



Franchising the Future

The franchising model has exploded across ASEAN, from Singapore to the Philippines to Thailand. Lawyers from around the region explain why it has become such a popular way of doing business, and why it's on its way to markets including Myanmar, Cambodia and even Laos. **Gregory Glass** reports.

Orders are, you've been in a franchised operation. Unless you've been living under the proverbial rock. Many ASEAN countries are, in fact, rife with franchises. In Singapore

"The sorts of enterprises that are most frequently franchised are those in the food and beverage sector, which dominate the franchise industry, as well as in the retail, beauty and spa, education and health-care sectors," says Tan, who notes that the Franchising and Licensing Association of Singapore estimated that in 2011, the annual turnover attributable to franchising was approximately S\$8 billion (US\$6.3 billion), accounting for 18% of Singapore's total domestic retail sales volume.

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- Joel Loo Sean Ee, regional counsel,
McWalden & Bailey, Bangkok

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alone, says Tan Tee Jim, a senior partner at Lee & Lee, there are more than 500 franchise systems and more than 3,000 franchisees.

“Rhonda Hare, a partner in Ashurst's Singapore office, says that Singapore looks to promote itself as a franchising hub, a role it has played with some success in the region. “Singapore has a sophisticated legal system and is a moderately regulated market. There are good intellectual property laws and the court system is transparent. The Singapore International Arbitration Centre is highly regarded as a venue for international dispute resolution,” says Hare. “Given the transparent legal system, Singapore is seen as an ‘easier’ jurisdiction for foreign franchisors as compared to some other

countries in Asia.”

Alan Adcock, a partner and deputy director of intellectual property at Tilleke & Gibbins in Bangkok, says franchising in Thailand is thriving, as the country's franchise businesses grew by 20% in 2012.

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Franchising as a business system has grown for the past 10 years in the Philippines. From 598 franchisors in 2000, the number has increased to around 1,300 in 2011, and continues to increase.

- Divina PV Ilas-Panganiban, partner,
ACCRALaw, Manila

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“While there are currently 370 franchise brands in Thailand, it is expected that this number will be 500 within five years. Retail and food and beverage concepts are often franchised in Thailand,” Adcock tells *Asia IP*. “It is very easy to franchise in Thailand, primarily due to the fact that Thailand currently has no franchise-specific legislation.”

Joel Loo Sean Ee, the Bangkok-based Asia-Pacific regional counsel for McWalden & Bailey, a law firm headquartered in the United Kingdom, says “franchising offerings here employ much flexibility and customizability, presenting significant appeal to a wide spectrum of demand and requirements.”

For instance, he says that while he often encounters local franchise models embodying affordability and flexible payment schemes that cater to individuals and small businesses, numerous foreign-based, complex conglomerate models have been introduced to Thailand by local corporations in view of harnessing the country's consumer-driven market and to take advantage of the lack of local franchise regulations and the local judicial recognition of freedom of contract.

Malaysia, too, has seen recent growth in the franchise sector, says Leela Baskaran, a partner at Skrine in Kuala Lumpur. “Franchising is a growing industry in Malaysia, contributing about 5% to 10% of the Malaysian retail sector,” she says. According to recent reports, as of 2013 there are more than 600 franchises from various sectors registered in Malaysia.

“Franchising is most commonly found in the food and beverage

and retail industry, with a growing number of franchises also being seen in the education industry, Baskaran says. “The Malaysian Government has taken the position that franchising is a way to encourage entrepreneurs to venture into business successfully.”

Jin Nee Wong, a partner at Wong Jin Nee & Teo in Kuala Lumpur, says that the country's franchise industry generated a total revenue of RM24.3 billion (US\$7.6 billion), and that the government projects that the industry will make up 9.4% of Malaysia's GDP by 2020. Food and beverage outlets comprise 34% of the franchises approved by the government, she says.

Similar growth has been seen in the Philippines, says Divina PV Ilas-Panganiban, a partner at ACCRALaw in Manila. “Franchising as a business system has grown for the past 10 years in the country,” she says. “According to data from the Philippine Franchising Association, from 598 franchisors in the year 2000, the number has increased to around 1,300 in 2011, and continues to increase to date.”

Ilas-Panganiban says that the most-frequently franchised businesses in the Philippines include beauty, health and wellness services, followed by hospitality and tourism-related enterprises, as well as food and other retail businesses.

Growth in Small Places

Franchising is even taking hold in those ASEAN nations that may be considered to be among the region's less-developed, lawyers say.

Prudence Jahja, an associate at Januar Jahja & Partners in Jakarta, says that franchising in Indonesia has become

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Januar Jahja & Partners, Jakarta

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increasingly more common in recent years. While new franchises seemingly span the whole spectrum, the most activity has been in the food and beverage and retail industries.

“Compared to more developed ASEAN markets such as Singapore or Thailand, franchising in Indonesia is still in the early stages, with government regulation in this area only beginning

about 15 years ago” she says. “While each country poses its own challenges and opportunities, Indonesia’s franchising system has recently added a strong element of uncertainty about how

foreign franchisors must engage and support local producers. This uncertainty will only add to the challenges of franchising in Indonesia.”

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We do have a lot of food franchises in Brunei - McDonalds, KFC, The Coffee Bean, Jollibee, to name a few - and more and more franchises are coming in. In recent times in Brunei, it seems people have become more willing to spend money on food, which is why many food franchises are coming in. There is a market for franchise offerings.

- On Hung Zheng, associate,
CCW Partnership, Bandar Seri Begawan

In Brunei, a country of some 400,000 people on the island of Borneo, there has been a recent increase in the number of franchised operations, says On Hung Zheng, an associate at CCW Partnership in Bandar Seri Begawan.

“We do have a lot of food franchises in Brunei - McDonalds, KFC, The Coffee Bean, Jollibee, to name a few - and more and more franchises are coming in. In recent times in Brunei, it seems people have become more willing to spend money on food, which is why many food franchises are coming in,” says On. “There is a market for franchise offerings.”

Franchising remains less common in Vietnam, Cambodia, Laos and Myanmar, but is slowly gaining in popularity in each of those countries, too, lawyers report.

In Cambodia, says Adcock, the number of franchise businesses is growing along with its middle class. “While the country’s current offerings lag behind those of some of its Southeast Asian neighbours,

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Fake KFC Attracts Embassy Tweet

Perhaps they were just hungry for some familiar fast food, but a fake KFC restaurant has captured the attention of the US Embassy in Yangon – and not in the way parent company Yum foods would like.

In February, the embassy posted a photo of the apparent KFC on its Twitter feed along with a tweet reading “A KFC restaurant in Yangon? We spotted this retail sign on Nawaday Street near downtown. That’s finger lickin’ good!”

Finger lickin’ good was a KFC advertising slogan in the United States used since the 1950s; it was abandoned earlier this decade as part of a push to make its offerings in the US seem healthier.

Yangon-based Global Post reporter Patrick Winn, in an interview with Public Radio International, said the KFC came complete with an authentic-looking sign. “There’s a fake KFC that arrived not too long ago with a very convincing sign, so convincing in fact I’m sure they got a real one from somewhere, maybe some KFC that closed down,” he said. “It’s so convincing that the US Embassy actually tweeted their arrival. The whole thing was totally fake.”

In Myanmar, franchising does not exist to a visible degree due to the previous sanctions placed on the country, says Rhonda Hare, a partner in Ashurst’s Singapore office. “While only a few small regional companies operate local franchises, there appears to be strong interest in franchising opportunities in Myanmar,” she says.

That interest has resulted in a number of fakes and near-fakes, including a Walmart, a Kmart, Burger Queen and the iCloud electronics store, as well as the not-exactly-a-KFC.



industry insiders claim that the country is ripe for additional franchising operations, particularly in the food and hospitality sectors. As there are no specific franchising regulations in Cambodia currently, the time is now for foreign franchisors to enter the market."

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It is highly recommended that franchisors and franchisees consult legal advisers prior to entering into a franchise arrangement.

- Daena Goh, partner,
Allen & Gledhill, Singapore

Thomas Treutler, partner and managing director for Vietnam at Tilleke & Gibbins, says that "franchising is not very common in Vietnam, but it is becoming more familiar. Most franchises in Vietnam are for foreign brands, and a majority of such foreign brands are in the food and beverage and fashion sectors.

Konrad Hull, partner/manager at VNA Legal, a firm with offices in Vientiane and Ho Chi Minh City, says franchisors in Vietnam face difficulties including protection of intellectual property, finding appropriate franchisees, and difficulties with Vietnamese suppliers not always being able to consistently supply input materials satisfying international standards, which forces franchisees to import many supplies to ensure quality. "However, Vietnam is still seen as a relatively untapped market for franchising, with a large scope for growth," he says.

Hull, whose practice also includes work in Laos, says franchising in that small country is not as common as in other ASEAN countries. "The current franchised enterprises are mostly restaurants, which include The Pizza Company and Fuji Restaurant," he says.

James Robert Cumiskey Jr, regional director – legal services at the Interactive Group law firm in Yangon, says that franchising in Myanmar is also becoming more common, especially in the restaurant industries.

Local Laws, Local Advice

Given that the franchise arrangement is essentially a matter of contract, the terms of the franchise agreement are critical to the commercial arrangement, says Daena Goh, a partner at Allen & Gledhill in Singapore. "It is highly recommended that franchisors and franchisees consult legal advisers prior to entering into a franchise arrangement. In instances where the

franchise business is to be conducted in another country, or if the governing law is another jurisdiction, it would be essential to have local legal advice sought to ensure that the franchise arrangement is compliant with, and enforceable under, the laws of relevant jurisdiction," Goh says.

Because only some of the ASEAN nations have specific laws which apply to franchise agreements, and those that do not have commercial laws which are vastly different from one another, it is essential to have competent, local legal counsel, whether you're the franchisee or the franchisor.

Benjamin Gaw, a director at Drew & Napier in Singapore who practices with the firm's corporate finance team, notes that in Singapore, a franchise arrangement is purely a contractual matter, with little specific franchise legislation in place.

"In Singapore, franchising is generally a self-regulated industry," he says. "From a franchisee's perspective, it is important

to ensure that they actually do the due diligence they need to do and that they understand what their obligations are. For some franchisees without experience in dealing with a franchise arrangement, they may not be aware that there are a lot of contractual and financial obligations involved."

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[Many of the clauses in a franchise agreement] are specified in the law and regulations affecting technology transfer. In order to guard a franchise agreement against invalidation, the parties should ensure that the agreement complies with the technology transfer requirements.

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Betita Cabilao Casuela Sarmiento, Manila

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The franchise business model is very common in Singapore. Gaw says that is, in part, due to the low barriers to entry to the market. "With more regulation, there would be more cost of compliance, and to franchise a business would be more expensive."

Goh says that the ease of franchising in Singapore is supported by a robust, pragmatic and business-friendly legal framework. "There are no enacted legislative provisions governing franchising under Singapore law. Generally, there are no formalities involved in the appointment of a franchisee nor is there any express

legislation in Singapore which generally imposes requirements on parties seeking to establish a franchise arrangement. Under Singapore law, the term 'franchise agreement' is not itself

meantime," she says.

Baskaran says that in Malaysia, many franchisors encounter problems with their obligation to renew. "The Franchise Act provides that the franchisee may at its option apply for extension of the franchise by giving not less than six months written notice to the franchisor, and the franchisor shall extend the franchise term except where a franchisee has breached the terms of a previous franchise agreement. Moreover, the renewal is required to contain conditions which are similar to or no less favourable than the terms of the original franchise agreement," she says.

Pericles Casuela, a partner at Betita Cabilao Casuela Sarmiento in Manila, says that the most common cause for reluctance of potential franchisors to enter the Philippine market is the lack of prior knowledge or information on the specific clauses required by law to be contained or not contained in a franchise agreement. "Those clauses are specified in the law and regulations affecting technology transfer," he says. "In order to guard a franchise agreement against invalidation, the parties should ensure that the agreement complies with the requirements imposed under the technology transfer regulations."

Ilas-Panganiban adds that if a franchise agreement does not conform to the provisions of the IP Code and is not approved and registered with the Intellectual Property Office of the Philippines, royalties paid under such non-conforming/

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Many different regulations affect the terms and conditions of a franchise agreement in Vietnam. For example, a foreign franchisor normally wishes to put a purchase option in the franchise agreement which gives the franchisor a priority right to acquire the franchised system. However, this may not be feasible due to the foreign ownership restrictions in the retail sector.

- Thom Thi Mai Nguyen, attorney at law,
Tilleke & Gibbins, Hanoi

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a legally-defined term or term of art and its true meaning is essentially a matter of contract, i.e. parties are generally free to contract on the terms of the franchise agreement. For example, if parties have made an express choice of law, then that choice will generally be given effect, unless the choice was not made *bona fide* or was illegal, or if the application of the law chosen by the parties would be contrary to the fundamental public policy of Singapore.”

Meanwhile, in Indonesia, Jahja notes that foreign franchisors must comply with Regulation 53, which requires, among other things, that franchisors and franchisees use "local components" for at least 80% of the raw materials, business equipment and merchandise used in the franchise. The regulation, which Jahja says is in response to the increased presence of foreign brands in Indonesia through franchising agreements, further states that this – and other – requirements will be enforced by a so-called Assessment Team. "However, corresponding regulations detailing how the Assessment Team will be created have yet to be issued, leading to questions as to how and when these new regulations will be enforced in the

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It is difficult to know exactly what types of conflicts occur most commonly in Laos. There is no publicly available information on the matter. However, based on our informal query with the Office of Economic Dispute Resolution and the People's Court of Vientiane Capital, we were informed that they are unaware of any dispute on franchising filed before their respective offices.

- Konrad Hull, partner,
VNA Legal, Vientiane

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non-registered franchise agreement will not be allowed as a business expense deduction of the franchisee for Philippine income tax purposes; the franchisor will not be allowed to avail of any preferential tax rate on royalties paid pursuant to such

wishes to put a purchase option in the franchise agreement which gives the foreign franchisor a priority right to acquire the franchised system in Vietnam. However, this may not be feasible due to the foreign ownership restrictions in the retail sector in

Vietnam. In such case, if such terms are executed, then upon the acquisition of the franchised system in Vietnam, the foreign franchisor's registration may be rejected by the licensing authorities and they will not be allowed to own the whole developed franchised system," she says.

In Laos, Hull says, it is difficult to know exactly what types of conflicts occur most commonly. "There is no publicly available information on the matter," he says. "In Laos, legal disputes are generally kept confidential only among the contending parties and court decisions are not published or publicly available. However, based on our informal query with the Office of Economic Dispute Resolution and the People's Court of Vientiane Capital (where most commercial establishments are located), we were informed that they are unaware of any dispute on franchising filed before their respective offices."

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non-conforming/non-registered franchise agreement under the applicable tax treaties; and the franchisee would find it difficult to source foreign exchange from the Philippine banking system to remit royalty payments to the franchisor outside the Philippines.

The absence of franchising legislation in the Philippines is seen as both a plus and a minus, says Ilas-Panganiban. "It may be easier to enter into a franchise in the Philippines in terms of contractual autonomy of the parties," she says. "Since there is no specific law on franchising in the Philippines, the parties are free to stipulate on the commercial terms as long as the agreement does not contravene Philippine laws, morals, good customs, public order and public policy. However, since there is no special franchising law, the Civil Code and the Intellectual Property Code provisions apply to franchising arrangements. Some parties to a franchising contract find it difficult to comply with certain provisions in the IP Code."

In Vietnam, where most franchisors are foreigners, obtaining legal advice relating to the applicable regulations on franchising in Vietnam is strongly recommended. "Franchising in Vietnam is probably more difficult when compared with the more developed ASEAN countries, as franchising is a relatively new concept here," says Hull.

Thom Thi Mai Nguyen, a commercial attorney in the Hanoi office of Tilleke & Gibbins, says a franchise relationship may relate to many other areas of the law other than those regulated under franchising legislation, which is rather simple. "Many different regulations may affect the terms and conditions of a franchise agreement; for example, a foreign franchisor normally

Hare, the Ashurst lawyer, notes that the developing markets of Myanmar, Laos and Cambodia pose unique challenges for any business transaction, including franchises. "Their legal systems are developing and are not always transparent, and there is some legislative uncertainty as new laws are implemented," she says. "These countries can be challenging for foreign investment as the legal framework can be opaque. Since there are no specific

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It is important to understand what the respective rights and obligations are for each party. In Myanmar, I often see clients who want to enter into a franchise agreement, but they do not fully understand all of the undertakings they are entering into.

- James Cummiskey, regional legal director,
Interactive Myanmar, Yangon

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laws regulating franchising in these countries, the parties must rely on the terms of the agreements, general contract law and the ability to enforce those agreements."

In Myanmar, Hare says, franchising is not expressly prohibited by law, but franchising does not exist to a visible degree due to the previous sanctions on Myanmar. "While

only a few small regional companies operate local franchises, there appears to be strong interest in franchising opportunities in Myanmar," she says. "The 2012 changes to the Myanmar

Legal Terms

Disputes between franchisors and franchisees are generally legal disputes arising from the parties' failures to meet or comply with their respective obligations under the franchise agreements, says Wong. "The rather common disputes involve the failure by franchisees to make payments promptly, while the franchisees would usually complain that the franchisors did not provide the support and assistance as promised in the franchise agreement," she says.

Other common disputes involve the encroachment of territorial rights given to the franchisees, in the case where franchisors appoint another franchisee within a close proximity to its other franchisee's outlet. Other conflicts arise due to the differences in expectations, perspectives and communication problems, Wong says.

"It is important for the franchisors to encourage their potential franchisees to read and understand the provisions of the franchise agreement before they sign on the dotted line," she says.

"It is also important for the franchisors not to oversell or over forecast the franchised business but rather to manage the potential franchisees' expectations on the profitability and the efforts required to make the franchised business a success. The franchisees should not have any unrealistic expectations that the franchised business would definitely be a success without any hard work or effort on its part. Problems are likely to arise if the

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foreign investment law will allow more foreign investment into Myanmar, and it is likely that we will see the establishment of global brands in Myanmar and the business structures will likely include franchising.”

Ng Kim Poh, a partner in Shook Lin & Bok's IP & IT department, notes that in Malaysia, there are a number of regulatory and substantive issues which must be considered and addressed carefully prior to entering into a franchise agreement. "Otherwise, the parties may find themselves running afoul of certain statutory requirements which attract criminal sanctions," Ng says. "For instance, a franchisor who intends to sell a franchise to a person who is not a Malaysian citizen is required to obtain the approval of the Registrar of Franchises.

But from a commercial aspect, Ng says the most important aspect both franchisors and franchisees must consider is probably the selection process. "For franchisors, it is of utmost importance that they have a good 'screening' or selection process in terms of choosing capable and well-capitalized franchisees before they enter into a franchise agreement. It may be foolish to think of the short term benefit of getting the franchise fees if the business is not well-run, as it would possibly damage the reputation of the franchise and brand in the long run."

As for franchisees, Ng says that it is imperative that they do not get too eager to jump onto the bandwagon without proper research and consideration. "They should only get into a business that they are well-prepared and well-capitalized to manage," he says.

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Goh Phai Cheng, Singapore

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franchisees have an inaccurate or incomplete understanding of the disclosure documents and franchise agreements and relied on oral representations made by the franchisor or its overly-enthusiastic franchise recruiter.”

In Myanmar, Cummiskey says he often sees clients who lack an understanding of what they are about to sign. "It is important to understand what the respective rights and obligations are for each party," he says. "Often, I see clients who want to enter into a franchise agreement, but they do not fully understand all of the undertakings they are entering into. Anyone about to enter into this type of arrangement should seek legal counsel experienced with franchise agreements."

Michael Soo, head of the IP & IT department at Shook Lin & Bok in Kuala Lumpur, says most problems between franchisors and franchisees are legal disputes regarding non-compliance of certain legal requirements imposed on franchisors. "But, such non-compliance quite often relates to commercial aspects of the franchise business, such as failure to provide franchisees with disclosure documents in the prescribed form (such as the detailed background and structure of the franchise business) before the signing of the franchise agreement," he says.

Siew Ling Su, a partner in the IP and technology practice group at Tay & Partners in Kuala Lumpur, says that there are few cases where disputes are actually litigated. "Where disputes are litigated, the disputes between franchisors and franchisees in Malaysia generally lean towards the validity of franchise agreements, breach of the terms (usually involving payment of royalties or goods sold and delivered) and issues involving the termination or the extension of the term of the franchise agreement."

Like Singapore, Thailand does not have a specific law that regulates business franchising. Piyamarn Pongtornpipat, a partner at Siam Premier International in Bangkok, says that parties can agree on terms and conditions of a franchise agreement under a general contract law, and that disputes mostly arise due to breach of contractual obligations such as non-competition, confidentiality, fee payment and failure to maintain required standard.

"Each party should engage legal counsel to review terms and conditions of the franchise agreement to ensure that they are legally binding and enforceable under governing law and do not violate local law of the country where performance of either party under the agreement is to be carried out," she tells *Asia IP*.

Hiring competent counsel will also help protect the long-term value of the franchisor's intellectual property, says Adcock. "Foreign franchisors should always be aware of the risk that an ex-franchisee will take the knowledge and experience he gained from running the franchise operation and open a competitive business or franchise," he says.

"Intellectual property rights infringement is an area of particular risk, and thus, franchisors should protect themselves clear and robust language in the franchising agreement," Adcock says. "Beyond this, franchisors should also include language in their franchise agreements prohibiting franchisees from opening competing businesses. This prohibition should not be limited to the lifetime of the franchise agreement, but rather run beyond its expiration or termination."

Angela Leong, a partner at Ravindran Associates in Singapore, says that all parties should take time to clarify expectations. "Verify that terms of the franchise agreement stipulate as clearly as possible objective measures for resolving disagreements without necessarily breaking the franchise relationship altogether," she says. "Be disciplined enough to contemplate worst-case scenarios and check that you are prepared for those possibilities."

Franchisees and franchisors in Singapore, Leong says, face a problem unique to the market: "Singapore is a small, easily-

saturated market, with a well-traveled population. A franchise needs to be ahead of trends or a fad may already be on its tail end by the time later entrants start their business here," she says.

Constance Leong, an intellectual property lawyer at Goh Phai Cheng in Singapore, says the city's demographics are also a positive for franchisors. "Unlike our ASEAN neighbours, the language of instruction and business in Singapore is English. An English education is accessible to everyone, and not only children of the elite and the wealthy. This puts Singapore on par with the developed countries with developed brand names and brand culture. It raises the standard of the Singapore workforce. Polarization of the people along ethnic lines is minimized. Western franchisors can easily and almost immediately connect with the consumers in Singapore," Constance Leong says.

Singapore also sees an extensive amount of outbound franchising compared to most of its neighbors, in part due to the government providing financial support to encourage Singapore brand owners to take their company overseas.

"The Singapore government recognized early on that the emerging global trends, such as a shift in demand towards Asia, are redefining the landscape of overseas opportunities for Singapore companies," Constance Leong says. "A financial help scheme called the SME Market Access Program, under the watch of the Ministry of Trade and Industry, helps defray 50% of third party costs, which include professional fees paid to franchise consultants and lawyers, of entering new markets, which are often barriers for smaller companies."

Joann Lee, an associate in the IP and technology practice group at Tay & Partners in Kuala Lumpur, notes that many of the challenges facing both franchisors and franchisees are of the commercial and operational nature rather than legal problems.

"Franchisors and franchisees may face problems of a different nature and such problems are often industry specific," she says. "For a foreign franchisor, being paid timely by franchisees and managing or controlling the quality of the franchise are often the common obstacles. Developing and growing the franchise is also challenging if the franchisees are not motivated or do not run their business with dedication."

Issues commonly faced by franchisees, Lee says, include the high cost of running the business, tough competition – particularly if the boundaries on exclusive territories are not drawn properly – and lack of support from franchisors. **AIP**



Franchisees such as Burger King should always engage competent legal counsel to review terms and conditions of the franchise agreement to ensure that they are legally binding and enforceable under governing law.