. The model law has taken these issues into account because it intends to be applied most effectively. In addition, it provides additional explanation of every additional topic. The UNIDROIT does not only have a model franchise disclosure law

but it also has a UNIDROIT Guide to International Master Franchise Arrangements. Therefore, the researcher is in the view that if a country has not yet enacted a franchise law in particular, it shall use the UNIDROIT model law on disclosure of information and adapt it to meet the requirements of franchise businesses in the country.

4.3 Analyzing the issue related to Disclosure of Information before making a Franchise agreement

Franchise business will most likely continue growing in Thailand but currently there is no supervision over franchise business, Thailand has no direct enforcement law and the existing laws cannot be fully applied for issues related to franchise business. When considering that the franchisor has leverage over the franchisee and the franchisor is the party to draft the contract and specifications, some of the existing laws that can be found in the contract will be for example the Civil and Commercial Code, Trade Secret Act B.E. 2545(2002), Competition Act B.E. 2542(1999) and other relevant laws that are directly related to franchising. This, however, is not enough to achieve fairness in business franchise and it does not cover many other cases such as controlling the franchise agreement forms to be specific, standardization of the rights, and the duties and responsibilities of the each party of the business operator by disclosing information of the business to the franchisee before entering the franchise agreement.

From analyzing the laws of both foreign countries and the UNIDROIT model, the researcher is in strong opinion that it is important to provide a disclosure document to the franchisee so that the franchisee will have the right understanding about the business that he or she will be investing in to protect the franchisee and give the franchisee the right and information that he need to make his decision and that the franchisor has not withhold any information from him. If those information have not been provided to the franchisee he may be in disadvantages when making the investment. From the two foreign laws and the UNIDROIT model, it can be seen that disclosure of information to prospective franchisee is clearly stated in the regulation. Nevertheless, in the Franchise Business Act, only descriptive details of 6 items are provided such as the date, rights and duties of the franchisor and franchisee, duration

and scope of area that the franchisor gives to the franchisee, rights to intellectual property, collection fee and renewal, termination of the contract, transferring of rights of a franchise to another, etc. When comparing the laws of America and Australian, as well as the UNIDROIT model law with the Franchise Business Act used in Thailand, one can see how much more information and details is required. This may be because there is no law controlling franchise businesses. The researcher sees that there are two issues, before entering a franchise contract and once a franchise agreement has been drafted up between the two sides. The researcher would like to give priority before contracting parties enter a franchise agreement since the researcher can clearly see that franchisee's right have not been protected by receiving fair information before entering a franchise business. The franchisee has not received sufficient information to make a true decision because of the nowadays forms of franchise. Once the franchisee decide to do a franchise business he will have to invest in many things such as decoration of the venue, infrastructure and accessories required to operate the franchise business, pay entry fee, and in some cases even royalty fee is required to collected annually, restriction of use of area, buying of products/services that need explicitly to bought by the franchisor, other investments, profits, financial operation management, work managements, trainings and resources to operate franchise and other conditions that the franchisee will have to agree to and may deem unfair toward the franchisee if no true and fair information and details have been provided to them prior to entering the franchise business. Consequently it can lead to negative impacts, and eventually disputes due to prospective franchisee not having received information before making decision to invest in a franchise. For this reason, the researcher sees the importance and would like to urge for a franchise system in Thailand where information need to be disclosure prior to entering a franchise agreement.

The laws in America and Australia set 23 topic headings for information to be disclosed. When comparing the laws it can be seen that there are similarity. For the model law, they have been divided into two cases, with a total of 28 topic headings where details of information need to be disclosed. It specifically elaborate what information need to be included in the disclosure document in order to provide it to the prospective franchisee. For the type of franchise business in Thailand when comparing them with other countries, it can be said that countries can have different

forms and agreements of franchise that varies in conditions as elaborated earlier in Chapter 2. It clearly states that the franchisee has the right to know who the franchisor is, information of the business, and the burden that the franchisee will have to carry once he decided to invest, what will need to be invested and how much. It can therefore be said that one of the main purpose for disclosing information is that the prospective franchisee understands the details of the franchisor, the franchisor's business and the investment.

The studies revealed that in the American law, the details on business information are categorized under Topic Item 1: The Franchisor, and any Parents, Predecessors, and Affiliates. Disclose Item 2: Business Experience requires for name, address, details of the founder, co-investors, and others to be identified. This is to disclose the information and the background of the franchisor. For Australia, the business information are categorized on the first page in the topic of franchisor details and business experience. The similarity between the two laws include the identifying of name, address, types of business, as well as, business experiences. The model law describe business information under topic A-F related to name, address, types, experiences, etc.

Regarding investment, the American law specifies under Item 7 on Estimated Initial Investment where a table is provided as a template which include examples such as initial franchise fee, training expenses, real property, whether product will be purchased or leased. The Australian law under Item 14 on the topic of Other payments include the range of costs to start operating the franchised business ; real property, including property type, location and building size, and equipment. For the model law, it will be under financial matters;"... including: (i) (a) an estimate of the prospective franchisee's total initial investment, information on the prospective franchisee's expected total initial investment is clearly important for the prospective franchisee to be able to evaluate whether or not he/she can afford to acquire the franchise. An element that has been excluded from the estimate that a franchisor must provide a prospective franchisee with, is the minimum working capital required."

All three model laws provide indication of business information and investment which are similar since the main aim of a disclosure information document

is for a prospective franchisee to know the background in order to help him with assess the burden that he will have to carry once he agreed to invest in that business.

Once the prospective franchisee knows the information about the franchisor, the researcher believes that the compensation and the accounting management system is important as well as a strategy plan in order to help evaluating and set targets direction for the business. For this reason, the researcher focused on the collection fees, profit, and the accounting management system of the American and Australian laws, but also, the model law. The researcher found that the laws require for the disclose document to disclose the conditions of the initial franchise fee, royalty fee as well as, disclose the terms of each financing arrangement, and statements, including franchisor's balance sheet, and statements of operations to track the status and the system as well as check as whether the process is transparency.

Consequently, the disclosure document should also include how the franchisor will be supporting the franchisee in operating the business and penalty where no disclose of information is provided. For the laws of America and Australia and UNIDROIT model law, clear requirements of training, management system, marketing, and advertisement is provided. For penalty where the franchisor did not disclose information within an agreed period of time, it also gives the franchisee the right to claim for compensation. The penalty may not be a monetary fine but can be termination of the contract for example. If implemented into the Thai context, we could analyses by studying each items individually in order to evaluate what should be included in a disclosure document. Nevertheless, the researcher is in the view that all three foreign laws aim for the enforcement of the law for each type of franchise business that is available in their countries. The researcher, therefore, used the principle of the UNIDROIT model law as a guideline as it intend to truly protect the rights of the franchisee and the UNIDROIT study groups aims to serve as a model law that can be used and adjusted to suit different forms of franchise businesses that are presently available or may be formed in the future. If countries apply the model law it will enable for this law to go into the same direction. In addition, the Franchise Business Act of Thailand provides only brief information on disclosure where topic items and content are not enough for franchisee's decision making. The disclosure information should only specify the required information. If too much information is

provided, it may be not all necessary, create burden, and waste unnecessary time. The researcher is therefore of the opinion that the model law should be adapted to the Franchise Business Law in Thailand. In addition the model law include a disclose document that are in accordance with the topics that should be included in the disclosure documents for the franchisee.



Chapter 5

Conclusion and Recommendations

5.1 Conclusion

An important thing when entering a franchise business is the franchise contract since the legal relationship of the contracting parties can varies in characteristics and relationship such as the right to give permission to use the franchise, right to use trademark and sell products because there is no specific law available presently. In this regard, the consideration between the parties under the franchise agreement is subject to the relevant laws such as the provisions on juristic and contract act under the Civil and Commercial Act, Intellectual Property Law, Trade Secret Law, Unfair Contract Terms Act, and Competition Law.

The various issues related to franchise business arise in Thailand because there is no specific law available which lead to contracting parties not being able to follow a guideline of practices. Consequently, relevant laws have been used to resolve disputes. The current draft franchise business bill still contains insufficient provisions on the definition of rights and obligations of the franchisor especially in terms of disclosure before entering a franchise agreement because franchisor in Thailand generally have higher negotiation power over the franchisee since there are no rules. If Thailand allows for information to be disclosed to the franchisee before entering into an agreement, it will reduce the chance for the franchisee to be exploited. The current franchise agreement in Thailand come in a form of readymade format where the franchisor lays the condition which can be considered unfair and unjust to the franchisee such as setting unreasonable obligations that burden the franchisee, conditions of teimination, or damage claiming. This is because there is no specific franchise law which lead to the franchisor setting his own conditions as he deems fit.

When considering the law of America and Australia, it can be concluded that in order to supervise the franchise business in the country better, one will need to realize that other countries gives importance to disclosing information before entering a contract. Whereas they specify the period of time in advance, as well as, set exceptional conditions when not to disclose information. The •Australian law, in

addition, also discussed dispute settlement between the parties and that in the event of dispute mediation should be applied. It also determines how a contract can be terminated.

Beside the laws used in these two countries, there is also another interesting international law which is the model law by the International Institute for the Unification of Private Law (UNIDROIT). The researcher would like to focus specifically on the UNIDROIT Model Franchise Disclosure Law which is a model law that requires franchisors to disclose information before entering into a franchise agreement. The model law determines the type of information that must be disclosed and that can affect the decision of prospective franchisee in entering into an agreement such as, background information about the franchisor, franchise business, business experience, financial statements, collection of fee, intellectual property, bankruptcy background, revenue, branch, renewal and termination of contract, and disputes, etc. The intention of the UNIDROIT is to be applicable to any franchise agreement in the present or in the future because UNIDROIT's intention is to assist and protect franchisee from bad franchise business with no potential. It is also available for other countries and can be adapted to suit different legal systems in order to provide for practical guidelines that go into the same direction.

Nevertheless, the provisions of the relevant Thai law or the applicable law including the draft franchise business bill still has restrictions when it comes to analyzing issues related to franchise business, leading to uncertain outcomes of the issues, and cannot reduce the problems which is in opposite with the increasing trend in the number of franchise businesses in Thailand. For this reason, the researcher is strongly in the opinion that Thailand should adopt a specific franchise law including preparing document to disclosure information before entering a franchise agreement so that the prospective franchise is given the right and liberty in making his decision based on the information provided to him.

5.2 Recommendations

When analyzing the problem of franchise business in Thailand, the researcher acknowledges that whenever a dispute related to franchise business in Thailand arise, relevant or similar laws have been used for application. Using such laws to solve a

dispute, nevertheless, make it impossible to address the true issue of the problem; it will only resolve the tip of the iceberg. The researcher would therefore like to propose the following:

1. There should be a law specifically for franchise business because other laws cannot fully be applied.

2. The franchise law should specify that a disclosure document should be provided to the prospective franchisee with the following items to be disclosed

- 1) Business Information
- 2) Investment
- 3) Fee or profit sharing
- 4) Financial system
- 5) Assistance and support and
- 6) Fine

- 3 The researcher strongly recommends to use the IJNIDROIT model law which defines the subject matter of disclosure, as well as, the terms and conditions of the franchise agreement that need to be disclosed to the prospective franchisee according to Article 6 of the model franchise disclosure law. The model law also gives priorities to those countries that decide to use the model law as a guidelines and want to adjust or amend their laws to make the law suitable for their national laws related to franchising.

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