



Franchise

in 30 jurisdictions worldwide

2014

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Overview

1 What forms of business entities are relevant to the typical franchisor?

Franchisors based in Singapore can set up a business entity by establishing a:

- sole proprietorship;
- general partnership;
- limited partnership;
- limited liability partnership; or
- private limited company.

Foreign franchisor companies in Singapore may establish a branch office (a branch office which is registered in Singapore is considered an extension of the parent company and not a separately incorporated entity – accordingly the liabilities of a branch office extend to its parent company) or a subsidiary company.

While foreign companies can create a representative office in Singapore, this would not be suitable for the business of a franchisor as in Singapore a representative office is considered to be a temporary arrangement for conducting marketing research or feasibility studies. A representative office does not have any legal status and cannot be engaged in any profit-yielding activities.

In order to determine the appropriate business entity, franchisors should consider tax issues, proposed expansion plans, proposed funding requirements (and the requirements of lenders) and the level of liability which the franchisor and any parent company may wish to accept.

2 What laws and agencies govern the formation of business entities?

The following laws govern the formation of business entities in Singapore:

- chapter 32 of the Business Registration Act, which provides a basic framework for the registration of persons carrying on business in Singapore, whether as sole-proprietors or partnerships. This Act does not apply to companies or limited liability partnerships;
- chapter 50 of the Companies Act; and
- chapter 163A of the Limited Liability Partnership Act.

The formation of business entities is regulated by the Accounting and Corporate Regulatory Authority (ACRA).

3 Provide an overview of the requirements for forming and maintaining a business entity.

Sole proprietorship

A sole proprietorship is not a separately incorporated entity and therefore the owner and the business are one and the same. The sole proprietor owns all assets and liabilities of the business.

A sole proprietorship must be registered with ACRA before undertaking any business in Singapore.

Sole proprietors are not required to audit their accounts or file annual returns with ACRA.

General partnership

A general partnership allows two or more people to establish and co-own a business. The partnership has no legal existence separate from its partners. Each partner can be held responsible for the actions of another partner.

A general partnership must be registered with ACRA before undertaking any business. A partner can give notice at any time of the dissolution of the partnership. If there are more than 20 partners the business entity must be registered as a company under the Companies Act.

Limited partnership

Limited partnerships (LPs) are similar to general partnerships, however in an LP partners can be either general partners (responsible for the actions of the LP and liable for all debts and obligations of the LP) or limited partners (whose liability would be limited to their investment in the partnership, provided that they do not participate in the management of the partnership).

Limited liability partnership

A limited liability partnership (LLP) combines features of partnerships and companies.

LLPs were introduced in Singapore in 2005 by the Limited Liability Partnership Act and must be registered with ACRA before carrying on business in Singapore. Registering an LLP gives owners the flexibility of operating as a partnership while enjoying many of the benefits that come with a corporate body. LLPs allow the partners to operate together while having a separate legal identity.

Company

A company is a business entity registered under the Companies Act and is a separate legal entity from its members. Under the Companies Act, a company must be registered with ACRA in order to carry on business in Singapore.

Most companies in Singapore are limited liability companies, meaning that the liability of the members is limited by shares or by guarantee.

A company can also be categorised as an exempt private company, namely one which has fewer than 20 shareholders and where none of the shareholders is a corporation. The benefit of this categorisation is that an exempt private company with a revenue of no more than 5 million Singapore dollars for a financial year is exempt from filing audited accounts, and can instead file unaudited accounts.

4 What restrictions apply to foreign business entities and foreign investment?

Generally there are no laws restricting foreign business entities and foreign investment in Singapore, other than for certain sectoral

restrictions (such as in the telecommunications, broadcasting and financial services sectors), however there may be employment and immigration issues that affect staff of foreign business entities.

Non-residents must apply for an employment pass under the Singapore Immigration Regulations if they intend to set up a business in Singapore. Once an application has been approved, an approval-in-principle letter will be issued and this will allow the applicant to register the business with ACRA.

If a sole proprietor is a foreign company then there must be a local manager. The local manager must be over 21 years old and must be a Singapore citizen, permanent resident, employment pass-holder, approval-in-principle employment pass-holder or a dependant pass-holder.

Similar to sole proprietorships, partnerships must appoint a local manager if none of the partners reside in Singapore. A person is deemed not to be a resident if they do not have a local address in Singapore.

Companies in Singapore also require at least one local-resident director (though this does not need to be a Singapore citizen). Foreigners who wish to act as local director of a company can apply for an EntrePass or approval-in-principle letter from the Work Pass Division of the Ministry of Manpower under the EntrePass Scheme.

- 5** Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

Sole proprietors pay taxes based on the profits made by their business and are taxed at their personal income tax rate.

In partnerships, profits and losses are shared among the partners and they are taxed in each individual partner's name at personal income tax rates.

An LLP is treated as a partnership rather than a separate legal entity for income tax purposes. Each partner is taxed based on their income share. Where the partner is an individual, their share of income from the LLP will be taxed based on their personal income tax rate. Where a partner is a company, their share of income from the LLP will be taxed at the tax rate for companies.

In Singapore, companies are taxed at a rate of 17 per cent. There are currently some tax exemptions in place, although these may be revoked in the future. Since 2008, a partial tax exemption on the first S\$300,000 of income has been granted to Singapore companies.

In addition, under the tax exemption scheme for new start-up companies, a newly incorporated company that meets qualifying conditions can claim for full tax exemption on the first S\$100,000 of normal chargeable income for the first three consecutive years of assessment.

A business is taxed on its chargeable income regardless of whether it is a local or foreign business.

- 6** Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

There are no specific laws in Singapore regarding labour and employment considerations for franchisors. However, there are restrictions on the number of foreign employees that can be employed by a business in Singapore and this is based on a ratio of local employees versus foreign employees. The exact ratio depends on the industry the franchise operates in.

There is generally very little risk that a franchisee or employees of a franchise will be deemed employees of the franchisor, provided that the franchise agreement is drafted to state that the franchisor and franchisee are independent contractors and not agents, joint venturers, partners or employees of each other.

- 7** How are trademarks and know-how protected?

Trademarks are protected under the Trade Marks Act, chapter 322.

While not mandatory, if a franchisor wishes to protect its trademark in Singapore it is advisable to register the trademark under the Trade Marks Act. A trademark registration lasts for 10 years and may be renewed. There is no restriction on the number of renewals.

If a franchisor does not register its trademarks there may still be some protection under the common law action of passing-off. For an action in passing-off to be successful, the franchisor needs to show that its business enjoys goodwill, that there is a likelihood of confusion by the use of an offending mark and that damage is caused.

If a foreign franchisor wishes to protect its trademark in Singapore, it will have to register its trademark in Singapore.

While Singapore is a party to the Madrid Protocol, many other major South-East Asian states are not currently members. Accordingly, the Madrid Protocol may prove inadequate for a franchisor that wishes to expand its franchise around South-East Asia.

Know-how can be protected by confidentiality provisions in the franchise agreement or by entering into a separate confidentiality agreement.

- 8** What are the relevant aspects of the real estate market and real estate law?

The real estate market and real estate law has little impact on franchising in Singapore unless a franchisor decides to acquire property to lease or sublease to its franchisee. There are some restrictions on the ability of foreign parties to purchase property in Singapore, although this is normally applicable to residential rather than commercial properties.

Laws and agencies that regulate the offer and sale of franchises

- 9** What is the legal definition of a franchise?

There is no legal definition of a franchise in Singapore.

- 10** Which laws and government agencies regulate the offer and sale of franchises?

There are no specific laws or government agencies that regulate the offer and sale of franchises in Singapore. General contract law governs the relationship between the franchisor and the franchisee.

The Franchising and Licensing Association (FLA) is the national franchising body in Singapore and a member of the World Franchise Council. The FLA was established in 1993 'with the mission to nurture and develop Singapore's franchise industry'. It is not mandatory for a franchise to become a member of the FLA. There are currently 137 member franchises.

- 11** Describe the relevant requirements of these laws and agencies.

The franchisor and franchisee must comply with the terms of the franchise agreement. If the franchisor is a member of the FLA, the franchisor must pay an annual fee and comply with the FLA Code of Ethics. The Code contains provisions relating to:

- written agreements;
- misleading promotion;
- full information on investment requirements;
- disclosure;
- legal advice;
- contact information;
- imitation of other's trademarks;
- selection of franchisees;
- training;

- business guidance;
- accessibility of franchisor;
- transferability of franchise;
- standards of conduct;
- notice of breach and time for remedy;
- termination with good cause; and
- dispute resolution.

12 What are the exemptions and exclusions from any franchise laws and regulations?

There are no franchise laws or regulations in Singapore. Accordingly, there are no applicable exemptions or exclusions.

13 Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

There are no laws that create such a requirement.

14 Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

There are no such laws, regulations or government policies.

For franchisors that are members of the FLA, the FLA Code of Ethics states that a member franchisor shall only select and accept a franchisee who, upon reasonable investigation, appears to possess the basic skills, education, personal qualities and financial resources adequate to perform and fulfil the needs and requirements of the franchise.

15 In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

There are no laws relating to pre-sale disclosures to sub-franchises. There are also no requirements regarding pre-sale disclosures to sub-franchises in the FLA Code of Ethics.

16 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

There are no laws relating to disclosure. However franchisors who are members of the FLA are required to provide a disclosure document to the franchisee at least seven days prior to the execution of the franchise agreement.

There is no provision in the FLA Code of Ethics which requires the disclosures to be updated.

17 What information must the disclosure document contain?

A franchisor who is a member of the FLA must disclose details of its current operations, the investment required, performance records and any other information that is pertinent to the franchise relationship.

18 Is there any obligation for continuing disclosure?

There is no requirement to provide disclosure documents on an ongoing basis to existing franchisees.

19 How do the relevant government agencies enforce the disclosure requirements?

No government agencies in Singapore provide or enforce disclosure requirements for franchises.

For franchisors who are members of the FLA, the FLA Code of Ethics will be interpreted by the FLA Executive Committee, whose explanations are final and binding on all members.

20 What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

Franchisees who suffer wrongful acts by franchisors can bring actions based on common law theories such as breach of contract, fraud, misrepresentation and antitrust.

For franchisors who are members of the FLA, the FLA Code of Ethics includes a specific provision regarding dispute resolution. Aside from these mechanisms, a franchisee can obtain relief through legal proceedings if they are able to establish a cause of action.

21 In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

The franchisor will not be held liable if a sub-franchisor violates a disclosure agreement.

Individual officers, directors and employees of the franchisor or sub-franchisor may be personally liable for disclosure violations.

22 In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

Currently Singapore's franchise industry remains largely unregulated by any specifically created legislation. Instead, general contract law governs the relationship between the franchisor and the franchisee.

23 Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub franchisee regarding predecessors, litigation, trademarks, fees etc, are there any general rules on pre-sale disclosure that might apply to such transactions?

There are no general rules on pre-sale disclosure that might apply to such transactions.

24 What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under the franchise sales disclosure laws?

Franchisees who suffer wrongful acts by franchisors can bring civil actions based on common law theories such as breach of contract, fraud, misrepresentation and antitrust. The burden of proof is on the franchisee to show that the franchisor knew that a statement made was false or deceptive and, as a result of the franchisee believing that statement, the franchisee suffered a loss.

Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship

25 Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

There are no specific laws regulating the ongoing relationship between franchisor and franchisee, but the general principles of contract law apply.

For franchisors who are members of the FLA, the FLA Code of Ethics states that a franchisor shall be conveniently accessible and responsive to communications from franchisees and shall provide a mechanism by which ideas may be exchanged and areas of concern discussed.

26 Do other laws affect the franchise relationship?

Depending on the structure of the franchisor–franchisee relationship and the terms of the franchise agreement, certain Singapore laws may regulate various aspects of franchising. Examples are given below.

The Multi-Level Marketing and Pyramid Selling (Prohibition) Act

The Multi-Level Marketing and Pyramid Selling (Prohibition) Act of 2000 prohibits multi-level marketing and pyramid selling because it encourages distributors to focus more on recruiting investor distributors than on retailing products. A franchise structure could potentially fit into such a prohibited multi-level structure if a franchisor, or someone holding a master franchise, sublicenses the rights of the franchise to several tiers of sub-franchisees.

An amendment made to the Multi-Level Marketing and Pyramid Selling (Prohibition) Act expressly excludes some franchise schemes that fulfil certain conditions as set out in section 2(b) and (c) of the Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order. In general, schemes that provide safeguards, behavioural checks or sharing of commission are not unlawful.

Income Tax Act

Where the franchise relationship is with a foreign franchisor, payments made to the foreign franchisor such as royalties and management fees are likely to be subject to withholding tax.

Unfair Contract Terms Act

The Unfair Contract Terms Act provides that certain contractual terms that are unfair will not be enforceable. It provides that a person may not exclude or restrict liability for death or personal injury resulting from negligence. In the case of other losses or damage, a person cannot exclude or restrict liability unless it is reasonable to do so.

Clauses prohibiting the franchisee from carrying out similar or competitive businesses during or after the term of the franchise are prima facie void unless they are reasonable (taking into consideration all the circumstances) to protect the franchisor's interest. Factors such as the period and geographical scope of the restriction compared with the franchise term and the territory granted to the franchisee are relevant in considering whether the clause is reasonable.

27 Do other government or trade association policies affect the franchise relationship?

The Singapore Franchise Mark (the Mark) is a certificate scheme jointly administered by the FLA, International Enterprise (Singapore) and the Standards, Productivity and Innovation Board. The Mark symbolises quality and is awarded to franchisors and franchisees who have attained a minimum standard in their business performance, management capabilities and business practices. This facilitates the identification of franchisors who adhere to sound and ethical franchise practices, and provides for greater transparency.

28 In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

How and when a franchise relationship will be terminated is usually set out in the franchise agreement. If there is a fundamental breach

of the franchise agreement by the franchisee, the franchisor may terminate the agreement under general common law or contractual principles. There may also be additional termination rights of the franchisor in the franchise agreement, for example, termination on insolvency of the franchisee.

29 In what circumstances may a franchisee terminate a franchise relationship?

How and when a franchise relationship will be terminated is usually set out in the franchise agreement. If there is a fundamental breach of the franchise agreement by the franchisor, the franchisee may terminate the agreement under the general common law or contractual principles. There may also be additional termination rights of the franchisee in the franchise agreement, for example, termination on insolvency of the franchisor.

30 May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

The franchise agreement will usually govern when a franchise agreement may be renewed.

If there is no provision in the agreement, or the franchisee fails to comply with certain provisions that are imposed in the franchise agreement prior to renewal, the franchise agreement may terminate or, in the event of a failure of the franchisee to comply with conditions, the franchisor may choose not to renew the franchise agreement.

31 May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

The franchisor may restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests by stating so in the franchise agreement.

32 Are there laws or regulations affecting the nature, amount or payment of fees?

No laws dictate the amounts that can be charged for an initial or ongoing fee.

33 Are there restrictions on the amount of interest that can be charged on overdue payments?

There are no restrictions on the amount of interest that can be charged on overdue payments.

34 Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

There are no laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency.

35 Are confidentiality covenants in franchise agreements enforceable?

Yes, confidentiality covenants in franchise agreements are enforceable.

36 Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

There is no implied duty of good faith in Singapore's contract law, however the Singapore courts generally uphold the validity of good faith negotiation clauses.

Update and trends

Singapore continues to embrace and encourage franchising. Franchising is seen as an excellent mechanism to educate, train and empower Singapore. Singapore's minimalist approach to franchise regulation has allowed an increasing number of franchise systems to expand into the region using Singapore as a base.

There is no indication that the government will increase regulations relating to franchises in the near future.

37 Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

Franchisees are not considered consumers for the purposes of consumer protection under the Consumer Protection (Fair Trading) Act.

38 Must disclosure documents and franchise agreements be in the language of your country?

Disclosure documents and franchise agreements may be in any language.

39 What restrictions are there on provisions in franchise contracts?

There are no restrictions on provisions in franchise contracts provided that they comply with applicable laws – for example, competition law.

However, non-competition clauses post-termination of a contract are generally unenforceable in Singapore unless the party seeking to enforce the clause can show a legitimate interest to be protected. While this generally should not be applicable in a franchisor–franchisee relationship, care should be taken to ensure that the non-competition clause does not unreasonably restrict the ability of the franchisee to carry out business after the franchise agreement comes to an end.

40 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

The Competition Act provides a generic law to protect consumers and businesses from anti-competitive practices of private entities. This law is enforced by the Competition Commission of Singapore (CCS).

The three prohibited activities under the Competition Act are agreements, decisions and practices which prevent, restrict or distort competition; abuse of dominant position; and mergers and acquisitions that substantially lessen competition.

The Third Schedule of the Competition Act provides an exemption for vertical agreements with respect to the prohibition against anti-competitive agreements. The guidelines released by the Competition Commission of Singapore have clarified the application of this exclusion with regards to intellectual property rights. The guidelines state that such intellectual property provisions are normally covered by the 'vertical exclusion' provision.

Under the Competition Act, any agreement which has the object or effect of preventing, restricting or distorting competition within

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Singapore is prohibited and will be void. There are exemptions to and exclusions from the strict application of the prohibitions in the Competition Act. If a franchise agreement falls within an exemption or exclusion and need not comply with the requirements of the Competition Act, clauses such as the control of selling prices by the franchisor may still be allowed.

Rather than attempting to catch all forms of anti-competitive activities, the CCS's principal focus is on activities that have an appreciable adverse effect on competition in Singapore or do not yield net economic benefit. The Competition Act applies to all private sector undertakings that are capable of carrying out commercial and economic activities, and applies regardless of whether the undertaking is owned by a foreign entity.

41 Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

Franchise disputes rendering litigation are usually heard in the civil courts. The amount claimed determines which court presides over the case. A magistrates' court has jurisdiction to hear and try an action for the recovery of a sum or sums not exceeding S\$60,000. A district court has jurisdiction to hear and try an action for the recovery of a sum or sums not exceeding S\$250,000. The High Court has jurisdiction to hear and try an action for the recovery of a sum or sums worth more than S\$250,000.

A franchise agreement may require the parties to go to arbitration in certain circumstances.

42 Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

Advantages

Singapore has been gaining recognition as an arbitration hub due to its position as a central point for regional trade and commerce, the accessibility of Singapore to regional clients and the perception of Singapore as a neutral destination to resolve disputes.

In 2010, the legislative framework relating to arbitration was amended to strengthen support of international arbitration and an arbitration facility centre was launched with the government's support.

In 2004, the Singapore Legal Progression Act was amended to expressly permit foreign lawyers to represent a party in Singapore arbitrations and give advice in relation thereto, even if the substantive law of the dispute is Singapore law. Neither the Arbitration Act nor the International Arbitration Act provides any nationality restrictions on the appointment of arbitrators.

Singapore has adopted the United Nations Commission on International Trade Law (UNCITRAL) model law, which applies a common series of rules for the conduct of international arbitrations.

Several leading international arbitral institutions, such as the International Centre for Settlement of Investment Disputes, the International Centre for Dispute Resolution, the World Intellectual Property Organization, and the Permanent Court of Arbitration, have recently established branches in Singapore.

Singapore law implies a general obligation of confidentiality into all Singapore arbitrations.

Disadvantages

Arbitral tribunals are usually unable to make orders affecting third parties or consolidating proceedings. This can be a disadvantage in the context of complex transactions involving multiple parties and contracts.

While parties may appeal to a court on a question of law arising out of an arbitration award under the Arbitration Act, such appeals are not permitted under the International Arbitration Act.

43 In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

There is no evidence to suggest that foreign franchisors are treated differently in Singapore from domestic franchisors. Singapore allows franchising by franchisors located offshore in any country. It is not necessary for a foreign franchisor to have a physical presence in Singapore.

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- Private Equity
- Product Liability
- Product Recall
- Project Finance
- Public Procurement
- Real Estate
- Restructuring & Insolvency
- Right of Publicity
- Securities Finance
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