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**Franchise**  
**Law**  
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**Market**  
**Consulting**  
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**Investment**

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**INTERNATIONAL  
FRANCHISE  
HANDBOOK  
2<sup>ND</sup> EDITION**



## **IMPRINT**

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It has been two years since we issued the first edition of the International Franchise Handbook. At that time, 18 countries and law firms provided input regarding the national franchise law in their respective country.

Now, two years later and following extremely positive feedback throughout the footprint of the first edition, we are proud to present to you the second edition of this handbook. We are very pleased to see that the demand for international legal expertise in this field is unbroken, proven also by the fact that this edition covers 31 countries and territories throughout the world, from East to West and North to South; from Canada to New Zealand, from Norway to South Africa.

And whereas our world has moved on two years and time has brought new challenges to global trade and security, nothing has changed from the initial statement made already in our first edition: A global view with local expertise is of the essence. Each law firm contributing to this edition is a champion of franchise law in its home country and at the same time is united with everyone else in the cross-border approach to international matters.

This international franchise group comprehensively supports companies from all industrial sectors in every aspect of national and international franchise law and their attorneys should be one of the first contact points for franchisors when it comes to structuring and evaluating steps to expand into foreign countries.

We at DWF with offices in U.K., Ireland, Germany, France and Dubai – and we know we can also speak on behalf of all colleagues from all law firms in this edition – do not stop in drafting international and national franchise, master-franchise and sub-master-franchise agreements, but go the extra mile in helping the franchisors make the right business decision based on our know-how of the local and international law.

Finally, we would like to thank all colleagues and firms who have contributed to this edition and hope that this edition will have the same success as the previous edition.

A handwritten signature in black ink, appearing to read 'M. Reif'.

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# Global View Local Expertise



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Partner - Head of Retail, Food & Hospitality

## 1. Retail Overview

**1.1.** Retailing is changing at an unprecedented rate. The advent of the click-and-collect revolution is causing a seismic shift in the retail/consumer relationship and the way consumers shop. As a nation of shopkeepers the UK is often a good barometer of retail trends. British Council of Shopping Centres estimates that there will soon be more than 150m sq ft of surplus retail space in the UK. The UK online retail industry is estimated to be worth £91bn, that's 21% of the total UK retail market, according to IMRG. It is predicted that in the next five years, online sales will grow by more than 100%.

**1.2.** The battle is no longer just for increased footfall but winning the hearts and minds of the consumer. Meeting consumer expectations and demands has never been more important or challenging and retailers now stand or fall by the strength of their supply chain. There is a need for immediacy and convenience, and the ever new ways of achieving these bring opportunities and challenges: knowing suppliers; working with them to maximise the supply chain potential; managing disputes in strategic relationships; dealing with business interruption; complying with new regulations and ensuring security of data are just some of the matters that need to be addressed effectively.

**1.3.** Retailers are learning they are only as strong as the weakest link in their supply chain. Therefore, ensuring that the key aspects of the supply chain are underpinned by robust but flexible legal platforms is crucial to getting supply chain issues right and, ultimately, meeting consumers needs. There is no doubt that consumers' expectations are high – retailers are, rightly or wrongly, viewed as the custodians of their safety and ethical expectations. Ensuring agility and performance security in supply chains is essential in such a fast-paced and evolving environment.

**1.4.** Experience shows that retailers need to look at their offering holistically: whether from farm to fork or factory to front door and are seeking ways to overcome the internal silos that may have evolved during retailers' previous bricks-and-mortar-only phase. The role of teams within retailer has changed for good, and any successful retail board knows this. Close communication with other teams is an everyday part of their job – be they retail operations, merchandising teams, online teams, marketing teams, the list goes on.

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## 2. The Future

**2.1.** The UK economy, and with it the UK retail sector, has enjoyed continued growth since 2013. Growth fell from 2.6% a year in 2014 to 2.3% pa in 2015. 2016 turned out better than most commentators expected with retail sales rising by around 2.1%.

**2.2.** At the beginning of 2016, many commentators, predicted the of 2.5% growth to continue. Then came the Brexit referendum vote, resulted in most commentators predicting slower growth for retail. Despite the end of last year being surprisingly good for retailers, it is likely that as the international value of sterling depreciates this will lead to consumer prices rising (the Centre for Retail Research predicting by around 5% (variable) in 2017). This together with little or no wage increases is leading the CRR to predict a growth in retail sales for 2017 to be 1.6% growth in sales and for 2018, 1.2%, a significant drop compared to recent years. The key issue is therefore where will this growth come from?

## 3. Global Reach –

### Looking at retailer strategy

**3.1.** In DWF's research conducted with 150 C-suite executives from leading retail organisations in the UK it showed that International expansion is central to many retailers' futures, with a focus on a low-cost, low-risk e-commerce strategy.

**3.2.** Tesco might be retreating from its international operations – as recently demonstrated by the sale of its South Korea business – but overseas expansion remains a major area of growth for UK retailers. As many as 43 per cent regard it as one of the top three areas they intend to focus on over the next three years.

**3.3.** Many retailers, including the likes of N Brown, Superdry and Marks & Spencer, have used the unlimited geographical boundaries of the internet to test international strategies in a quick, cheap and often lower-risk way. It is therefore not surprising that 49 per cent of retailers say e-commerce is the format that will receive the most focus for investment.

**3.4.** While international expansion offers great opportunities for growth, especially online, it is also where the biggest competition comes from, with 47 per cent of retailers saying global online represents the most significant threat to their future growth. It is clear that international, and in particular the use of online across borders, are key battlegrounds.

**3.5.** Expansion plans are predominantly focused on the EU and Asia, with 47 per cent of retailers looking at Europe, while 32 per cent are targeting Asia. Department stores and general merchandise retailers have a particularly strong bias to EU expansion, with 77 per cent of companies prioritising this region.

**3.6.** In contrast, only 2 per cent are focusing on North America, which may explain why some retailers are less interested in the potential impact of the Transatlantic Trade and Investment Partnership negotiations. It is a similar story with Africa, where virtually no interest is being shown in expansion into the territory.

**3.7.** There are many models available to launch internationally, from using third parties under licence or as commercial agents or franchise, through to the business taking the plunge itself, or benefiting from the local experience of a joint venture. What is clear is that retailers are less keen on local market M&A, as just 5 per cent saw this as the route to market entry, clearly favouring the increased control the other routes provide.

**3.8.** The Franchise model has often been used by well-established retail brands to expand their business presence and market share in a fast paced manner. Benefits of Franchising include:

- Rapid expansion of business;
- Penetrating new markets by engaging partnership with local business men;
- Reduced Capital and Operational expenditure;
- Higher return on investment;
- Lower risk of business exit;
- Increase brand value and presence.

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**3.9.** For the franchisee it brings security, brand knowledge and competitiveness.

**3.10.** The DWF survey showed that franchising & licencing, remains popular – the third most cited mechanism for international expansion (after strategic alliances and direct investment). This varied considerably within the retail sector however, for the fashion and general merchandise industries franchising was seen as the most important mechanism, whereas in electricals & technology, entertainment, personal finance & banking and utilities none of our respondents saw it as a priority.

## 4. The Position in the UK

**4.1.** Most recent figures from the British Franchising Association (BFA) indicate that Franchising is worth a record £15bn to the UK economy, demonstrating a 14% increase in the number of outlets owned by franchisees in between 2013 and 2015.

**4.2.** It is estimated by the BFA that there are over 44,000 franchisee-owned units in the UK, run by 901 central companies, with the personal services industry (which includes businesses such as children’s tuition and pet grooming parlours) accounting for the biggest portion of growth.

**4.3.** Surprisingly however the retail sector has, according to the BFA, witnessed the biggest fall in numbers with a reported 18% drop in retail franchises from 104 in 2010 to 86 in 2015. As stated above this is at odds with the franchise model being one of the preferred methods of expansion internationally. The reason for this could well lie in the cost of franchise agreements in the UK.

**4.4.** In a report in the Telegraph in 2015 it was reported that the cost of a McDonald’s franchise was per restaurant £150,000 to £400,000 together with a £30,000 one-off franchise fee and the start-up costs of a drive through KFC being as high as £500,000.



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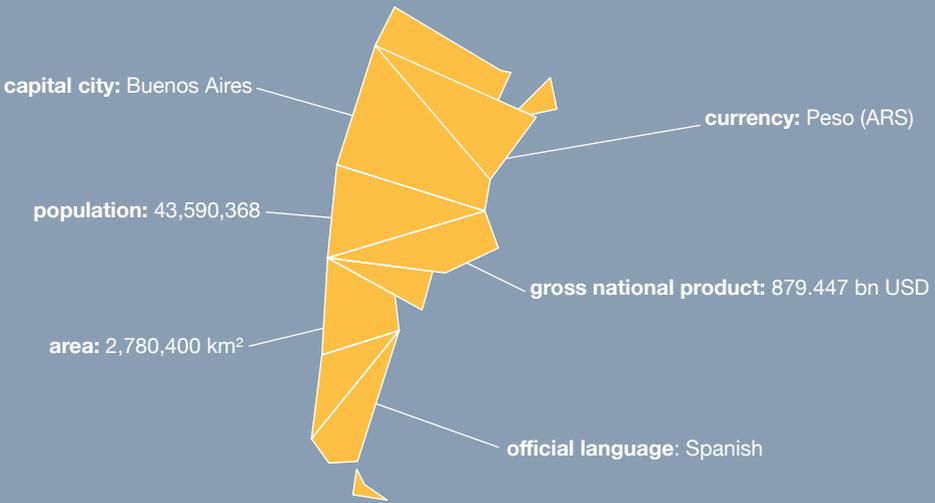


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# International Franchising

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**VAGEDES**  
& ASOCIADOS | ABOGADOS



## Franchising in ARGENTINA

- The new Civil and Commercial Code of Argentina (“CCC”), which came into force on August 1st, 2015, has meant a significant improvement for the legal basis of franchise law, creating a legal framework, which adds security and predictability to transactions.
- According to local law, prior to the execution of the franchise agreement, a franchisor must provide the franchisee

with economic and financial information covering the last two (2) years of franchise units similar to the one offered to the franchisee.

- The royalty payments to foreign beneficiaries are subject to a reduced effective withholding tax rate in case of technology transfer, duly registering the franchise agreement with the National Institute of Industrial Property (INPI/ Direction of Technology Transfer).

Regarding the **legal basis of franchise law**, franchise agreements were previously ruled by the general principles of contract law, but also by case law, now introduced in the new CCC in its articles 1512 to 1524. The new CCC defines franchise as an agreement in which one party, named franchisor, grants another, named franchisee, the right to use a proven system, aimed to commercialize certain goods or services under the trade name, emblem or trademark of the franchisor, who provides a set of technical knowledge and the continuous provision of technical or commercial assistance against a direct or indirect consideration of the franchisee. The franchisor cannot have a controlling ownership interest (directly or indirectly) in the franchisee's business.

One **specific regulation for foreign franchisors** is that the franchisee has the right to defend and protect its rights to operate the franchise in Argentina and the franchisor must appoint the franchisee as its attorney-in-fact in Argentina with respect to defending such rights. Furthermore foreign franchisors have to deal with the registration requirement of foreign shareholders (see next point).

A foreign company has generally three options to carry out business in Argentina: (i) incorporate a local subsidiary (SA or SRL), (ii) acquire a participation in an existing Argentine company, or (iii) establish a branch. When it comes to incorporate a local subsidiary, even though there are other types of business structures in local **corporate law**, the most utilized ones are the Corporation (Sociedad Anónima - SA) and the Limited Liability Company (Sociedad de Responsabilidad Limitada - SRL). The differences between SA and SRL are not significant, having the same tax treatment. If foreign companies are interested in being shareholder or partner of a local company, the foreign entity has to be registered with the Superintendence of Corporations (IGJ) and a local resident has to be appointed as legal representative.

According to **Consumer Protection Law** no. 24.240, the Law is designed to protect the final user of a good or service. Franchisees are not consumers of a good or service and are therefore not protected by this law.

In Argentina the CCC stipulates that the franchise contract by itself shall not be considered an agreement limiting, restricting or distorting competition, which is key from the **antitrust** regulations standpoint. According to the Argentine Competition Law the two main offenses are the lessening of competition and the abuse of a dominant position. Post-term competition covenants are valid for one year after expiration of the contract and within a reasonable territory.

Franchisor and franchisee are independent parties and there is no employment relationship between them. Employees of the franchisee have no employment relationship with the franchisor (unless case of labor fraud).

**Sales agent** law is regulated under articles 1479 and following of the CCC, but such law is not directly applicable to franchise agreements.

Argentina has a huge diversity of **tax** regulations and does not have a "tax code". Taxes are levied in three levels: federal, provincial and municipal level. A company is considered tax resident if it is incorporated in Argentina; a branch of a foreign company is considered Argentinean tax resident too. The income tax law establishes a federal tax on the worldwide income obtained by legal entities domiciled in Argentina and Argentine branches of foreign entities, with a tax credit granted for tax paid abroad on foreign income. SAs, SRLs companies and branches are generally taxed in the same way. The corporate income tax rate applicable is generally 35%. The general VAT rate in Argentina is 21%; a company that makes taxable supplies of goods or services

in Argentina is considered a VAT taxpayer. Royalty payments to foreign beneficiaries are subject to a reduced effective withholding tax rate in case of technology transfer. A rate of 28% of the gross payment applies for payments that relate to registered patents or trademarks. This is further reduced to 21% of the gross payment for payments relating to technical assistance, engineering and consulting services that are not obtainable in Argentina. Those reduced withholding rates only apply if the agreements are duly registered with INPI (otherwise a 31.5% rate applies). However, the rate of the withholding will depend on the nature of the underlying payment and the applicability of any double taxation treaty, so that specific tax advice should be sought. Individuals are subject to income tax (progressive rate: ranging from 9% to 35%), wealth tax and social security contribution.

The franchisee is given the right to use the franchisor's **IPRs** (including trademarks, patents and know-how) for the exclusive purpose of carrying out the franchise business. In order to protect trademarks in Argentina registration with the local trade mark office (INPI) is required. Essential part of a franchise agreement is the existence and transmission of know-how, characterized as "technical knowledge, procedure, set of information necessary for industrial production, which is the result of experience in the production process and which the author wants to keep secret, whether for personal use or in order to transfer it confidentially to a third party". Know-how depends directly on confidentiality and is the economic basis of this type of contract. For this reason this obligation is enforceable even in the post-contractual stage (Law no. 24.425, Agreement on TRIPS).

Specific laws might contain **restrictions** to certain provisions in franchise agreements, for example: (i) Labor Law, (ii) Antitrust

Law (non-competition and fixed prices) and (iii) Tax Regulations, among others.

The **fees** for a franchise agreement are not regulated by law. Neither are its nature and/or the amount of royalties to be paid. In general, there is an initial fee and subsequent fees that are set as a percentage of the franchisee's sales. Because of the possible registration of franchise agreements with the INPI in order to obtain tax benefits, certain parameters regarding initial franchise fees, amount of royalties, price and other payment terms may be established by such institute. The parties can stipulate that payments to a franchisor should be made in the franchisor's domestic currency. This usually occurs in international franchises.

**Confidentiality clauses** are very common in franchise agreements. The franchisor is obliged to maintain confidentiality of the reserved information that integrates the set of transmitted technical knowledge and to assure this confidentiality with respect to the persons, dependent or not, to whom must be communicated such information in order to develop the franchise activities. This obligation subsists after the expiration of the contract. Although the duty of confidentiality is only foreseen explicitly for the franchisee, it is also required for the franchisor, by application of the principle of good faith of the CCC, and must also prevail in any negotiation prior to the conclusion of a franchise agreement. Confidentiality clauses are enforceable in Argentina according to TRIPS during the term of the contract and even in the post-contractual stage.

Regarding the **termination**, a franchise agreement cannot be terminated early by either party before the end of its original term without cause. Agreements for a shorter period than three years are terminated by operation of law upon maturity. In order to terminate the contract with expiration of its original term, the party

willing to terminate the agreement has to give prior written notice with one month per year of duration up to a maximum of six (6) months. In franchise agreements which are negotiated for an indefinite period, the prior notice should be sent at least upon completion of the third year, or it has to be compensated for the lack of prior written notice or the lack of execution of three years. These notices do not need fair cause.

In Argentina the **transfer of franchise** may be restricted within the agreement. Except as otherwise agreed the franchisee may not assign its position or the rights that emerge from the contract while in force, except monetary rights and obligations. This provision does not apply to wholesale franchise agreements. In such cases, the franchisee must obtain the prior consent of the franchisor in order to grant sub-franchises.

The law does not expressly establish how franchising disputes must be dealt with, and leaves it to the parties to determine it. In general such matters may be settled in **arbitration, mediation** or directly by **litigation in court** depending on the time and cost of each procedure. In certain local jurisdictions it is mandatory for the claimant to file and conclude a mediation before filing a judicial claim.

The **applicable law** on franchise agreements can be chosen freely. However, the CCC also prescribes several mandatory provisions that must be included in all franchise agreements and will have effect in Argentina, even if the agreement is executed under foreign laws. Foreign law will not be applied by local courts when it leads to solutions that are incompatible with Argentine public order principles.

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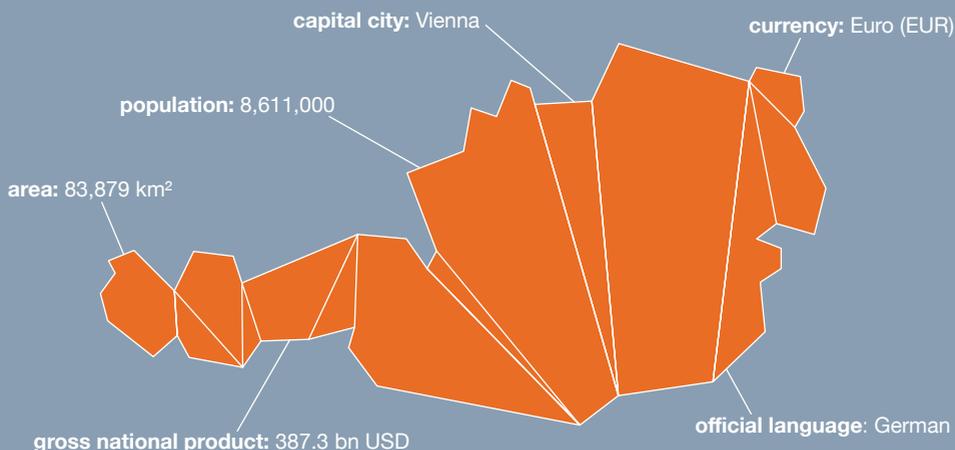
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## Franchising in AUSTRIA

- Austrian legal framework does not provide a codified franchise law, but the conclusion of franchise agreements is admissible if general law principles are observed.
- Private autonomy allows to implement franchise systems in various types of legal entities; the choice of the legal form may depend on accounting, tax or liability aspects.
- No special restriction for offer, granting or sale apply for foreign franchise systems; thus, foreign franchisors have the same possibilities entering the market as national franchisors.

## Areas of Law regularly affected by/ regularly affecting Franchising

The Austrian legal framework does neither provide a codified franchise law on national basis nor a legal definition of the term “franchise”. Only the European Block Exemption Regulation (Commission Regulation (EU) No 330/2010) provides rules on international basis which apply to franchise systems in Austria. Following the principle of personal autonomy, the conclusion of franchise agreements is admissible. There are no special restrictions regarding franchise systems and therefore also the implementation, offer or granting/sale of foreign franchise systems are not bound to specific rules. Foreign franchisors have the same possibilities gaining access to the market as national franchisors. However, general law principles have to be observed by both of them.

In accordance with the principle of private autonomy there are also no specific restrictions regarding the corporate form and therefore various types of legal entities – such as the form of a sole proprietor, a partnership or a corporation – are suitable for both a franchisee and a franchisor. When choosing a legal form, accounting and tax issues as well as aspects of rising and maintenance of capital have to be taken into account. In addition to that also the liability of the stakeholders is an essential aspect for the decision on the legal form (e.g. a stock corporation or a LLC provide for a limitation of the liability of the shareholders). The formation process of a business entity – independently whether on the side of the franchisor or franchisee – depends on the selected legal form. As the legal form as sole proprietor as well as most private business partnerships need not necessarily be registered in the commercial register of the respective commercial court the formal requirements of forming such entities are lower than the formal requirements forming a capital corporation.

The Austrian Consumer Protection Act (Konsumentenschutzgesetz – KSchG) is applicable to legal transactions concluded between a person, for that the respective transaction belongs to the operation of its business, and a person, for that the transaction does not do so. Preparatory actions prior to the start of business of a natural person do not belong to the operation of business and therefore the natural person is treated by law as a consumer. This also applies to the conclusion of a franchise agreement. Therefore franchisor should carefully check whether the franchisee enters a franchise agreement as consumer.

Moreover, under Austrian law franchise agreements can constitute a cartel in the sense of the Austrian Antitrust Law (Kartellgesetz – KartG), if they cause a prevention, restriction or corruption of competition (e.g. in the case of an ascertainment of prices). Franchise systems can also be subject to the Austrian Competition Law (Bundesgesetz gegen den unlauteren Wettbewerb 1984 – UWG), as there is usually a competitive relationship between different franchisees of the same franchisor; moreover, also a franchisee and a franchisor can compete in particular cases. Therefore typical clauses of franchise agreements (e.g. minimum prices or fixed sale prices, absolute territory restriction, purchase obligations regarding other products than the main subject of the franchise contract and prohibition of cross-delivery or the use of internet-trade) shall be checked under competition law aspects.

According to the Austrian Supreme Court, a franchisee is a self-dependent businessman acting on his own behalf and account (OGH 4 Ob 321/87). This definition is opposed to the risk of the establishment of a labor contract between franchisee and franchisor; yet, in the light of German jurisdiction (Regional Court Düsseldorf 20.10.1987, NJW 1988, 725ff), such risk cannot be eliminat-

ed entirely. Moreover, depending from the exact contractual arrangement, a franchisee can be a person similar to an employee (OGH 4 Ob 68/79; arbeitnehmerähnliche Person). Consequences of such a qualification are the competence of labor courts, the applicability of the Act on Employee's Liability (Dienstnehmerhaftpflichtgesetz) and the obligations of the franchisor to pay social security contributions for the franchisee.

A franchise agreement is usually similar to the agreement concluded with an authorized dealer or a commercial agent. According to the Austrian Supreme Court the compensatory claim of the commercial agent for loss of clientele (Section 24 Austrian Commercial Agents Act [Handelsvertretergesetz]) may be analogously applicable to a franchise agreement (9 ObA 8, 9/91). In order to avoid the applicability of the compensatory claim, the legal position of the franchisee should be structured as independent as possible.

Natural Persons domiciled or habitually resident in Austria are subject to unlimited tax liability regarding personal income tax (Einkommenssteuer). Persons, who are unlimited tax liable in another country, but achieve some income also in Austria, are subject to limited tax liability, i.e. limited to such income in Austria. The Austrian corporation tax (Körperschaftsteuer) correspondingly applies to corporations (such as LLC's and Stock Corporations) having their general management or place of business in Austria. Austrian corporations are subject to a corporate income tax rate of 25 %. Please note that Austria has concluded various double-tax treaties in order to counteract a possible multiple taxation. Goods and services provided by an entrepreneur in Austria for remuneration are subject to sales tax/VAT (Umsatzsteuer). Finally, franchise agreements containing elements of tenancy agreements can be subject to stamp duties (Rechtsgeschäftsgebühren). The trademark of a franchisor can be

protected as a national trademark by registration with the Austrian patent office, as a community trademark or (based on a national trademark) as an international trademark. A special form is the registration of a trademark person (franchisee) committed to preserve commercial interests of another person (franchisor) (trade mark registered in the name of an agent). The trade name and facilities can be protected not also by trade mark law, but also by competition law. Moreover, the firm of a company also enjoys the protection of commercial- and naming right law. Beyond that the precise graphic presentation of a franchisor and a franchisee can be copyrighted, if such presentation and appearance constitutes a work in the sense of the Austrian Copyright Act (Urheberrechtsgesetz).

### **Selected Questions/Aspects**

Before concluding a franchise agreement, franchisee may be interested in obtaining information about relevant legal and economic issues. The Austrian legal system does not provide any binding disclosure obligations in the relationship between franchisor and franchisee. The International Institute for the Unification of Private Law issued a non-binding "Model Franchise Disclosure Law". Apart from this, when potential contracting parties start negotiations, a pre-contractual disclosure obligation may accrue; its specific content has to be determined depending on the details of each individual case. A violation of pre-contractual duty of care can justify claims for damages (culpa in contrahendo).

Regarding the amount of franchise fees no specific legal restrictions are in place. Such fees can be agreed upon in line with general law principles (e.g. usury and violation of bonos mores). According to most franchise agreements, the franchisor has to pay a non-refundable one-time entry fee as well as an ongoing monthly fee (e.g. based on the sales of the franchisee). In case of late payment default interest of in the amount of 9,2 %

over the base rate of the European Central Bank.

Franchise agreements contain continuing obligations (Dauerschuldverhältnis) similar to service contracts; hence, the contracting parties are bound by mutual fiduciary duties, including an obligation of confidentiality. Beyond that franchise agreements usually contain an explicit confidentiality clause, which is/can be combined with a penalty that is payable in case of non-compliance.

Franchise agreements are usually concluded as continuing obligations, which can be terminated by each party subject to terms and dates as agreed upon (ordinary termination). In addition such agreements can also be terminated with immediate effect for good cause (extraordinary termination). The Austrian law does not provide for an obligation of a franchisor to renew a franchise agreement, unless such obligation is agreed.

Any transfer of a franchise agreement requires an assignment agreement, hence a trilateral agreement between the franchisor, the resigning and the entering franchisee. Some franchise agreements contain already the approval of the franchisor that the franchisee is transfers its rights and obligations under the franchise agreement to a third party (its legal successor). Apart from that, a transfer of the business of or the shares in the franchisee is possible. In general such transfer is not permissible, however can be restricted by change of control clauses in the franchise agreement.

### Dispute Resolution and Applicable Law

Disputes arising in the context of franchise agreements are usually settled by the Commercial Court competent for the defendant. Subsequently, usually two appeal stages stand open (Higher Regional Court, Supreme Court). Laws concerning international jurisdiction can be waived by the parties of a franchise agreement

and jurisdiction as well as arbitration clauses may be agreed upon. Inter alia, arbitration clauses bring about the advantage of the relieved execution of arbitral awards in all member countries of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

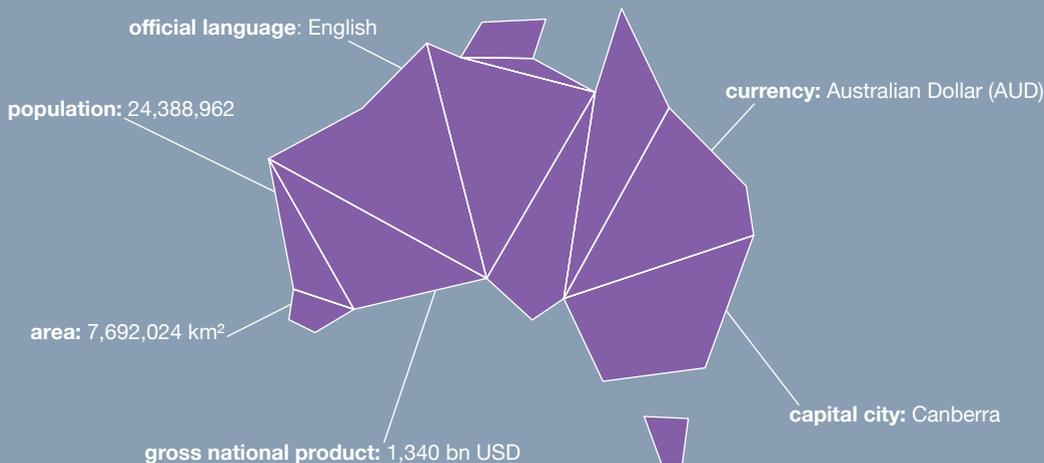
Irrespective of the choice of law agreement, according to the Convention on the Law Applicable to Contractual Obligations (Convention 80/934/EWG), for franchise agreements usually the law of such country is relevant, in which the franchisee has his main residence. Moreover the CISG can be applicable to disputes, but may be waived by the contract parties. As a consequence, in the course of franchise agreements with foreign elements the applicable law should be agreed. Both, the Convention on the Law Applicable to Contractual Obligations and the Austrian Laws of Conflict state the primacy of a choice of law by contracting parties.

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## Franchising in AUSTRALIA

- The Franchising Code of Conduct (the “Code”) is a mandatory code regulating franchise agreements and disclosure requirements in Australia;
- Knowledge of Australian employment laws is prudent to minimize risks for franchisees and franchisors.
- New unfair terms legislation may affect ‘standard form’ franchise agreements where one party has less than 20 employees; and

## Legal Basis of Franchise Law

The Competition and Consumer (Industry Codes - Franchising) Regulations 2014 (Cth) prescribes the Code in Australia. The Code defines a franchise agreement ("FA") as a written, oral and/or implied agreement where: a person grants the right to carry on a business under a system or marketing plan suggested by the person; the business is associated with a trade mark; and the franchisee pays certain fees.

The Australian Competition and Consumer Commission ("ACCC") is the federal agency which administers the Code.

## Foreign Franchisor Restrictions

When seeking to operate a franchise system in Australia, foreign business entities need to be aware that certain types of investments require the approval of the Foreign Investment Review Board including acquisitions of shares or assets of businesses over certain monetary limits. See [www.firb.gov.au](http://www.firb.gov.au).

## Business Entity

Foreign franchisors often establish wholly-owned proprietary limited subsidiary companies under the Corporations Act 2001 (Cth) ("Corporations Act") to operate their Australian franchise. A company can be established simply and costs approximately A\$1,000. At least one director must be an Australian resident. Other structures may also be appropriate, subject to legal and taxation advice. See [www.asic.gov.au](http://www.asic.gov.au).

## Consumer Law

The Competition and Consumer Act 2010 (Cth) ("CCA") imposes consumer guarantees in respect of goods or services up to A\$40,000 which protect consumers and franchisees alike. Consumer goods must be of acceptable quality, fit for a disclosed purpose and free from undisclosed encumbrances. Consumer services must be rendered with due care and skill, fit for a particular purpose and supplied within a reasonable time. See [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au).

Unfair contracts legislation recently commenced in Australia which renders unenforceable any, 'unfair term' in standard form contracts (which generally include franchise agreements) where one party has less than 20 employees, unless such a term is reasonably necessary to protect the legitimate interests of the party trying to enforce the term.

## Competition Law

The CCA also affects franchising by prohibiting parties from engaging in: misleading and deceptive or unconscionable conduct; price collusion between competitors and other forms of cartel conduct; resale price maintenance; and third line forcing or other forms of exclusive dealing. Immunity from the latter three prohibitions may be obtained from the ACCC in certain circumstances. See [www.accc.gov.au](http://www.accc.gov.au).

## Labour Law

Legally, there is no employment relationship between franchisors and franchisees, and it is unlikely to be deemed an employment relationship given the existence of a franchise agreement and that the remuneration of the franchisee is profits rather than a wage. To further emphasise the legal separation between franchisor and its franchisees, it is prudent for each franchisee to be an incorporated entity. Recent events in Australia have led to questions about franchisors' responsibility for franchisee' breaches of employment laws. Currently, franchisors could be held liable under accessorial provisions of the Fair Work Act 2009 where they were "knowingly concerned in or a party to" a contravention of the Fair Work Act. If proposed changes to the Fair Work Act are enacted there could be an increased risk of liability on franchisors where they 'should have been aware of the breaches and could reasonably have taken action to prevent them from occurring'. Franchisors can minimise risks by obtaining legal advice and ensuring they have practical systems that educate and promote Fair Work compliance to their franchisees.

## Sales Agent Law

Some Australian states/territories have laws affecting sales of small businesses. In Victoria, before selling a business for less than A\$350,000, the vendor must provide a prescribed document to the prospective purchaser. Failure to do so may enable the purchaser to avoid the contract.

## Tax Law

Businesses and individuals may be subject to income tax, capital gains tax, goods and services tax and stamp duty. Other taxes may apply depending on the type of entity. Payroll tax and workers' compensation may also be payable. Withholding taxes are relevant where foreign entities are involved, for example, where royalties are paid offshore. Detailed legal and taxation advice is critical for foreign franchisors. See [www.ato.gov.au](http://www.ato.gov.au).

## Intellectual Property

Trade marks, patents, registered designs and plant breeders' rights can be registered through IP Australia. See [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au). Together with copyright, such rights are protected by Australian intellectual property laws. Confidential information, including know-how and trade secrets, is generally protected by non-disclosure agreements or confidentiality deeds.

## Disclosure

Franchisors must provide a prescribed form disclosure document ("DD") to prospective franchisees at least 14 days before the franchise agreement is signed or non-refundable money is paid. The DD includes information about master franchisors, which generally relieves master franchisees of the obligation to provide a separate master franchisor's DD or a combined DD. The Code also requires franchisors/master franchisees to provide a prescribed information statement. The DD generally must be updated each year within 4 months of the end of the franchisor's financial year. If certain events occur, the franchisor must notify franchisees in writing within 14 days.

If at any time circumstances arise that might cause the DD to be misleading, the DD should be updated. The Code also imposes disclosure obligations where the franchisee leases premises from the franchisor or its associate.

The DD must cover: contact details and business experience; litigation history; existing franchisees; former franchises; master franchisor details; intellectual property; supply of goods/services; site/territory information; franchisee payments; marketing funds; unilateral variation by the franchisor; end of franchise arrangements; amendments on transfer; and financial details and earnings information. A copy of the Code and the final form FA must also be included. The DD and FA must be in English.

If disclosure obligations are breached, franchisees' options include: litigating (whereby damages will generally be based on quantum of loss); reporting breaches to the ACCC; negotiating a desired outcome; terminating pursuant to the FA (if possible); or terminating within the earlier of 7 days after signing or making a payment under the FA (the cooling off period). If litigating in a master franchising situation, the court will determine the relative culpability and apportion liability between the master franchisee and franchisor. If the franchisee terminates during the cooling off period, all monies paid by the franchisee must be reimbursed except for the franchisor's reasonable expenses (provided the amount or method of calculation was in the FA). Under the CCA, officers, directors and employees of an entity can be held liable as an accessory if they knowingly aid or abet the acts or omissions of another. Liability can also apply to directors and officers of companies under the Corporations Act.

## Franchise Agreements

The Code prohibits the following types of provisions in FAs: restrictions on franchisees associating; a general release of the franchisor; waivers of franchisor

representations; requirements to commence proceedings or mediation outside the state/territory where the business is based; and requirements for the franchisee to pay the franchisor costs of settling a dispute. The Code also provides that restraints of trade will be ineffective in certain circumstances.

### Payments

There are currently no specific laws affecting the payment of franchise fees.

There are no specified limits on the amount of interest which can be charged by franchisors on overdue payments. However, the amount must be a genuine pre-estimate of the loss suffered. Except for the withholding tax obligations referred to above, there are no restrictions on a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency.

### Confidentiality

Provided confidentiality clauses are sufficiently clear, they will be enforceable. Courts can enforce such clauses and make orders for damages where a party has suffered loss.

### Termination/Expiry

Subject to the Code, a franchisor may terminate an FA on the basis of rights contained in the agreement. The Code provides that in certain circumstances, an FA may permit a franchisor to terminate immediately. Other than in those circumstances, if the franchisee breaches the FA, the franchisee must first be given written notice and an opportunity to remedy the breach. If the franchisee has not breached the FA and immediate termination grounds do not apply, the franchisee must be given reasonable notice and reasons for the termination.

A franchisee may terminate an FA within the cooling off period, with the franchisor's consent, via an express right in the FA or at common law, including where the

franchisee entered into the FA on the basis of false representations by the franchisor. There is no obligation for a franchisor to renew an FA unless provided for in the FA. A franchisor may not unreasonably withhold consent to the transfer of a franchisee's franchise.

### Dispute Resolution

The Australian court system consists of federal and state/territory courts which have different jurisdiction based on the type of law involved and/or amount of loss claimed. Alternative dispute resolution processes are also available. The Code requires dispute resolution provisions to be inserted into all FAs. The most common dispute resolution process in franchising is mediation. FAs commonly make mediation mandatory prior to litigation.

The use of arbitration is uncommon in Australia as effective alternatives are available. Litigation can also be as fast and involve similar costs as arbitration. Whilst there is no prohibition against clauses specifying that a foreign law applies to an FA, parties cannot contract out of or exclude the Code and other specific laws. The application of foreign laws can also add complexity and expense.

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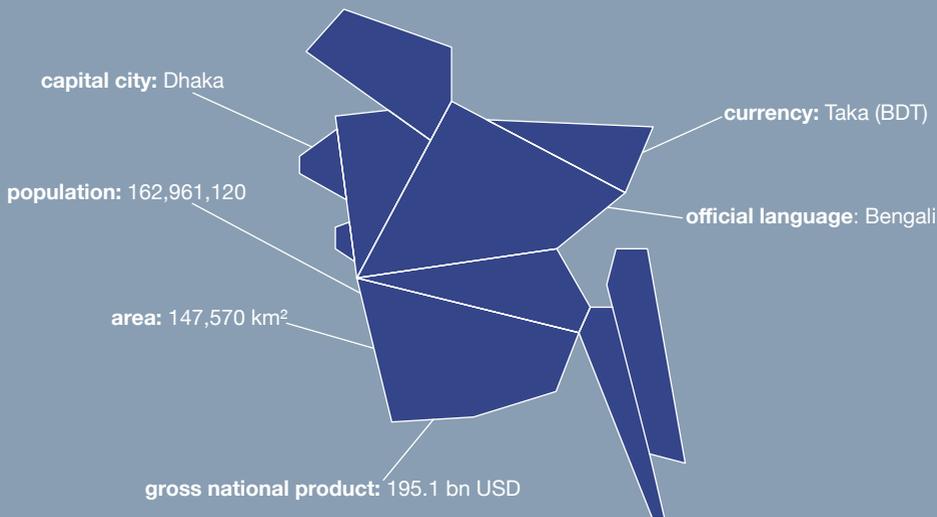


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## Franchising in BANGLADESH

- There is no separate legislation to govern a franchise-deal/agreement in Bangladesh or any specific definition of franchise in the law.
- To initiate a franchise business in Bangladesh, the Parties enter into an Agreement as per the Contract Law of Bangladesh.
- The relationship between the franchisor and franchisee shall be governed by the terms and conditions of the agreement and obligations imposed by the franchisors should be followed.

### **Form of Entity; Corporate Law**

Limited company, incorporated as per the Companies Act 1994, is a common form of business entity that enters into franchise agreement with the franchisor. Besides incorporation/registration of a company as such at the Company House (i.e. Registrar of Joint Stock Companies and Firms), there remain several licensing requirements; for instance, the company should have a trade license, VAT (Value Added Tax) Registration Certificate, TIN (Tax Identification Number) Certificate, Import Registration Certificate. Based on the nature of business there shall be several other licenses and approvals that the company should obtain.

### **Contract Law**

For a contract to be executed in Bangladesh, it is necessary that the agreement must be lawful and it is enforceable in Bangladesh in compliance with the Contract act 1872. The agreement between the franchisor and franchisee shall have to cover certain provision for the parties to achieve their intended outcomes and motive, to form the agreement. The essential elements of a contract, such as the basic concept of offer, acceptance and consideration, shall have to be fulfilled for the formation of contract. A glimpse of provision, i.e. of what is to be covered by an agreement, is elicited below:

#### **A. Grant of Rights**

The franchisor firstly, as per the deduced terms of the agreement between the parties, grant the franchisee certain rights, such as whether the franchise business shall be of a kind which is transferable or not to any other, allowing the use of trademark, trade names, designs, labels etc. The franchisor may also on the other hand restrict the franchisee from carrying out certain activities, which is not agreeable to that of the franchisor, or does not fall within the franchisor's code of business and policy.

### **B. Term and Renewal**

The contracting parties (franchisor and franchisee) have to mention the term of the agreement, i.e. the period till which the agreement is valid and the arrangement of renewal, once the term of the agreement comes to an end.

### **C. Fees and Payments**

In the contracting agreement, the franchisor shall agree regarding the fee and payments owed to franchisor for their use of the franchisor's license. Such fee and payment to franchisor may include: License fee, Royalty fee, Joining fee, Design fee, Initial Training fee, Quality Assurance fee, etc.

### **D. Indemnity**

One of the other essential feature of an agreement include insert of the indemnity clause. This is where a party (or both parties) pledges to compensate the other (or each other) for any harm, liability, or loss which arises out of the agreement.

### **E. Termination**

Once an agreement is formed it is imperative that a clause is kept which governs the termination of the agreement, otherwise parties might just go through a havoc and pile of legal anguish against one another. If an agreement entered upon, it is vital that proper dissolution of an agreement takes place. To terminate an agreement, one should provide notice of termination to the other party, other than seizing the opposite party by surprise.

### **F. Alternative dispute Resolution**

Alternative dispute resolution is an informal resolution of dispute processes where the parties meet with a professional third party who aid to resolve the parties dispute in a way that is of minimal formality and often more consensual than is conducted in the courts. In Bangladesh the governing law for such resolution is the Bangladesh Arbitration Act 2001, which has to be followed by the parties in order to execute a proper resolution. Any

dispute which arises between franchisor and franchisee shall firstly be resorted through arbitration, before entering into the complex court procedure.

### **G. Confidentiality Clause**

The parties to the agreement shall be strictly bound by the confidentiality clause, as per the terms and conditions of the agreement. The parties may agree that the parties shall not, disclose, divulge and /or disseminate to any third party, any Confidential Information of the other party.

### **H. Applicable Law**

If the agreement is executed in Bangladesh, then the applicable law is suggested to be the laws of Bangladesh. However, the laws outside of the jurisdiction of Bangladesh can still be followed by the parties.

### **Foreign exchange regulation**

The main legislation with respect to foreign exchange transactions is the Foreign Exchange Regulation Act 1947; besides there are certain Rules, regulations and guidelines by the central bank of Bangladesh. The legislation, ordains to regulate certain payments, royalty, dealings in foreign exchange and securities and the import and export of currency and bullion.

### **Intellectual property Laws**

Trademarks, service-marks, patents, designs can be registered in Bangladesh through the Department of Patents, Designs and Trademarks, which involve quite time-consuming procedure. Such rights are protected under the Bangladeshi intellectual property laws (i.e. the Patents and Designs Act 1911, Rules 1933, Trade-marks Act 2009, Amendment Act 2015, Rules 2015, Geographical Indication of Goods (Registration and Protection) Act 2013, Rules 2015).

### **Labor Laws**

With respect to the employment liabilities, the franchisee is usually the responsible counterpart to its employee unless other-

wise is agreed in the franchise agreement. The applicable laws in Bangladesh do not restrict adoption of any such practice/culture of the franchisor unless it is in contravention with the Bangladeshi laws. To be more precise, the employment/labor law (i.e. Bangladesh Labour Act 2006, Amendments and Rules 2015) allows offering such benefits which are more favorable to the employees/workers than the benefit-standards mentioned in the laws; thereby, the franchisee may adopt the necessary practices.

### **Consumer Protection**

The Consumer Protection Act 2009 in Bangladesh was enacted to ensure the rights of consumers, as well as establish a fair trade competition and the free flow of reliable marketplace. As per the provision of the laws, an aggrieved consumer, who is unsatisfied with his/her purchase, uses, of services, can file a complaint directly at the Magistrate's court. The consumer shall be entitled to file a complaint on the basis of anti-consumer activities to the Director General of the National Consumer Rights Protection Directorate or any other person authorized by him.

### **Competition Law**

The Competition Act 2012 is the governing law in Bangladesh which aims to establish a healthy competition in business practices by breaking syndicates that often manipulate the marketplace. The competition law restricts from imposing bar on any individual from signing any agreement with a producer of any commodity or service, which may create an adverse impact or a monopoly or oligopoly. Though such legislation lacks enforceability; in the agreement between the parties it is preferred that no such provision is mentioned which triggers any of the arrangement of the competition law, and restrict the franchisee in doing something which is forbidden by the law.

### **Implications of Tax and VAT**

The taxation regulation is Bangladesh

is regulated by Income Tax Ordinance 1984, Income Tax Rules 1984, VAT Act 1991 and VAT Rules 1991.

As to taxation implications, the franchisor is not liable to pay tax in Bangladesh, if it does not operate as a legal entity in Bangladesh. However, before any payment is being made to the franchisor, the franchisee is liable to deduct tax and VAT at source. The rates of tax and VAT depend on the type of payment being made. The rates are as follows:

Royalty, License fee, Payments related to intangibles, Commission:  
20% Tax;15% VAT

Any other payments for services:  
20% Tax;15% VAT

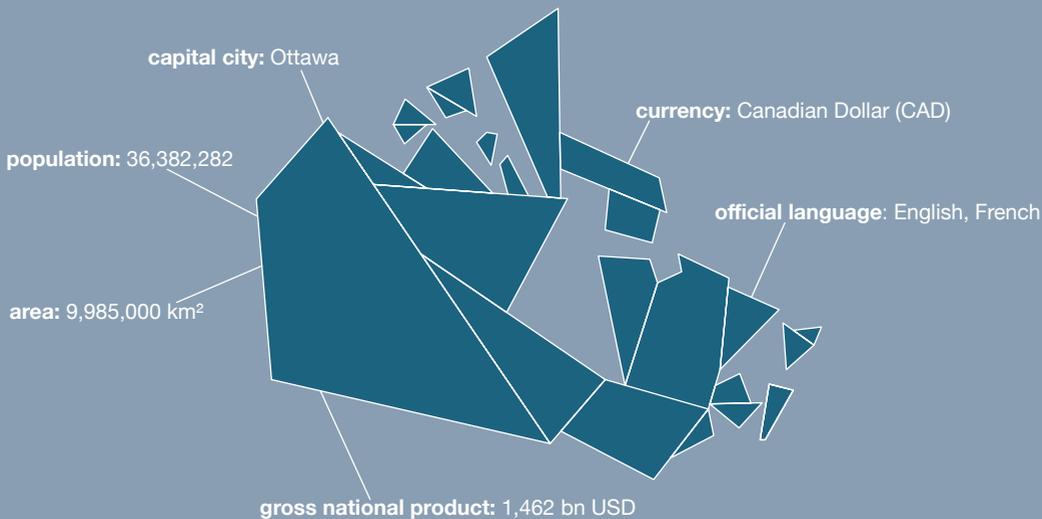
Any other payments:  
30% Tax;15% VAT

Besides, the franchisee shall have to operate at an arm's length price with the franchisor to comply with the transfer pricing regulations. A franchisee's expenses related to royalty, technical services fee, technical know-how fee or technical assistance fee is admissible expense for tax purpose up to 8% of the net profit disclosed. Bangladesh has a vibrant taxation regime where the rates may vary every fiscal year making it more up to date with the global tax regime and making it investor-friendly.

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## Franchising in CANADA

- In Canada, freedom of contract is a compelling force in franchise law
- 6 of the 10 provinces have very similar franchise disclosure legislation
- The courts treat the franchise relationship as a commercial relationship.

### Introduction

With the exception of the province of Quebec (a civil law jurisdiction), Canada follows a common law legal system, based upon the British system of case law and precedent. It is interesting to observe the evolution of the provincial franchise statutes (now 6 provinces out of 10). Besides being very similar, they all emphasize pre-contractual disclosure, remedies for inadequate or false disclosure and very little with regard to the contractual rights and obligations of the parties.

The courts view the franchisor/franchisee relationship as a commercial relationship, not a business/consumer one.

## Franchise Legislation

Currently, franchise specific legislation (containing primarily disclosure obligations) exists in the provinces of British Columbia, Alberta, Manitoba, Ontario, New Brunswick and Prince Edward Island.

Canadian franchise legislation is designed to protect franchisees primarily by mandating detailed pre-contractual disclosure of such matters as the franchise system's history, status of existing and previous franchisees, management, amount of investment required of franchisees, the existence of litigation involving the franchisor, the financial condition of the franchisor and any other "material fact". A "material fact" is broadly defined in the statutes as any fact that might reasonably be expected to have an impact on the prospective franchisee's decision to purchase the franchise or the amount they would be prepared to pay for the franchise. All information contained in the FDD must be current at the time it is delivered to a prospective franchisee, with only a couple of exceptions that need be current only as of the last fiscal year. There are no requirements to register franchisors or franchise systems in Canada and no government has any enforcement powers. The statutes provide to aggrieved franchisees private remedies for inadequate or misleading disclosure, such as rescission and damages. Franchisees may also sue for breach of the implied covenant of fair dealing and the right in each of the statutes for franchisees to organize themselves into franchisee associations.

The requirement for a franchisor to make disclosure, by the delivery of a franchise disclosure document ("FDD") to the prospective franchisee, is triggered by the payment of money to the franchisor or its affiliate(s) or the signing of any agreement by a prospective franchisee relating to

the franchise. Disclosure must be made at least 14 days before the triggering event. No disclosure is required prior to any other activity with prospective franchisees, such as meetings, providing marketing material, etc.

Despite some small differences among the franchise statutes in Canada, the statutes are similar enough to make it possible to create one franchise disclosure document for use in all of the provinces.

The definition of a "franchise", under the various provincial statutes, is very similar and involves the grant of a right to engage in a business, in association with the franchisor's trademarks, the payment of money (either one time or continuing) and the franchisor's right to exercise significant control over or the provision by the franchisor of significant assistance in the operation of the business. In certain of the provinces, the definition also includes business arrangements commonly known as "business opportunities". Due to the broadness of this definition, it is advisable for any party granting distribution rights of any sort to examine whether or not the arrangement might be a franchise under the relevant provincial statute.

Neither the common law nor the provincial statutes dictate the content of a franchise agreement, including the amount of any fees charged to franchisees. However, any provision in a franchise agreement that restricts the application of the law of the province as it relates to matters covered by the provincial statute or jurisdiction of the courts of that province are unenforceable. Also, the provincial franchise statutes all have provisions which nullify any waiver of rights given by the statutes. Laws of general application will also apply to franchise agreements, which would restrict the maximum amount of interest charged (60%) and may restrict the geographic scope and duration of post-termination non-compete clauses. If no disclosure is made, the remedy of rescis-

sion is available for 2 years. If a disclosure document is delivered late or a defective disclosure document is delivered, then the franchisee has only 60 days to rescind the contract. In both instances franchisees have a right of action against the franchisor and the franchisor's associate (defined, but essentially an involved affiliate) for complete reimbursement of all money invested by the franchisee and for compensation for any net losses incurred. If the franchisor makes a disclosure but fails to disclose a material fact or makes a material misrepresentation, the franchisee also has a right of action against the franchisor and all persons who signed the document for damages.

### **Non-canadian Franchisors**

There are very few special considerations for non-Canadian franchisors in Canada, who must abide by the same laws as domestic franchisors. Non-Canadian franchisors can enter into franchise agreements of all types from their home jurisdiction directly with Canadians without the necessity of creating a Canadian corporation or any other business structure. Subject to withholding taxes, non-Canadian franchisors may repatriate revenue directly to their home jurisdiction without being subject to Canadian income tax rules. Non-Canadian franchisors are also at liberty to create a corporation or other business entity under Canadian federal law or the law of any of the provinces. Such corporations or other business entities will be taxed at rates higher than Canadian owned corporations or other business entities. There are requirements in some of the provinces regarding the number of non-Canadian resident members of the board of directors, but others do not have such requirements.

By far, the most common method employed by non-Canadian franchisors entering the Canadian market is master franchising, either for the entire country, by province or by region. Other than compliance with the provincial franchise

disclosure statutes and withholding tax considerations, there is very little Canadian law with which the non-Canadian franchisor need be concerned in this approach, assuming the master arrangement downloads the vast majority of franchisor responsibilities to the master franchisee.

### **Tax considerations**

#### **(i) Withholding Tax**

Canada imposes a withholding tax when a resident of Canada pays or credits certain amounts to a non-resident of Canada. Canadian withholding tax applies on payments of royalties, dividends, interest and certain other items paid to a non-resident of Canada. What this typically means for a non-Canadian franchisor is that payments coming from a Canadian master franchisee will be automatically reduced by the amount of the withholding taxes, which start at a rate of 25%. Withholding taxes that are deducted from royalties paid to the non-Canadian franchisor may be eligible for foreign tax credits against taxes payable by the franchisor in its home jurisdiction and/or a rate reduction, depending upon the existence of a tax treaty between Canada and the home jurisdiction.

#### **(ii) Goods and Services Tax ("GST") and Harmonized Sales Tax**

Non-residents carrying on business in Canada or receiving income from commercial real property located in Canada must register with (and provide security to) the Canada Revenue Agency ("CRA") for GST purposes, as well as collect and remit GST on taxable supplies made in Canada. GST is a federal value-added tax that applies to most supplies of property and services made in Canada. GST is a fully recoverable tax for most corporations engaged in making taxable supplies, such that the actual cost of GST is ultimately borne by the end consumer. British Columbia, Saskatchewan, Manitoba, Québec and Prince Edward Island each impose a distinct PST. The provinces of Ontario, New Brunswick,

Nova Scotia and Newfoundland & Labrador combine their respective provincial taxes of 8% with the GST of 5% to form the HST which is imposed as a single tax at a rate of 13%.

### TradeMarks

Franchisors planning to enter the Canadian marketplace should seriously consider registering the system trademarks under the federal Trade-marks Act.1, which, among other things, gives the owner of the trademarks exclusive right to use the marks throughout Canada.

### Competition Law

Fairly recent amendments to the Competition Act effectively decriminalize price maintenance. It is now a civil reviewable practice that is presumptively lawful until proven to have an adverse effect on competition. This change should allow for greater harmonization of a foreign franchisor's pricing policies. Other than this and the false advertising provisions of the Competition Act, franchising in Canada can be conducted safely without regard to Canadian competition law.

### The Special Case of Quebec

Non-Canadian franchisors should be aware of some additional restrictions encountered under the law of the Province of Quebec that, although not specifically dealing with franchising, nevertheless have an impact upon franchising activity in that province. A duty of good faith and fair dealing is enshrined in the Civil Code of Quebec ("CCQ"),<sup>2</sup> and applies also to precontractual negotiations. The CCQ also sets forth a series of rules, founded upon an implicit precontractual disclosure obligation, governing certain types of provisions contained in adhesion contracts (contracts not subject to negotiations), such as external (i.e., franchisor's operating manuals), abusive, illegible and incomprehensible provisions.<sup>3</sup> These specific disclosure obligations are unilateral and imposed on the stipulating party in order to ensure that the adhering

party has knowledge of and has consented to all of the provisions in the contract. Furthermore, the burden of proof of such knowledge and consent is placed upon the stipulating party.

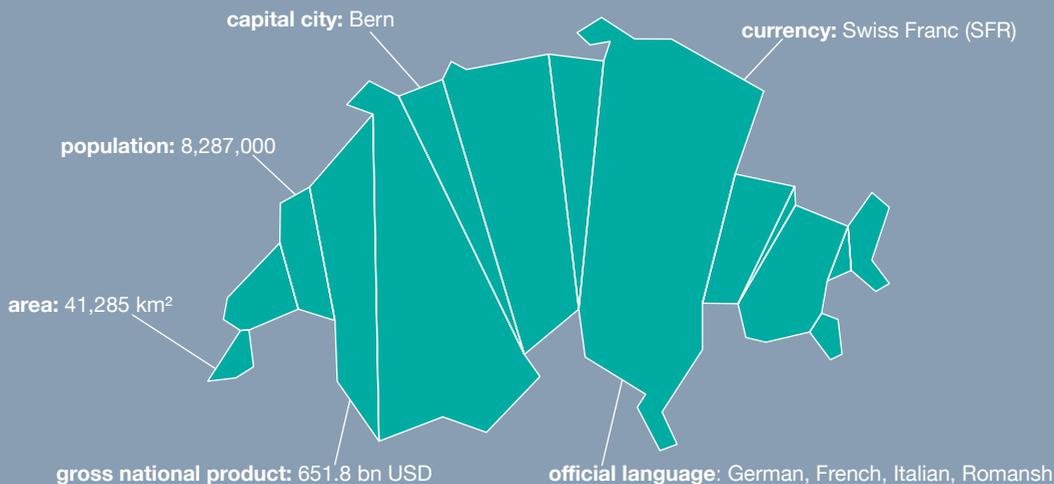
*\* Edward (Ned) Levitt is a Certified Franchise Executive, a partner at Dickinson Wright LLP, Toronto, Canada, and provides legal services to Canadian and international clients on all aspects of Canadian franchise law. He was General Counsel to the Canadian Franchise Association (2000-2007) and is a member of the American Bar Association Forum on Franchising, the International Bar Association and the International Committee of the International Franchise Association. As a member of the Ontario Franchise Sector Working Team, Ned was instrumental in the creation of Ontario's franchise legislation and has had significant input in the franchise legislative process throughout Canada. Among his many publications is the leading text, Canadian Franchise Legislation (2001, LexisNexis/Butterworths).*

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## Franchising in SWITZERLAND

- The Swiss legal environment is favorable for franchising. Swiss law is a good option to choose for international franchise systems.
- Switzerland has no specific legislation on franchising. However, single rules of labor law (for instance with regard to social security) or sales agent law (for instance with regard to the compensation for clientele) may apply by analogy.
- In addition, unfair competition law and antitrust law have a major impact on franchising agreements.

## Areas of Law Regularly Affected by/ Regularly Affecting Franchising

Switzerland has **no specific legislation on franchising**. Apart from the general rules on contracts, specific rules on other types of contracts are applied to franchise agreements by analogy according to the case law. Other than contract law, unfair competition law and antitrust law have a major impact on franchise agreements.

As there is no legal definition of “franchise”, it may be difficult to draw a clear distinction in practice between an ordinary distribution agreement and a product franchise agreement where the franchisee sells products or services under a uniform distribution concept. The distinction may be easier for business format franchising agreements where the integration of the franchisee in the distribution organization of the franchisor is more extensive.

For most businesses, there are no significant restrictions for **foreign franchisors**. Restrictions may apply with regard to residence and work permits for foreign citizens (in particular for non-EU/EFTA nationals).

Swiss **corporate law** is favorable for Swiss and foreign companies. A company does not need a license to do business in Switzerland, except for certain businesses.

A foreign franchisor has several options to implement its franchise system in Switzerland: It may choose to enter into franchise agreements with Swiss franchisees as a foreign company. Alternatively, it may establish a branch office or found a subsidiary in Switzerland. A subsidiary allows the franchisor to limit the liability from the franchise business in Switzerland to the liability of its Swiss subsidiary.

The shareholders of a Swiss company do not need to be Swiss citizens or Swiss companies. However, the company must be able to be represented by one person

who is resident in Switzerland. This requirement may be fulfilled by a member of the board of directors or by an executive officer.

Franchisees are unlikely to be qualified as consumers, but their customers may. The level of **consumer protection** in Switzerland is rather low compared to other jurisdictions. The Unfair Competition Act protects consumers against certain unfair commercial practices. As for all distribution systems for products, the rules of the Product Liability Act („PLA“) and of the Product Safety Act („PSA“) are relevant for franchise systems.

In **antitrust law**, there are no specific rules for franchise agreements. Assuming that neither party has a dominant position on the relevant markets, the general rules for vertical agreements apply. Resale price maintenance and absolute territorial protection are considered the most harmful vertical restraints. Many franchise agreements will qualify as selective distribution agreements, for which reason the rules for selective distribution need to be complied with.

**Labor law and sales agent law** are not directly applicable to franchise agreements. However, single rules may apply by analogy to protect the franchisee, in particular in a subordination franchise agreement where the franchisee lacks autonomy for its business decisions (similar to an employee). The application of labor law rules to franchise agreements may have extensive consequences for the franchisor. For example, it may become responsible for the franchisee’s social security contributions.

It is controversial if the franchisee may be entitled to an (inalienable) compensation for clientele at the end of the contract (“Kundschaftsentschädigung”), in our view, only under extraordinary conditions. It is important to clearly state in the agreement that the franchisee will remain

a legally independent entrepreneur, free to make its own business decisions. Still, it is not fully excluded that a judge might come to a different conclusion after having assessed the full agreement and the way it was put into practice.

Switzerland has a favorable **tax** burden for undertakings, which partly varies from Canton to Canton. Important taxes are the tax on corporate income, withholding taxes and VAT.

**Intellectual property rights** (such as trademarks or patents) are protected by federal law and international treaties. Know-how is often of particular interest for franchise agreements. Know-how can only be protected by keeping it secret and by imposing confidentiality obligations on anyone to whom it is disclosed. To the extent that know-how qualifies as a business secret, it is partly protected by the Unfair Competition Act and by criminal law. Licensing of know-how is possible.

### **Selected Questions/Aspects**

Under Swiss law, no special **pre-sale disclosure** exists. However, all relevant facts of a franchise agreement (*essentialia negotii*) must be disclosed by the franchisor to the potential franchisee. The disclosed facts must be accurate and the negotiations shall be conducted seriously. The language of documents and agreements is subject to the parties' discretion, but in the event of a court proceeding, the documents need to be translated into the court's official language (normally German, French or Italian).

If the franchisor violates its duty of disclosure, the (potential) franchisee is entitled to claim damages. Usually, the potential franchisee may claim damages for the created trust in the conclusion of the agreement (negative interest). Where an agreement has been concluded the franchisee may claim that it should be placed in the position as if it had never concluded the agreement with the

franchisor (positive interest). In case the franchisee has concluded the agreement under error, fraud or duress, it could declare to the franchisor not to honor the contract. The master-franchisee is liable for its own acts and omissions and is not liable for the behavior of a third party (franchisor). As a principle, individual officers, directors or employees of the franchisor/master-franchisee are not liable to the franchisor's/master-franchisee's business partners, provided that the franchisor/master-franchisee is an incorporated enterprise; unlawful conduct remains reserved.

Franchise agreements are principally governed by the freedom of contract principle, but **mandatory legal restrictions** may affect them. Amongst others, such restrictions exist regarding the prohibition of infinite agreements, the limitation of liability or any clauses which significantly restrict competition (as may be the case for non-competition clauses).

There are no written laws regarding the nature, amount or payment of a **franchise fee**. Usually, the franchisee has to pay an initial fee as remuneration for the advanced services of the franchisor (planning and development of the system). For the rights and advantages related to the use of the system, it has to pay ongoing fees (often a percentage of the sales figures or a higher purchase price of the products). Generally spoken, a debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum, unless a higher rate of interest – up to currently 10 and 12%, respectively, for consumer credits and 15-18% for ordinary credits – has been agreed. A franchisee is principally free to make payment to a foreign franchisor in the franchisor's domestic currency.

If a **confidentiality clause** is (allegedly) violated by a party, the non-breaching party may claim enforcement of the clause before the competent court and the

arbitral tribunal, respectively. Injunctions and preliminary injunctions are both possible prior to or during the main court proceedings.

A **termination** of the franchise agreement by a party usually occurs by proper notice of termination (ordinary termination). However, an extraordinary termination is possible at any time and with immediate effect in the event of changed circumstances and for so-called “valid reasons”. Valid reasons for an extraordinary termination exist when the continuation of the contract until the next proper termination date is unacceptable to the other party. Where in essence the franchise agreement has been entered into with the parties in person, death, incapacity to act, insolvency, bankruptcy and debt enforcement lead – unless otherwise agreed – to the termination of the agreement.

Generally spoken and unless otherwise agreed in the franchise agreement, the renewal of a franchise agreement is subject to the parties’ mutual agreement.

The parties may agree on a restriction of the franchisee’s ability to **transfer** a franchise itself or its ownership interest in a franchise entity. Such (restricted) transfers are often subject to prior written approval of the franchisor.

### Dispute Resolution and Applicable Law

The court system varies from Canton to Canton, but the rules on civil procedure are national. Switzerland is well-known for international arbitration. Arbitration is a good option for commercially important franchise agreements if one or both parties are not familiar with the Swiss court system or the Swiss languages.

According to Swiss international private law, the parties can freely choose the law applicable to a franchise agreement. The Swiss legal environment is favorable for franchising. Swiss law is a good option

to choose for international franchise systems.

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## Franchising in CHINA

There have not been a franchise law but there have been several administrative regulations on franchising in China. Key features of China's franchise regulatory regime are:

- Selling franchise in China requires the franchisor to meet the so-called "two plus one" requirement, in order to prove the successful experience of the franchise system.
- Foreign franchisors are allowed to sell franchise in China directly without any direct experience in China.
- Selling franchise is subject to prior disclosure to the potential franchise and afterwards filing with the regulatory authority.

## Franchising in China

In February 2007, China's State Council, the highest administrative governmental body, promulgated its first comprehensive set of franchise regulations with the issuance of the Regulations on the Administration of Commercial Franchise (the "2007 Regulations"). Before that, the Ministry of Commerce enacted a ministry decree on commercial franchise in 2004. Further before this decree, franchising had been sold in China through licensing arrangements. The 2007 Regulations have consolidated the previous rules and requirements and subject franchising to a State Council level regulation, which is only lower than laws passed by the national legislature in terms of hierarchy of statutes in China. In April 2007, the Ministry of Commerce ("MOFCOM") issued the Administrative Measures for Archival Filing of Commercial Franchises (the "Filing Rules") and on May 1, 2007, the Ministry issued the Administration Measures for the Information Disclosure of Commercial Franchises (the "Disclosure Rules"). In December 2011, MOFCOM updated both the Filing Rules and the Disclosure Rules. With implementation of the 2007 Regulations, the Filing Rules, and the Disclosure Rules, China has put into place a legal framework for the franchising sector, imposing the so called "two plus one" franchisor qualification requirement and the prior-to-sale disclosure and after-sale filing requirements with certain intervention into the franchisor-franchisee relationship.

The 2007 Regulations define "franchise" to mean an arrangement whereby (1) an enterprise through an agreement grants other operators the right to use its business operating resources, including registered trademarks, logos, patents, and proprietary technologies; (2) the franchisee conducts business under a uniform mode of operations; and (3) the franchisee pays franchise fees according to the agreement. Both individuals and enterprises can conduct franchise activities

as a Franchisee, but only enterprises (as opposed to individuals) can engage in franchising activities as a Franchisor.

## Requirements on Franchisor

Under the 2007 Regulations, a Franchisor must be an enterprise. The 2007 Regulations do not require that the Franchisor be an enterprise incorporated in China. In practice, cross-border franchising is permitted by MOFCOM as long as the foreign enterprise completes the commercial franchise filing with MOFCOM and complies with other provisions under the 2007 Regulations, the Disclosure Rules and the Filing Rules.

To become a Franchisor, the enterprise must have a mature operation method and have the ability to provide continuous guidance, technical support, and business training to the Franchisee. The enterprise must currently own at least two stores which have been in operation for more than one year (i.e., the "two plus one" requirement). This requirement also applies to master franchisees or regional sub-franchising franchisees. The two own stores do not need to be operated in China. In practice, it is also acceptable for the filing purpose if an affiliate of the franchising entity meets the "two plus one" requirement, especially for the foreign franchisor, provided the affiliate is either the parent or subsidiary of the franchising entity.

## Disclosure of Information

The Franchisor is required to provide accurate information on specified matters relating to its franchise system to prospective franchisee at least 30 days before the franchise contract is executed. In addition, in case of any significant changes to the information which has been disclosed in the disclosure document, the Franchisor is required to promptly inform the Franchisees of that changed information.

The abovementioned disclosure obligations apply to a foreign Franchisor who

engages in franchising in China (i.e., the mainland China, excluding Hong Kong, Macau and Taiwan).

### **Unfair Contract Terms or Practices**

Under the Chinese Contract Law, if a party requests the other party to sign a contract based on its standard terms and conditions, the offering party is obligated to follow the principle of fairness, reasonably call the other party's attention to the provision(s) excluding or limiting the offering party's liabilities, and explain them upon request. It is an especially significant obligation of a Franchisor in the franchising industry, as standard franchise contracts are normally used. Furthermore, a standard contract will be interpreted against the drafting party in a dispute. This would be relevant in the context of franchising to the extent that standard form franchise agreements are used by a Franchisor.

The 2007 Regulations make several references to fairness and reasonableness. For example, it is provided that the principles of free will, fairness, honesty, and good faith shall be followed for engagement in franchise activities.

### **Filing Requirements**

Within 15 days of the execution of its first franchise agreement, a Franchisor is required to file the specific documents required by the Filing Rules with the relevant bureau of commerce ("Bureau of Commerce") at or above the county level:

If the Franchisor engages in franchising within one province, it must file these documents with the Bureau of Commerce at the provincial level. If the Franchisor engages in franchising in more than one province or if the Franchisor is incorporated outside mainland China, it must file those documents with the Ministry of Commerce.

Upon completion of the initial filing, if there are any changes to the filed infor-

mation of a Franchisor, the Franchisor must apply to the Bureau of Commerce to file for an amendment within 30 days from the date of the change.

Both the 2007 Regulations and Filing Rules require that a Franchisor must report to the Bureau of Commerce prior to March 31 each year the information about the franchise agreements concluded, revoked, terminated, or renewed to March 31 during the previous year.

### **Franchise Fees**

According to the 2007 Regulations supplemented by the Disclosure Rules, the franchise fees shall be included in the disclosure document. The Franchisor must disclose basic information about franchise fees including the type, amount, and method of payment for franchise fees (including whether deposits are required and the conditions and method of refunding a security deposit).

The Franchisor and Franchisee may freely agree on the nature, amount or payment of fees. Nonrefundable deposits are generally not supported by Chinese courts.

### **Term, Termination and Renewal of Franchise Agreements**

The term of the franchise agreement may not be less than three years, unless it is otherwise agreed upon by the Franchisee. This minimum period requirement does not apply to the renewal of a franchise agreement.

The Franchisee may unilaterally terminate the agreement after the franchise agreement has been concluded within a "certain period of time" agreed upon and specified in the franchise agreement. However, there is no express requirement for a specific minimum period in the 2007 Regulations and it is left for the parties to agree on, acting in good faith and reasonably. Except for this unilateral right to terminate on the part of the Franchisee, under the Chinese law, unilateral termina-

tion rights must be agreed upon in a contract, except in case of material breach or frustration. That is, in other cases, both Franchisees and Franchisors may unilaterally terminate a franchise contract for cause only.

The 2007 Regulations do not impose any obligation on a Franchisor to renew the franchise contract, but if the Franchisor and the Franchisee decide to conduct negotiations to renew the franchise contract (basically a new franchise agreement), the 2007 Regulations do require the Franchisor and its Franchisee to negotiate the renewal in accordance with the principles of fairness and reasonableness.

### **Governing Law and Dispute Resolution**

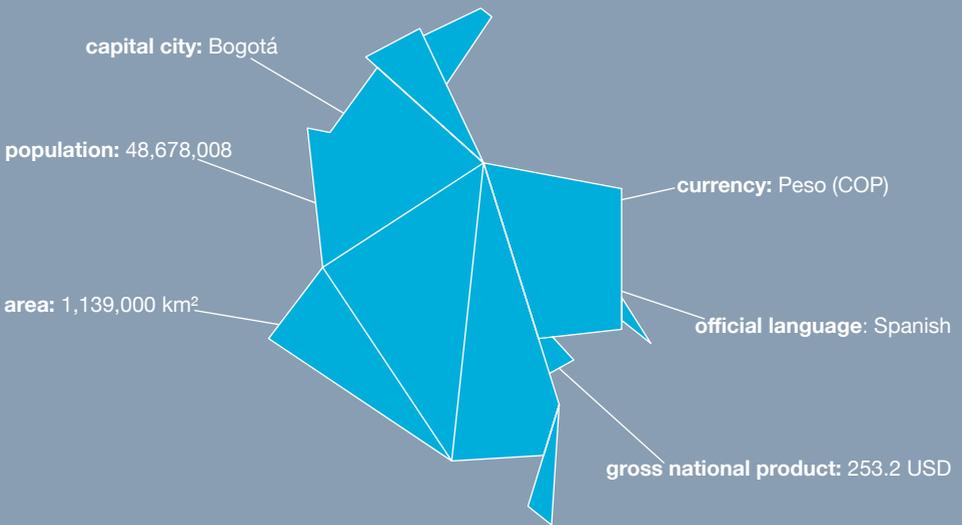
Under the law of China, for a contract between a Chinese party and a foreign party (including one from Hong Kong, Macau, and Taiwan), the parties may agree on a governing law other than Chinese law and may select a foreign court (subject to the “substantive connection” test) or arbitration outside China. But for a contract between two Chinese parties, the Chinese contracting parties do not have the right to select a foreign law or a foreign venue for their contract dispute. Therefore, Chinese law and a venue in China are mandatory in a franchise agreement between a Chinese Franchisor and a Chinese Franchisee. However, if a foreign Franchisor and the Chinese Franchisee enter into other contracts in relation to the Franchise contract, the parties may select a foreign law and venue for those contracts.

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## Franchising in COLOMBIA

- Franchising is not specifically typified or regulated in the Colombian Legislation, and as many other contracts, the free will and personal autonomy of the contracting parties are the basis of the agreement.
- Franchise Agreements are commonly Accession Agreements in which the terms and conditions are normally established by the franchisor.
- Franchises, although not regulated in Colombia, have various elements from other contract forms such as: supply contracts, agency agreements, and intellectual property licensing. In the case of disputes, the provisions and relevant aspects of these contracts may be applied by analogy to franchising.

## Prefixed Summary

Franchising throughout the last years has become one of the most complete and reliable contractual forms for the exploitation of a commercial activity in the Colombian territory. Although franchising per se has not been typified or specifically regulated in the Colombian legislation, the general principle of autonomy of the contracting parties which governs the commercial legislation, as well as all the other existing principles of commercial law, have permitted the successful structuration of franchises within the Colombian territory.

## Legal Basis of Franchise Law

Franchising is not typified in the Colombian internal legislation, thus there are no legal regulations in connection with franchising, or a legal definition of franchise. Nonetheless, general principles of commercial law such as: personal autonomy of the contracting parties, good faith, remuneration in contracts, amongst others, are equally applicable to franchises.

## Specifics Regarding Foreign Franchisors

The same general principles apply for foreign franchising, as there are no regulations or legal restrictions other than the exchange rules which apply in all cases of foreign investment.

## Corporate Law

All the different forms of business entities available under the Colombian legislation are suitable for both franchisors and franchisees. However, currently the most popular form of business entity is the Simplified Joint Stock Company, in Spanish Sociedad por Acciones Simplificada, better known by its acronym "S.A.S.", as this business entity has several advantages and a much more expedite and simplified formation procedure when compared to all the other entities.

## Consumer Protection Law

According to the Colombian Consumer Protection Legislation, a consumer is

any person or legal entity who acquires a determined product for the satisfaction of its own private needs, or for the satisfaction of corporate needs, whenever these are not directly linked to the economic activity of the consumer company. In this sense, franchisees may be treated as consumers under Colombian legislation when acquiring products or services which are not part of their business or main activity. As consumers, franchisees may be entitled to i) legal procedures for obtaining the effectiveness of guarantees for defective products, ii) the right to be given clear and sufficient information regarding the acquired products, iii) the right to be protected against misleading publicity, iv) the right to have contracts interpreted in his favor, and in general all rights to which consumers are entitled.

## Antitrust / Competition Law

According to the Colombian legislation regarding antitrust and competition, agreements and practices which have the purpose to limit the production, supply, distribution, or consumption of products or services, and in general all practices and procedures which limit free competition and which aim to set or maintain inequitable prices, are forbidden. Nonetheless, these agreements and practices must be carefully analyzed according to each specific situation and under the Rule of Reason as opposed to the Per-se rule. In a franchise agreement, two of the most commonly used clauses are: i) Exclusivity clauses in favor of the franchisor, ii) Non-competition agreement between franchisee and franchisor. Although in principle these type of clauses contain conditions which are contrary to free competition, it has been stated in the Colombian jurisprudence and legal theory that these restrictive terms have the purpose of protecting the overall structure of the franchise business and the legitimate rights and interests of the franchisor. Thus, a violation of free competition will not necessarily occur in these cases

which must always be analyzed carefully according to the Rule of Reason.

### **Labor Law Aspects**

From the labor law perspective, both parties in a franchise Agreement are considered to be independent and therefore the employees of each party are subordinates only to their direct employer. In this sense, employees of franchisor or franchisee are not considered to be related, subordinated, or directly linked by means of a labor relationship to the other party, and the only entity which will be responsible for the payment of salaries, fringe benefits, indemnifications, or any other expenses derived from an employment relationship, will be the direct employer with whom workers have subscribed an employment agreement. Nonetheless, and in order to prevent any risks, it is recommended to include indemnity clauses and insurance policies in the franchise agreements, which among other things will protect and cover the parties against any lawsuit, claim, or any other contingency which may arise with the franchisor or franchisee's employees.

### **Sales Agent Law**

Sales Agency is defined as a contract in which a merchant assumes independently and in a stable form, the promotion and exploitation of businesses in a determined economic field, within a prefixed territory, as a representative or as a sales agent of a national or foreign entrepreneur. Once the Sales Agency Agreement is terminated, the Sales Agent could be entitled to the payment of an indemnification corresponding to a 12th part of the average commission received within the last three years, for each year of duration of the Agreement. Although some of the characteristics of the Sales Agency are common to a franchises, the risk of having a franchise Agreement taken as a Sales Agency are low, for as long as the characteristic features of franchise agreements, specifically those related to trademark licensing and the transmission

of the franchisor's know-how, are present in the terms of the agreement, the nature of the franchise Agreement will not mutate to that of a Sales Agency.

### **Tax law Aspects**

By virtue of the income received by the franchisor due to royalties and payments made by the franchisee for the technical assistance or sale of goods, the franchisor, either national or foreigner, is obliged to the payment of income tax as this income was generated due to activities performed inside the Colombian territory. Additionally, all activities involving the purchase of goods or services are subject to the payment of sales tax, and the commercial and industrial activities are subject to the industry and trade tax.

### **Aspects of IPR Law**

The franchisor's trademarks, even when licensed in favor of the franchisee, will remain protected against infringement, provided that the corresponding registration procedure has been completed before the Superintendence of Trade and Commerce (which for this purpose acts as the Colombian Patent and Trademark Office), and the renovation fees are timely paid every 10 years. As for the protection of know-how, said protection is obtained by means of enforceable confidentiality agreements, and the overall treatment of the franchisor's know-how as a trade secret.

### **Pre-sale disclosure / pre-contractual information**

Franchises in Colombia do not have a specific regulation, thus all provisions and obligations derived from pre-contractual disclosure of information will depend on what is freely agreed between the parties. Commonly, all confidential information disclosed in this pre-contractual phase, will be protected by means of confidentiality agreements which are signed by the parties prior to the disclosure of information.

## Legal restrictions affecting franchise agreements

Although there are no specific legal restrictions which apply to franchise agreements, said agreements must contain at least the following essential elements: i) Disclosure of information, ii) License agreements of intellectual property rights, iii) Technical assistance, iv) Remuneration in favor of the franchisor.

## Franchise fees

Franchise fees may be agreed upon between the contracting parties, however, there is a legal restriction in connection with the maximum interest rate for overdue payments, which is 1.5 times the bank interest rate (“Interés Bancario Corriente – IBC”) periodically established by the Colombian National Bank.

## Confidentiality clauses

Confidentiality clauses in franchise agreements are enforceable under the Colombian jurisdiction. However, in order to strengthen these clauses it is advisable to clearly define what will be considered as confidential information, the period during which confidentiality of the information must be maintained, and a penalty clause in order to anticipate the damages which may be caused in case of breach.

## Termination of franchise agreements

In line with the contractual freedom of franchise agreements, the parties may agree on the causes of termination of said agreements. The most common causes for termination are: i) The breach of the acquired obligations of either party, ii) Mutual consent between the parties, and iii) The expiration of the duration of the agreement. The possibility and the circumstances for renovation of the franchise agreement will also depend entirely on what is freely agreed between both parties.

## Transfer of franchise agreements

It is possible for a franchisor to restrict a

franchisee’s ability to transfer the franchise, by incorporating this restriction in the franchise agreement.

## Dispute resolution

Dispute resolutions may be subject to either the Colombian courts, or arbitration. The Colombian court system is a multiple instance system with the following vertical judicial hierarchy: i) Municipal Courts, ii) Circuit Courts, iii) Superior District Tribunals, iv) Supreme Courts. Additionally, the judicial branch in all of the aforementioned instances is divided horizontally depending on the specific area or branch of law. Nonetheless, in most cases these disputes are resolved through arbitration due to the specialty of the arbiters in the specific areas of law, and the celerity of arbitration procedures when compared to common courts. As for the applicable law for franchise agreements, the Colombian Commercial Code has stated that all contracts or agreements to be executed in the Colombian territory must be subject to the Colombian legislation.

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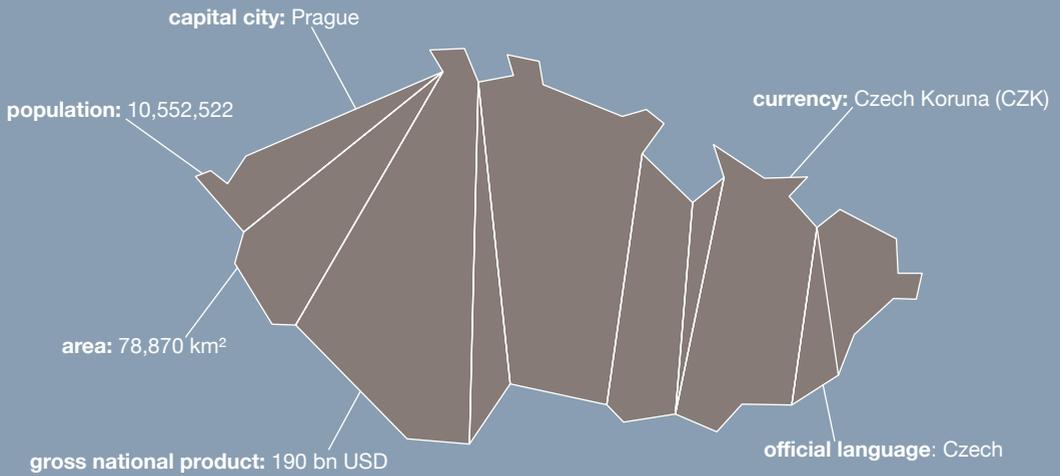
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## Franchising in CZECH REPUBLIC

- No special legal regulations on franchising.
- Franchisor and franchisee are considered to be entrepreneurs under Czech law.
- Prior to concluding a franchise agreement the franchisor must inform prospective franchisee about all relevant legal and economic issues important for the franchisee to decide whether to conclude a franchise agreement or not

## Legal Basis of Franchise Law

The Czech Republic, like many other European countries, lacks special legal regulations governing franchising relationships. Therefore, the application of a range of legal provisions is brought into question.

Czech law considers a contract to be a legal act between two or more parties that sets, changes, or cancels the rights and obligations of the contractual parties. As franchise activities are carried out in order to generate a profit, the franchisor and franchisee are considered to be entrepreneurs under Czech law, whereas contracts concluded between entrepreneurs (natural or legal persons) are governed principally by the Civil Code (No 89/2012 Coll.). Generally, most of the provisions in the Civil Code which deal with contractual obligations are not mandatory and have a rather supporting function in the event that the parties fail to regulate certain issues explicitly. However, the autonomy of the contracting parties is limited by the mandatory rules of public law.

Franchise agreements represent an innominate contract, which may include elements from various types of contracts. Owing to the absence of special legal regulations on franchising, franchise agreements have no specific formal requirements. However, they will most likely be concluded in writing. A franchise agreement should deal with all issues regarding the cooperation between the parties.

Pursuant to Czech law, it is at the franchisor's and the franchisee's absolute discretion whether they conclude the franchise agreement for a fixed or an indefinite period of time. However, franchise agreements are usually concluded for a fixed period of time. Agreements are usually concluded for a period varying from 5 to 10 years or, exceptionally, for up to 20 years where the franchise system is capital intensive.

## Specific regarding foreign franchisors

Czech law does not treat foreign franchisors any differently from domestic franchisors.

## Corporate Law

Franchisors and franchisees are free to choose any form of business entity existing under Czech law or to do business as a sole trader. Nevertheless, the most common form of corporate vehicle established by a typical franchisor in the Czech Republic is a private limited liability company (s.r.o.). Furthermore, many franchisees of smaller franchise systems do their business as sole traders.

Other forms of business entities in the Czech Republic are joint-stock company (a.s.), European joint-stock company (SE), general partnership (v.o.s.) and limited partnership (k.s.).

All business corporations mentioned above (and their branches as well) are subject to registration in the Commercial Register maintained by the relevant Register Court.

## Consumer Protection Law

Franchisees are not treated as consumers under Czech law.

## Antitrust/Competition Law

Competition law plays an important role in the area of franchise agreements. Czech Competition Law is fully harmonized with European Union regulations and therefore the same rules relating to exclusivity, protection of contractual territory, resale price maintenance, exclusive dealership obligation and competitive restrictions apply as in other EU countries.

## Labour Law Aspects

In principal, labour law does not apply to the relationship between the franchisor and franchisee. However, where a franchisee is a sole trader, there may be a risk that the franchise agreement may be treated as an employment agreement

if the characteristics of an employment relationship are met.

### **Sales Agent Law**

Sales Agent Law does not apply to franchisees under Czech Law.

### **Tax Law Aspects**

Resident enterprises and branches of foreign enterprises are subject to corporate income tax at a standard tax rate of 19%. Individuals are subject to a flat income tax rate of 15%; however, a solidarity surcharge of 7% applies to income exceeding 48 times the average monthly wage. The income of foreign residents with no permanent establishment in the Czech Republic will only pay tax on Czech-sourced income. Thus, withholding tax will apply to franchise fees. The general withholding tax rate amounts to 35% but is usually reduced by relevant tax treaties.

### **Aspects of IPR Law**

Trade marks, designs and utility models or patents can be registered through the Czech Industrial Property Office ([www.upv.cz](http://www.upv.cz)).

Although Czech law does not provide a legal definition of know-how, it uses the term in some regulations. Nevertheless, know-how is defined by case law. In order to minimize risks relating to know-how and the protection thereof, it is recommended to specify know-how in the franchise agreement itself and to state that any breach of know-how results in a contractual penalty or in termination of the franchise agreement.

### **Pre-sale disclosure/ pre-contractual information**

There is neither a special legal regulation nor any case law on franchise disclosure law; however, the general rules of the Civil Code on pre-contractual disclosure apply. Czech courts do not appear to have dealt with issues regarding a franchisor's responsibility for providing

incomplete, incorrect, or outdated information to a prospective franchisee when presenting the franchise system, i.e., before entering into the franchise agreement. However, Czech courts are emphasizing that responsibility more and more in other types of contracts under the general rules on pre-contractual disclosure according to the Civil Code.

Analogically, according to current case law, it can be deduced that, prior to concluding a franchise agreement, the franchisor must ensure that all relevant facts that are important for the franchisee to allow him/her to make a decision to conclude the franchise agreement have been clearly presented. In the event that the franchisor breaches this duty, the franchisee has the right to claim damages.

### **Legal restriction affecting franchise agreements**

Franchise agreements are principally governed by the freedom of contract principle, but some specific laws, especially data protection law and competition law, may affect them as well.

### **Franchise Fees**

There are no regulations that specifically impact franchise fees and no restriction on payments in the franchisor's domestic currency.

### **Confidentiality clauses**

It is highly recommended that a non-disclosure agreement between the franchisor and prospective franchisee be concluded. In Czech law, a non-disclosure agreement is not specifically regulated; thus, an innominate type of contract should be used instead. In other words, there are no mandatory provisions. However, such agreements should be in writing.

The non-disclosure agreement should explicitly set forth the obligation of the future franchisee to remain silent about all facts he/she comes across in connection with the negotiations about the

franchise agreement, regardless of the source of information (franchisor/manual or other franchisor sources).

Because it is very difficult to assess the damages caused by a breach of the non-disclosure clause, setting a sanction in the form of a contractual penalty is highly recommended. The amount of the contractual penalty should be appropriate and should reflect the value of the secured obligation and maximum potential damage.

It is common and also recommended that a franchise agreement contains a confidentiality clause, whereas the same rules as mentioned above apply.

### Termination of franchise agreements

As a matter of principle, an agreement concluded for an indefinite period of time can be terminated by the end of the calendar quarter via a three-month notice. There also are some statutory provisions on terminating fixed-term agreements and permanent agreements with immediate effect. In order to ensure the certainty of the contractual relationship, it is advisable to expressly agree on the exact conditions and manner of terminating the agreement.

Furthermore, it is recommended to expressly regulate certain obligations after terminating the agreement, such as prohibition of the franchisee's continued use of the trademarks, and the obligation to return all materials given to the franchisee.

### Transfer of Franchise Agreements

The parties may agree to restrict the possibility to transfer the franchise agreement and/or transfer an ownership interest in the franchisee's entity. Such transfers are very often subject to the franchisor's prior written consent.

### Dispute Resolution

There are various types of possible dispute solutions, such as civil procedure, arbitration and mediation. In the Czech Republic the civil judicial system is not

specifically diversified and general courts deal with various agenda. There is a system of general courts (district, regional, high and supreme) and a constitutional court that stands outside the system of general courts.

Arbitration is an alternative to civil proceedings and is used in commercial and consumer matters especially. The parties involved may choose between a permanent arbitration court and an ad hoc arbitrator/panel of arbitrators.

Next to arbitration, mediation is the most used alternative form of dispute resolution. Mediation, however, does not end with an enforceable judgement.

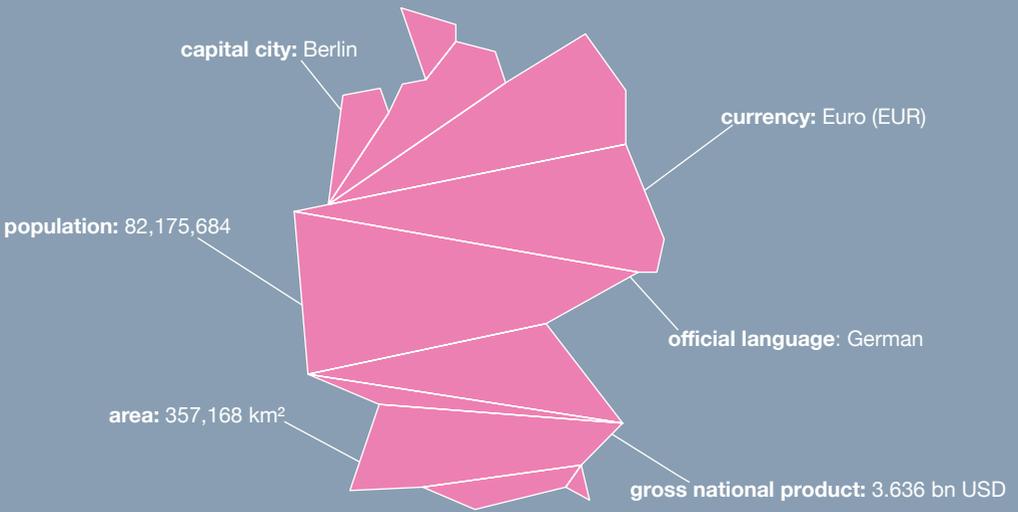
### Applicable Law

Czech law allows the parties to choose a foreign law to govern the contract. Generally, choosing a foreign law is only advisable if, at the same time, the jurisdiction of the courts of said foreign country or of an arbitration court is agreed.

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## Franchising in GERMANY

- No specific form or procedure prescribed by law regarding franchisor's pre-contractual information.
- As a "business founder" a franchisee may be entitled to revoke the franchise agreement.
- Franchisees may be entitled to compensation payment upon termination of the franchise agreement.

## Areas of law regularly affected by/regularly affecting franchising

In Germany, there is no legal definition of “franchise”. Notwithstanding recent discussions regarding the necessity of implementing statutory franchise regulation, to date, German franchise law is not codified. It was developed by court decisions.

The most common **corporate** form to set up business in Germany is the private limited liability company (“GmbH”). It is easy to set up by one or more persons and requires a minimum capital of EUR 25,000.-. Solely the registered capital is liable to the company’s creditors, not the shareholders personally. The formation costs for a GmbH are very moderate. With respect to corporate law aspects, there are no restrictions on **foreign business entities** in Germany in general, and neither on franchisors in particular.

Under German law, franchisees are not treated as **consumers** as the intention of their conduct is business-oriented. However, at the stage of setting-up business, a franchisee may be qualified as “business founder”, and as such may be entitled to revoke the franchise agreement within, generally, two weeks following signing. However, if the franchisee is an entity such as a GmbH, there is no right of revocation.

Only single provisions of the statutory **law on sales agents** are analogously applicable to franchising. If the franchisee is incorporated into the franchisor’s sales organisation like a sales agent and is obliged to transfer the customer base to the franchisor, the franchisee may be entitled to a compensation payment of up to an average annual remuneration upon termination of the agreement. However, according to a recent ruling by the German Federal Supreme Court, there is no such entitlement in franchises mainly comprising anonymous mass

business. Accordingly, the franchisor’s risk of a possible compensation payment can be mitigated by not imposing on the franchisee an obligation to transfer the customer base.

Under German **labor law** one shall take care that a franchisee is not qualified as an employee of the franchisor. A decisive criteria is the grade of personal dependency of the franchisee. Pursuant to German jurisdiction, someone is considered an independent businessperson when he is basically free to design his activities, and to set his working hours, and assumes his own entrepreneurial risk. If the franchisee is an entity such as a GmbH, such risk will not arise.

Franchisors need to protect their **IPR** against third-party attacks or imitation by registering their IPR as trademarks, either as an International Registration (“IR”) with the World Intellectual Property Organisation (“WIPO”), as EU Trademark (“CTM”) with the EU Intellectual Property Office (“EUIPO”) in all 28 EU member countries, or as a national trademark in Germany only. It is recommended to also carry out research beforehand in order to prevent the potential loss of the trademark later and corresponding claims for disclosure and damages.

Pursuant to German **tax law**, all business entities having their registered office or place of management in Germany, and all individuals having their place of residence in Germany are considered tax-residents of Germany and are subject to unlimited tax liability in Germany on their worldwide income unless stipulated otherwise in an applicable double tax treaty.

A GmbH, for example, is liable for corporate income **tax** in the amount of flat 15 % on its taxable profits, plus solidarity surcharge in the amount of 5.5 % of the corporate income tax, plus for trade tax. Trade tax is a municipal tax, the amount

of which therefore is dependent on the place of business (e.g., Berlin 14.35 %, Cologne 16.625 %, Munich 17.15 %). Distributions of profits of a GmbH to a corporate parent company are taxed with a rate of 25 % dividend withholding tax, plus solidarity surcharge. Individuals conducting business in Germany, or being partner in a partnership in Germany, are subject to progressive income tax of 14 % to 45 %, depending on their income.

### Pre-contractual disclosure

Prior to signing a franchise agreement, franchisors and, in a sub-franchising structure, master franchisees have the **pre-contractual duty to inform** each potential franchisee about all circumstances recognizably relevant for the conclusion of the franchise agreement. Thus, this obligation affects all data necessary to enable the potential franchisee to generate own calculations of profitability and to draw own conclusions as to the prospects of success regarding the franchise. However, there neither is a statutory list of what information has to be made available and in what form, nor is there a standard compliance procedure. The German Franchise Association (“Deutscher Franchiseverband e.V.”) provides a guideline regarding the minimum information ([www.franchiseverband.com](http://www.franchiseverband.com)). Also, German franchise law does not know a general obligation to continuously update the pre-contractual information. However, such an obligation may arise during the term of the franchise agreement if certain circumstances arise, which are recognizably relevant to the franchisee. For reasons of proof, pre-contractual information should be carried out in writing. A violation of the pre-contractual duty to inform may lead to damage claims by the franchisee, who may possibly rescind the franchise agreement as well as claim back all paid franchise fees (earned income deducted) and all expenses incurred in connection with the franchise business.

### Legal restrictions

Besides the German law on T&C, restrictions regarding provisions in franchise agreements mainly derive from **antitrust/competition law**. Franchise agreements may contain restrictions that collide with art. 101 Treaty on the Functioning of the EU (“TFEU”). Exemptions from the prohibition in art. 101 TFEU are possible under the EU-Vertical Block Exemption Rule (“V-BER”), provided that the respective parties to a franchise agreement do not have a market share of more than 30 % each. The V-BER contains so-called black clauses (“core restrictions”), rendering the entire agreement null and void, as well as so-called grey clauses, rendering solely the specific provision in an agreement null and void. Examples for black clauses are provisions dictating fixed prices or prohibiting passive sale outside a designated territory, whereas provisions prohibiting a franchisee competition for more than five years or for an unlimited time are grey clauses.

Franchise agreements as pre-formulated agreements significantly limit the other party’s contractual freedom, which is why their **T&Cs** are subject to a judicial effectiveness control. This is lessened in b2b-only agreements such as franchisor-franchisee-relationships. However, still such T&C-clauses are ineffective that unreasonably disadvantage the other party.

### Selected aspects

Basically, there are no laws in Germany regulating the payment of franchise fees, and payments to a foreign franchisor may be made in the franchisor’s domestic currency. The interest rate in Germany for default payments in b2b-transactions is nine percent above the base interest rate (currently: - 0.88 % = 8.12 %).

**Confidentiality clauses** in franchise agreements are very common and enforceable in Germany. The franchisor may file an interim injunction against an

infringing franchisee and claim damages occurred due to the breach.

Franchise agreements are entered into for a certain time and terminate with lapse of that time. A regular **termination** by one of the parties before that is not admissible, unless both parties unambiguously agree on it. However, franchise agreements may be terminated by each party without notice if it is unreasonable for the terminating party to continue the contractual relationship until the agreed time of termination (good cause). If the cause for the termination is a breach of a contractual obligation by the other party, e.g. non-payment of franchise fees, the termination for good cause is only admissible after having issued a fruitless warning (advisably in writing), and within a reasonable period of time after learning about the circumstances for the termination. Unjustified terminations by a franchisor might entitle the franchisee to claim damages.

Franchisors are, in general, free to decide whether or not to **renew** a franchise agreement.

It is admissible to contractually restrict a franchisee's ability to **transfer** its franchise, typically by requiring an explicit prior written approval of the franchisor.

### **Dispute resolution and applicable law**

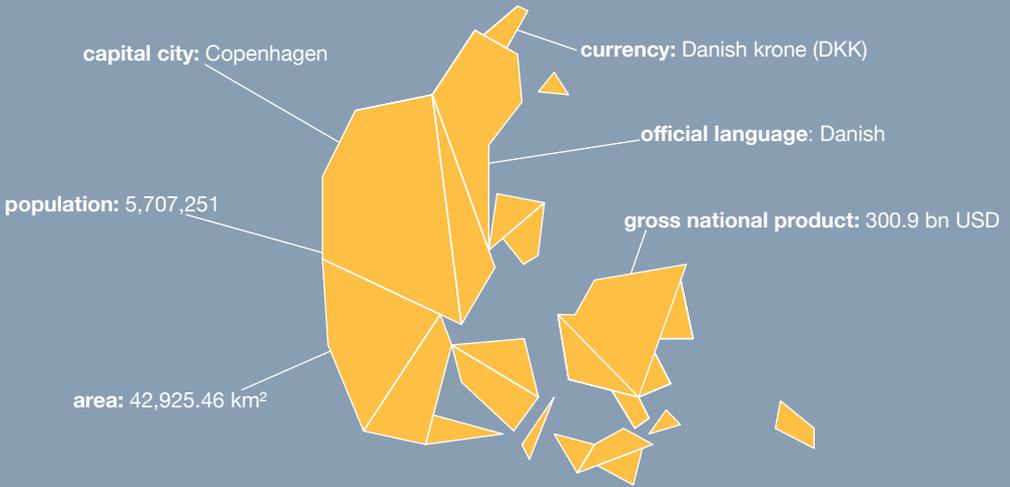
Germany provides one (federal) **court system**, consisting of the local courts (values < EUR 5,000.-), the district courts (values > EUR 5,000.-), the higher regional courts (generally courts of appeal), and the Federal Supreme Court. In principle, it is admissible for the parties to a franchise agreement to agree on a choice of law to be applicable on their contractual relationship, and, if the franchisee is a merchant, to agree on a venue clause.

It is also admissible to agree on **arbitration** as the exclusive way of resolving disputes between the parties, thus waiving the due process of law. This may be favourable, as the parties may choose the language of the proceedings and have influence on the arbitrators selected. Also, arbitration proceedings are, unlike proceedings before ordinary courts, not held in public. However, if the value in dispute is rather low, arbitration may often be too cost-intensive.

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## Franchising in DENMARK

- There is no law, which regulate franchise agreements in Denmark. Hence, a franchise agreement is regulated by the contract agreed on by the parties.
- Foreign and national franchisors typically establish the franchise business within a company structure recognized by Danish company law, often as a private or public limited company (A/S) or a private limited liability company (ApS). The establishment of a A/S or a ApS requires registration with the Danish Business Authority and a minimum equity capital of respectively EUR 67,000 and EUR 6,700.
- Franchisees are not regarded as consumers in Danish law and therefore a franchise relation is B2B.

# Areas

## 1) Legal basis/definitions and specifics regarding foreign franchise in DK

There is no legal definition of a franchise in Danish law and nor is it regulated by any specific code. A franchise agreement is initially regulated by the contract, which the parties have agreed on. The franchise agreement is additionally complemented by general Danish contract law, accompanied by national and European legislation governing relevant areas such as trademarks, patents, competition etc. Therefore, a franchise agreement is often subject to an intense negotiation and regulation of the terms, including for instance means of dispute resolution and remedies in the event of breach of contract.

Danish law does not impose any restrictions specifically on foreign franchisors in Denmark.

## 2) Corporate law – business entity

Foreign and national franchisors typically establish the franchise business within a company structure recognized by Danish company law, often as a private or public limited company (A/S) or a private limited liability company (ApS). The forming of one of the above-mentioned companies requires registration with the Danish Business Authority and a minimum equity capital of respectively EUR 67,000 and EUR 6,700. Professional advice on the legal and financial consequences concerning the different company structures is strongly recommended. However, with the right guidance a company can often be established within days, if necessary.

There are no restrictions on foreign business entities and/or investments in respect of corporate law.

## 3) Consumer protection law – franchisee or customer?

Franchisees are not regarded as consumers in Danish law and therefore the

relation is B2B, even though the franchisee may be vulnerable in the start-up phase.

## 4) Competition law

The Treaty on the Functioning of the EU (TFEU) chapter 7, modifies and complements Danish competition law. Notably in relation to franchising Section 6 in the Danish Competition Act that is similar to art. 101 TFEU, which forbids measures restricting the free competition, is the most relevant rule to observe.

In addition to the Danish Competition Act, it is implied and often regulated in the franchise agreement that the franchisee must restrain from competing with the franchisor and other franchisees engaged with an identical franchise setup contrary to the franchise agreement.

## 5) Labour law aspects

Generally, franchise agreements are not regulated by the principles applicable to employment arrangements. However, if the franchisee is under such duty of obedience and control in relation to the franchisor that in reality the franchisee is not an independent operator, but an employee, this will activate a range of Danish labour acts mandatory for the employer to observe, including payment of holiday allowance, term of notice etc.

## 6) Sales agent law

The Danish sales agent law is not applicable to franchise agreements neither directly or analogously.

## 7) Tax – how are foreign businesses and individuals taxed in the specific country?

In Danish tax law, the principal rule of company tax liability to Denmark is whether the entity has a permanent establishment of business. Individuals are considered tax residents if Denmark is the country of residence. The tax liability of companies is furthermore affected by the choice of company structure,

i.e. whether taxation is conducted directly at the company or by the owners. The rate on taxation for companies in 2016 is 22%. The effective tax rate for persons with a normal income is approximately 44% and for people with a high income 54%.

This area is subject to an intense regulation and changeableness, which is why professional advice is pivotal on this matter.

It is furthermore noticeable that the royalties due from the franchisee to the franchisor is only subject to 22% tax, which is often, lowered even further due to double taxation conventions (DTC).

### **8) IPR – trademarks, copyright, patent etc.**

Franchisors' IP rights in relation to marketing and production are protected by both Danish and European acts governing the area. This includes both copyright, trademarks, patents, names etc. The know-how included in a franchise agreement is protected by the Danish Marketing Practices Act, which protects business secrets in broad terms. Additionally, it is customary that the parties insert a non-disclosure agreement (NDA) into the deal.

## **Selected**

### **questions/aspects:**

#### **1) Pre-sale disclosure/ pre-contractual information**

There is no legal obligation for the franchisor to provide the franchisee with specific pre-contractual information, as the franchise agreements in Denmark are governed by the principle of contractual freedom. It is however customary that both the franchisor and franchisee conduct different types of investigations (comparable to a due diligence investigation).

Here is no legal threshold of the amount or type of information to be exchanged between the parties nor a duty to update previously disclosed information. There are also no language requirements.

In case of essential breach of contract, the party is entitled to rescind the franchise agreement and claim damages. Award of damages/reimbursement depend on the fault by the violating party and is decided by the Court.

#### **2) Legal restrictions affecting franchise agreements**

Under Danish Contract Law the primary source governing the parties is the agreed contract and the wording hereof. Under special circumstances, Section 36 of the Danish contract law allows the Court to disregard provisions in an agreement wholly or partially if it is unreasonable or against honest conduct to let it stand. This is the "catch-all-provision" in Danish contract law and applies to all contracts, including franchise agreements.

#### **3) Franchise fees**

The regulation of the franchise fee, such as nature of payment, amount and currency is for the parties to agree on and there is no legal framework governing the subject. If a payment is overdue, a creditor may claim penalty interests amounting to 8,05% (2016).

#### **4) Confidentiality clauses**

Confidentiality clauses are enforceable through legal action in Denmark. A party may file a prohibitory injunction against another party in order to stop the illegitimate disclosure of information. Furthermore, a party can file for damages. The damage amount can differ depending on which grounds the claim is stated on, thus Section 19 of the Danish Marketing Practices Act allows the Court to decide the amount, whereas a previously agreed provision can declare the amount and therefore the parties do not rely on the Court's assessment.

## 5) Termination of franchise agreements

Franchise agreements are normally irrevocable in the stipulated duration of the contract. However, if no termination point is agreed, the usual term of notice in Danish law is between 3-6 months (fair notice).

In any case, the parties should regulate the legal matters between the parties according to expiration, particularly in terms of goodwill compensation, competition clause concerning the franchisee etc.

## 6) Transfer of franchise agreements

There is no judicial prohibition of the franchisor's right to transfer his/her rights to the business. It is on the other hand common to agree that the franchisee is not allowed to transfer the rights without the consent of the franchisor with regard to the high importance and the amount of resources spent on selecting the right franchisee in the first place.

## Dispute resolution and applicable law:

The Danish judicial regime consists primarily of a one-court system based on three instances from City Court to High Court to Supreme Court, however with alternative ways of dispute resolution also available such as arbitration and mediation, both judicial and extrajudicial.

Furthermore, in international commercial cases, the parties can agree on The Maritime and Commercial Court to be the chosen forum, which has special competence in international and commercial matters. It is however a condition that The Maritime and Commercial Court itself accepts the role as a rightful dispute resolution forum. These options are available to all.

It is customary for the parties in franchise agreements to agree upon arbitration as

the dispute resolution method in order to prevent disclosure of business secrets. In minor franchise agreements, it is recommendable to agree on a traditional court process in order to reduce costs and considering the relatively quick process time in the Danish judicial system compared to other countries.

Concerning the choice of applicable law to a franchise agreement, the principal rule is that the parties can freely determine which law is to govern the contract. This includes both arbitration and traditional legal proceedings. It is recommendable to agree on the choice of law in writing and to be explicit in relation to which set of rules is to govern.

DK

### Niels Gade-Jacobsen

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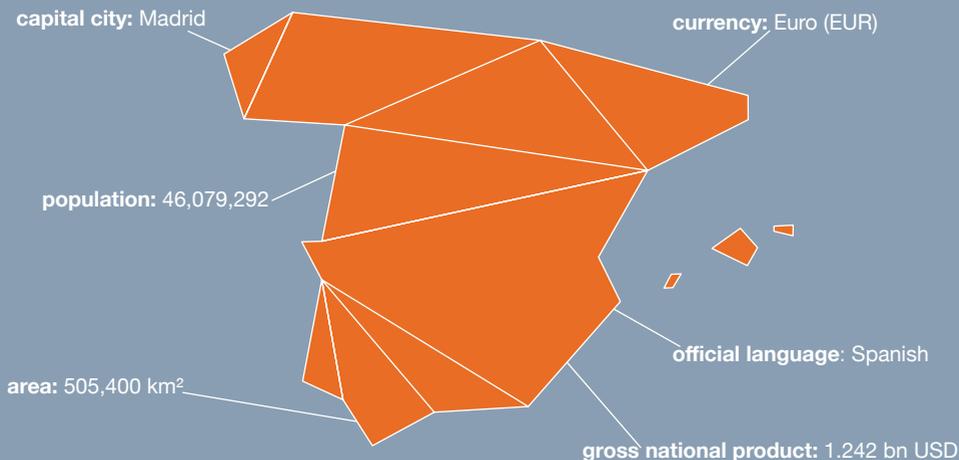
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## Franchising in SPAIN

- The law that regulates franchise in Spain is the Royal decree 201/2010.
- The relationship between franchisor and franchisees is based on the legal independence of their companies, limited by the framework of their agreement. Their relationships are independent, each one responds to the other for his contractual breaches.
- Individuals or legal entities that intend to develop the franchising activity in Spanish territory are obliged to communicate their data to the Register of Franchisors within three months from the start of the activity.

The franchise in Spain is legally defined as a system of collaboration between two legally independent parties, linked to each other through a contract whereby one of the parties, the franchisor company yields, in exchange for an economic remuneration, the right to use its trademark and their “know-how” business, for a limited time and in a determined territory.

The franchise responds to the need for a constant renewal of the market offer, obliged by the unstoppable and increasing appearance of new competitors and the requirement to offer new benefits.

The Spanish legislation is circumscribed to article 62 of the Law 7/96, of the 15th of January of “Ordenación de Comercio Minoristas”, and especially to “Real Decreto” 201/2010, of the 26th of February, which regulates the commercial activity in the franchise regime. The “Real Decreto” additionally gathers the European Union law in regard to retail organizing, specifically Ruling 2790/99 and Directive 2006/123.

The above mentioned legislation is brief and systematic. It defines the commercial activity of the franchise allowing a clear differentiation between the franchise, the commercial license, exclusive distribution rights, the agency contract, strict business opportunities, mere trademark cession, technology transfer and manufacturing license. Additionally, the “Real Decreto” regulates that the franchisor must have (i) intellectual or industrial property rights, (ii) a know-how which must be transferred to the franchisee, and (iii) the obligation from the franchisor to render commercial and technical assistance. This regulation is also strict in regard to the pre-contractual information that the franchisor must communicate to the potential franchisee. This information must be real and without fraud.

The franchisors registry is supervised by the Industry Ministry. This registry is created as a public registry with an administrative nature in which all natural or legal persons

which pretend to develop the franchise activity in Spain must communicate its data. Franchisors established in other European Union member states without a permanent establishment in Spain are exempt from this communication duty, none the less the applicable law to the exercise of commercial activity under franchise requires that the franchisor owns the title or license rights and are in force in Spain for the use of the brand and distinctive signs of the franchising entity.

The following information must be submitted to public authorities in order to obtain a franchise certificate:

Information concerning franchisors: name and address of the franchisor, address, registration data in the Commercial Register, if any, and the number or tax identification code.

Rights’ title of the industrial or intellectual property covered by the franchise agreement and a granted and in force accreditation of ownership or license rights of use, as well as its duration and possible legal actions brought by the holder or user of the mark, if any.

Description of business being franchised, stating the number of franchises available to the network and the number of establishments that comprise it, distinguishing the exploited directly by the franchisor operating under the regime of transfer of duty indicating the municipality and province in which they are located. They must also indicate for how long the company has carried out the franchiser activity, specifying owned and franchised establishments and franchisees who have ceased to belong to the network in Spain in the last two years.

In the event that the franchisor is a master franchisee, it must accompany the information related to the following data from the franchisor: name, company name, address, legal form and duration

of the master franchise agreement; and proof that it has a contract evidencing the assignment by the original franchisor.

The franchise ensures the quality of the franchised product, its originality and the knowledge already possessed by one of the parties - the franchisor - offers the possibility to other parties to join a business that implies a lower commercial risk.

National statistics show that 90% of entrepreneurs who decide to start their business independently will cease their activity before a year, compared to 10% of closures under a franchise system.

In recent years, the franchise has become an important tool for entrepreneurs and for business developments. In fact, according to the last business results about franchising in Spain, we can appreciate an increase in the past years in spite of a severe economic crisis. Throughout 2016, Spain's economic activity remained in an expansive trend with an advance in the GDP of 3.2%, one of the highest rates in the old continent. The contribution of domestic spending has been decisive in the excellent result obtained by the national

economy, leaving behind the long crisis initiated in 2008. Domestic household consumption grew in the third quarter of the year 3.5% year-on-year, with the annual closing expected to be in this environment.

The Spanish franchise system is currently composed of a total of 1.232 franchisor brands, of which 1,014 are of national origin (82.3%) and 218 (17.7%) are from 28 different countries. Foreign franchises brands are led by France (47), Italy (37), United States (36); UK (13) and Germany (12). These 5 countries bring together 66.5% of foreign franchisors brands with presence in Spain.

Of these 1,232 franchises, the sector with the highest number of brands is "Fashion", with a total of 204 networks which are integrated in eight subsectors of activity, followed by "Hostelry/Catering", with 174 chains disaggregated into six sub-sectors. "Beauty / Aesthetics" with 107 brands and " Specialized Stores" with 81.

It is also noteworthy the entry to the Spanish market of 11 new franchisor brands, 6 are related Business Consulting and Services to corporations and 5 in the Real estate sector.

The above data has been gathered from the Spanish Agency of Franchisors, entity which elaborates on a yearly basis a statistical study on the evolution of the franchise sector in Spain.

Our economic structure makes Spain a country of SMEs. The spanish entrepreneur values the possibilities that the franchise system offers; a different model of growth, a different model of risk management which is flexible enough to quickly adapt to the uncertainty of economic changes.

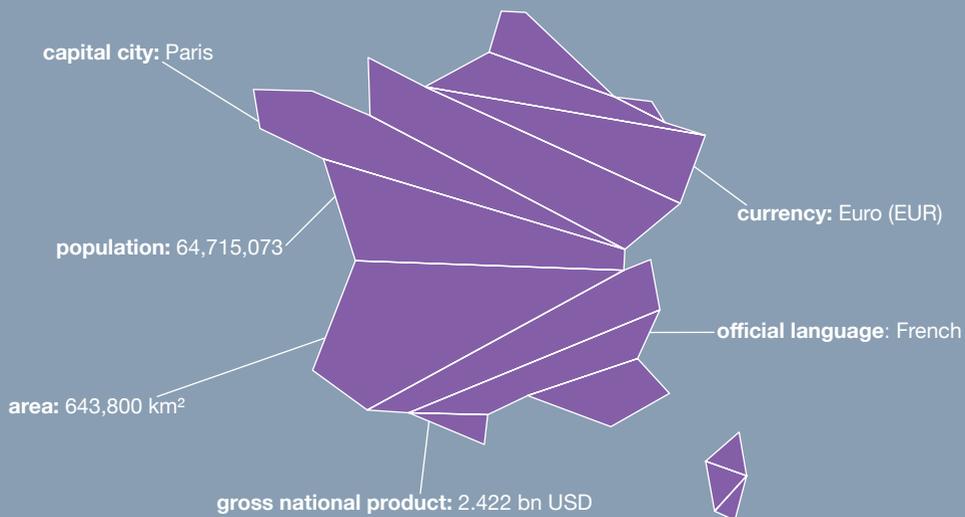
Based in our experience in dispute resolutions we recommend foreign franchisors to include an arbitration clause in order to avoid the Spanish court system which is usually slow and dilatory.

Our firm can provide foreign and local franchisors all the required services for a successful establishment in Spanish territory.

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## Franchising in FRANCE

- France is the European front runner in the franchising sector
- There is no specific statutory regime applicable to franchising in France
- French franchise law derives mainly from case law

## Areas of law regularly impacting franchise agreements

There are no rules or regulations defining a franchise under French law. The definition of franchise has been construed by French courts as a relationship characterised by three elements: (i) a trade mark licence, (ii) the transfer of specific know-how and (iii) the assistance provided to the franchisee by the franchisor. Although articles L. 330-1 and L. 330-3 of the French Commercial Code regulate the creation and maximum duration of a franchise agreement, French franchise law mainly derives from case law.

Except in a limited number of areas listed in article L. 151-3 of the French Monetary and Financial Code (e.g. the manufacture and marketing of weapons and ammunition) where a prior authorisation from the French Finance Ministry is required, foreign investors can freely invest in France, subject only to a declaration of foreign investments and/or a statistical declaration being filed in certain circumstances.

Most companies are incorporated in France either as a *société par actions simplifiée* (SAS), a *société à responsabilité limitée* (SARL) or a *société anonyme* (SA). These three corporate vehicles provide their shareholders with limited liability protection up to the amount of their respective shareholding. The SAS is, however, considered as the most flexible type of corporate vehicles in so far as it allows its shareholders to tailor the company to their needs. Corporate entities are created by the signature of their by-laws which must thereafter be filed with the clerk's office of the competent French Commercial Court to incorporate the company at the Trade and Companies Registry.

French consumer protection legislation is not applicable to franchise agreements as franchisees cannot generally be considered as "consumers". Franchisees however benefit from certain protection

under both the French Commercial Code and the French Civil Code which is directly inspired by consumer protection legislation (e.g.: prohibition of unfair clauses).

Competition law issues are governed by EU and French competition rules and regulations, and more specifically by:

(i) articles L. 420-1 and seq. of the French Commercial Code, which prohibit anti-competitive practices intended to restrict access to market, fix prices, limit or control production, opportunities, investment or technical progress, or divide markets or sources of supplies;

(ii) articles L. 442-1 and seq. of the French Commercial Code, which prohibit restrictive trade practices; and

(iii) European regulations against anti-competitive practices.

Franchisees are considered as independent traders. However, if during the term of a franchise agreement, the franchisee is placed in a subordinate relationship vis-à-vis the franchisor, French courts have held that the franchisee could be considered as an employee of the franchisor and that labour law should apply in such circumstances. In order to reduce this risk, franchisors should therefore avoid placing franchisees in a subordinate relationship and refrain from setting retail prices.

With regard to sales agency law, there is always a risk that a franchisee might be considered as the franchisor's sales agent if the franchisee acts on behalf of the franchisor. To mitigate this risk, franchisors should thus ensure that franchisees are paid directly by customers.

Franchisors and franchisees are primarily subject to corporate income tax and value added tax. Currently, the standard rate of corporate income tax in France is 33.33% and 28% for SMEs but it will

progressively be lowered down to 28% for all companies by 2020. Supplies of goods and services in France are subject to VAT at the standard rate of 20%, unless reduced rates or exemptions apply.

In order to be protected, trade marks must be registered with the INPI (National Intellectual Property Institute) as a national or an international trade mark or with the European Office for Harmonisation in the Internal Market as a European trade mark. Know-how and trade secrets are not protected per se under French law. Protection can nonetheless be granted if the franchisor requests that the franchisee signs a non-disclosure agreement listing precisely which information and data should be regarded as confidential. Copyright protection may only be available if the franchisor can demonstrate that the operations manual or other material is original.

### **Selected questions/aspects**

Pursuant to article L. 330-3 of the French Commercial Code, any person who provides to another person a trade name, a trade mark or a sign and requires from that person to commit to exercise its activity on an exclusive or quasi-exclusive basis, must supply to the other party, before signing any contract, a document giving truthful information in order to enable the other party to make an informed decision. The pre-contractual information document, which must be delivered at least 20 days before the execution of the franchise agreement, must inter alia include the following information: identification of the franchisor and its managers, information regarding the trade mark to be licensed, information regarding the franchisor's banks, business history of the franchisor, general and local market study and information on potential for development of the franchising system, presentation of the franchise network, main terms of the franchise agreement and amount of investment required from the franchisee. The sanctions for failing to comply with the pre-contractual

disclosure obligations are both criminal (each infringement is subject to a criminal fine of EUR1,500) and civil. The main civil sanctions are the invalidity of the franchise agreement and the obligation to pay compensation to the franchisee. Invalidity is however not automatic: the franchisee must demonstrate that its consent was vitiated and that the franchisee would not otherwise have agreed to sign the franchise agreement. In addition to invalidity or as an alternative sanction, the franchisor can be ordered to pay damages when failure to provide truthful information has caused direct harm to the franchisee. Damages generally amount to the gross margin that the franchisee would have realised if the information had been correctly disclosed. If the franchise agreement is rescinded, the franchisee may be entitled not only to the reimbursement of the franchise fees but also to compensation for the losses sustained during the exploitation of the franchise.

There are no provisions under French law regulating shared liability between franchisor and sub-franchisor. Although the sub-franchisor can be considered directly liable, the franchisor may also be held liable if it has disclosed wrongful information to the sub-franchisor or directly to the franchisee.

Apart from the non-binding AFNOR standard which requires that the franchise agreement be drafted in the language of the franchise's place of exploitation, there are no binding rules or regulations imposing the use of the French language in pre-contractual disclosure documents and/or franchise agreements.

In addition to French general commercial law, certain specific rules relating to distinct contractual obligations apply to franchise agreements (e.g.: according to article L. 330-3 of the French Commercial Code, an exclusive or quasi-exclusive supply provision cannot exceed ten years).

In France, there is no compulsory requirement regarding the nature, the amount, the payment currency or the settlement terms of franchise fees, which are therefore freely determined by the parties. The amount of default interest which can be charged on overdue payments is determined by the parties, provided it does not exceed three times the amount of the legal interest rate. If no default interest rate is provided in the franchise agreement, the applicable rate amounts to 10 per cent above the official interest applied by the European Central Bank in its most recent financing transaction.

A franchisee may be required to comply with confidentiality obligations. Confidentiality clauses should however be specific as French courts may interpret them restrictively.

Where a franchise agreement is concluded for an indefinite term, it may be terminated by the franchisor at any time by written notice. Any abrupt termination of an established commercial relationship is prohibited, except in case of breach by the franchisee of its main contractual obligations. Where a franchise agreement is concluded for a fixed term, generally it can only be cancelled in case of serious and repeated breaches by the franchisee of its main contractual obligations. Non-renewal of a franchise agreement following expiry is not considered wrongful. Most franchise agreements however contain specific provisions regarding renewal and pre-renewal negotiations. In such cases, franchisors are not considered to be at fault if they decide not to renew the franchise agreement provided however that they exercise their right not to renew.

As franchise agreements are concluded *intuitu personae*, any change of franchisee usually requires the franchisor's prior consent, failing which the franchise agreement may be terminated by the franchisor.

## Dispute Resolution and Applicable Law

In France, disputes are brought before specialised courts, depending on the matter involved. Franchise agreements usually provide that French local and commercial courts will be competent to hear any disputes regarding the terms of the franchising arrangements. International franchise agreements may also contain arbitration clauses.

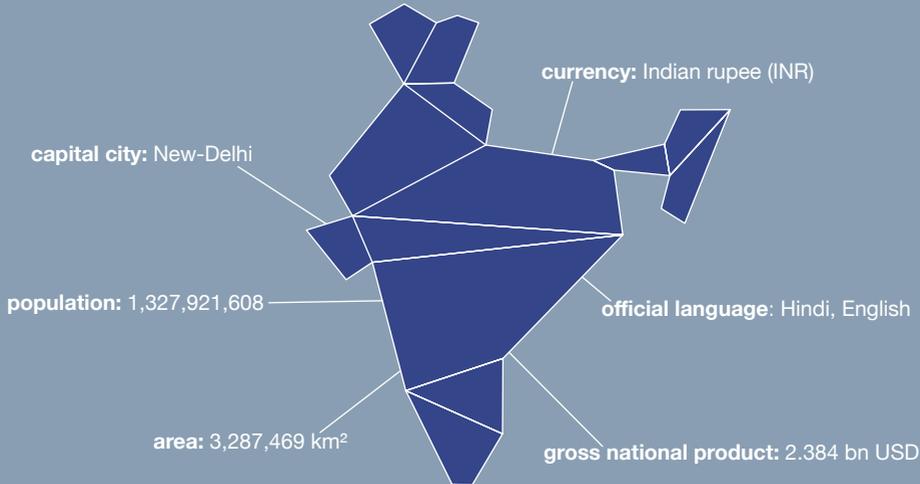
International agreements providing for a foreign governing law and/or a foreign jurisdiction clause are valid under French law, provided such provisions do not conflict with the French international public order, which is rarely the case in franchising matters.

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## Franchising in INDIA

- India does not have a codified law which governs franchising. Hence, the rights and liabilities of a franchisor and franchisee are subject to mutual agreement between the parties.
- India provides for an effective and robust regime for the protection of intellectual property rights of franchisors.
- Payment of license fee/royalty to foreign franchisors does not require government approval.

## Legal Basis of Franchise Law

India presently does not have a codified law regulating franchising and hence, is governed by a gamut of laws and regulations and numerous government agencies play a vital role in regulating franchising.

The term “franchise” and “franchisor” have been defined under the Finance Act, 1994. Section 65(47) of the Finance Act, 2005 defines the term “**Franchise**” as an agreement by which a franchisee is granted representational right to sell or manufacture goods or to provide services or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved.

The term “**Franchisor**” has been defined under Section 65(48) of the Finance Act, 1994, as any person who enters into a Franchise relationship with the franchisee and includes any associate of the franchisor or a person designated by the franchisor to enter into Franchise on his behalf. It is to be noted that although the aforesaid definitions of franchise and franchisor are only pertinent in relation to applicability of service tax, the same fills the absence of any clear statute on franchising in India.

## Foreign Franchisor

The activities of a foreign franchisor in India are governed by the Foreign Exchange Management Act, 1999 as well as the Foreign Direct Investment Policy (“**FDI**”) published by the Government of India.

A foreign franchisor can either directly establish in the form of a subsidiary or joint venture and organized as a company or a limited liability partnership in India or enter into a master franchise agreement or by way of individual franchise to a franchisee in India.

In order to set up a Limited Liability Partnership a minimum of two partners

is required along with a registered office location within India. The formation of a private company requires a minimum of two shareholders and a public company can be formed with a minimum seven shareholders.

## Consumer Protection Law

A franchisee does not fall within the ambit of a ‘consumer’ under the Consumer Protection Act, 1986 (“**COPRA**”) given franchising is deemed to be a commercial activity. However, under COPRA the consumer can institute a ‘complaint’ (as defined under Section 2(c) of COPRA) against a manufacturer or service provider for any unfair trade practices or restrictive trade practices, defective goods, goods sold which are hazardous to life and safety. Therefore, both the franchisor and the franchisee can be held liable for a consumer complaint. Franchisor may protect itself contractually through indemnity provisions built in a franchise agreement.

## Competition Law

Under the Competition Act, 2002 the franchisor can be held liable for any anti-competitive agreements which causes or are likely to cause an appreciable adverse effect on competition within India as well as for abuse of dominant position.

## Labour Law

The franchisee in India would be governed by a plethora of labour and employment laws and regulations which are center and state specific. However, a franchisee can only be deemed to be an employee of the franchisor subject to its franchise agreement. If such a franchisee is deemed to be an employee of the franchisor, then the franchisor shall also be governed by various labour law obligations.

## Tax Law

The franchise arrangement is subject to direct as well as indirect taxes. Income arising/accruing in India is subject to

the Income Tax Act, 1961 (“**Income Tax Act**”). When the income of a foreign franchisor arises/accrues in India through or from any ‘business connection’ in India, then such an income is subject to withholding tax. The tax is levied on the remittance to the foreign franchisor which accrues/arises in the form of royalty payment, fee for technical services. However, if such an income is classified as business income not being a royalty payment or fee for technical services then the same would not be subject to withholding tax. However, if non-resident is from a country which has entered into a tax treaty with India, then such a non-resident shall be entitled to relief under the tax treaty. As per Section 90(2) of the Income Tax Act in a scenario where the foreign taxpayer’s country has entered into a double taxation avoidance agreement with India, then the provisions of either the tax treaty or the Income Tax Act shall apply which are more favourable to the non-resident.

Under the Indian tax treaty the business income of a non-resident is taxable to the extent that is attributable to a ‘Permanent Establishment’. The tests for ‘Permanent Establishment’ are firstly, fixed place of business, secondly presence of foreign personnel in India and thirdly, creation of an agency. If the franchise arrangement becomes a ‘Permanent Establishment’, then the franchisor shall become liable to pay tax in India.

### **Intellectual Property Rights**

Trademarks in India are governed by the Trademarks Act, 1957 and are territorial in nature. In order to have an enforceable claim over a trademark in India, the trademark has to be registered as per the procedure laid down under the Trademarks Act. An Indian registered trademark owner has the right to institute proceedings for infringement of the mark and seek remedy in the form of injunctions, damages and accounts for profits. If the franchisor chooses not to register the

mark in India, then it can only avail the remedy of passing-off against infringement of the mark. Protection under Madrid Protocol for international trademarks is available in India.

### **Pre-disclosure Requirements**

India does not have any statutory pre-sale disclosure requirements applicable to a franchisor. It is advisable for the franchisee to undertake an independent due diligence exercise in order to ascertain the viability of entering into a franchising agreement. It would be prudent to draft all documents in English.

### **Franchise Fee**

The parties by mutual agreement may fix a franchise fee as well amount of interest that may be charged for outstanding payments. Currently, there are no restrictions on a franchisee to make payments to a foreign franchisor in the franchisor’s domestic currency. However, the parties must assess the applicable tax provisions as well as norms on remittance as laid down by Reserve Bank of India from time to time.

A franchise agreement should stipulate grounds for **termination**. The term of an agreement and **renewal** of such term can be decided by the parties to the agreement. Indian courts recognize confidentiality provisions built into contracts. The party aggrieved by the breach of the **confidentiality** clause can claim injunction and damages. Non-compete provisions which operate post termination are not enforceable in India.

If there is a **breach** of the franchisee agreement, remedies in the form of specific performance of the contract, suit for damages for breach, suit for injunction, etc. may be brought. **Dispute resolution** in India is through courts or arbitration or mediation or conciliation. The court system in India has three basic levels consisting of the subordinate courts, the high courts and the Supreme Court.

Common law system is followed in India. Dispute resolution through courts may be time consuming, however quick remedy in the form of arbitration is available. The Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) governs arbitration proceedings in India. The recent amendment to the Arbitration Act has made the process quicker by providing a time limit of twelve months to complete the arbitral process. The amendment also provides for a fast track procedure (at the behest of the parties) whereby the process can be cleared within a span of six months.

The parties can also choose to undertake arbitration in a foreign country. Indian courts have the power to enforce such foreign awards by virtue of India being a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Law governing the franchise agreement can be freely chosen by the parties. The local courts of India have the authority to recognize the foreign law in case the franchisor is a foreign entity.

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## Franchising in IRELAND

- Franchising is a very flexible method of doing business in Ireland
- Franchising in Ireland is very similar to the UK model
- In recent years there has been rising international interest in the Irish market and greater levels of investment and confidence in the Irish franchise market.

## Legal Basis of Franchise Law in Ireland

There is no statutory definition of a franchise or franchising under Irish law. In practice, a franchise is an agreement under which the franchisor grants the franchisee the right to exploit a package of IP rights. It usually also involves the exclusive distribution or purchase of goods or services. A franchise may also involve the franchisee entering into a related lease agreement or software licence agreement.

Franchising is not specifically regulated by law in Ireland. Franchisees are not protected by any other laws or regulations, such as those protecting local agents or distributors. Franchises that involve business in regulated industries (for example, the provision of healthcare services) must comply with applicable regulatory requirements, regardless of the governing law and jurisdiction of the franchise agreement.

## Specifics regarding foreign franchisors

There are no specific restrictions imposed on foreign franchisors operating in Ireland, and no statutory approvals are required when entering the Irish market.

It may be necessary for a foreign franchisor to register as branch, or establish a standalone Irish incorporated company in Ireland.

There are no laws that require franchise agreements prepared under the laws of a foreign jurisdiction, or certain provisions in them (for example, exclusion clauses and the provision of local guarantees), to be adapted to be enforceable locally. However, franchise agreements are usually amended to refer to Irish legislation, even when they include foreign governing law and jurisdiction clauses.

## Corporate Law

A franchisor may operate in Ireland as a sole trader, partnership or company. The most common business model for

franchisors is a company limited by shares (established under the Irish Companies Act 2014).

Incorporating an Irish company limited by shares requires certain documentation to be prepared and filed at the Irish Companies Registration Office, including details such as the identity of the relevant director[s] and secretary, details of the company secretary and details of the share capital of the company.

There are no specific restrictions on a foreign business establishing in Ireland, provided that the relevant local requirements as to establishment are complied with.

## Irish Consumer Protection Law

Ireland has various consumer protection laws, although there is no general definition of a consumer. Generally, however, a consumer must be a natural person (whether in Ireland) who is acting for purposes unrelated to the person's trade or business. A franchisee is unlikely to be deemed a consumer.

## Irish Anti-Trust / Competition Law

Generally, the Irish competition authorities have taken a favourable view of franchising. Irish competition law broadly mirrors EU law.

Prima facie, any agreement between undertakings that have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services, in Ireland, are prohibited. Franchise agreements, provided they have been drafted in light of the relevant prohibition, will normally not be prohibited as a matter of Irish competition law.

## Labor Law Aspects

There are no examples of cases where the courts have considered a franchisee or its employees as employees of a franchisor. In practice, most franchise agreements will specifically exclude this possibility.

Irish employment law is complex, with over 30 pieces of major employment legislation in force. It is recommended that franchisors ensure that any actions they take do not raise the possibility of a franchisee being able to assert that it is in reality an employee.

### **Irish Sales Agent Law**

An agent under the European Union (Commercial Agents) Regulations 1994 (as amended) is defined as an individual who has “continuing authority to negotiate the sale or purchase of goods on behalf of another person”. Accordingly, this is unlikely to apply to a franchisee and therefore, there are no applicable agency laws in Ireland that should apply to a franchise relationship.

### **Irish Tax Law**

Foreign businesses that have a permanent establishment in Ireland will be taxable in Ireland and there are no tax rules that specifically apply to franchising, so franchisors will be subject to taxation in the same way as other entities of that nature.

Generally, dividends paid and other distributions made by Irish-resident companies are subject to dividend withholding tax (“DWT”) at a rate of 20%. However, DWT does not apply when an Irish-resident company pays dividends or make other distributions to any of the following:

- An EU resident person.
- A person resident in a jurisdiction that has concluded a double tax treaty with Ireland.
- A person controlled by the above persons.

### **Aspects of IPR Law (esp. trademark law, copyright law, patent law)**

In Ireland, typically, the franchisee is granted a licence to use the relevant IPRs granted, in connection with the business,

in the allocated territory for the term of the agreement. The franchisor retains ownership of the IPR. Under Irish law, there are no restrictions on the franchisor's ability to limit the use of IPRs for the purposes of the franchised business, or to carve out express reservations from the rights granted.

Any licences granted over IPRs (including trade marks, copyright, design rights, patent rights and any other relevant IPRs), as distinct from the IPRs themselves, can be registered with the Irish Controller of Patents, Designs and Trade Marks. Registration is not mandatory.

### **10. Pre-Sale disclosure / pre-contractual information**

There are no formal pre-contract disclosure requirements in Ireland.

The Irish Franchise Association's Code of Ethical Conduct requires its members to make full and accurate written disclosure of all information material to the franchise relationship to prospective franchisees within a reasonable time before the execution of any binding documents. This is not a binding legal obligation.

To create a formal contract, the contract must be signed by both parties and exchanged (there must also be consideration). There are no language, notarisation or registration requirements to create a binding franchise agreement.

### **Legal restrictions affecting franchise agreements in Ireland**

Local law does not require that particular provisions must be expressly included in a franchise agreement.

Exclusion and entire agreement clauses are enforceable in Ireland, and are generally effective to protect the franchisor. However, the benefit of exclusion and entire agreement clauses may be lost if there was fraud or misrepresentation that induced a franchisee to enter into a contract.

## Franchise Fees

There are no specific requirements in relation to the nature, amount or payment of franchise fees, and the franchise agreement will provide for these matters. Regarding interest on overdue payments, while there are no statutory restrictions in business relationships, the level of interest that can be charged may not amount to a penalty if it is to be enforceable.

Generally, no exchange control or currency regulations apply to payments to an overseas franchisor.

## Confidentiality clauses

It is usual for a potential franchisee or master licensee to sign a confidentiality agreement before entering into negotiations for a franchise, which are fully enforceable under Irish law.

## Termination of franchise agreements

The only pre-conditions that need to be satisfied before terminating a franchise agreement are those contained in the agreement, save in respect of a fundamental breach of the terms of the franchise agreement. Under Irish law, there is not statutory right of renewal. Any right to renew must be incorporated in the agreement.

## Transfer of franchise agreements

It would be normal under Irish law to include a restriction on the franchisee's ability to transfer the franchise arrangement. It would also be normal for the franchise agreement to contain provisions dealing with situations where the "control" of the franchisee has changed from one party to another.

## Dispute Resolution and Court System

Most franchise agreements will provide for mediation and/or arbitration before a dispute is referred to court for adjudication. Mediation is not mandatory but increasingly, the Court can ask the parties to mediate.

Litigation costs are generally quite high and operate as a significant disincentive to a party contemplating taking enforcement proceedings of any kind.

Civil proceedings may be commenced in the Circuit Court or the High Court, depending on the value and complexity of the claim. A decision from the High Court may be appealed to the Court of Appeal if the case raises an important point of principle or practice, or if there is a compelling reason.

In international disputes between an overseas franchisor and a local franchisee or master franchisee, a requirement for an overseas forum and overseas governing law will be enforceable.

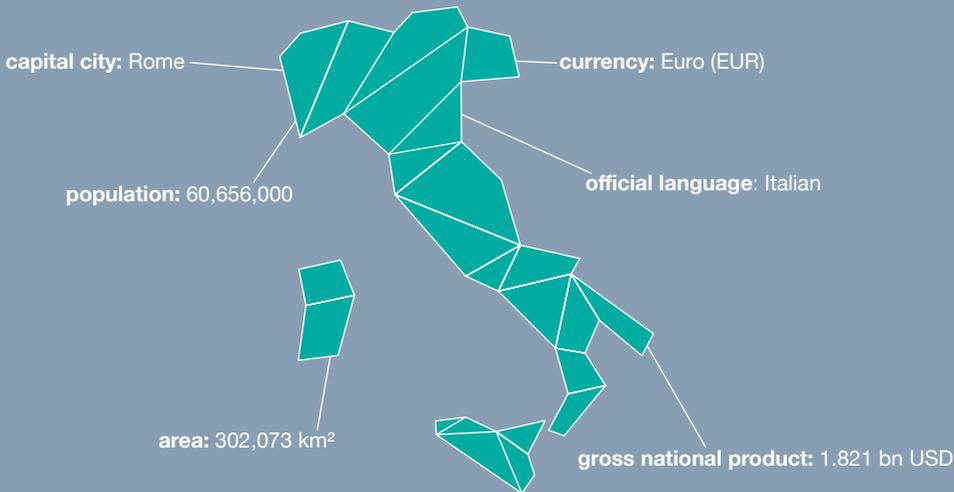
## Applicable Law

The Irish courts will recognise a choice of foreign law in a franchise agreement for a business operating in Ireland. Save as already highlighted above, there are no mandatory local rules that apply despite a choice of foreign law.

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## Franchising in ITALY

- franchise agreements must be executed in writing (lack of this form leads to nullity);
- significant disclosure obligations lie upon the Franchisor. At least 30 days prior to the execution of the franchise agreement, the Franchisor must provide the franchisee with a final and complete draft of the agreement itself, with certain annexes (details of the Franchisor, list of trademarks used in

the franchising system, key features of the Franchisor's activity, variation of the number of franchisees year by year);

- the duration of franchise agreements cannot be less than 3 years.

## Legal definition

According to Law 129/2004, the franchise agreement is a contract between two economically and legally independent parties whereby one party (Franchisor) grants to the other (Franchisee), upon consideration, a set of industrial or intellectual property rights by including the Franchisee in a system involving several affiliates in a territory with the aim of marketing certain goods or services.

## Other provisions applicable to franchise agreements:

The general principles of Italian contract law are also applicable to franchise agreements.

Mandatory requirements of franchise agreements: franchise agreements are null and void if not executed in writing.

Furthermore, a franchise agreement must contain the following:

- the amount of investments and any entry fee that the Franchisee must pay before carrying out any activity
- the method of calculation and payment of royalties and the possible indication of a minimum turnover to be reached by the Franchisee
- the scope of territorial exclusivity
- the details of the know-how provided by the Franchisor
- the acknowledgment by the Franchisee of the know-how granted by the Franchisor
- the characteristics of the services offered by the Franchisor
- the conditions for renewal, termination or transfer of the franchise agreement.

Should a franchise agreement lack any of

the above, the same could be declared invalid by a Court, without prejudice to the Franchisee's right to claim for damages.

## Disclosure obligations

At least 30 days prior to the execution of the franchise agreement, the Franchisor must provide the franchisee with a final and complete draft of the agreement itself, with certain annexes (details of the Franchisor, list of trademarks used in the franchising system, key features of the Franchisor's activity, variation of the number of franchisees year by year). The franchisor may refuse to disclose the above, if the information must be kept confidential for objective reasons. According to prevailing legal literature, any breach of such obligations is a violation of the obligation of dealing fairly and in good faith; hence the franchise agreement could be annulled, without prejudice to the Franchisee's right to claim for damages.

## Foreign franchisors

If the franchise agreement is subject to Italian law and the Franchisor never operated in Italy, the Franchisor must also provide the Franchisee with:

- a list of all its franchisees and direct sales units by country. Upon request by the Franchisee, information on location and contact details of at least twenty operating franchisees (or all existing franchisees, if less)
- variation of the number of franchisees and related locations during previous 3 years
- details about proceedings of the previous 3 years for which the decision or award has become final.

## Company law

The most commonly used types of Italian companies are the società a responsabilità limitata – S.r.l. (limited liability company) and the società per azioni - S.p.A. (corporation). In an S.r.l., the minimum

share capital is 1 Euro, the appointment of a supervisory body is required only if certain revenue / net asset / employee thresholds are exceeded and a more flexible governance is possible. In an S.p.A., the minimum share capital is Euro 50,000, a supervisory body and auditors are always required.

All directors must have an Italian tax registration number.

In general, there is no restriction regarding the incorporation of a company by foreign shareholders (unless the laws of the jurisdiction of the shareholders impose restrictions, in which case the same restrictions will apply – provided that this reciprocity principle operates only with respect to non EU shareholders).

Special regimes and tax benefits may apply if the company meets “innovation” and “technology” criteria.

### **Tax**

Foreign companies with a permanent establishment in Italy must have an Italian VAT account. In general, the following corporate taxes apply: income tax (flat rate of 24%); a regional tax levied on the value of the production gross of costs for personnel and other financial costs (min 3.90%). The ordinary VAT rate is 22%.

### **IPR**

The protection and enforcement of intellectual property rights are provided for by the Code of Industrial Property (Legislative Decree 30/2005).

The protection of trademarks and inventions is granted by registering them with the Italian Patents and Trademarks Office. Registration for trademarks lasts for 10 years and it can be renewed for additional periods of 10 years, without time restrictions. Registration for patents lasts 20 years. Trademark registrations enforceable in Italy are also (i) EUIPO registration (EU Trademark) (ii) international

registration under the Madrid Protocol. Patent protection is also available under the EPC by means of a European Patent or under the Patent Cooperation Treaty.

Designs can be recorded and protected at national, EU and international level.

The protection of know-how and trade secrets is regulated by the Code of Industrial Property and by the provisions on unfair competition practices.

### **Franchise fees / interest rate**

Italian law does not specify the amount or the method of payment of the fees due by the Franchisee. If the parties do not agree on a specific interest rate for any outstanding amount, the provisions of Legislative Decree 231/2002 on late payments in commercial transactions apply (European Central Bank interest rate + 800 basis points).

### **Confidentiality clauses**

Such clauses must be expressly inserted in the franchise agreement. The term for the confidentiality obligation can extend also after termination of the agreement.

### **Assignment of franchise agreements**

The Franchisor can restrict the Franchisee's ability to transfer or assign the agreement. The agreement can provide for change of control clauses.

### **Termination of franchise agreements**

Franchise agreements may be entered into either for an indefinite or for a fixed term. In case of a fixed-term franchise agreement, the Franchisor has no obligation to renew the agreement (although the parties can agree otherwise). The duration of franchise agreements cannot be less than 3 years, without prejudice to the right of each party to terminate the agreement for breach.

### **Competition law**

Franchise agreements may contain non-competition or exclusivity clauses.

These clauses must comply with national and EU laws and regulations governing competition. According to some case law, if, during the term of the agreement, the Franchisor diverts (or attempts to divert) the Franchisee's customers, the former may be liable for unfair competition practices.

### Employment law

The Franchisee is an independent legal entity or entrepreneur: the same and its employees cannot be considered as employees of the Franchisor. However, should the Franchisor extensively interfere with the Franchisee's conduct of its business or provide the same (or its employees) with specific and binding instructions or orders or should the Franchisee or its employees be hierarchically subject to the Franchisor's personnel, the Franchisee (if the same is an individual entrepreneur) and its employees could claim to be acknowledged as employees of the Franchisor.

### Sales Agent Law

Unless expressly agreed between the parties, the Franchisee cannot be deemed as an agent of the Franchisor and therefore no provision of law relating to agents is applicable to franchisees. However, according to some legal literature, the termination indemnity provided by the Civil Code for the benefit of agents may be claimed by the Franchisee, should the franchise agreement contain a non-competition clause.

### Dispute resolution

The parties may decide to submit a dispute either to a Court or to arbitration. The parties may also agree that, before resorting to litigation, they should attempt conciliation before the chamber of commerce in the territory where the Franchisee has its registered office. In Italy, the court system contemplates a first instance Court, the Court of Appeal and the Supreme Court. Arbitration (either national or international) is regulated by the Italian

Civil Procedure Code and by the supplementary rules set forth in the relevant arbitral regulations. An award of a regulated arbitration (arbitrato rituale) may be enforced as a Court decision.

### Applicable Law

The parties are free to agree upon the applicable law.

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## Franchising in JAPAN

- Although there is no statutory regulation specific to franchising, franchise agreements and franchisor conduct are subject to restrictions under competition law and general laws in Japan.
- Foreign franchisors may operate in Japan in substantially the same manner as domestic franchisors, through either subsidiaries or branch offices.
- Recently, there are organized franchisees claiming they are unjustly exploited by large-scale franchisors and in need of more protection. The movement involves several legal disputes and has gained some decisions in its favour.

**There is no general definition of the franchise business existing in current statutes.** The Small and Medium-sized Retail Business Promotion Act (SMRBPA) defines “specified chain business” but only relates to retail franchising of “small or medium” sized franchisees. The Japan Fair Trade Commission (JFTC) enforces the Anti-monopoly Act (competition law), and gives a general definition of franchising in its guideline (Guideline) (not legally binding, but still exerts influence on franchisors) as “a form of business in which the head office provides the member with the rights to use a specific trademark and trade name, and provides coordinated control, guidance, and support for the member’s business and its management. The head office may provide support in relation to the selling of commodities and the provision of services. In return, the member pays the head office”. **There are no separate laws that relate specifically and solely to franchising;** however, the Civil Code, governing contractual relationships, and other general laws of Japan apply to franchise-related issues.

**There are no restrictions on foreign investment specific to franchises.** As such, foreign franchisors may freely grant master franchise, franchise, or similar rights to local corporations. Foreign investment in general, including foreign franchising, will be restricted by the Foreign Exchange and Foreign Trade Act (FEFTA) which mandates foreign investors to make filings when taking certain actions such as the acquisition of shares of local corporations. Several other laws also restrict foreign investment in areas such as mining, telecommunication, broadcasting, shipping and aviation.

**A foreign franchisor may establish entities carrying out businesses in Japan in two modes,** namely, branch office or subsidiary. Since a **branch office** is recognized as a part of a foreign company, all the rights and liabilities sourced therefrom will belong to the foreign company.

**A subsidiary usually takes the form of kabushiki kaisha (stock company)** which may be wholly owned. A foreign franchisor needs to prepare its articles of incorporation and other documents and concurrently, elect directors, pay capital (no minimum amount required) and more, before registering a new kabushiki kaisha with the Legal Affairs Bureau.

**The Consumer Contract Act, a consumer protection law, is not applicable to franchise agreements.** The law relates only to contracts between business operators and consumers whereas the parties to a franchise agreement are both business operators.

**Acts of franchisors that impose disadvantages on franchisees may constitute violations of the Anti-monopoly Act,** in which franchisor-franchisee relationships are one of the primary concerns. The Guideline identifies franchisors’ actions or provisions of franchise agreements that would constitute “unfair trade practices” under the statute, such as, among others, restrictions on choice of suppliers, discount sales or sale price, forced purchase quota, unilateral revision of franchise agreement, non-competition clauses and tie-in sales. The other JFTC guidelines put forth instances where franchisors’ acts against their business affiliates (not limited to franchisors) such as suppliers would infringe the provisions of the act. Franchisors violating the law face JFTC administrative dispositions such as cease and desist orders or penalties while injured franchisees may claim for damages caused by such acts in private lawsuits.

**A franchisee is not considered as a worker under the labour related laws** as it is an independent enterprise without being directed or supervised by a franchisor. However, two recent orders by local Labour Committees, the administrative authorities with jurisdiction over collective labour disputes, found

the franchisees operating convenience stores as “workers” in relation to labour unions (both orders have been appealed). However, it is not certain whether a franchisee would be deemed as a “worker” in other respects, such as, among others, labour conditions, minimum wage, and dismissal.

While it is unlikely that a franchisee would be deemed as an **agent or a distributor**, franchise agreements in many cases stipulate that the franchisee shall not be considered as such. Nonetheless, under Japanese laws, franchisees and sales agents or distributors are basically treated similarly.

**Income of foreign franchisors established as subsidiaries is subject to taxes such as corporate tax, corporate enterprise tax, and corporate inhabitant tax, among others, regardless of the place such income accrued.**

On the other hand, if they are branches of foreign corporations, only income earned in Japan is taxable. **Consumption tax** (like VAT) is also imposed on foreign businesses and royalty fees are subject to the tax.

**In Japan, only registered trademarks enjoy protections as legal rights under the Trademark Act.** As such, a franchisor desiring to register a trademark must submit to the Commissioner of the Japan Patent Office an application for registration that provides the relevant information and documents.

**Court precedents citing a general provision of the Civil Code found franchisors to bear the duty to perform disclosure prior to contract.** The SMR-BPA mandates that covered franchisors conduct pre-contractual disclosure encompassing items such as business specifics and the franchise agreement content. The Guideline also advises all franchisors of the same and in practice many franchisors comply.

**There is no statutory regulation of franchise agreements and thus parties are free to negotiate the terms of the deal.** However, oppressive provisions imposed on franchisees, such as non-competition or pre-fixed penalty clauses, may be rendered void by a court to the extent conflicting with public policy under the Civil Code.

**There is no law regulating the nature, amount or payment of franchise fees.** Similarly, no legal restriction exists in relation to the **payment by franchisees to franchisors in foreign currencies.** Nevertheless, under the FEFTA, local franchisees must report to the Minister of Finance through the Bank of Japan after making a payment to foreign non-resident franchisors exceeding JPY 30 million (approx. US\$360,000). The franchise fees paid to foreign non-resident franchisors by local franchisees, to the extent they are paid as consideration for use of an industrial property right or any other right concerning technology, copyright, machinery or equipment, etc., are subject to withholding tax (currently 20.42 per cent per annum and a reduced rate may apply by applicable tax treaty). **Parties may freely agree on the interest rate for overdue franchise fees** a franchisee may owe to a franchisor. If there are no such provisions, the rate shall be six per cent per annum by virtue of the Commercial Code.

**A party may file for an injunction and/or claim damages for breach of a confidentiality clause of a franchise agreement.** Aiming at protecting its know-how, franchisors may, and often do, impose non-competition provisions on franchisees extending after termination of the agreement.

In absence of contractual confidentiality clauses, a party may resort to the Unfair Competition Prevention Act, which prohibits certain trade secret disclosures.

A party may **terminate a franchise agreement** pursuant to termination clauses therein. In addition, under the Civil Code, when a party does not perform its contractual obligation, the other party may terminate the franchise agreement. However, there are cases where courts have restricted termination by franchisors based on general provisions of the Civil Code. Although the decisions vary in reasoning, multiple courts held that termination by a party is only valid when the mutual trust relationship between the parties was destroyed by the other party. Similarly, **franchisors' freedom to refuse renewing franchise agreements may be restrained by courts.**

**Franchisors may restrict franchisees' ability to transfer its franchise** to third parties. In practice, franchisors prohibit any form of transfer or assignment of franchisee's contractual status to a third party and more often than not a violation thereof constitutes grounds for termination.

**Litigation and arbitration are the primary means to resolve franchising related disputes.** Under the **three-tiered judicial system**, a party may file a case to a **District Court** which may then be appealed to a **High Court**, whose decision could be subject to a final appeal to the **Supreme Court**.

**Arbitration is beneficial for foreign franchisors** since the parties may agree on the language used therein. The procedure, held behind closed doors with arbitrators of the parties' choice, may proceed more efficiently and confidentially, and usually concludes more promptly than court cases.

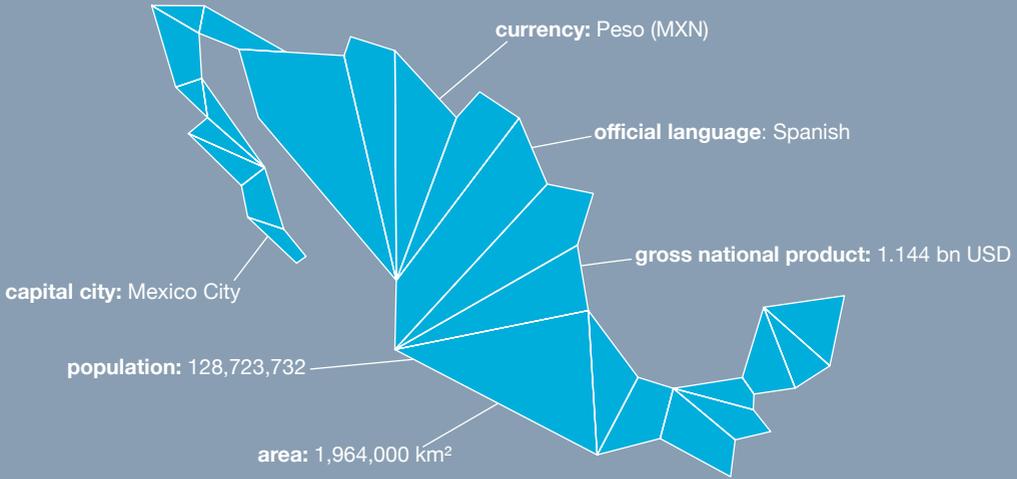
**Franchise agreements may be governed by law other than Japanese law.** It is advisable to select arbitration as the dispute resolution measure in such case so that the parties can nominate arbitrators familiar with the governing law.

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## Franchising in MEXICO

- Mexico is an attractive destination for franchises since they have a solid legal framework providing certainty to both franchisor and franchisee.
- The Mexican government supports small and medium enterprises, as a factor for the development of the internal market, including franchises.
- Franchises in Mexico are efficient business models for accessing economic success.

## Franchise Definition

The Industrial Property Law (IPL) states that a franchise shall exist when a license for the use of a mark is granted, technical know-how is transferred or technical assistance is provided, so that the person to whom the license is granted can produce or sell goods or provide services according to the operative, commercial and administrative methods established by the owner of the mark, in order that the quality, prestige and image of the products or services distinguished by said mark may be maintained.

## Applicable Laws

Mexican Constitution, Industrial Property Law, Commercial Code, General Corporations Law, Federal Civil Code, Copyright Law, Foreign Investment Law, Federal Consumer Protection Law and Federal Economic Competition Law

## Related Authorities

Mexican Institute of Industrial Property (IMPI in Spanish), National Copyright Institute, General Direction of Foreign Investment, Federal Commission of Economic Competition, and the Federal Attorney for Consumer Protection.

## Setting up a Franchise

When a franchisor wants to start its business in Mexico, it must register its trademarks and patents, protect its trade secrets and guarantee confidentiality and access to jurisdiction. At the same time, foreign businesses will have to establish a legal domicile in Mexico and register it before the Ministry of Finance for taxation purposes and to begin to generate income.

There are a variety of legal entity forms that differ in terms of the responsibilities which the partners assume before third parties. If a foreign franchisor desires to establish a business in Mexico, the recommended legal entity form is a limited company.

The entity must be formed by at least two partners or shareholders, it is necessary to incorporate the company before a Public Notary. An application to the Ministry of the Economy must be filed to obtain an authorization to use the preferred company name. Bylaws of a Mexican company are elaborated with the articles of incorporation.

A new Mexican company must be inscribed in the National Registry of Foreign Investment. Likewise, it will be necessary to register the company with the Mexican Informational System of Businesses.

## Franchise Disclosure Information

The franchisor must deliver to the future franchisee the information related to the situation that its business is in. Such information must be delivered in writing with the signature of both parties, at least 30 days before the franchise agreement takes effect.

Once the required pre-contractual information is delivered, there is no provision that requires divulgence of additional information to the franchisee. The information that must be delivered is: the description of the franchise, the intellectual property rights included with the franchise, the fees of the franchise for payment, the technical assistance that will be provided, the territory in which the franchise will be working.

If the franchisor fails to truthfully deliver the required information to the franchisee, the latter shall have the right to demand the annulment of the contract and can request damages in no less than one year. If the year has elapsed before filing the claim, the franchisee can only demand the annulment of the contract.

## Contractual Elements

The requirements and minimum contents that a franchise agreement should have are: the geographic zone, the location

and features of the establishment, inventory policies, marketing and publicity, the goods supplied and suppliers, technical training, performance evaluation, causes of termination.

The parties can freely establish the nature, quantity and form of payment of the fees of the franchise, also the interest rates that apply as long as they are not excessive. If the rates are found to be null, a legal rate of 6% annually will apply.

Commercial transactions must be paid in national currency. Nevertheless, commercial transactions may be contracted in foreign currency, able to be paid with foreign or national money at the exchange rate of the day in which the payment is made.

The parties may terminate the contract if they agreed so. In case one of them fails to comply with an essential obligation of the contract, the harmed party may require its enforcement or may rescind it and, demand the payment of damages if a contractual penalty is not stipulated.

The obligation to renew the contract at its termination is not required by any provision of law. It may only be renewed as agreed.

The restriction on the transmission of rights of the franchise can be contractually stipulated. If so, the stated conditions for the restriction govern.

The language that can be used in the franchise agreement can be foreign. But, in the event of a legal controversy in which it becomes necessary to offer the agreement, it must be translated to Spanish.

The parties may establish that foreign law governs the franchise agreement. Nevertheless, because it is a contract having legal effect in Mexico, it is recommended that the applicable contractual

provisions do not contravene the provisions of the public national order. Otherwise, they will be declared null, and national law will apply.

### **Disputes**

All types of alternative resolution mechanisms can be used to solve any dispute regarding franchise agreements. Also, any controversy arising from these agreements can be decided by local or federal judges.

The type of trial ordinarily will be commercial, and the tiers of the trial consist of the first instance, the appeal and the constitutional proceedings.

Arbitration is always possible, provided that the dispute is for a considerable amount, because the costs for the arbiter and arbitration proceeding are considerable.

### **Intellectual Property Rights**

A franchisor's intellectual property rights are protected by obtaining a title of rights granted by IMPI for both trademarks and patents. Copyrights are protected by material fixation.

The owner has the right to exploit these rights in a monopolistic form for the duration established by the law in each case. Such right is what permits him to license them in favor of franchisees and to oppose third parties' unauthorized use of them.

### **Confidentiality aspects**

The industrial and commercial information which the franchisor keeps confidential and which has a competitive or economic advantage is considered a trade secret. It is sufficient that the owner has taken the necessary steps to maintain its confidentiality.

The information that has been disclosed in relation to the franchise must be guarded by both parties, if it is considered

confidential. In case a party divulges the information, he will be responsible for the damages that result.

In cases in which the directors or employees have individually assumed particular obligations due to the franchise agreement, such as guarding confidential information, that responsibility extends to them.

Confidentiality clauses are enforceable, they have a specific regulation in the IPL establishing the cause of payment for damages or criminal actions if such is the case.

### **Other legal Considerations**

The Economic Competition Law governs antitrust and competition matters. The franchise agreements must comply with it in order to avoid business schemes that might be considered monopolistic.

Every foreign business or individual that generates income, disposes of assets or renders services within Mexico is subject to the Income Tax Law and the Value Added Tax Law.

In cases related to the payment of the Income Tax the law contemplates variable rates for individuals according to the amount of the income. For businesses, the rate is fixed at 30% without considering the income amount. In both cases, the tax is paid on taxable income.

The only applicable rate for the Consumption Tax is 16% on the value of the sale.

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## Franchising in MALAYSIA

- Currently, franchise makes up to only below 10% of the Malaysia's domestic market with over 700 registered franchise systems and 6,000 franchising outlets.
- Malaysia regularises franchising through the Franchise Act 1998 ("FA"), as amended by the Franchise (Amendment) Act 2012 with effect on 1 January 2013.
- The Franchise Development Division ("**Registrar**") under the purview of Ministry of Domestic Trade, Cooperatives and Consumerism ("**MDTCC**") enforces the franchising laws in Malaysia.

## Franchising Law

The legal definition of “franchise” under the FA refers to an agreement (whether written or oral) where (1) franchisor grants franchisee with the right to operate a business based on the franchise system for a term, and the right to use the confidential information or intellectual property belonging or licensed to the franchisor; (2) franchisor possesses the right to administer continuous control over the franchisee’s business operations in accordance with the franchise system; and (3) for an agreed fee or other form of consideration in exchange of the franchise rights.

The FA imposes a system of registration on the franchisors, master franchisees and franchisees of foreign franchisors before any offer of sale or operation of franchises in Malaysia. The sale of franchise is deemed to be in Malaysia if (1) the offer is made in Malaysia and accepted within or outside Malaysia; or (2) the offer is made outside Malaysia and accepted in Malaysia; or (3) the franchise business is or will be operated in Malaysia.

To qualify for registration, franchisors must demonstrate that their business is profitable in the last 3 years. As for the franchisees of a local franchisor or master franchisee, they are required to register within 14 days from signing the franchise agreement. A foreign franchisor must adhere to the same registration and qualification requirements above before any offer of sale of its franchise in Malaysia.

## Company Law

A private limited company is the most practical and common form of entity relevant to franchising. The incorporation of companies regulated under the provisions of Companies Act 1965 is recently repealed by the Companies Act 2016 (“**CA 2016**”) effectively on 31 January 2017. Under the CA 2016, a private limited company can be incorporated by a single shareholder and one resident director.

Prior to incorporation, name search may first be conducted to determine whether the proposed name for the intended company is available. If the proposed name is approved, applicant may proceed to lodge the incorporation documents with the Companies Commission of Malaysia.

There is no specific equity condition for companies undertaking franchise business. However, foreign companies are encouraged to join venture with a Malaysian entity or resident. In addition, foreign equity restrictions may be applicable to certain specific industries and it is advisable to consult a local legal advisors.

## Consumer Protection Law

The Consumer Protection Act 1999 (“**CPA**”) only applies to the contractual relationship or provision of goods and/or services between the franchisees and consumers. The protection afforded by the CPA would not apply to franchisees or franchisors as they are both considered as business operators rather than “consumers”.

## Anti-Competition Law

The Competition Act 2010 prohibits all agreements that are deemed anti-competitive and abuse market dominance. Nonetheless, the Malaysian Competition Act 2010 and Guidelines cannot apply to agreements which are required to comply with specific legislation. A franchise agreement with non-compete provisions for the purposes of adhering to the statutory requirements under the Act would not be considered as anti-competitive.

## Labour Law

It is unlikely that a franchisee might be deemed as employees of the franchisor. Having said that, in order to minimize any potential risks, the franchise agreement between the franchisor and franchisee should state clearly that such relationship does not exist and that the franchisee could take appropriate steps to demon-

strate its franchise status and independent undertaking to the public.

### **Sales Agent Law**

There is no specific sales agent law in Malaysia, except that direct sales schemes (e.g. multi-level marketing, mail order sales etc.) are regulated under the Direct Sales Act and Direct Sales (Scheme and Conduct) Regulations 2001. Companies that undertake direct sales schemes in Malaysia must be licensed and their marketing plan and products must be approved by the Direct Selling Controller.

### **Tax**

The royalties, financial gains and profits collected by the franchisor is a taxable income and subject to the tax rate imposed by Malaysian Tax Authorities. Different tax rates will apply depending on whether the business is owned through a company or sole proprietorship.

### **Intellectual Property**

A franchisor is required to register his trademark or service mark relevant to his franchise with the Intellectual Property Corporation of Malaysia before applying for the registration of the franchise business.

### **Pre-sale Disclosure**

The FA requires the disclosure of the proposed franchise agreement terms, IP rights, business and financial details, costs and justification of fees by the franchisor to the franchisee at least 10 days before the execution of franchise agreement.

### **Franchise Agreement**

The FA requires a copy of the franchise agreement to be submitted for Registrar's approval prior to signing. The FA prescribes that the following mandatory issues (amongst others) must be addressed in the agreement, failing which the agreement may be deemed null and void:

- territorial rights and fees imposed on the franchise, a statement on cooling off period of not less than 7 working days, parties obligations, IP rights, duration and terms for renewal and effect of termination
- franchise term of not less 5 years
- details of promotion fund (if franchisor requires promotion payment from franchisee)
- non-compete in similar business during the franchise term and for 2 years after terminating franchise agreement
- no discrimination in fees, royalties, goods, services or equipment that may harm selected franchisees competitively

### **Franchise Fees**

There is no specific provision under the FA that governs franchise fees. Generally, franchisors must not cause overvaluation of fees and prices or unreasonable conduct that may risk the business interests of the franchise system. If the Registrar opines the fees are unreasonably high, the Registrar may require further information from the franchisor before the grant of approval.

### **Confidentiality Clause**

Pursuant to Section 26(1) of the FA, franchisees (including the directors, spouses and immediate family of the directors, and employees) must provide a written undertaking not to disclose any information contained in the operation manual or obtained from the franchisor during the franchise term and for 2 years after the expiration or termination of the franchise agreement. It is an offence under the FA if such written undertaking is not provided, and the franchisor may commence civil action if the franchisee breaches the confidentiality clauses.

### **Termination**

Termination may occur upon the expiry of the minimum term prescribed by the

FA or before the expiration date under the franchise agreement except for good causes (e.g, if the franchisee voluntarily abandons the business, the franchisee assigns the franchise rights for the benefit of creditors or repeatedly breached the franchise terms) or fails to remedy the breach within a period stated in a written notice given to the franchisee, which be a minimum of 14 days.

### **Transfer of Franchise**

A franchisor may restrict a franchisee's ability to transfer the franchise or ownership of a franchisee entity provided that the franchise agreement contains such restriction.

### **Disputes Resolution**

Parties may either refer disputes to the Malaysian courts system or alternative dispute resolution mechanisms such as mediation or arbitration. Unlike the court system where hearing or trial dates are scheduled by the court and proceedings are heard publicly, mediation or arbitration offer flexibility and confidentiality of the proceedings. However, the cost for mediation or arbitration may not necessarily be cheap as it depends on whether it is an international or domestic mediation/ arbitration. As Malaysia is a signatory to the New York Convention, arbitral awards issued in other signatory states will be recognised and enforceable in Malaysia.

### **Applicable Law**

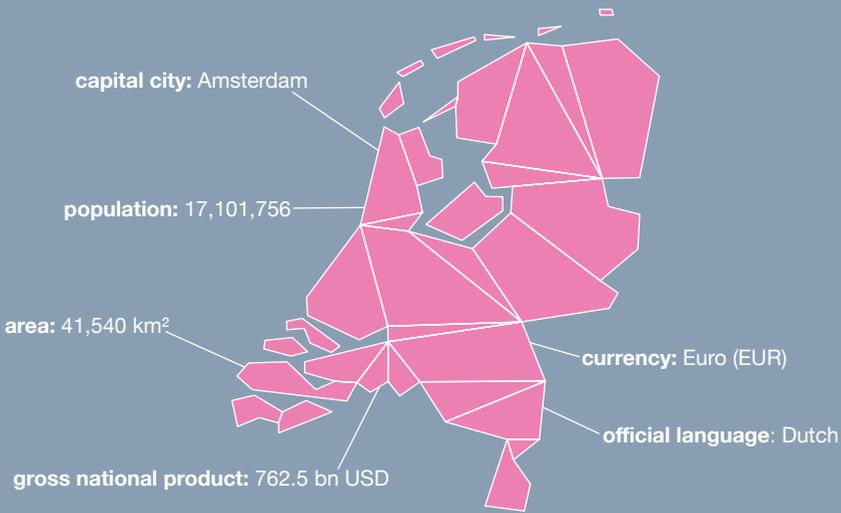
Parties are free to elect the applicable law to the franchise agreement. The locality and proximity of the franchise business, the legal and practical environment of the jurisdiction and costs of litigation in the jurisdiction are usual factors to be considered.

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## Franchising in NETHERLANDS

- High level of contract freedom.
- Market has drawn up rules balancing interests of franchisors and franchisees.

## In general

Dutch law does not contain specific rules for franchising and general contract law applies. Dutch general contract law offers a high level of flexibility. Recently, a set of non-binding self-regulatory rules of conduct has been developed: the Dutch Franchise Code (DFC). The DFC sets out specific rights and duties of the franchise parties, including the obligation for the franchisor to provide the franchisee with information about its financial position, and an exploitation estimate (prior to the franchisee entering into the franchise agreement). The DFC will be codified and therefore the franchise sector will be subject to additional mandatory rules in the near future.

## A franchise business

The most common legal form to set up a franchise business in the Netherlands is the private limited liability company (B.V.). Incorporation of a B.V. requires a Dutch language notarial deed containing the company's articles of association. The B.V. must be registered with the Trade Registry at the Dutch Chamber of Commerce. Without registration the board members are liable for the B.V.'s obligations. There are no minimum share capital requirements, but it must be paid up to avoid liability of the shareholder(s).

Profits realised by the B.V. are subject to 25% corporate income tax (20% over the first EUR 200,000). Franchise fees are generally tax deductible. Royalty payments are not subject to a royalty withholding tax. Dividend distributions to Dutch tax resident individual shareholder(s) are in principle subject to 15% dividend withholding tax, which can be credited against personal income tax. Tax treaties may reduce the dividend withholding tax for non-Dutch tax resident shareholders. Generally, a withholding tax exemption applies to dividend distributions to EU/EEA tax resident companies.

## Competition law

The Treaty on the Functioning of the EU (TFEU) prohibits agreements between independent market operators which restrict competition. Franchise agreements that are not capable of appreciably restricting competition do not fall within the scope of the TFEU. Common provisions in franchise agreements that could fall within the scope are: non-compete clauses, provisions on selective distribution or the restriction of (active) sales into an exclusive territory or an exclusive customer group. Although such provisions at first glance appear to be able to restrict competition, these provisions are less likely to have anti-competitive effects in franchise agreements. In general, provisions in a franchise agreement which are deemed to be essential to protect the know-how of the franchisor and/or the identity and reputation of the brand, fall outside the scope of the TFEU.

As for all vertical agreements, the general block exemption applies to franchise agreements. Accordingly, franchise agreements are exempt where the market share on the relevant markets held by each of the franchisor and the franchisees does not exceed 30%.

## Labour and sales agency law

As a main rule both (mandatory) labour law and (mandatory) sales agent law do not directly apply to franchising. Depending on the factual circumstances there is a risk that a franchise agreement is considered an employment or a sales agent agreement. To mitigate the risk that a franchisee qualifies as an employee the following circumstances should be avoided:

- the franchisee has a relationship of authority with the franchisor (the franchisor gives directions and instructions and the franchisee must comply with these);
- the franchisee is obliged to perform his work personally; and

the franchisor is obliged to pay salary to the franchisee.

To mitigate the risk that a franchisee qualifies as a sales agent, the following circumstances should be avoided:

- the franchisor is obliged to pay a commission to the franchisee; and
- the franchisor instructs the franchisee to provide intermediary services in arranging contracts to be entered into by the franchisor and, where appropriate, to conclude such contracts in the name and on behalf of the franchisor.

### Protection of IP

Under Dutch law certain intellectual property rights arise automatically (e.g. trade name rights, database rights and copyrights), others require registration (e.g. trademarks and patents). It is recommended to register trademarks in the countries where goods and services are offered on the market. For the exclusive trademark rights in Belgium, the Netherlands and Luxembourg (the Benelux) a registration in the trademark register of the Benelux is required. For exclusive rights in all EU member states the trademark should be registered as an EU trademark at the EU Intellectual Property Office.

Know-how can be contractually protected by implementing non-disclosure terms in the franchise agreement for the duration of the contract as well as following its termination. Penalty clauses for breach of confidentiality obligations are allowed and common in Dutch law contracts. It is recommended to include an obligation for the franchisee to impose the non-disclosure on any subordinates.

During 2018 an EU directive on the protection of undisclosed know-how and business information against unlawful acquisition, use and disclosure will have to be implemented into Dutch law. This

directive introduces a harmonised definition of 'trade secrets' and an obligation for the EU member states to ensure that the confidentiality of trade secrets is also safeguarded in legal proceedings.

### Selected aspects

There is no statutory list of information that has to be made available in pre-contractual negotiations. It follows from case law that from the moment parties start to negotiate, the franchisor has a duty of care to provide proper and correct information to the franchisee before the franchise agreement is entered into. Incomplete or incorrect information may lead to liability of the franchisor and invalidity of the agreement. During pre-contractual negotiations parties are to a certain extent free to end these without consequences. At a certain more advanced stage of the negotiations parties may be liable towards each other in case of withdrawal.

A franchise agreement may be entered into for a definite or an indefinite period of time. The latter does not expire automatically. It is strongly recommended to include clear termination provisions including notice period. Parties may include termination events in the franchise agreement (e.g. non-performance).

The interest amount for overdue payment can be determined in the contract. Without a contractual arrangement, interest is determined by law. The amount of interests is calculated from the day following the date that has to be considered as the expiry date for payment until the day the debtor paid the outstanding amount. Currently, the statutory interest rate is 8% per annum.

Overall parties have a fair amount of freedom of contract. Freedom of contract is limited by the principle of reasonableness and fairness, an overriding Dutch law concept taking into account the general accepted legal principles, the fundamental conceptions of law in the Netherlands

and the relevant social and personal interests which are involved in the specific situation. The principle of reasonableness and fairness can affect provisions in the franchise agreements and the interpretation thereof. It may also supplement a contract in case of voids.

### **Dispute resolution and applicable law**

Parties are allowed to freely choose the law applicable to the franchise agreement. Under EU law the Dutch courts may deviate from the contractual arrangements only if it regards provisions of Dutch mandatory law which are held to

be crucial and grant the parties protection going beyond that provided for by the law applicable to the agreement (overriding mandatory provisions).

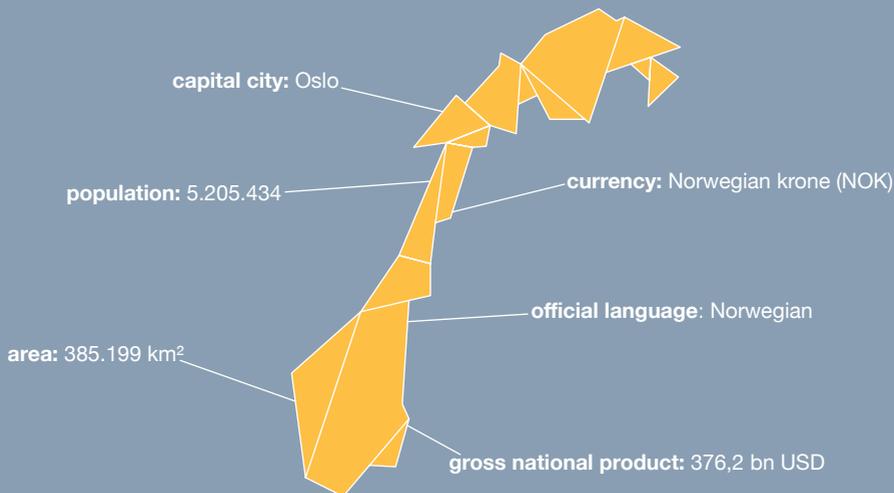
Arbitration is a common alternative dispute resolution process. Advantages of arbitration may be that the proceedings are handled behind closed doors and that the Netherlands is a contracting state to the New York Arbitration Convention which means that an arbitral award will be recognised and enforceable in other signatory states.

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## Franchising in NORWAY

- There is no law, which regulate franchise agreements in Norway. Hence, a franchise agreement is regulated by the contract agreed on by the parties.

- The most common way for foreign and national franchisors to do franchise in Norway is to establish a public limited company (ASA) or a private limited company (AS). Both type of companies requires registration in

the Norwegian Brønnøysund Register Centre a minimum equity capital of EUR 110,500 (NOK 1,000,000) or EUR 3,300 (NOK 30,000).

- Regarding dispute resolution the most common in Norway is to agree to arbitration as the dispute resolution method in order to prevent the disclosure of business secrets.

# Areas

## 1) Legal basis/definitions and specifics regarding foreign franchise in Norway

There is no legal definition of a franchise under Norwegian law nor is it regulated by any specific code. Hence, a franchise agreement is initially regulated by the contract agreed on by the parties. General Norwegian contract law, accompanied by national and European legislation governing relevant areas such as trademarks, patents, competition etc., therefore complement the legal framework of franchise agreement. A franchise agreement is accordingly often subject to an intense negotiation and regulation of the terms, including for instance means of dispute resolution and remedies in the event of breach of contract.

Norwegian law does not impose any restrictions specifically on foreign franchisors in Norway.

## 2) Corporate law – business entity

Foreign and national franchisors typically establish the franchise business within a company structure recognized by Norwegian company law, often as a public limited company (ASA) or a private limited company (AS). The forming of one of the above-mentioned companies requires registration with the Brønnøysund Register Centre and a minimum equity capital of EUR 110,500 (NOK 1,000,000) or EUR 3,300 (NOK 30,000), respectively. Professional advice on the legal and financial consequences concerning the different company structures is strongly recommended. However, with the right guidance a company can often be established within a short period of time. In general, there are very few restrictions on foreign business entities and/or investments in respect of corporate law.

## 3) Consumer protection law – franchisee or customer?

Franchisees are not regarded as con-

sumers in Norwegian law and therefore the relation is B2B, even though the franchisee may be vulnerable in the start-up phase.

## 4) Competition law

Undertakings operating in Norway, including foreign franchisors, are obliged to comply with two sets of competition legislation; The Norwegian Competition Act and the competition rules applicable to undertakings pursuant to the EEA Agreement.

Notable in relation to franchising is Art. 53 of the EEA agreement, which forbids measures restricting the free competition, such as for instance export prohibitions banning the sale to other territories not part of the designated franchise area. Exemptions from the prohibition in Art. 53 of the EEA agreement are possible if the respective parties to a franchise agreement do not have a market share of more than 30% each.

## 5) Labour law aspects

Generally, franchise agreements are not regulated by the principles applicable to employment arrangements. However, if the franchisee is under such duty of obedience and control in relation to the franchisor that in reality the franchisee is not an independent operator, but an employee, this will activate a range of Norwegian labour acts mandatory for the employer to observe, including payment of holiday allowance, term of notice etc.

## 6) Sales agent law

As a rule, the Norwegian Agency Act is neither directly nor analogously applicable to franchise agreements.

## 7) Tax – how are foreign businesses and individuals taxed in the specific country?

Limited companies incorporated in Norway and foreign companies with their effective management and control in

Norway are deemed tax residents in Norway making them subject to Norwegian taxation on their worldwide income unless otherwise is stipulated in an applicable tax treaty. The rate on taxation for companies in 2016 is 25%.

Individuals domiciled or permanently resident in Norway are subject to Norwegian income tax on their worldwide income unless stipulated otherwise in an applicable tax treaty. The effective tax rate for income/loss due to ownership in companies and partnerships is 28.75%. The top marginal income tax rate for personal income is 38.7%.

This area is subject to an intense regulation and changeableness, which is why professional advice is pivotal on this matter.

### **8) IPR – trademarks, copyright, patent etc.**

Franchisors' IP rights are protected by Norwegian acts governing the different areas. Furthermore, as mentioned, Norway is a party to the Agreement establishing the European Economic Area (EEA Agreement), entailing that Norway is bound by substantive provisions mirroring the Treaty of the functioning of the EU as well as secondary EU legislation in the area of IPRs. "

On a practical note, however, Community trademarks (CTM) have no effect in Norway, which is why applicants wishing to obtain trademark protection in Norway need to file a separate application with the Norwegian Industrial Property Office or designate Norway in an international trademark registration.

The know-how included in a franchise agreement is protected by the Norwegian Marketing Control Act, which protects business secrets in broad terms. Additionally, it is customary that a non-disclosure agreement (NDA) is included in the franchise agreement.

## **Selected**

### **questions/aspects:**

#### **1) Pre-sale disclosure/ pre-contractual information**

The general rule is that there is no legal obligation for the franchisor to provide the franchisee with pre-contractual information as the franchise agreement is governed by the principle of contractual freedom. It is however customary that both the franchisor and franchisee conduct different types of investigations (comparable to a due diligence investigation). Normally, this includes a prospect of the projected franchise company drawn up by the franchisor as well as intense investigation of the market by both the franchisor and the franchisee.

In case of essential breach of contract, a party is entitled to rescind the franchise agreement and claim damages. The amount of damages awarded, decided by the relevant court, will depend on the circumstances of the case.

#### **2) Legal restrictions affecting franchise agreements**

Under Norwegian Contract Law, the primary source governing the legal relationship between the parties is the agreed contract and the wording thereof. Under special circumstances, Section 36 of The Norwegian Contracts Acts allows for Norwegian courts to disregard agreements or provisions of an agreement wholly or partially if it is unreasonable or against honest conduct to let it stand. This is the "catch-all-provision" in Norwegian contract law and applies to all contracts, including franchise agreements.

#### **3) Franchise fees**

The regulation of the franchise fee, such as nature of payment, amount and currency is for the parties to agree upon and there is no legal framework specifically governing the subject. If a payment is overdue, a creditor may claim penalty interests amounting to 8.50% (2016).

#### 4) Confidentiality clauses

Confidentiality clauses are enforceable through legal action in Norway. A party may file a prohibitory injunction against another party in order to stop the illegitimate disclosure of information. Furthermore, a party can file for damages. The amount of damages awarded can differ depending on the grounds on which the claim is based.

#### 5) Termination of franchise agreements

Unless the parties have agreed otherwise, franchise agreements are, as a rule, non-terminable during the stipulated duration of the contract. If no duration of contract has been agreed upon, the usual term of notice in Norway is considered to be between 3-6 months (fair notice) depending on the circumstances of the case.

In any case, the parties should regulate the legal matters both in case of a premature termination and a contractual expiration, particularly in terms of goodwill compensation, a competition clause concerning the franchisee etc.

#### 6) Transfer of franchise agreements

There is no judicial prohibition concerning the franchisee's right to transfer his/her rights to the business. However, it is common to agree that the franchisee is not allowed to transfer the rights without the consent of the franchisor due to the importance and amount of resources spent on selecting the right franchisee in the first place.

### Dispute resolution and applicable law:

The Norwegian judicial regime consists primarily of a one court system based on three instances from City Court to High Court to Supreme Court, however with alternative ways of dispute resolution also available such as arbitration and mediation, both judicial and extrajudicial.

In general, these options are available to all.

It is common for the parties in franchise agreements to agree to arbitration as the dispute resolution method in order to prevent the disclosure of business secrets. In minor franchise agreements, it is recommendable to agree on a traditional court process in order to reduce costs and considering the relatively quick process time in the Norwegian judicial system compared to other jurisdictions.

Concerning the choice of applicable law to a franchise agreement, the main rule is that the parties can determine which law is to govern the contract. This includes both arbitration and traditional legal proceedings. It is recommendable to agree on the choice of law in writing and to be explicit in relation to which set of rules is to govern the agreement.

In terms of forum in case of judicial proceedings, the main rule allows for the parties to determine which of equivalent Norwegian courts is to be competent.

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## Franchising in NEW ZEALAND

- New Zealand does not have any franchising-specific legislation, nor a mandatory disclosure regime. Franchise agreements are the most common agreement by which the franchisor and franchisee's legal obligations to each other are defined. Foreign franchisors should have their franchise agreement drafted or reviewed by a New Zealand lawyer experienced in franchising.
- Franchisors must abide by New

Zealand's consumer protection, privacy, labour and health and safety legislation when operating a franchised business in New Zealand. Failure to abide by such legislation may result in severe penalties.

- Franchisors should register their trade marks, patents, designs or plant variety rights with the Intellectual Property Office of New Zealand with the assistance of an experienced New Zealand intellectual property lawyer.

## Doing Business in New Zealand

New Zealand consistently receives high rankings for its attractiveness to investors, including the recent World Bank's "Doing Business 2016" publication that placed New Zealand in first place for overall ease of doing business. New Zealand's stable economic, legal and political environment provides reassurance of fair and equitable treatment, as does its reputation for anti-corruption and adherence to the rule of law.

## Establishing a Business in New Zealand

For franchisors looking to franchise in New Zealand, the most common business structures are:

- (a) establishing a branch office for an overseas company; or
- (b) setting up (or purchasing) a New Zealand registered company.

To incorporate a company, the franchisor must reserve a company name, provide a registered office address and address for service (these are often the same), have at least one shareholder and one or more directors. At least one director must be resident in New Zealand (or a director of a company registered in an "enforcement country", which includes Australia).

It is not necessary (although it is often desirable) to adopt a company constitution. This can be done at the same time as incorporation, or at a later date.

As with a branch registered as an "overseas company", a New Zealand subsidiary will be required to file an annual return and register it with the Companies Office. Certain types of New Zealand companies are required to publically disclose their financial statements (or group financial statements), namely:

- (a) "large companies" (where the total assets of the company and its subsidiaries (if any) exceed \$60 million and/or the total revenue of the company and its subsidiaries (if any) exceeds \$30 million,

- in each case for the previous two accounting periods);
- (b) "large overseas companies" (which carry on business in New Zealand and which qualify as large);
- (c) companies with more than 10 shareholders who do not opt out, or companies with fewer than 10 shareholders who opt in, to the financial reporting regime; and
- (d) "public entities" (Government agencies and other public bodies).

The financial statements must be audited in certain circumstances. It is important that new companies understand the financial reporting requirements, not just for themselves, but also (if relevant) their group companies and ultimate holding company. Detailed advice should be sought, both to ensure compliance and to manage any disclosure of financially sensitive information.

## Legal Basis for Franchising in New Zealand

New Zealand does not have any franchising-specific legislation nor a mandatory disclosure regime. Franchisors are encouraged to join the self-regulatory Franchise Association of New Zealand ("FANZ"). FANZ is the peak body representing the franchising community at government and other industry forums.

While membership is optional it may be perceived as a badge of quality, indicating that the franchisor is committed to observing the best practice in franchising through adherence to the Code of Practice and Code of Ethics, which set minimum franchising standards. These include the requirement to provide prospective franchisees with a disclosure document at least 14 days prior to signing a franchise agreement and for the franchise agreement to contain a 7 day "cooling-off period" from the date of signing of the agreement, during which time the franchisee has the right to terminate the agreement.

## Franchise Agreements

A franchise agreement is a legal document that governs the relationship between the franchisor and franchisee and is the most common agreement by which the franchisor and franchisee's legal obligations to each other are defined in New Zealand.

Franchise agreements commonly contain provisions relating to set up and operation of a franchised business, payments to the franchisor by the franchisee, how the agreement may be ended, the manner in which disputes are handled, and the preservation and permitted uses of confidential information and intellectual property.

Foreign franchisors should have their franchise agreement drafted or reviewed by a New Zealand lawyer experienced in franchising, prior to providing the agreement to a potential franchisee.

## Taxation

New Zealand's tax system principally comprises:

- tax on income (including resident and non-resident withholding tax); and
- a broad based consumption tax called goods and services tax ("GST").

New Zealand does not have a general capital gains tax (although some specific types of transactions may give rise to income tax on capital gains), nor any stamp duty, gift duty or death duty.

A number of tax considerations will need to be taken into account when considering which business structure to use and when thinking about carrying on a business or deriving other sources of income in New Zealand. If taxable activities are undertaken both in New Zealand and abroad, then double tax agreements (or tax treaties) may reduce the incidence of double taxation.

It is advisable that foreign franchisors obtain appropriate taxation advice prior to undertaking business in New Zealand.

## Consumer Protection Laws

As with any other New Zealand business, franchise businesses are subject to a number of consumer protection laws including the Consumer Guarantees Act 1993 ("CGA"), the Fair Trading Act 1986 ("FTA") and the Commerce Act 1993.

The CGA gives consumers rights if the goods or services they receive do not meet the guarantees imposed by the CGA. For example, that the goods must be of acceptable quality, fit for the particular purpose, match the description, sample or model shown to the consumer and sold free of any encumbrances. Likewise, services must be carried out with reasonable care and skill, be fit for the particular purpose required, be carried out within a reasonable time (if no time has been agreed for completing the work) and be charged at a reasonable price (if no price has been agreed to upfront).

The FTA prohibits misleading and deceptive conduct, unsubstantiated claims, false representations and certain unfair practices. The FTA also prohibits pyramid selling schemes, unfair contract terms, bait advertising and referral selling. Directors that contravene the FTA can face penalties of up to NZD\$200,000 with companies facing penalties up to NZD\$600,000. It is possible to contract out of certain provisions of the FTA for business to business transactions. The FTA is enforced by the Commerce Commission.

The Commerce Act 1993 prohibits price fixing, resale price maintenance and certain other practices that lessen competition in a market. The Commerce Act is also enforced by the Commerce Commission.

## The Privacy Act 1993

Franchisors in New Zealand must comply with New Zealand's privacy laws which are set out under its Privacy Act 1993. The Privacy Act governs the manner in which an agency (such as a business, however formed) may collect, use, disclose, store and give access to information about an identifiable individual ("personal information") and is enforced by New Zealand's Privacy Commissioner. Generally speaking, New Zealand's privacy laws are consent based – meaning that most activities in respect of personal information will be lawful if the individuals concerned have given valid consent at the right time.

## Labour Laws

Employment in New Zealand is governed largely by the Employment Relations Act 2000. Other labour laws are found within the Holidays Act 2003, the Wages Protection Act 1983, the Minimum Wages Act 1983 and the Health and Safety at Work Act 2015. New Zealand has particularly stringent laws relating to labour and health and safety, and franchisors who will employ individual staff in New Zealand need to ensure strict compliance with all relevant Acts. For further information on employment laws in New Zealand see: [www.employment.govt.nz/](http://www.employment.govt.nz/). For further information on health and safety laws in New Zealand see: [www.worksafe.govt.nz/worksafe](http://www.worksafe.govt.nz/worksafe).

## Leasing

There is no legislation which specifically applies to franchising or to commercial leasing. The Property Law Act 2007 contains provisions that apply where no express terms have otherwise been agreed to - for example, when and how a landlord can terminate a lease.

## Intellectual Property

Franchisors are well advised to register their trade marks, patents, designs or plant variety rights with the Intellectual Property Office of New Zealand (see

[www.iponz.govt.nz](http://www.iponz.govt.nz) for further details). Trade mark registration provides the exclusive right to use that trade mark throughout New Zealand and promote the goods or services it covers. That exclusivity continues for as long as the owner pays renewal fees every ten years. Know-how and trade secrets are usually protected using non-disclosure or confidentiality deeds.

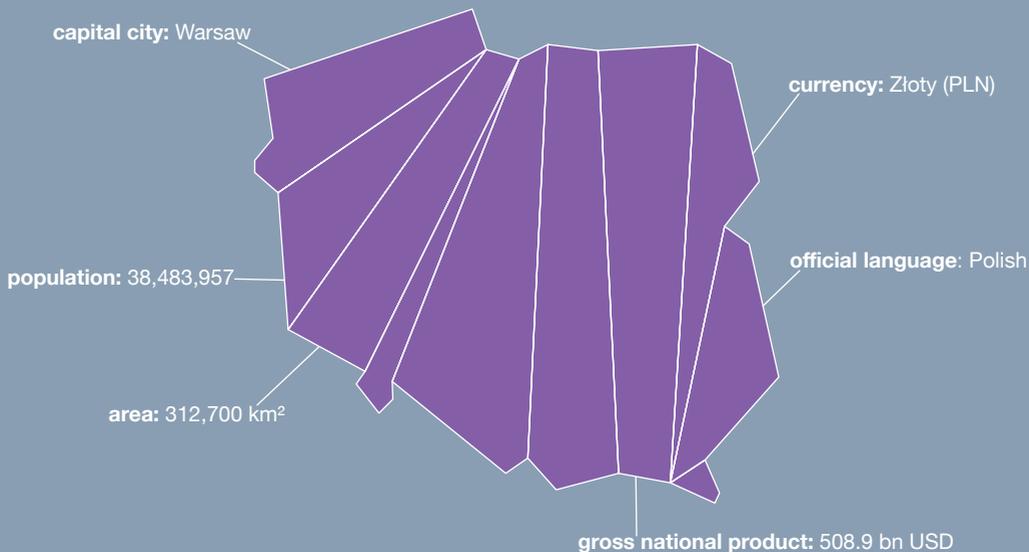
## Who is Anthony Harper?

Anthony Harper is recognised as one of New Zealand's leading full service law firms, with offices in Auckland and Christchurch. Our legal expertise and innovative approach to client service has rewarded us with longstanding partnerships with a wide range of New Zealand and international clients. With a string of high profile corporate transactions Anthony Harper has earned praise from many sources. We are recommended in influential global guides and directories including the Asia Pacific Legal 500, Chambers and Partners and Asia Law Profiles. Our team regularly advises well-known franchises in New Zealand and internationally and are very well placed to assist with all your franchising needs.

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more than law



## Franchising in POLAND

- There are no specific regulations dealing with franchise in Poland, besides restrictions relating to competition matters which are consistent with EU laws.
- Foreign franchisors can conduct business activity in Poland on the same terms and conditions as local entities.
- The shape of a franchise agreements depends on the parties.

### **Legal basis of franchise law**

In Poland there is no legal definition of franchise agreements or any codified franchise law. Only general provisions of the Civil Code (on liability for breaches, etc) will apply to franchise agreements. Based on the freedom to contract principle, the parties to franchise agreements may structure the agreement terms and conditions without having to take into account specific requirements or restrictions.

However, parts of franchise agreements (depending on the wording) may sometimes be interpreted as creating separate agreements (such as service, order, agency or license agreements). In such cases, Civil Code provisions regulating such agreements (i.e. service, order, agency or license agreements) may directly apply to those parts of the franchise agreement that are deemed to be such agreements.

### **Foreign franchisors**

There are no restrictions on foreign entities acting as franchisors. Foreigners may either be a party to a franchise agreement with a Polish entity or incorporate a company in Poland that will enter into the franchise agreement. Foreigners are treated the same as domestic entities. There are restrictions of a general nature on both Polish and foreign entities dealing with/from abroad, i.e. relating to the transfer of personal data abroad.

### **Corporate law**

Foreigners may conduct business in Poland by incorporating partnerships or companies. The most common form for a franchisor is a limited liability or joint-stock company (only the latter may be floated on the stock exchange). It is relatively easy for a foreigner to set up a company. It does not require any special permits and is usually done within two weeks and, in the case of a limited liability company, within one day (provided it is done online). A subsidiary of a foreign entity is not required to have a Polish shareholder.

### **Consumer protection law**

Franchisees are always entities carrying on business activity. This means they are not treated under Polish law as consumers and therefore cannot benefit from any protection offered by consumer protection regulations.

### **Antitrust/competition law**

As a member of the EU, Poland is subject to EU competition regulations. According to the Treaty on the Functioning of the European Union, agreements which may affect trade between EU states and which have as their object or effect distortion of competition are prohibited. In general, franchise agreements can be deemed such agreements as they usually contain non-competition undertakings [is this what you mean simply?], price fixing or territorial limitations. However, the EU and Polish laws provide for exemptions relating to franchise agreements, i.e. the parties to a franchise agreement may agree to clauses which are otherwise prohibited if their market share does not exceed a certain threshold. However, if the franchisor has a dominant position (if its market share is more than 40%), stricter regulations will apply.

### **Labour law aspects**

In most cases, the franchisee is a business entity and employs individuals either under employment or civil contracts. There is usually no risk of the franchisee being regarded as the franchisor's employee. The franchisor may sometimes insist that some of the persons working for the franchisee are formally employees.

### **Sales agent law**

The protection offered to agents (mainly under EU regulations) does not apply to franchise agreements (as distinct from agency agreements).

### **Tax law aspects**

Franchisors incorporated in Poland pay corporate income tax (CIT) at 19%. The income of franchisors that are not

incorporated and do not have a permanent establishment in Poland is taxed in Poland, but only in the part generated here. Withholding tax should be calculated and paid by the franchisees. As Poland is party to numerous treaties on avoiding double taxation, withholding tax in Poland can be reduced (depending on the wording of a particular treaty).

Franchisees who are companies also pay 19% CIT, while those whose turnover does not exceed EUR 1.2 million per annum pay 15% (reduced CIT also applies in theory to franchisors, but they cannot benefit from it in practice as they exceed the turnover threshold). Franchisees operating as a partnership or self registered entrepreneurs pay PIT at 19% (there is no way to reduce it to 15%).

### **IP law**

IP is protected in Poland as in any other EU country. Poland is party to numerous international treaties and conventions on the protection of various IP rights. Trademarks are protected in Poland if registered here (Polish Patent Office), at EU level (Office for Harmonisation in the Internal Market) or worldwide (WIPO).

There are no specific regulations on know-how, which can only be protected as business secrets or copyrights (if requirements are met).

### **Specific provisions of franchise agreements**

There are no specific requirements regarding pre-sale disclosure/pre-contractual information. It is up to the parties to address these aspects in the franchise agreement. If a disclosure turns out to be untrue, the breaching party will bear liability based on general principles of the Civil Code and specific provisions of the franchise agreement (it may have to pay contractual penalties or compensate losses, or the other party may terminate the agreement).

There are no restrictions on the nature, amount, currency or payment of franchise fees.

Confidentiality clauses are widely used in franchise agreements. They are in theory enforceable, but it is extremely difficult in practice to prove a breach and any losses incurred. Agreement sometimes stipulate that the breaching party has to pay contractual penalties. It is, however, worth noting that a court may reduce the contractual penalties if the damaged suffered as a result of the breach is significantly lower or cannot be shown at all.

The parties are free to decide on the rules for terminating franchise agreements. Agreements are usually entered into for a fixed term and are subsequently prolonged automatically if they are not terminated before the end of the term. In an alternative model, the agreement is entered into for a fixed term after which it is automatically transformed into a non-fixed term agreement. However, the parties agree that each is entitled to terminate the agreement with immediate effect in the circumstances explicitly listed in the agreement. If the agreement is terminated for a reason, the party in breach also has to pay a contractual penalty.

It is up to the parties to decide whether the rights and obligations under the franchise agreement are transferable. The franchisee is not usually allowed to transfer rights or obligations without the franchisor's consent, while franchisors are often entitled to make such transfers to their group companies and sometimes to third parties without having to obtain the franchisee's consent.

The parties may chose to have disputes resolved by a common or arbitration court. In most cases, disputes are resolved by common courts. If arbitration in Poland is chosen, the parties usually

select the Arbitration Court at the Polish Chamber of Commerce or the Lewiatan Court of Arbitration. Polish arbitration regulations are based on the UNCITRAL model.

The parties are also free to chose Polish or foreign law as the law governing the franchise agreement.

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## Franchising in RUSSIA

- No special requirements for foreign entities at the level of Russian franchise laws, however, certain limitations arising from currency exchange control, enforcement of foreign courts decisions and some others.
- Precise tax planning is highly recommended for foreign entities considering the possibility to become a party to a commercial concession (franchise) contract in Russia
- Duly state registration is required for granting of exclusive rights to be used in commercial activity from one party to another.

## 1. Legislation

The definition of “franchise” is missing in the Russian legislation. Instead, a notion of “commercial concession” is used which is almost identical to franchise with certain limitations and peculiarities.

Relations connected with contract of commercial concession are governed by provisions of Chapter 54 of the Civil Code of the Russian Federation (hereinafter referred to as the “CCRF”).

Under the contract of commercial concession one party (the **Rights Holder**) grants the other party (the User) – for a consideration and for a definite or indefinite term – the right to use a combination of IP rights owned by the rights holder in the User’s business, including trademarks, service marks and other rights to items covered by exclusive rights stipulated by the contract, such as trade names and trade secrets (know-how).

## 2. Specific requirements for foreigners

Russian legislation does not have specific requirements and restrictions for foreign Rights Holders entering into commercial concession relations on the territory of Russia.

## 3. Corporate law

Parties to commercial concession contract must be commercial entities and/or persons registered as individual entrepreneurs, i.e., only registered entrepreneurs.

3.1. The most popular legal form for commercial entities in Russia is limited liability company (“**LLC**”). Both Russian and foreign citizens and companies may found LLC and hold shares in it.

3.2. Foreign entity also has a right to incorporate a joint-stock company (“**JSC**”). In general, legal requirements for JSC are similar to requirements for registration of LLC, although there may be certain differences, depending on the form: either public or non-public.

3.3. Foreign entity also has a right to deal with commercial concession through a representative office or branch established in the Russian Federation which are not recognized as legal entities and form a part of a company which founded it.

3.4. A foreign individual may also be registered as an individual entrepreneur and then become a party to the commercial concession contract under Russian law.

## 4. Consumer Protection Legislation

Generally the User shall deliver to buyers (customers) all additional services which they could expect by acquiring (ordering) goods (works, services) directly from the Rights Holder.

The Rights Holder shall bear subsidiary liability for the claims made to the User for the inconsistency of the quality of goods (works, services), sold (performed or rendered) by the User under the contract of commercial concession. The Rights Holder shall bear joint liability for claims made to the User as the manufacturer of the products (goods) of the Rights Holder.

## 5. Antitrust legislation

The law provides a standard procedure for antitrust regulation of contracts of commercial concession.

There are certain restrictions for economic entities occupying dominant position, whose share in the market exceeds 50% (or exceeds 35% under certain conditions). Terms of a commercial concession contract may be declared invalid by the Federal Antimonopoly Service if such terms deem to restrict competition and infringe economic interests of other market players.

## 6. Labor law

By 2017 there were no known cases when the User had been deemed to be an employee of the Rights Holder and the respective commercial concession contract had been treated as sham and void.

## 7. Commercial agency

Russian legislation does not provide for application of provisions on agency agreement and commission agent agreement, under which one party following the instruction of other party makes transactions, to relations arising from the commercial transaction.

## 8. Tax Law Aspects

Foreign entities and individuals are subject to corporate income tax and tax on any income/profit received from sources in the Russian Federation. Foreign company pays property tax reflected on its balance as fixed assets of its permanent representative office in Russia, as well as real estate tax on Russian property owned by foreign company; an individual is subject to real estate tax on real estate located in the Russian Federation. Moreover, foreign companies and individuals are also subject to land tax in relation to land plots owned by it, as well as to all necessary state duties and fees.

Russian companies with foreign participation are subject to tax similar to Russian tax residents, i.e. without exemptions provided for foreign companies.

## 9. Intellectual property

Granting of exclusive rights to be used in commercial activity from the Rights Holder to the User should be duly registered with the Federal Service for Intellectual Property (Rospatent).

Under the contract of commercial concession, the User when carrying out activities provided for in the contract shall use trade name, trade mark, service mark or other brand identity of the Rights Holder only in the way indicated in the contract.

## 10. Pre-sale disclosure

Requirements to disclose information in relation to the commercial concession are absent in the Russian legislation.

## 11. Legal restrictions for franchising agreement

The terms providing for the User's obligation to sell commodities, carry out works or render services solely to the buyers (customers) that are located or have the place of residence in the territory defined by the contract may not be included into the contract of commercial concession.

## 12. Remuneration

Remuneration under the contract of commercial concession may be paid by the User to the Rights Holder in the form of fixed non-recurrent and/or periodical payments, deductions from proceeds, markups on the wholesale price of goods given by the Rights Holder for resale, or in other form stipulated by the contract. Remuneration to the foreign Rights Holder may be set in the foreign currency. Restrictions provided for by the law on foreign exchange control may be applied to transactions with foreign currency.

## 13. Confidentiality

The law provides that the User shall not disclose trade secrets (know-how) of the Rights Holder and other confidential commercial information received from the Rights Holder. Otherwise, the party in breach shall compensate the incurred damages, unless other liability is expressly stated in the contract.

## 14. Termination of the contract

Either party to the contract of commercial concession concluded without making reference to its validity term, shall have the right to terminate the contact by giving six months notice to the other party. If the contract provides for the possibility of its termination by paying specific monetary compensation, then the party shall give 30 days' advance written notice of it to the other party.

The Rights Holder may repudiate the contract in case of breach by the User of the conditions of the contract on the quality of the produced goods or

conducted works or services, gross breach of instructions or directions of the Rights Holder aimed at ensuring compliance with the character, manner and conditions of the use of the complex of intellectual property rights, and breach by the User of its obligation to pay the fees to the Rights Holder within the terms provided in the contract.

When the right to the trade name, trade mark or service mark included in the complex of exclusive rights granted under the contract of commercial concession is terminated without replacement of the terminated right by a new similar right, such contract shall be terminated, and the User is entitled to claim damages.

If either party is declared insolvent, the contract shall also be terminated.

### **15. Transfer of rights under the contract**

A sub-concession contract requires consent of the Rights Holder.

The legislation does not expressly regulate any change of control issues.

### **16. Court disputes**

Disputes arising out of the contract of

commercial concession are heard before the arbitrazh courts being the disputes between legal entities and individual entrepreneurs related to business activities.

The parties have a right to include an arbitration clause into the contract making the arbitration tribunal the dispute resolution body. The arbitration tribunals offer several advantages over state courts: they are noted for increased confidentiality, short terms and flexibility in relation to dispute resolution.

### **17. Applicable law**

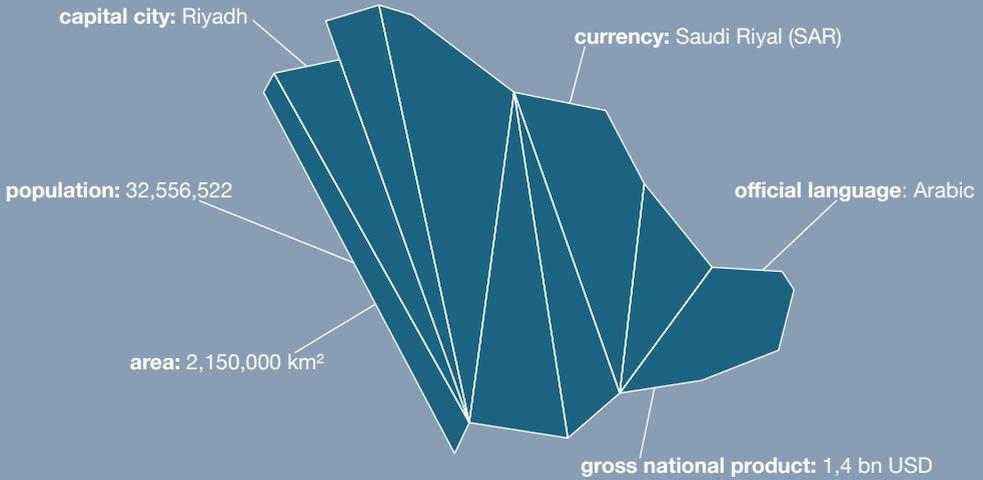
As a general rule, if contractual relations between the parties are complicated by any foreign element (for example, if one of the parties is foreign legal entity), the parties have a right to choose another national law as the governing law.

It is worth mentioning that in case any dispute arises, the practical enforcement of decisions of foreign courts on the territory of Russia may face certain difficulties.

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## Franchising in SAUDI ARABIA

- Saudi laws regulate a franchise like an agency and SACAR is the predominant governing law; and
- There is a strong emphasis placed on the doctrine of autonomy. Subject to the inclusion of certain mandatory clauses, a franchise agreement may be structured in accordance with the parties' requirements

## Legal Basis of Franchise Law

Franchise, commercial agency and distributorship laws in the Kingdom of Saudi Arabia are governed by Ministerial Order No. 1012 of 17/09/1412 (corresponding to 22/03/1992) as issued by the Ministry of Commerce and Industry (“**MOCI**”). Franchising falls within the scope of the Saudi Arabian Commercial Agency Regulations (“**SACAR**”) and its Implementing Regulations (“**IR**”) and is, therefore, treated like a commercial agency.

SACAR is the predominant authority for determining the law governing the franchise agreement (“**FA**”) between a franchisor and franchisee. including, but not limited to, matters pertaining to the registration procedure, rights and duties, and the provision of a model franchise agreement, which may be adopted at the parties’ discretion.

Article 6 of the IR stipulates that any entity intending to act as an agent must be registered with the Commercial Agents’ Register with the MOCI. Similarly, for the purposes of consumer protection, all agency agreements must be registered with the MOCI within 3 months of the FA coming into effect. Under article 1 of the Commercial Agencies Regulations (“**CAR**”), Saudi individuals and entities are required to register a FA. In addition, under article 9 of the IR, certain requirements pertaining to the registration with the MOCI must be satisfied.

## Restrictions

The Saudi economic market places very few restrictions on foreign franchisors and franchisees. Legal restrictions on foreign investment are determined through the classification of the relevant activity as either ‘a service’ or trading’. The provision of service activities allows a foreign investor (not including the Gulf Cooperation Council (“**GCC**”) nationals) to establish a wholly owned limited liability company (“**LLC**”) in Saudi Arabia.

The Saudi Arabia General Investment Authority (“**SAGIA**”) does not stipulate a minimum capital requirement for service activities. In contrast, investors engaging in commercial activities are restricted to the establishment of an LLC with a minimum capital requirement of 20 million Saudi Riyals, and a 25% ownership stake held by a Saudi national or company. In addition, SAGIA publishes and updates a list of those activities which are restricted and therefore not available to foreign investors. The complete list is available at:

[www.sagia.gov.sa/en/InvestorServices/InvestorLibrary/SubCategory\\_Library/Business\\_not\\_permitted.pdf](http://www.sagia.gov.sa/en/InvestorServices/InvestorLibrary/SubCategory_Library/Business_not_permitted.pdf)

## Mandatory Clauses

The legal system of Sharia law (**Islamic law**) prevails in Saudi Arabia; it therefore provides the legal framework for FA’s. In upholding the doctrine of autonomy, the law permits the parties to an FA to structure it in accordance with their stipulations and requirements. However, specific legislative requirements must be complied with under the law. Articles 10 and 11 of the IR stipulate that FA’s must satisfy certain minimum requirements, including, but not limited to stating, inter alia: the rights and obligations of the parties, the capacity and nationality of the parties, the subject and purpose of the franchise, the services, goods and other works covered by the franchise, and the duration and mode of termination in relation to the franchise.

## Consumer Law

A franchisee is not considered a consumer; instead, a franchisee is considered similar to an agent of the franchisor. In order to afford protection to public consumers, commercial agency regulations are subject to Sharia law and any relevant contractual terms. There is a duty on the franchisee to provide maintenance and products at a reasonable cost for the duration of up to a year after termination

or appointment of a new franchisee, in addition to abiding by any warranty periods stipulated by the franchisor.

### **Competition Law**

Saudi Arabia promotes and encourages fair competition and discourages activity that enhances anti-competitive business practices. Initial competition legislation was passed as the Competition Regulation, Royal Decree No. M/25 of 4th Jumada Awal 1425 Hijra (corresponding to 22/06/04). Royal Order A/92 of 6th Ramadan 1425 Hijra (corresponding to 20/10/05) established the Competition Protection Council (“**CPC**”), which operates under the umbrella of the MOCI. Through resolution No. 13/2006 of 25th Dhul Qada 1427 Hijra (corresponding to 16/12/06) the CPC issued the Implementing Rules of the Competition Regulation. These rules were issued in the form of Regulatory Guidelines under the Council’s Resolution No. 25/2008 of 9th Ramadan 1429 Hijra (corresponding to 09/09/08). Although the guidelines do not within themselves provide statutory authority, they offer an insight into the Council’s approach to the application of the guidelines.

Prohibited practices include any activity that aims to restrict trade or disrupt fair competition.

Under the country’s competition laws, price manipulation which may result in the creation of a false market, is prohibited. The price of commodities is subject to general supply and demand principles. Similarly, imposition of special stipulations/ conditions on the purchase or sale of goods which may negatively impact upon the market or a seller or buyer, is prohibited.

### **Intellectual Property Law**

The Trademark office at the MOCI addresses all trademark matters. A request must normally be filed with the MOCI in order to ascertain whether any similar previous filings exist. The general

principle dictates that the first applicant to file for the protection of a trademark is the rightful owner of that trademark. The law stipulates that the mark must be distinctive and not in contravention to any religious or moral practices or geographical names. Once the relevant application form has been filed with the MOCI, a decision is issued by the MOCI within 60 days; if approved, the trademark protection is valid for the duration of 10 years. Final rejection by the MOCI is grounds for appeal within 30 days of the decision, by the applicant.

### **Termination/Expiry**

An FA may be terminated in accordance with the terms stipulated within the contract. As Saudi law does not stipulate a minimum duration for a FA, the parties must determine the term of the contract and the manner in which it is terminated. Where a franchisor unlawfully terminates an FA, the courts may make an award of direct damages to the franchisee; however, if the claim lacks merit, then an order may be issued to deregister the franchisee from the Commercial Agency Register.

In the event of a termination dispute, the registration of a new franchisee will be withheld by the MOCI until the previous franchisee has obtained its full rights. However, this will not prevent the appointment of a new franchisee by the franchisor, and therefore will have negligible bearing on the franchisor or the new franchisee, as the new FA shall be recognised by the judiciary.

### **Dispute Resolution**

Dispute resolution terms may be stipulated by the parties, who are at liberty to determine the governing law and jurisdiction. In Saudi Arabia, all dispute resolution matters involving a franchise are addressed by the Board of Grievances. Arbitration is also an alternative option.

Saudi Arabia has the authority to enforce both foreign dispute resolution

judgments and arbitral awards (as a signatory to the New York convention). Subject to the fulfilment of certain conditions, therefore, the enforcement courts have the jurisdiction to enforce arbitral awards or judgments issued by a foreign court of law. Such conditions include, but are not limited to, matters pertaining to reciprocity, contravention and public policy.

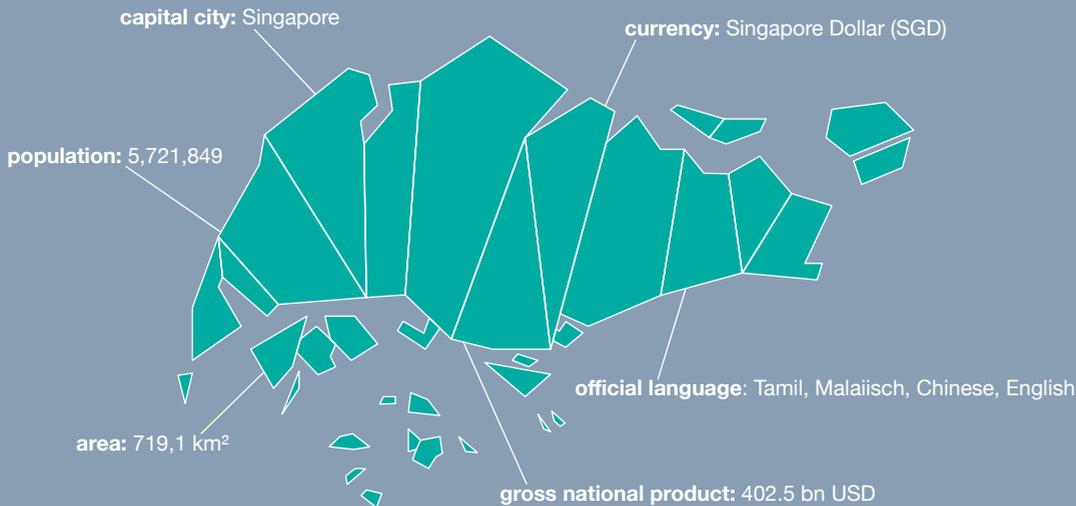
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## Franchising in SINGAPORE

- No specific law that governs franchising — comes under general contract law.
- No pre-contractual disclosure is required so parties are advised to negotiate disclosure terms and to do due diligence.
- Specific attention must be made to Competition Act, Multi-Level Marketing and Pyramid Selling (Prohibition) Act and Unfair Contract Terms Act.

## Governing Law

There is no specific law that governs franchises. It comes under the ambit of general contract law.

## Restrictions

No restrictions exist for foreigners in general, franchisors from any country are allowed to offer their franchises here, but staffing of businesses is affected by employment and immigration laws. Non-residents are required to apply for work passes and permits, each of which is subject to different requirements. Employers are at times limited by a quota and have to pay a monthly levy for foreign workers. As long as the franchise agreement is drafted to state that the franchisor and franchisee are independent contractors and not agents, partners or employees of each other, there is a slim chance that a franchisee or employees of a franchisee might be deemed employees of the franchisor.

## Business Entities

Franchisors can generally choose from a sole proprietorship, partnership, and company. Before doing any business, one must be registered with Accounting and Corporate Regulatory Authority (ACRA).

A sole proprietorship is not incorporated separately, and the sole proprietor owns all assets and liabilities. The sole-proprietor has the absolute say in the running of the business. Sole proprietors pay taxes based on the profits made by the business, and are taxed at their personal income tax rate. Singapore follows a progressive tax rate starting at 0% and ending at 22% for individuals and are taxed only on domestic income.

A general partnership allows two or more people to jointly own a business. It has no legal existence separate from the partners, so each partner can be held responsible for the actions of the other. In partnerships, profits and losses

are shared among the partners, and they are taxed each based on their personal income tax rates.

In a limited partnership, the partners can be general partners, or those who are responsible for the acts of the partnership, and are liable for all debts and obligations, and/or limited partners, or those whose liability is only to the extent of their investment.

A limited liability partnership (LLP) combines a partnership and a company, which allows the partners to operate the business, while considered to have a separate legal entity. The partners of the LLP will not be held personally liable for any business debts, but a partner may, however, be held personally liable for claims from losses resulting from his own wrongful act or omission. 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. Companies are taxed at a rate of 17%.

A company is a business form which is a legal entity separate and distinct from its shareholders and directors. It can be an exempt private company (20 members or less and no corporation holds beneficial interest in the company's shares), private company (50 members or less), or public company (more than 50 members). A company can sue or be sued in its own name, can own property in company's name and members not personally liable for debts and losses of company.

## Specific Laws

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

There are no specific restrictions on provisions in franchise agreements, but the terms of an agreement must be fair and reasonable to be enforceable, in accordance with the Unfair Contract Terms Act.

Franchise agreements must also comply with the Competition Act. Under this law, there are three prohibited activities, more specifically: (1) agreements, decisions and practices which prevent, restrict or distort competition; (2) abuse of dominant position; and (3) mergers and acquisitions that substantially lessen competition. There exists an exemption under the law for “vertical agreements” with respect to Item 1. This exclusion covers agreements which concern the purchase or redistribution of products, such as in a franchise agreement where the franchisor sells to the franchisee products for resale. This includes IPR provisions contained in the franchise agreement, such as the trademark and know-how which the franchisor licenses the franchisee in order to market the products.

The Multi-Level Marketing and Pyramid Selling (Prohibition) Act of 2000 prohibits multi-level marketing and pyramid selling. Master franchise schemes are expressly excluded, as long as the benefit received by any promoter or participant is as a result of the sale, lease, license or other distribution of a commodity and not as a result of the recruitment of additional participants; the promoter of the scheme shall not knowingly make false or misleading representation or omission relating to the scheme or the commodity; the promoter shall not make any representation on the benefits other than those allowed and there is a clearly stated policy on refund or buy-back guarantee.

### **IP Protection**

It is not mandatory, but highly advisable, for the franchisor to register its trademark with the Intellectual Property Office. For

unregistered trademarks, some form of protection still exists under the common law action of passing-off. Know-how can be protected by confidentiality provisions/agreements. For such confidentiality clauses to be enforceable, there must be a legitimate proprietary interest to be protected, and it is reasonable as to interests of the parties and the public as well. Usually, to determine its reasonableness, length and scope of the restriction are considered.

### **Disclosures**

There are no statutory laws governing pre-sale disclosure requirements from a master franchisee to a sub-franchisee. Franchisees are advised to negotiate disclosure terms and to undertake their own due diligence prior to entering into any agreement. There are no restrictions on the language to be used in disclosure documents and franchise agreements. Also, there are no specific regulations governing disclosure, compliance procedures or continuing disclosure requirements, except those provided under the Code of Ethics governing the members of Franchising and Licensing Association (FLA). The FLA is a professional association that promotes and facilitates the use of franchising as a growth strategy for enterprises. Membership is not mandatory.

### **Fees**

There are no laws regulating the nature, amount or payment of franchise fees. Parties are generally free to negotiate the amount of interest to be charged on overdue payments. Except for withholding tax, there are no restrictions on a franchisee’s ability to make payments to a foreign franchisor in the franchisor’s domestic currency.

### **Termination**

The franchise agreement may provide for renewal upon satisfaction of certain conditions. Otherwise, the franchisor may refuse to renew the agreement.

The franchise agreement may also provide for events of default that would give rise to a right to terminate. The agreement may also be terminated under common law where there has been a fundamental breach of the contract. The cancellation or rescindment of the franchise agreement by the franchisor entitles the franchisee to damages, depending on the terms of the franchise agreement and whether there were losses incurred by the franchisee.

### **Transfer**

The franchisor can restrict a franchisee's ability to transfer its interests by providing for it in the franchise agreement.

### **Dispute Resolution**

Parties can choose the governing law of the franchise agreement and they may expressly specify the types of dispute resolution in case of a dispute. Disputes are resolved by civil action in the courts, but alternative dispute resolution is also available. The value of the claim determines the court in which the matter will commence. A claim for a sum not exceeding \$60,000 will be heard in a magistrate's court, from S\$60,000 and S\$250,000 will be heard in the State Courts, and above \$250,000 will be heard in the High Court. The Rules of Court and State Courts Practice Directions provide rules on the process. When parties want to maintain confidentiality over the dispute, or want to specify short timelines, arbitration may be preferable.

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## Franchising in TURKEY

- Franchise agreements are vertical agreements. If franchisor's market share does not exceed 40%, franchise agreement will be able to benefit from the block exemption. In order to benefit from such block exemption, the non-compete clauses must not exceed five years.
- Franchise agreements contain similar provisions with agency agreements and portfolio compensation

granted to agencies is also applicable to franchisees. Portfolio compensation cannot exceed the average of franchise fees received from the franchisor for the last five years of commercial activities.

- If franchisor has a standard form agreement, it should ensure that important commercial/penalty provisions of these agreements are specifically acknowledged by franchisee.

## General Information on Franchise Agreements

There is no specific legislation directly governing franchise agreements. They are considered as sui generis type of agreements, containing aspects of various agreements specifically defined under the Turkish Code of Obligations (“**TCO**”). The Court of Appeals defines franchise agreements as “long-term and continuous contractual relations whereby franchisee has the right to market a product or service on its own behalf by using franchisors’ trademark or trade name and operation methods and franchisor undertakes to provide support and information to organization and administration of the relevant business”.

There is no restriction in the applicable legislation differentiating foreign franchisors from local ones. Accordingly, foreign franchisors can carry out their activities within the country through local franchisees, like any other Turkish entity. In Turkey, most preferred corporate entity types are joint stock corporations and limited liability partnerships. In order to establish a corporate entity, there are two stages; registration with the relevant trade registry and conducting tax opening of the company before the relevant tax office. There is no restriction regarding nationality of shareholders or partners of corporate entities.

## Consumer Protection Law

Consumer is defined as an individual or a legal entity that benefits from a product and/or a service without any commercial purpose. As both franchisor and franchisee are merchants and carry out commercial activities, they will not be deemed consumers and cannot benefit from the rights granted to consumers under the applicable legislation. However, franchisees are bound by the obligations under the relevant legislation, if consumers benefit from products provided by franchisees.

## Competition Law

As franchise relations are based on marketing and distribution of a product or service, franchise agreements are deemed vertical agreements. The prohibitions set out under the Law on Protection of Competition (“**Competition Law**”) will apply to franchise relations. Accordingly, franchise agreements will be assessed as to whether they cause prevention, distortion or restriction of competition directly or indirectly in a particular market. Franchise agreements or their provisions violating the Competition Law will be deemed invalid and a monetary fine up to 10% of the infringing entity’s turnover generated in the previous year may be imposed. If franchisor’s market share does not exceed 40%, the relevant agreement will be entitled to benefit from the block exemption. Another condition to benefit from such block exemption is that the non-compete clauses under franchise agreements must not exceed five years. If franchisee conducts its operation within franchisor’s facility, such restriction will not be applicable. If a franchise agreement cannot benefit from the block exemption, parties may still apply to the Competition Authority for individual exemption, to avoid invalidity of non-compete provisions and monetary fines.

## Labor Law

Both franchisor and franchisee conduct commercial activities to gain profits. In this regard, the relationship between these parties is purely commercial and does not contain any employment related items. Accordingly, labor legislation is not applicable to franchise agreements.

## Agency Law

As franchise agreements contain very similar provisions to agency agreements, the Court of Appeals opines that portfolio compensation granted to agencies as per Turkish Commercial Code (“**TCC**”) is also applicable to franchisees. Portfolio compensation cannot exceed the arithmetic average of franchise fees and/or other

payments received from the franchisor for the last five years of commercial activities (or for the complete term of the agreement if executed for a shorter term).

### **Tax Law**

Income generated through franchise operations of a foreign (non-resident) company is deemed commercial income and will be collected through withholding. The relevant withholding rate is 20%. Such amount is paid by franchisee to the relevant authority on behalf of franchisor. If there is a double taxation treaty between the investors' country of origin and Turkey, applicable tax regime (e.g., tax rates, exemptions and refunds) will be determined accordingly. If foreign entity has established a capital company in Turkey, income gained by such company will be subject to 20% corporate tax, regardless of the shareholding percentage of the foreign entity.

### **Intellectual Property Law**

Franchisors should register their intellectual property rights with the Turkish Patent Institute (the "TPI") for protection. The trademarks can be registered for a period of ten years, which may be renewed consecutively. As Turkey is a party to Madrid Protocol and the Patent Cooperation Treaty, foreign franchisors may register their intellectual property rights with the TPI in a more expedited way.

### **Disclosure Requirements/ Confidentiality Clauses**

Under Turkish law there is no pre-contractual disclosure requirement regulating franchise agreements. The parties are entitled to freely determine the term of the confidentiality clause, the breach of which is commonly tied up to a penalty payment.

### **Important Remarks on Franchise Agreements**

General restrictions set forth under the TCO are applicable to franchise agreements. For instance, the parties to a franchise agreement will not be able to

limit the other party's liability arising from gross fault or gross negligence.

Majority of scholars opine that restrictions under the TCO on agreements in standard form will be applicable to franchise agreements. Accordingly, if franchisor has a standard form agreement, it should ensure that important commercial/penalty provisions are specifically acknowledged by franchisee. Otherwise, such provisions would not be deemed included. However, certain scholars argue that this restriction should not be applicable to franchise agreements, as both parties are merchants.

Parties are free to determine the amount and the currency of the franchise fees. Under the TCC, parties can determine the interest rate applicable to the commercial transactions freely.

Under Turkish law, there is no renewal obligation imposed on parties with respect to franchise agreements. Franchise agreements may be either terminated in line with contractual provisions or through termination notice. Legal ground of the notice will vary depending on the term of the agreement. For instance, an agreement signed for a definite term can only be terminated based on a just cause or in return for compensation. However, an agreement signed for an indefinite period will be terminated at any time through a regular termination notice, unless otherwise agreed under the agreement. If there is no notice period under the contract, regular notice period will be three months, by way of reference to provisions for agency agreements.

Franchise agreements are principally transferrable, unless otherwise agreed by parties. Parties are free to agree on limitation clauses regarding transferability of the agreement.

If parties to a franchise agreement are Turkish entities, all contractual documents must be executed in Turkish. Otherwise,

parties will not be able to raise any claims based on such documents. Such rule will not be applicable to agreements, if one of parties is a foreign entity. Parties generally execute such agreements in dual column format and state that the Turkish version will prevail in the event of a discrepancy.

### **Dispute Resolution/Applicable Law**

All disputes arising from franchise agreements are held by civil courts. Civil litigation is governed under the Civil Procedure Law and the International Private and Procedure Law, depending on whether or not the nature of the claim has a foreign element. The Turkish legislation allows disputes to be brought before a litigation or arbitration proceeding. If parties did not agree on the jurisdiction of an arbitration tribunal regarding the

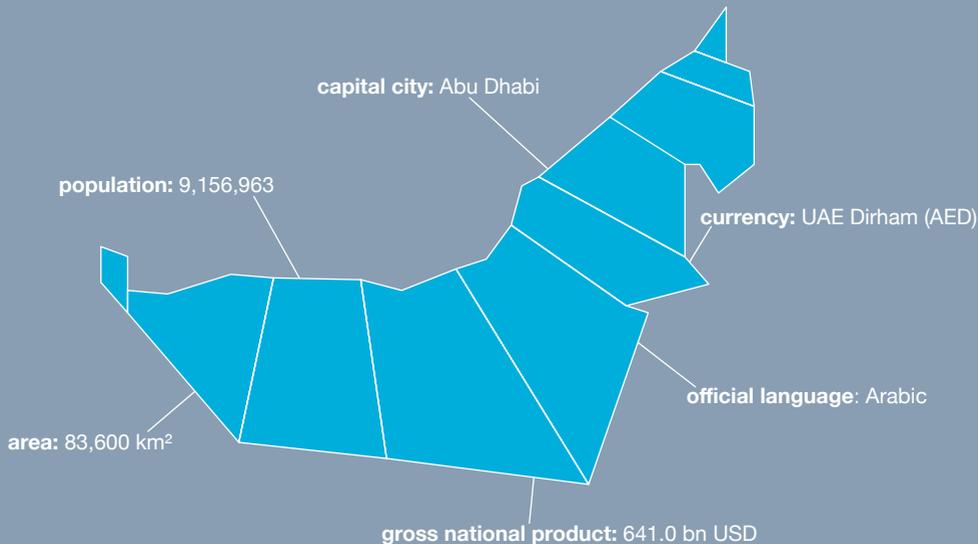
dispute, as a general rule, such dispute would be subject to a litigation procedure to be carried out before the competent court. As litigation procedures carried out before the Turkish courts may be time consuming, determination of jurisdiction of an arbitration tribunal may be more time efficient for the parties.

In principle, the parties are free to choose the governing law in franchise agreements, if one of parties is a foreign entity. Turkish law will be applicable to franchise agreements, if both franchising parties are Turkish entities. However, certain scholars argue that parties to a franchise agreement can still choose foreign law, even if both parties are Turkish entities, provided that there is a foreign element in the franchise relationship.

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## Franchising in UNITED ARAB EMIRATES

- Only UAE nationals and companies wholly owned by UAE nationals are permitted to become franchisees onshore in the UAE.
- Franchise agreements are subject to strict registration requirements under the Commercial Agencies Law; failure to comply with such could lead to lack of protection for franchisees under federal law. However parties can opt out of these registration requirements.
- Non-UAE nationals may be permitted to become franchisees by operating out of one of the UAE's many free zones, though this is subject to a different set of restrictions.

## Doing business in the UAE

The UAE is one of the most attractive destinations in the region for international franchisors. In particular, the emirate of Dubai has developed a well-earned reputation for being a business-friendly hub.

## Franchises under the Agencies Law

The UAE does not have a dedicated franchise law. The primary law franchisors should therefore consider is Federal Law No. 18/81 on the organisation of commercial agencies (as amended) (“**Agencies Law**”). For this law to apply, a franchise agreement must be registered with the UAE Ministry of Economy (the “**Ministry**”). In order for the Ministry to accept an application for the registration of a franchise agreement, it must meet the following minimum criteria:

- The franchise agreement must be exclusive to all or part of the UAE, as well as exclusive to a product or number of products;
- The franchisee must be a UAE national, or a legal person wholly owned by UAE nationals; and
- The franchise agreement must be duly notarised. Notarisation requirements in the UAE can be more stringent than in other jurisdiction; e.g. for any document to be notarised, it must be translated into Arabic by a certified legal translator. A notary public may also examine and opine on the content of a franchise agreement, and has the discretion to request amendments to comply with their interpretations of local laws. For this reason, it is always important to seek legal advice on any franchise agreement from counsel in the UAE who are familiar with such procedures.

Registration with the Ministry is important to franchisees, as it affords them a degree of protection that would not otherwise be available. For example, more recent amendments prohibit the franchisor from

terminating a registered agreement without a solid justifiable cause, and can even prohibit the franchisor from opting not to renew a registered agreement after it has exceeded its initial term. Franchisees can even go so far as to request customs authorities to block parallel imports of the franchisor into the country.

## Opting out of the Agencies Law

The franchise parties may decide to forego the application of the Agencies Law by not registering their agreement with the Ministry. They may wish to do this for a number of reasons, for example if the parties do not want to enter into an exclusive relationship.

This would simply mean that the agreement would not benefit from the protections under the Agencies Law, although the agreement would still technically be enforceable under UAE law.

The unregistered agreement would then be given the same treatment as any other commercial agreement in the UAE. Note, however, that this would not allow an exemption from the requirement of having a UAE national (or company owned by a UAE national) as a franchisee/sponsor, as there is a general requirement onshore for 51% of the shareholding of any business to be owned by a UAE national.

## Other important laws to consider

Regardless of whether the Agencies Law would apply or not, a franchisor must be aware of other important federal and local laws, most notably:

- Federal Law No. 8/80 on regulation of labour relations, as amended
- Federal Law No. 5/85 on civil transactions
- Federal Law No. 18/93 on commercial transactions

- Various intellectual property laws, including Federal Law No. 37/92 on trademarks, and Federal Law No. 40/92 on copyrights and neighbouring rights
- Depending on the emirate where the franchise would operate, a number of local municipality rules would apply, ensuring that the actual place of business is operating to the standards required by the local municipality

The above mentioned laws are accompanied by more expansive implementing regulations.

### Free zones

Free zones in the UAE provide highly advantageous features such as exemption from the local ownership minimum requirement, complete exemption on import and export duties and no restriction on the repatriation of capital and profits.

Free zones are often, however, subject to other regulatory restrictions designed to protect the onshore market and to ensure a sustained commitment to contributing to the growth of the UAE and region's economy.

Franchisors opting to enter into an agreement with an offshore entity must be aware that their activities would be restricted to the free zone territory, and are prohibited from selling goods onshore. Franchisors must therefore consider carefully the financial and operational implications of operating in any free zone in the UAE.

### Federal system of the UAE

The UAE is a constitutional federation, meaning that each emirate is subject to a hierarchy of laws and judicial authorities, among other consequences. Under the UAE constitution, federal laws have primacy over laws passed by each emirate. A unique aspect of the UAE federal system is its judiciary. The judicial system comprises civil, criminal and sharia law

courts with commercial cases heard in the civil courts. It is worth noting also that both the emirates of Dubai and Ras Al Khaima operate independently of the federal court system, meaning that the highest courts in those emirates are their respective courts of cassation.

### Dispute resolution and enforcement

If a franchise agreement is registered under the Agencies Law, the local UAE courts will have exclusive jurisdiction over any disputes arising out of or in connection to the agreement. Before a claimant can submit a claim to the local courts, they must seek approval from the Commercial Agency Committee within the Ministry.

It is worth considering that, as the official language of the UAE is Arabic, any disputes heard in the local courts must take place in Arabic. Therefore, all documents submitted to local courts must either be prepared in Arabic or translated by a certified legal translator. If there is a discrepancy between the original language and its Arabic translation, the latter will prevail.

For unregistered agreements, however, franchising parties are free to opt for whichever method of dispute resolution they deem suitable for their particular business arrangement.

A popular dispute resolution forum is the Dubai International Financial Centre, which operates an independent English-language court system, as well as the DIFC-LCIA tribunal.

Enforcement of a final order from the DIFC Courts is made manageable thanks to a Protocol of Enforcement between the DIFC Court and the Courts of the Emirate of Dubai. The DIFC Courts have also entered into Memoranda of Understanding with the Courts of the Emirate of Ras Al Khaima, as well as the UAE Federal Ministry of Justice, in order to

ease enforcement of DIFC Court orders in emirates other than Dubai.

DIFC-LCIA arbitration awards may enjoy similar benefits in terms of ease of enforcement under the above-mentioned Protocol, provided that the award is first 'converted' into a DIFC Court judgment following certain procedural requirements.

Whatever forum for dispute resolution is chosen, parties to a dispute must ensure that their appointed counsel is duly registered with the competent local regulatory authorities.

### **Value Added Tax**

Franchisors must bear in mind impending regulatory reforms on the horizon in terms of the tax regime in the Gulf region. The UAE, along with all other GCC member states, will be collectively implementing value-added tax ("**VAT**") from 1 January 2018, likely starting at 5%. The UAE Federal National Council has approved the draft law on 15 March 2017, and is currently pending final ratification by the President of the UAE.

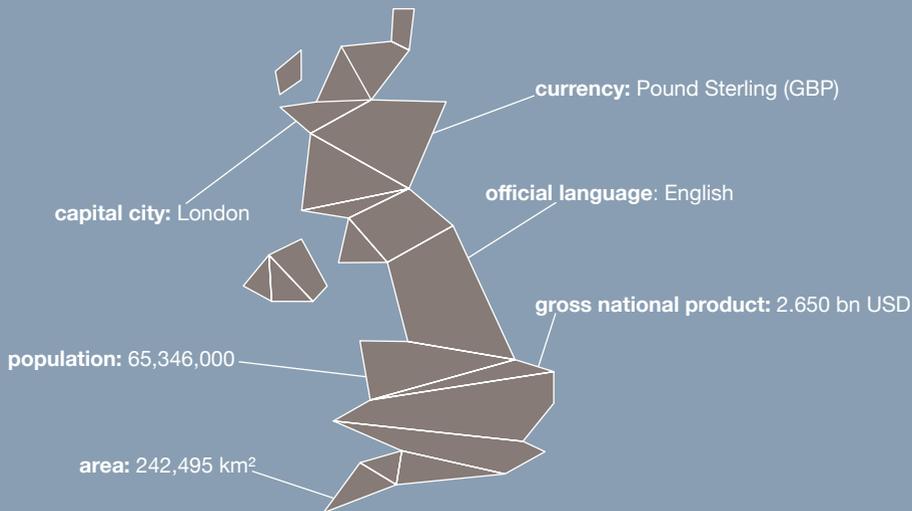
Some guidance has been published by the UAE Ministry of Finance on its applicability. For example, businesses which meet the criteria for registration must register online with the Ministry of Finance from October 2017, in preparation for the launch of the regime. Current and potential franchisors in the UAE are therefore encouraged to seek guidance on how the new VAT regime may impact their business operations, and their bottom line.

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## Franchising in UNITED KINGDOM

- Unlike other countries, franchising is not regulated and there are no rules for pre-sales disclosure or pre-contractual information;
- Restrictions imposed on franchisees are subject to competition law and must be reasonable;
- Franchisors can obtain registered trade mark protection for their brand.

There is no legal definition of “franchise” in the UK. The term is used to describe a variety of different business relationships but is most commonly recognised as “business format franchising”. Business format franchising consists of the grant of a licence by one person, the franchisor, to another person, the franchisee. The licence entitles the franchisee to trade under the brand of the franchisor and to follow a proven successful business model. In return, the franchisee is required to make periodic payments to the franchisor.

Unlike other countries such as the US and Australia, franchising is almost completely unregulated in the UK. The only law specifically controlling franchising is the Trading Schemes Act 1996 (the “1996 Act”). If a franchise agreement falls within the 1996 Act, the franchisor will be subject to advertising restrictions which control the content of advertisements and new franchisees joining trading schemes are entitled to a 14 day „cooling off“ period. Single tier trading schemes under which all UK franchisees operate at a single level except for the franchisor, are exempt. Accordingly many UK franchise networks are exempt from the 1996 Act.

The Modern Slavery Act 2015 („MSA“) requires commercial organisations with a global turnover above £36m to publish an annual statement disclosing what steps it has taken to ensure that human trafficking is not occurring in any of its supply chains or businesses. The franchisor is not required to take into account the turnover of independent franchisees when calculating the threshold. However, it must include the turnover of franchisees that are members of the franchisor’s group.

There is some self-regulation in the UK. The British Franchise Association requires its members to comply with the European Franchise Federation Code of Ethics for

Franchising. The code requires a franchisor to operate a pilot operation before launching its network, to own the relevant underlying trade marks and to provide initial and ongoing training.

There are no laws or regulations regulating the implementation, offer or granting of foreign franchise systems in the UK although franchisors will need to comply with UK legislation as it applies to the operation of any other businesses.

A franchisor may operate under various legal structures. The franchisor can operate as a partnership, limited company or limited liability partnership („LLP“). Most franchisors will operate their business as a limited company. The benefit of this model is that the shareholders’ liabilities for the debts of the company are limited to the value of their unpaid share capital (if any).

It is a relatively straightforward procedure to incorporate a limited company in the UK. Limited companies are incorporated by registration at Companies House using standard form documentation. There is an obligation to file an annual return and accounts. There is also a requirement to notify Companies House of any changes in directors or share capital.

There are no statutory restrictions on UK companies having foreign shareholders.

There is extensive statutory protection for consumers in the UK. There are different definitions of „consumer“ but a consumer is generally regarded as an individual who is acting in his or her personal capacity for domestic purposes rather than in the context of a business. A franchisee is regarded as a small business and consumer protection law will not apply.

Franchising is subject to competition law in the UK. The UK competition rules are set out in the Competition Act 1998 (the “Act”). The Act mirrors the EU competition

rules but is likely to continue in force after Brexit. Competition law primarily affects the legal enforceability of restrictions imposed on the franchisee and further consideration is given to that below.

Foreign businesses or individuals with a permanent base in the UK will be taxed in the UK in the usual way but there are no specific tax rules which apply only to franchising. Franchisees will be subject to UK taxation in the same way that other businesses are regulated.

There are various ways in which a franchisor can protect its intellectual property in the UK. It is possible to obtain a registered trade mark in the UK by filing an application with the Intellectual Property Office (“**IPO**”). A trade mark will only be registered if it is distinctive. Registration is a relatively straightforward procedure and the benefit of registration is that it will give the franchisor an effective monopoly over the use of its mark in the UK in relation to the classes for which the mark has been registered. Copyright is an unregistered right and arises automatically. The franchisor can protect copyright in the manual and other written materials by obtaining an acknowledgement from the franchisee as to the franchisor’s ownership of copyright and an undertaking not to copy, alter or adapt any copyright works other than pursuant to the terms of the agreement.

Like copyright, know-how is unregistered. A franchisor can only protect its know-how in the UK by contract. Therefore, the franchisor must secure confidentiality undertakings from the franchisee in relation to any know-how contained in the manual or otherwise disclosed to the franchisee.

There are no rules in the UK for pre-sales disclosure or pre-contractual information and the onus is on the franchisee to conduct its own due diligence. The European Code of Ethics for Franchising

provides that the franchisor should give full disclosure of all material information to potential franchisees.

There are some restrictions affecting the content of franchise agreements. These arise mostly in the context of competition law. As outlined above, the Act prohibits certain types of restrictions and the EU vertical agreements block exemption will permit an agreement to be exempted, provided it meets certain conditions and does not contain any so-called „black-listed“ provisions. Price fixing, minimum resale price maintenance and export bans are black-listed. However, non-compete obligations are generally permissible, provided they meet the other requirements of the vertical agreements block exemption and do not continue for more than five years. The UK courts will generally enforce post-term non-compete covenants against the franchisee provided the obligation is limited to the goods or services supplied under the agreement, the premises from which the franchise operated or a reasonable geographic radius and to a period of one year after termination of the agreement.

There are no requirements in the UK on the nature, amount or payment of franchise fees. There are also no restrictions against payment in other currencies.

Confidentiality clauses are generally enforceable in the UK. However, this can be difficult in practice as it will depend on whether the relevant confidential information is clearly identified in the agreement and whether the franchisor can prove misappropriation of that confidential information.

There are no restrictions relating to the termination of franchise agreements and there is no general requirement for a franchisor to renew a franchise agreement after a limited period. However, the franchise agreement will often include the right of the franchisee to renew the

agreement for at least one more term provided the franchisee is not in material breach of the existing agreement and meets other specific conditions. In the UK there is no general right of compensation given to franchisees in the event of legitimate termination or expiry of the agreement.

Often the franchisor will seek to restrict the franchisee's ability to transfer or sell the franchise. This is justified because it is recognised that the franchisor is entitled to preserve the quality and uniformity of the franchise network. The franchise agreement will contain certain conditions relating to transfer of the franchise such as a requirement that the purchaser is fit to carry on the business and passes relevant training.

Disputes can be resolved through a variety of processes in the UK. The parties often agree to resolve disputes before the courts. However, alternatives include mediation and arbitration and the British Franchise Association offers its own mediation and arbitration procedures which are generally more franchise focused and less expensive.

The franchisor may wish to enforce a non-compete undertaking or restrictive

covenant rather than raise an action for damages. This can be obtained quickly by way of injunction in England or interdict in Scotland. General proceedings for breach of contract can be commenced in either the County Court or the High Court in England or the Sheriff Court or Court of Session in Scotland, depending on the value and complexity of the claim.

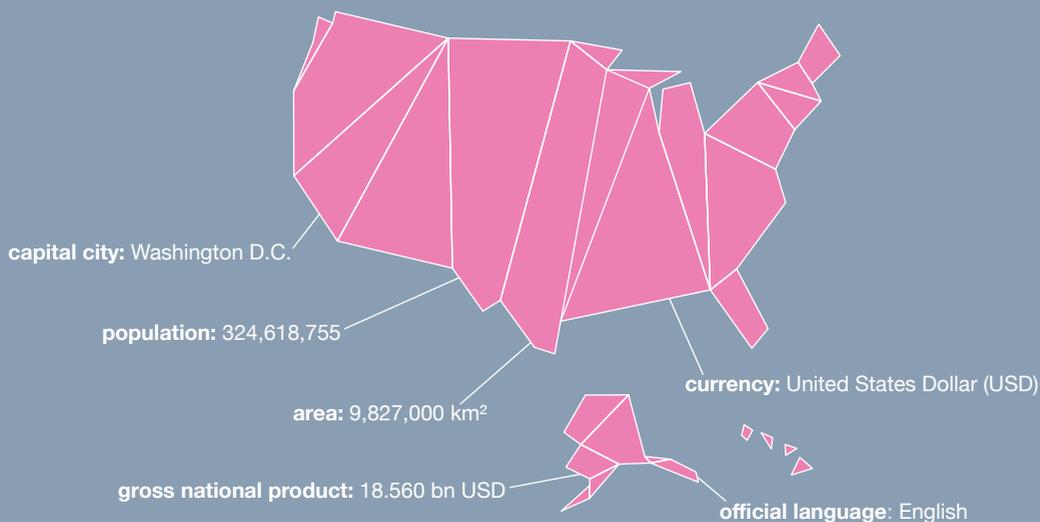
Sometimes parties use arbitration if they wish to preserve the confidentiality of the dispute. However, arbitration can be just as lengthy as court proceedings and the costs may well exceed the cost of court proceedings as the parties are required to pay for the arbitrator.

There are no restrictions on choice of applicable law relating to franchise agreements. Often the franchisor will choose English law or Scots law, depending on where the franchisee is operating its business. If the franchisor is operating a UK business it may well select separate governing laws depending on whether the franchisee is operating in Scotland or England. UK courts will recognise a choice of foreign jurisdiction in a franchise agreement for a business operating in the UK.

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## Franchising in USA

- The US has both federal and state franchise laws. The Federal Trade Commission (FTC) Franchise Rule applies nationally but some states also regulate franchising.
- If a relationship involves the license / use of a trademark, assistance to or control over the licensee and the payment of a fee, the relationship may be considered a franchise requiring compliance with franchise laws.
- Trademark rights can arise from use of a trademark in commerce with or without trademark registration. Careful screening of the trademark to be used and early application for registration is advised.

## Franchising in the United States

As noted above, regulation at the federal level is governed by the FTC Rule which requires pre-sale disclosure of 23 enumerated items covering the franchisor, key personnel, litigation and bankruptcies, fees and expenses, the initial investment, suppliers, financing arrangements, obligations of franchisor and franchisee, territory, IPR, restrictions on goods and services, financial performance representations, outlet information, financial statements of the franchisor and contracts through a Franchise Disclosure Document (FDD). This FDD must be given to the prospective franchisee at least 14 days before signing the Franchise Agreement or payment of fees. No federal registration is required.

Certain states require that the franchise offering be registered and approved for sale prior to any offer or sale. California, Hawaii, Illinois, Indiana, Maryland, Minnesota, New York, North and South Dakota, Rhode Island, Virginia, Washington and Wisconsin have such registration statutes. Some states review the offering / franchise agreement and may require addenda to the FDD and agreements as a condition to granting registration. Certain other states require filing of a Notice of Intent to offer franchises (Michigan) or to obtain exemption from the application of state business opportunity laws that would otherwise regulate a franchise offering (Florida, Kentucky, Nebraska, Texas and Utah). Some states require compliance with their business opportunity laws unless the franchisor has obtained a federally registered trademark (Connecticut, Maine and North Carolina) and others unless there is a federally or state registered trademark (Georgia, Louisiana and South Carolina).

### Corporate law

Various forms of business entities are permitted including corporations, limited and general partnerships, limited liability companies (LLC) and others. These are

formed through filings of documents with the state authorities in the chosen state and will require designation of a local agent. Many franchisors have chosen LLCs to conduct business because they allow flexibility in management and ownership structure and they are a “pass through” entity for income tax purposes. Contrary to the situation with corporations where the corporation is subject to income tax and the shareholders are also subject to income tax on dividends received, LLCs are not subject to a separate income tax. All profits are taxed directly to their owners.

Care should be exercised in determining the state of formation for the franchisor. While a franchisor may have a principal place of business separate from the state of formation, variations in franchise, tax, corporate and other laws may result in some states having a more favorable business and regulatory environment.

### Specifics for Foreign Franchisors

Foreign franchisors are generally treated in the same manner as domestic franchisors. There are some statutes that require reporting and other disclosures and there are the generally applicable laws regarding transactions or investments with persons associated with terrorism.

### Consumer protection laws

Some state consumer protection and deceptive trade practices acts allow franchisees to bring litigation for violation of these laws by the franchisor. These vary by state.

### Antitrust / Competition laws

Federal antitrust law has become less of a concern for franchisors with successful litigation and enforcement action based upon tying arrangement and resale price maintenance being less common. Exposure can be further limited through description of terms in the franchise agreements and disclosure of any tying arrangements or price requirements in

the FDD. State antitrust statutes are not preempted by federal law and may apply different standards particularly with regard to franchisor requirements for minimum sales price maintenance.

### **Labor laws**

Franchisees are generally independent contractors under most franchise agreements. There have been increased efforts by the federal government and trade unions to treat franchisors as employers of franchisees and franchisee employees focusing on collective bargaining, benefits under workers compensation laws and violations of labor law. Some of these efforts have been successful. Different tests of joint employer status are applied, but franchisors can reduce their exposure as a joint employer by reducing the amount of control they exert over franchisees and franchise operations, particularly on issues relating to franchisee employees, by focusing any controls on product/service quality and by emphasizing the independent nature of the franchisees in all dealings and contracts.

### **Tax law aspects**

The United States government and many states impose income taxes. These taxes vary depending upon the form of business entity, the state of formation, the principal business location and contacts with the taxing state. While older authority required franchisor presence in the state, states are increasingly taxing royalties paid to franchisors by franchisees located in the state even if the franchisor does not have a formal presence in the state. Most royalty and franchise fees paid are ordinary income to the franchisor. Capital gains may be taxed at lower rates. Franchisors without a presence in the United States are subject to taxation and withholding taxes on income received.

### **Aspects of IPR law**

Franchisor intellectual property is protected through various federal statutes including the Lanham (Trademark) Act,

the Copyright Act and the Patent Act depending upon the IP involved. As noted above, trademark rights arise from use in the U.S. and not merely from registration. Trade secrets are protected both by law and contract. With the recent enactment of the federal Defend Secrets Act of 2016, both state and federal courts have jurisdiction to prevent trade secret misappropriation. Most courts will prohibit use or disclosure of confidential information and enforce non-competition agreements preventing operation by former franchisees if the terms are reasonable in time and territory.

### **Pre-sale Disclosure**

Franchisors (including sub-franchisors) are required to provide the FDD in plain English following the FTC format and procedures. Franchisors must amend the FDD upon the occurrence of certain material events and at least annually. Remedies for failing to make proper disclosure will vary by state, but franchisees may typically receive rescission, actual damages, attorneys fees and punitive damages in a proper case. Failure to comply with disclosure rules may also expose the franchisor to FTC or state regulatory enforcement. Franchisors, subfranchisors and officers may be held liable depending upon applicable law.

### **Legal Restrictions affecting franchise agreements**

Some registration states require certain provisions in franchise agreements. Certain other states have also enacted franchise relationship laws that restrict the ability of franchisors to terminate or refuse to renew a franchise agreement as described below.

### **Franchise fees**

There are no laws applicable to the nature, amount, currency or payment of franchise fees. Generally applicable state usury laws may restrict the interest that may be charged on overdue payments.

## Confidentiality Clauses

Confidentiality clauses are generally enforceable through litigation if necessary.

## Termination of Franchise Agreements

Some state laws prohibit termination or failure to renew without good cause, providing statutory prescribed advance notice and allowing a period of time in which to cure. These laws vary by state, but good cause is generally defined as a failure to comply with a material obligation of the franchise agreement. The notice and cure periods also vary by state but may be as long as 90 days.

## Transfer of Franchise Agreements

Franchisors may place restrictions on the franchisee's ability to transfer but franchisors should have valid business reasons and exercise good faith when refusing transfers. Some state laws may supersede these contractual provisions.

## Dispute Resolution

Dispute resolution through litigation may occur in either state or federal court. Federal courts have limited jurisdiction prescribed by statute to questions of federal law as well as state law claims if jurisdictional requirements are met.

Arbitration may be required by agreement and allows privacy and often quicker resolution. The procedure, terms, venue and jurisdiction of the arbitration proceeding may also be defined by the parties. Arbitration awards are generally binding and not subject to appeal.

## Applicable law

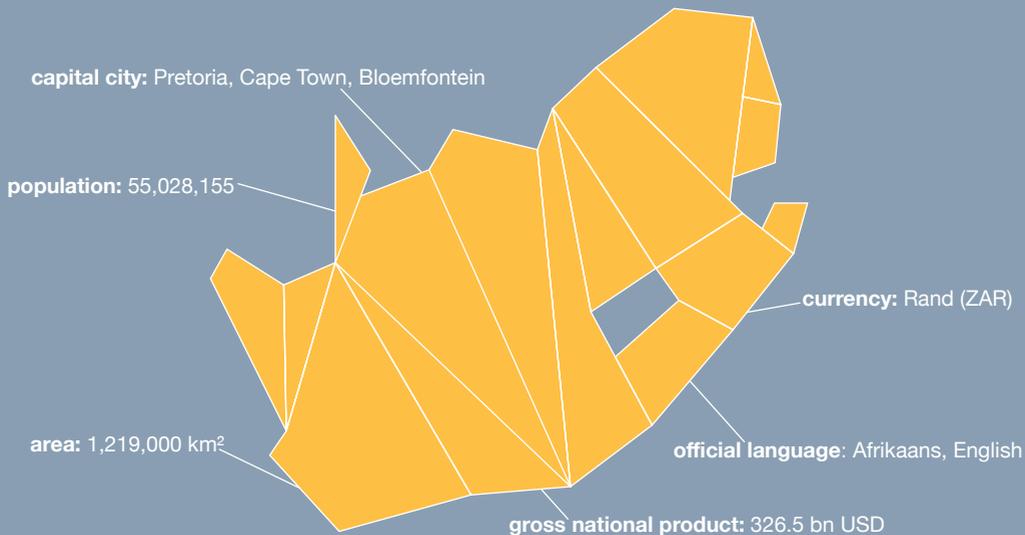
Franchisors may specify the law to govern the franchise agreement and the forum for resolution, but some state laws may supersede these provisions.

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## Franchising in SOUTH AFRICA

- Franchising is governed in South Africa by means of common law and statute. Parties are free to enter into a franchise agreement and to structure their business relationship as they prefer, provided that it complies with the minimum statutory and common law requirements.
- The South African legal system provides for adequate protection and enforcement of intellectual property rights. A franchisor's intellectual property rights can be protected by means of statute and common law.
- Franchising is a one of the preferred options to establish and expand a business in South Africa.

A franchise agreement is viewed in South African law as an ordinary commercial agreement governed by the law of contract. Since 1 April 2011, all franchise agreements in South Africa are also subject to the statutory provisions of the Consumer Protection Act 68 of 2008 (“CPA”). The CPA defines a franchise agreement as an agreement in terms of which (a) a consideration is paid whereby the franchisor grants the franchisee the right to carry on business under a system or marketing plan substantially determined or controlled by the franchisor; (b) under which the business will be substantially or materially associated with advertising, marketing, trademarks or any branding of franchisor; and (c) that governs the business relationship between the parties, including the providing of goods or services.

Different entity options are available to conduct business within South Africa, including a sole proprietor, partnership, trust, a South African company or an external company. A South African company would usually be the preferred choice. The South African Companies Act 71 of 2008 distinguishes between 2 types of profit companies, namely a private company and a public company (both which are subject to limited liability). There are generally no restrictions on foreign shareholding in South African companies or foreign franchise investments.

- The CPA promotes an economic environment that supports consumer rights and responsibilities with reasonable standards regarding consumer goods and services. A franchisee has been included in the definition of a “consumer” and the following fundamental rights are available to consumers as well as franchisees:

- Equality (no discrimination);
- Privacy;

- Disclosure and information;
- Fair and responsible marketing;
- Honesty and fair dealing;
- Fair, just and reasonable terms and conditions;
- Fair value, good quality and safety; and
- Right of choice (including supplier selection). A franchisee’s right of choice regarding suppliers may be limited in the event where the goods and services are reasonably related to the branded products of the franchisor.

The Competition Act 89 of 1998 aims to prevent anti-competitive practices and refers to horizontal and vertical restrictive practices, both of which may apply to the franchise industry in respect of the following:

1. Territorial restrictions, exclusive dealings and exclusive territories;
2. Contractual obligations to source products and services only from a specific supplier and the tying of products; and
3. Price fixing, minimum price maintenance and minimum discounts. In the context of franchising, the above exclusionary acts by a franchisor may be regarded as anti-competitive, unless the franchisor can demonstrate that there is a technological, efficiency or pro-competitive gain which outweigh such an effect.

Both franchisors and franchisees will be required to adhere to South African tax regulations regarding income tax, value-added tax (VAT), employees tax, capital gains tax and withholding taxes (in the case of foreign transactions), all of which will depend upon the specific business structures and entities involved.

Protection is afforded to intellectual property rights in South Africa by means of statute (trademarks, copyright, patents, designs and plant breeders' rights) as well as common law rights (i.e. know-how, trade secrets, goodwill, reputation and confidential information). Trademarks, patents and designs may be registered with the South African Companies and Intellectual Property Commission (CIPC). Copyright is not registered (except for copyright in cinematograph films). The CPA requires the franchisor to identify and specify all its intellectual property rights in a franchise agreement, as well as conditions regarding the use thereof.

A franchisor is obliged to provide a prospective franchisee with a disclosure document at least 14 calendar days prior to the signing of a franchise agreement, which should contain prescribed minimum information such as (a) the number of individual outlets franchised by the franchisor; (b) the growth of the franchisor's turnover, (c) a statement confirming that there have been no significant or material changes in the financial position and that franchisor will be able to pay its future debts; and (d) written projections in respect of levels of potential sales, income, profits or other financial projections for the franchise business.

The disclosure document must be accompanied by a certificate from an accountant/auditor confirming that (a) the business of the franchisor is a going concern; (b) the franchisor is able to meet its current and contingent liabilities; (c) the franchisor is capable of meeting all of its financial commitments in the ordinary course of business; and (d) the franchisor's financial statements have been prepared as required and fairly reflects the financial position of the franchisor.

The disclosure document should also include (a) a list and specific details of current franchisees and of outlets owned

by the franchisor; and (b) an organogram depicting the support system in place for franchisees.

South African case law confirmed that a franchise agreement is neither an employment nor a partnership agreement. In terms of South African employment legislation, a franchisee and its employees would not be regarded as employees of the franchisor (unless there are specific circumstances and other agreement(s) between the parties stating otherwise).

Statutory requirements regarding franchise agreements include amongst others, that:

- A franchise agreement should be in writing and signed by at least the franchisee. It should also be in plain and understandable language. Specific information as specified in the CPA franchise regulations should be included in a franchise agreement.
- Provisions in a franchise agreement should prevent:
  - Unreasonable or overvaluation of fees, prices or other direct or indirect consideration;
  - Conduct which is unnecessary or unreasonable in relation to the risks to be incurred by one party; and
  - Conduct that is not reasonably necessary for the protection of the legitimate business interest of the franchisor, franchisee or the franchise system.
- A franchisee may by means of written notice to the franchisor, cancel a franchise agreement without costs or penalty within 10 business days after signing such an agreement.
- Should a franchisor receive any direct or indirect benefit or compensation from

suppliers, the fact thereof should be disclosed by the franchisor in writing with an explanation of how it will be applied. Should the franchisee not fully understand any provisions of a franchise agreement, the franchisee may request a written explanation thereof from the franchisor.

All amounts and fees payable by the franchisee (initial and ongoing financial obligations), should be disclosed by the franchisor, including specific information regarding the franchisee's monthly royalties or license fees, training costs, working capital, stock requirements, establishment funds and other related expenses. In the event where a separate marketing fee will be charged, additional financial and administration requirements will be applicable. Interest rates on overdue payments are regulated in terms of the National Credit Act 34 of 2005. Exchange control regulations and Reserve Bank approval would apply where payments are made to and from other countries.

Confidentiality clauses are normally included in a franchise agreement. The parties may agree that the franchisee will treat all business information and records strictly confidential and not disclose it to any third party without the franchisor's prior written approval.

The CPA states that the provisions regarding duration and renewal should be incorporated in a franchise agreement. The parties may agree to renewal, termination and post-termination provisions and stipulate the consequences and procedures following termination, provided that such terms are in line with the 'fair and reasonable' principles as specified in the CPA.

It is a CPA requirement that the conditions for transfer of rights and/or assignment of rights be addressed in a franchise agreement. A franchisee may be restricted

to transfer its rights and obligations and ownership interest in the franchisee entity, provided that it has been agreed upon in the franchise agreement.

Parties may elect to resolve disputes by means of mediation, arbitration or alternative dispute resolution mechanisms. In the absence of agreed upon arbitration or dispute resolution mechanisms (or authorities having exclusive jurisdiction over certain matters for example the Consumer Commission or Competition Commission), the parties may approach the South African courts directly in the event of a dispute.

Parties to a franchise agreement may agree to any governing law, provided that it will be subject to the provisions of the CPA, as well as any other legislation and regulations which may be applicable in the South African trade and market place especially in as far as it relates to franchising.

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**»In our world, which seems to be getting closer every day, a global view with local expertise is of the essence. Thus, this second edition of the International Franchise Handbook shall give you first-hand information from local champions on franchise law in as many as 31 countries throughout the world.«**