INTERNATIONAL FRANCHISE HANDBOOK

1st EDITION

IMPRINT

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BridgehouseLaw Germany / Dr. Mathias Reif, Dr. Christine von Hauch

GLOBAL VIEW, LOCAL EXPERTISE

It is with great honor and privilege that we have the opportunity – together with FranNet and FisherZucker – to present to you the first edition of the International Franchise Handbook.

In our world, which seems to be getting closer every day, a global view with local expertise is of the essence. At BridgehouseLaw, we understand this and offer clients a "One-Stop Shop" for all of their international commercial and tax-related matters, going above and beyond traditional legal and taxation advice by working together with knowledgeable local partners.

This first edition of the International Franchise Handbook, however, is not only our work but that of all law firms represented in this book. Each of them are champions on franchise law in their home country and all of them are united in the cross-border approach to international matters.

While we are represented in Germany, Turkey and the US through own offices in Atlanta, Berlin, Charlotte, Cologne, Istanbul and Munich, BridgehouseLaw´s global services are further available through our BridgeAlliance partner firms in North America, Europe and the Middle East - some of whom also contributed to this edition.

In our international franchise group we comprehensively support companies from all industrial sectors in every aspect of national and international franchise law. This contains, amongst others, the drafting of international and national franchise, master-franchise and sub-master-franchise agreements, the reviewing of a business idea with respect to its "franchisability", as well as support in setting up franchise systems.

I, Mathias, as one of the managing partners of BridgehouseLaw Germany, am proud to be the central contact point of this practice group. For years I have been advising companies in the set-up or expansion of their distribution systems as well as franchisees, especially in drafting international and national franchise and commercial agent agreements. In addition, I am an Associated Expert with the German franchise association.

I, Christine, work especially for international franchisors seeking advice in Germany.

The practice group furthermore consists of managing partner Oliver Bolthausen, LL.M. (USA) as well as Ms. Victoria Geks, LL.M. (Aberdeen).

Finally, we would like to thank all colleagues and firms, contributing to this edition, namely our co-publishers FranNet and FisherZucker.

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FranNet / Jania Bailey

READY, SET, GROW!

In my years, I've seen a lot of franchise systems. The young brands, the mature brands. The good brands, the bad brands. The brands that are on the verge of exploding, and the brands that are on the verge of imploding. Franchise brands come in all shapes and sizes – there are no two alike.

What I also find is that executives in franchise systems know their brand's business. They know the operations, marketing and the P&Ls. Where most franchisors tend to fall short is perhaps the most important key in helping their system truly prosper: knowing who would make a great franchisee in their system. And they're unsure where to go to find those great franchisees.

Typically, most systems have no issues locating prospects who may seem to be well-intentioned and perhaps well-financed, but they are simply not a good "fit" for your franchise. As the franchisee is the physical conduit between your business model and your cash paying customers, placing an ill-fitting franchisee into your system is a ticking time bomb. So if you're intent on growing your franchise, how can you make sure that you're onboarding franchisees who ideally fit your system?

As President of FranNet, we are the industry's most respected leader in helping individuals find their ideal franchise and we've helped hundreds of franchise systems strategically grow for more than 27 years. With more than 100 locally-based franchise consultants across North America and Europe (and expanding), FranNet uses a proprietary profiling process to expertly match individuals with ideal franchise opportunities. We work with select franchisors and are experts at helping our clients evaluate the various types of business opportunities in the marketplace today. We guide our clients across the globe to make sound business decisions that afford them the best chance for professional and personal success.

Our FranNet consultants also work in geographically protected areas providing two significant advantages versus our competition. First, living and working in the market gives our consultants the advantage of intimately knowing the market. They understand the competitive landscape and what opportunities are best for their clients. Second, the proximity within the market allows for face-to-face attention for their clients. When considering something as important as going into business for yourself, knowing you have the local presence of a qualified FranNet franchise consultant in your area carries a great peace of mind.

FranNet's winning formula begins with the individual's Personal Franchise Assessment (PFA), our proprietary assessment that looks at a person from many facets, including focusing on their behavior profile, risk tolerance, communication style and financial background, among other things. These attributes are combined with what we have learned in our 27 years in business to identify franchises in which our client is most inclined to succeed.

With the PFA as the structural foundation, our FranNet consultant works with the client to build a business model that identifies the unique characteristics of the franchise that fit the client best. Short and long-term goals, exit strategies, and business preferences are some of the key components of the overall business plan. We also help financially qualify the individual so that our franchise recommendations fit the individual's budget.

Then, our client is presented a select number of franchise opportunities that align with their unique business model. Finally, our FranNet consultant provides the client with the guidance and tools to research the franchises and introduces them to the franchises they want to research further. In a sea of uncertainty the client faces through the franchise research process, we are the guiding rudder to calm the client and allow them to make fact-based, sound decisions in selecting the ideal franchise for them specifically.

The benefits to the franchisor are numerous. FranNet presents its franchisor partners with financially qualified, well vetted, and keenly fitting franchisee candidates who are thoroughly educated on the opportunities and vision of the franchise. There's no fees owed to FranNet unless the individual ultimately invests in your franchise, thus maximizing the opportunity for a lifelong, happy, top producing franchisee.

FranNet-International and the Opportunities Abroad
According to the International Franchise Association (IFA), more than one-third of the units of the 200 largest US-based franchisors are outside the United States. Most indications suggest this trend will increase to about one-half of all units by the end of the decade. To understand the impact of international growth, two of the world's largest franchise systems receive more than half their operating income from their overseas operations: McDonalds (60%) and YUM Brands (70%).

Further, the IFA found in a survey to its members that roughly 80 percent already have international operations, are planning to begin, or will accelerate international franchising as it's viewed as important to the company's future.

FranNet consultants operate internationally in Canada, Germany and the United Kingdom. With international franchise opportunities so abundant, we have taken an aggressive expansion plan toward outfitting entrepreneurs all over the world with the resources necessary to make the most educated decision possible on business ownership. In our immediate future, we're eyeing additional expansion opportunities across Europe, Australia and the Middle East.

For some franchise systems, maybe expansion around the world isn't immediately on your radar. One of the biggest opportunities we've found for franchisors to "stick their toe into international waters" is through expansion into Canada.

Canada presents one of the biggest expansion opportunities for many American-based franchisors. It's a country with close proximity to the U.S., a strong economy and a population roughly that of California. Opportunities abound for brands that want to expand internationally with less of a risk in this known market. FranNet has been operating in Canada for about 15 years and has seen revenues from the country grow to a significant portion of the company's overall production. As a matter of fact, one of our top performing offices in the entire company is based in Toronto.

FranNet expanded into Europe in 2013 when it bought the assets of FranNet-Germany, and opened an office in the United Kingdom in 2014. FranNet's plan is to help other franchisors expand into international markets as FranNet has the infrastructure there to support franchisors' growth plans.

Regardless if your plans are focused on expansion across the U.S. or across the globe, FranNet has the franchising expertise to help your franchise brand grow strategically, intelligently and responsibly through well-vetted, eager franchisees who are uniquely qualified to bring your brand to life around the world.

Wishing you much success,

Jania Bailey

Jania Bailey
FranNet, President & COO

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A WORD FROM FISHERZUCKER

It is our pleasure to work with FranNet, BridgehouseLaw and the other fine firms who collaborated to make this handbook possible. We hope that this short primer of national laws that affect franchising will provide you with insight as to the general legal landscape of the countries presented, but it's no substitute to engaging competent legal counsel here and abroad to navigate all of the laws and issues that may impact your franchise offer and operations.

Founded in 1995, and representing well over 100 brands, FisherZucker, LLC is a full-service law firm with a practice dedicated almost exclusively to franchise, distribution and licensing matters. We are an alternative to large law firms, which have considerable overhead costs and high hourly rates. Our clients receive the benefit of a personal relationship, and the efficiency and cost-consciousness that is available only in a boutique practice. Our lawyers have substantial experience, proven expertise and they produce results.

As many of our clients expand beyond the territorial confines of the United States, we provide advice concerning overseas expansion and protection of intellectual property rights abroad. Our attorneys draft and negotiate international master franchise agreements and development agreements, and single-unit franchise agreements as well as disclosure documents. As part of this process we take into account the business goals of our client and, in conjunction with accountants and local counsel, we ensure that the agreements are enforceable and minimize any tax implications of the transaction.

We have long-standing relationships with various attorneys in other countries - many of whom helped bring this handbook to life - who assist us in providing the local perspective on expansion within a particular country. In addition, it's been our privilege to help numerous foreign franchisors launch their brands in the United States.

Again, we thank FranNet, BridgehouseLaw and each of the contributing law firms to this International Franchise Handbook. To each of you, we wish you growth and success in your business.

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THE WAY TO EUROPE: TRADEMARK PROTECTION

Apart from specialized know-how and related technical solutions, successful franchises are based on uniform symbols to make the most of the value of brand recognition and thereby leverage one of the key synergies available to franchise systems: market penetration through dissemination. To achieve this goal, it is of vital interest to any franchisor to obtain and retain intellectual property rights not only to the aforementioned know-how and solutions, but also to the franchise brand, to make it available on his terms to franchisees (internal control), and to protect it against third parties' attack or imitation (external control).

Cornerstone of any brand strategy is a valid trademark strategy, since it constitutes an indefinitely extendable intellectual property right, guaranteeing accumulation and retention of goodwill. This necessitates the consideration of national borders, as intellectual property rights are commonly awarded within specific jurisdictions and countries. Any start-up, or extension, of a franchise therefore has to evaluate several aspects when contemplating the leap to Europe.

First and foremost, the intended scope of business has to be assessed, already keeping in mind foreseeable mid- and long-term goals in this regard. This offers the chance to make use of the possible gains of efficiency in the European trademark system and reduces the risk of competitors taking advantage of initial hesitations, e.g. by registering (similar) trademark rights in neighbouring countries and thereby impeding market entrance of the franchise there at a later stage.

This initial assessment directly paves the way for the next important step: which kind of trademark to pursue. There are three distinct variants available:

(i) Already existing national trademarks can constitute a basis for an International Registration ("IR") with the World Intellectual Property Organization ("WIPO"), extending the trademark rights to specifically designated European countries or the European Union ("EU") as a whole. On the downside, such an IR is wholly dependent on the existence of the national trademark for five years after its registration. Should the national trademark be (partially) cancelled during this time for any reason, the IR would follow suit, unless costly transformed into national applications. Also, no modification or adaptation is possible for the European market; the IR trademark and its goods and services have to be identical to the underlying national trademark.

(ii) It is also possible to attain trademark rights in all 28 EU countries by registering a single Community Trademark ("CTM") with the Office for the Harmonization of the Internal Market ("OHIM"). The trademark can be tailored to specific needs of the European market and is by far the cheapest alternative if more than one European country is the intended target for the franchise. The main disadvantage, which it shares with an IR designated for the EU, is that a CTM has to contend with all existing trademark pools in the EU right off the bat, but it has distinct benefits with regards to its proceedings, use and defence compared to a similar IR.

(iii) Finally, national trademark applications can be contemplated. If only a single EU country is – and foreseeably will be – targeted by the franchise, it is the most cost effective solution, with the added benefit that the contending pool of already existing and therefore potentially opposing trademarks is the smallest. Any expansion of the franchise at a later time will require further efforts, though, and carries the aforementioned risk of new obstacles arising in the meantime.

All approaches have in common that the potential risks of opposing intellectual property rights should be ascertained beforehand through research and analysis to prevent the potential (partial) loss of the trademark later and corresponding claims for disclosure and damages. Such evaluation and analysis as well as the assessment of all accompanying circumstances, which might impact these strategic decisions, are part and parcel of the advisory services of BridgehouseLaw Germany in formulating an individual and comprehensive solution for franchisors on their way to Europe.

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RIGHT WAY RIGHT BUSINESS

area: 7,692,024 km² | **population:** 23,726,600 |
official language: English | **capital city:** Canberra |
currency: Australian Dollar (AUD) | **gross national product:** 1,100 bn. USD

John Sier, Louise Wolf / MST Lawyers

AUSTRALIA

Legal Basis of Franchise Law The Competition and Consumer (Industry Codes - Franchising) Regulations 2014 (Cth) ("Code") replaced the 2010 regulations on 1 January 2015 and regulates franchise agreements in Australia.

The Code defines a franchise agreement ("FA") is 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.

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. Depending on each entity's circumstances, other structures may be appropriate. Legal and taxation advice is required to determine the best structure. See 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.

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.

Labour Law The relationship between a franchisor and franchisee 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. However, to eliminate any risk, it would be prudent for a franchisee to be an incorporated entity.

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.

Intellectual Property Trade marks, patents, registered designs and plant breeders' rights can be registered through IP Australia. See 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 now includes information about master franchisors, relieving master franchisees of the obligation to provide the 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 be included and are usually annexed to the DD. 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 of such expenses is 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's costs of settling a dispute. The Code now 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. If Australian unfair contracts law is amended to have broader application than merely consumer contracts, it could apply to FAs and potentially affect 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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area: 83,878 km² | **population:** 8,572,895 |
official language: German | **capital city:** Vienna |
currency: Euro (EUR) | **gross national product:** 373 bn. USD

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AUSTRIA

Except for the European Block Exemption Regulation (Commission Regulation (EU) No 330/2010), there is neither a codified franchise law, nor a legal definition of the term "franchise" in the Austrian legal framework. Yet, as an effusion of personal autonomy, the conclusion of franchise agreements is admissible. Due to that fact also neither specifics for the implementation, offer or granting/sale of foreign franchise systems in Austria nor other special restrictions regarding franchise agreements exist. However, general law principles have to be observed.

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 for (e.g. a stock corporation or a LLC provide for a limitation of the liability of the shareholders).

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. This also applies to the conclusion of a franchise agreement. Therefore franchisor should be carefully when looking for a new franchisee in Austria and when concluding a franchise agreement.

In addition to that under Austrian law a 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). Furthermore, 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. For this reason 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 double under 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 eliminated 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). Important consequences of such a qualification are the competence of labor courts, the applicability of the Act on Employee's Liability (Dienstnehmerhaftpflichtgesetz) as well as 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. The Austrian Supreme Court affirmed the possibility to analogously apply the compensatory claim of the commercial agent for loss of clientele (Section 24 Austrian Commercial Agents Act [Handelsvertretergesetz) 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.

As to personal income tax (Einkommenssteuer), persons domiciled or habitually resident in Austria are subject to unlimited tax liability. Other 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 (Körperschaftssteuer) 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 various double-tax treaties (which Austria is a party 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. Please note 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).

Prior to signing a franchise agreement, information of the franchisee about relevant legal and economic issues is essential. The International Institute for the Unification of Private Law issued a non-binding so-called Model Franchise Disclosure Law. Apart from this, when potential contracting parties start negotiations, a pre-contractual obligation accrues; 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 applicable law (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.

A franchise agreement is a contract containing continuing obligations similar to a service contract; hence, the contracting parties are bound by mutual fiduciary duties, including an obligation of confidentiality. In addition to that general principle franchise agreements normally contain an explicit confidentiality clause, which is/can be combined with a penalty which is payable in case of non-compliance.

As franchise agreements are usually stipulate a continuing obligation (Dauerschuldverhältnis), 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. Such transfer is permissible in general, however can be restricted by change of control clauses in the franchise agreement.

Disputes arising in the context of franchise agreements are usually settled by the Commercial Court competent for the defendant. Subsequently, at most 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.

Irregardless 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, it should be taken into account that the CISG can be applicable (yet can be excluded) on goods or works supply agreements. 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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area: 30,528 km² | **population:** 11,198,638 |
official language: Dutch, French, German | **capital city:** Brussels |
currency: Euro (EUR) | **gross national product:** 434 bn. USD

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Errol Cohen / LE PLAY avocats

BELGIUM

The franchise law in Belgium is similar to the French franchise law, thus, in addition to the content of this chapter, it is referred to the information provided in the French section.

The definition of a franchise is the same as in France. Its essential elements are the know-how, the pilot stores, the brand and technical support.

Any franchisor or franchisee shall set-up a company as per limited or anonymous company through a notary office.

The majority of French case law is applicable to the Belgian market and it is even customary to invoke French precedent of courts before the Belgian jurisdiction in case Belgian decisions are lacking.

As in France, there's no specific law for franchise in Belgium.

However, Belgium adopted in 2005 the Laruelle law (similar to the French Doubin law).

This law requires the potential contractors to exchange information prior to the conclusion of the franchise agreement, so that the parties fully understand the contractual obligations they undertake and its consequences.

The franchisor shall fulfill certain obligations before signing the franchise agreement, such as providing a "Pre Contractual Information Document" (DIP) to the franchisee. This document contains the same information as in the French DIP: Company balance sheets, market conditions, contract duration etc. However, in Belgium the following information must be additionally included:

- The statement that the franchise agreement was concluded in consideration of the person.
- The calculation of the fee and terms and method under which those fees could be adapted during the agreement and upon renewal.
- A call-option in favor of the franchisor.
- Exclusive rights granted to any of the parties.

The DIP shall be sent within one month before the conclusion of the agreement. The franchisee has upon receipt one month to examine it and decide if it wishes to engage. The franchisor may not, during that period, make any decisions with respect to this agreement.

If the franchisor does not grant the franchisee the aforementioned month, the franchisee may request cancellation of the agreement for a period of two years after conclusion of the agreement.

The franchise agreement shall provide for:

- The franchise's strategy.
- The necessary means to achieve the franchise concept.
- The obligations and responsibilities of the parties.

The franchisee is required to attend training in order to learn the brand's image and to collaborate loyally.

The franchisor must train and assist the franchisee.

The duration of the franchise agreement shall be set so that the franchisee can reasonably recapitalize its investments specific to the franchise.

The agreement shall clearly provide the conditions under which the franchisee will be able to assign its agreement (including a RoFR by the franchisor).

Like France, Belgium has a federation of the franchise, which works to strengthen the franchise label in Belgium and which supports its members in matters with the public authorities. The Belgian federation of the franchise (FBF) offers as an alternative to the Belgian commercial courts, to refer matters to the Conciliation Commission of the FBF.

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currency: Real (BRL) | **gross national product:** 3,073 bn. USD

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BRAZIL

Legal Basis of Franchise Law

Franchising is regulated indirectly by a wide and sparse variety of laws that will range from the Brazilian Civil Code to administrative instructions issued by the Brazilian Patent and Trademark Office ("INPI"). The "Franchise Law" itself is narrow, limited mainly to the disclosure obligations. Franchise is defined as a "a system whereby a franchisor licenses to the franchisee the right to use a trademark or patent, along with the right to distribute products or services…, and use a business method…".

Specifics regarding Foreign Franchisors

There is no discrimination of foreign franchisors based solely on their status as non-citizens, albeit it is more complex, in general, to be a foreigner shareholder to any business in Brazil. Also, the registration of franchise agreements before INPI is mandatory to remit royalties abroad.

Corporate Law

Limited liability companies ("Limitadas") and corporations ("SAs") are the most common type of companies in Brazil. Both are recommended form of business entity for franchisors and the choice between Limitada and SA is directly related to franchisor's business structure. Limitadas are more straightforward, flexible and economical to operate. The extensive provisions governing SAs provide a more detailed regulatory framework for management and shareholder relations and enhanced transparency, although at the cost of increased administrative and publication costs. An SA may be a publicly-held corporation or a non-publicly held corporation. Once the company has been recorded in the Commercial Registry, it must be registered with the Brazilian Federal Tax Authorities ("CNPJ"), City Hall Finance Department (CCM); National Social Security (INSS); and Guaranteed Fund for Length of Service (FGTS). Foreign entities that will be a shareholder of a company must submit a document to the Commercial Registry issued by the competent authority in the relevant place of incorporation which proves its regular existence under the applicable laws. Also, foreign shareholders (whether entities or individuals) shall appoint an individual resident in Brazil as its representative. According to the exchange control rules, foreign companies or individuals acquiring shares from Brazilian companies must register the foreign investment made with the Central Bank of Brazil ("Bacen"), in order to (i) transfer amounts to pay in the capital stock; (ii) receive dividends or interests and (iii) repatriate funds. Finally, all the foreign documents, powers and certifications, to be legally valid in Brazil must be: (i) issued/formalized as an official document (notarized by a notary public or certified as authentic by the Brazilian Consulate upon presentation of the respective originals); (ii) legalised by the competent Brazilian Consulate; (iii) translated into Portuguese by a sworn translator registered with the competent commercial registry in Brazil; and (iv) registered with the registry of documents ("Cartório de Registro de Títulos e Documentos").

Consumer Protection Law

The predominant position of the Brazilian Superior Court of Justice of Brazil is that the relationship between franchisee and franchisor is subject to the Franchise Law and should not fall under the protection of the Brazilian consumer laws.

Antitrust/Competition Law

Brazilian law does not set forth a specific competition policy for franchise agreements, but some vertical restraints which may affect the franchise chain. In Brazil, an antitrust infringement is any act in any way intended or otherwise able to produce the following effects, even if such effects are not achieved: (i) to limit, restrain or, in any way, harm competition or free enterprise; (ii) to control a relevant market of a certain product of service; (iii) to increase profits on a discretionary basis; or (iv) to abuse one's market power. Accordingly, price and non-price restrictions (such as territorial limitations) which are common to franchising agreements are accepted by the Brazilian Competition Agency whenever there is high competition between brands.

Labor Law Aspects

Franchise Law expressly excludes the spillover of franchisee employment liabilities to the franchisor. Nonetheless, to the extent that the franchise relationship deviates from its statutory model by establishing significant managerial interference of franchisor on franchisee' operation increases the risks of franchisor labor liabilities.

Sales Agent Law

There are no legal implications and/or restrictions arising from Brazilian sales agent law which are applicable to franchisees.

Tax Law Aspects

Brazilian tax system is complex, especially considering the large diversity of tax regulation and the existence of three government levels (Federal, State and Municipal) empowered to impose taxes and require compliance with ancillary obligations. Considering such complexity, it is important to mention that any rate and tax described below may vary according to some business and legal aspect, being extremely important to perform a detailed case-by-case analysis to identify the best tax strategy for the franchisor. Generally speaking, for franchisors located in Brazil the main federal taxes due on franchise business are: (i) IRPJ (Income Tax), at a rate of 15%; (ii) CSL, a federal tax on net profits lied at the rate of 9%, (iii) CIDE – Royalties, a contributions at the rate of 10% and (iv) PIS/COFINS, a social security contribution levied on franchisor's income at the rate of 1,65% (PIS) and 7,6% (COFINS). The main State tax is ICMS (State VAT), which is levied on sales of goods, and may be applicable depending on the type and locations of the franchise business. The main municipality tax due on franchise business is ISS, a service tax which rate may vary from 2 to 5% depending on the municipality. It is important to note, however, that the legal provision regarding such taxation is actually being challenged in Brazilian Supreme Court. Regarding foreign franchisors, it is important to stress that the remittance of money abroad are subject to the retention of withholding tax according to the country of destination and subject to international treaties to avoid double taxation.

Aspects of IPR Law

The Brazilian trademark system is based on the "first filed" jurisdiction for trademark protection so as a rule trademark rights are only obtained by means of valid trademark registration per class (Brazil adopts the International Nice Classification System). There is no legal definition of know-how in Brazil. In broad terms it can be defined as general knowledge and techniques that are not protected under the Industrial Property Law (e.g. trademark/patent).

Pre-sale disclosure/pre-contractual information

As previously stated, the disclosure in Brazil is heavily regulated; therefore strict compliance with the Franchise Law is paramount to prevent liabilities to the franchisor. Franchisor must provide a prospective franchisee or master franchisee with a written disclosure document presented in clear language and in Portuguese (unless franchisee accepts otherwise). Disclosure documents must be delivered to prospective franchisees at least 10 days prior to the execution of any binding document. There is an extensive statutory list of information that must be a part of the disclosure, in addition to others that are either advisable to inform or common market practice to do so. In general terms, the statutory disclosure must include updated detailed information about the franchisor, its operation and the potential risks.

Legal restrictions affecting franchise agreements

Specific laws might contain or imply, even if by omission, restrictions on certain provisions of franchise agreements, as common examples we could cite: (i) certain limitations on the percentage of royalty remitted abroad; (ii) restriction to non-solicitation/non-compete provisions; (iii) liability/monetary damage limitation provisions, among others.

Franchise fees

Although the matter is controversial, INPI's traditional position is that royalty payments may not supersede, in total (trademark, patents, know-how, technical assistance), 5% of total net revenue obtained with sales. So long as there is a foreign party in the agreement, in most cases Brazilian law allows payments using a foreign currency. Otherwise, usually the remuneration may be established in a foreign currency, but effective payment may only be performed in the local currency (based on the exchange rate of the execution of the agreement).

Confidentiality clauses

The contractual protection of know-how and trade secrets in franchise agreements by means of confidentiality clauses is permitted, but there are some limitations. Such provisions affect free competition/freedom of work.

Termination of franchise agreements

Although the Franchise Law requires that the franchisor describe the obligations and rights of both the franchisor and franchisee under the franchise agreement, it does not mandate relationship conditions or requirements. As long as the franchisor does not misrepresent its intentions, there is no duty to renew the franchise agreement.

Transfer of Franchise Agreements

There is no limitation on the transfer of ownership, unless stipulated by the contract.

Dispute Resolution

Traditionally, disputes are solved by the judicial courts, but arbitration has increased significantly. It is recommendable (in any case) to elect Brazil as jurisdiction to avoid the bureaucracy related to the local enforcement of foreign decisions.

Applicable Law

Parties are free to elect the governing law of franchise agreements. Nonetheless, foreign law shall not be upheld as valid when it is considered to be in violation of public policy, morality or sovereignty of Brazil or a fraud under Brazilian law. Such concepts are not expressly defined by Brazilian law and would be interpreted case by case.

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currency: Canadian Dollar (CAD) | **gross national product:** 1,578 bn. USD

Peter Viitre / Sotos LLP

CANADA

In Canada, **franchises are regulated** at the provincial, rather than federal, level. At the time of writing, five of Canada's 10 provinces (i.e., Ontario, Alberta, Manitoba, New Brunswick and Prince Edward Island – the "Disclosure Provinces") have franchise legislation in place, with a sixth (British Columbia) expected to implement similar legislation in 2015.

The **definition of "franchise"** under the laws of each Disclosure Province is quite broad and captures many types of business relationships beyond the traditional notion of a franchise. In four of the five Provinces there is a three-pronged test with the following components:

1. There must be a grant of a license to sell or offer for sale goods that are substantially associated with the upstream party's (i.e., the franchisor's) **trademark**, name or other commercial symbol.

2. There must be a (direct or indirect) **payment** or series of continuing payments made by the downstream party (i.e., the franchisee) to the franchisor either in consideration of the grant of the license or otherwise in the course of operating the licensed business. In other words, any payment by the franchisee to the franchisor will typically qualify for this prong of the test.

3. The franchisor must either exert **significant control** over, or provide **significant assistance** in, the franchisee's method of operating the licensed business (including by way of building design and furnishings, site selection, or training).

In addition to this general test, there is also an alternative formulation for the grant of **representational or distribution rights** where the franchisor provides location assistance, including securing retail outlets or accounts or securing locations are sites for vending machines, display racks or other product sales displays.

As a result of the breadth of the above definition(s), **anyone who is considering selling branded products or services in or into one of Canada's Disclosure Provinces through any other person or entity** (i.e., not directly to the ultimate purchaser/consumer, whether through branch offices, corporate locations or otherwise) would be well-advised to **consult with Canadian counsel** to determine whether the activity in question would constitute a "franchise" under applicable law.

Canadian franchise laws contain the following three basic elements:

1. In each Disclosure Province, the franchisor must provide to each prospective franchisee (including a master franchisee) a **franchise disclosure document (an "FDD")** that meets the Province's statutory and regulatory requirements at least 14 days before the earlier of the franchisee's signing of the franchise agreement and its payment of any money to the franchisor. Each franchisor is further required to provide a statement of material change (an "SMC") to the prospective franchisee if a material change occurs within the minimum **14-day** waiting period (or thereafter but before the signing of any agreements or payment of any money). Each FDD and SMC must be accompanied by a **certificate** signed by at least two officers or directors of the franchisor who attest to the document's accuracy and completeness on pain of **personal liability.**

The over-arching requirement is to **disclose all "material facts" including those listed in the applicable regulations,** so that the prospective franchisee has all of the information it requires to make a fully informed decision as to whether to purchase the franchise in question and how much it is willing to pay for it – the itemized list set out in the applicable regulation is **not exhaustive,** and each individual FDD must be **customized** to suit the particular franchise and location being granted when it is delivered to a prospective franchisee.

2. Each franchise agreement imposes on each party to it a **duty of fair dealing** in its performance and enforcement. Such duty includes the duty to act in **good faith** and in accordance with **reasonable commercial standards.** It is not, however, a fiduciary duty: while the one party must consider the interests of the other in making its decisions, it need not place the other party's interests ahead of its own. This duty is in addition to the **general duty to act honestly** and in good faith in the performance of contractual obligations imposed by Canadian common law.

3. Franchisees have the **right to associate** with one another and to form or join organizations of franchisees, and franchisors are prohibited from interfering with, prohibiting or restricting any such activity in any way.

Unlike many jurisdictions, there is **no governmental administration or enforcement** of franchise law anywhere in Canada, so there is **no requirement**

for franchisors to register or to file their FDDs with any governmental authority, and enforcement of franchise legislation is left entirely to private rights of action. This also means that **FDDs must be current as of the date they are delivered** to the prospective franchisee, rather than being updated only once per year for public filing.

Each franchise act contains within it two principal remedies for the breach of its requirements: (1) a comprehensive **rescission** right for failure to provide an FDD that meets the requirements of the act and its regulations or for failing to deliver the FDD within the required time, and (2) a right of action for **damages** for breaches of the duty of fair dealing, violations of the right to associate and misrepresentations contained within an FDD or SMC.

Canada's franchise legislation **does not restrict the content of franchise agreements** or the franchisor's ability to set the amounts of franchise fees and the terms of their payment (including their currency), confidentiality restrictions, termination provisions, or transfer restrictions. However, general restrictions do exist under: the governing law and venue restrictions, discussed below; the provisions of Canada's Interest Act, which prohibit the charging of criminal interest rates (generally, effective annual interest of 60% or more); the common law regarding the scope and term of non-competition covenants; and the statutory Duty of Fair Dealing.

Foreign franchisors expanding to Canada should be aware of the following types of legislation and regulation:

a. Canada's **franchise laws** apply equally to foreign systems entering Canada as to domestically-based systems.

b. Foreign franchisors typically either grant franchises directly to Canadian franchisees (or master franchisees) or use a **Canadian corporation** to serve as the Canadian franchisor. Canada does not have limited liability companies (LLCs).
There are **no restrictions on foreign ownership of Canadian corporations** (although 1/4 of a Canadian corporation's directors must be Canadian residents) and the thresholds for application of Canada's foreign investment review rules are high enough (especially for investors from WTO member countries) that they do not typically come into play in franchise transactions.

c. Foreign businesses and individuals may be **taxed** in Canada on their worldwide income if they become or are deemed to be **resident** in Canada, and any Canadian corporation established by a foreign franchisor will be taxed in this way. Non-residents are required to file Canadian tax returns and pay tax on the income they earn in Canada (or, in the case of US residents and residents of certain other countries with which Canada has a tax treaty, on the income earned from a **"permanent establishment"** through which they carry on business in Canada).

Certain payments by Canadian residents to foreigners (including **royalty payments** by Canadian franchisees to foreign franchisors) are **subject to withholding tax** at varying rates.

Foreign franchisors and their Canadian subsidiaries must also collect and remit Canadian goods and services tax **(GST)** or harmonized sales tax **(HST)** on any taxable goods and services they sell in or into Canada.

d. Canada has a robust regime for the protection of **intellectual property**, with trademarks, patents, copyright and industrial designs each being subject to **registration** with the Canadian Intellectual Property Office (CIPO) and the resulting protection afforded by the applicable federal statute.

e. Canada's **Competition Act** primarily affects franchising by prohibiting **misleading advertising** and other deceptive marketing practices through both civil and criminal enforcement regimes; the latter being reserved for false or misleading statements made "knowingly or recklessly". However, **mergers of franchise systems** may also be subject to pre-merger notification, depending on their size, and possibly substantive review to determine whether they are likely to prevent or lessen competition substantially in one or more relevant markets.

f. In Canada, franchising is considered to be a business relationship, to which **consumer protection law does not apply.** However, Canada's provincial franchise acts are generally regarded as remedial legislation enacted primarily for the protection of franchisees.

g. An **employment relationship** will generally not meet the test for being a **franchise**, and vice versa, and employees are expressly excluded from the application of each Disclosure Province's franchise act. However, it is possible for a franchisor to become liable to its franchisees as a **"joint employer"** if the amount of control exerted by the franchisor over the franchisee (especially its employment-related functions) is sufficiently high.

h. Canada has **no formal sales agency laws** of general application; however, the general rule is that agents (even those only holding apparent authority) may bind their principals. In addition, specific legislation covering certain regulated industries (e.g., financial intermediaries and real estate brokers) may impact both the agency and franchise agreements of businesses within those industries.

Canada's **court system** is split between federal and provincial courts and nine out of Canada's 10 provinces operate under the common law, with Québec administering a civil law regime. As noted, franchise law is a matter of provincial jurisdiction and each province's Superior Courts have jurisdiction over franchise law disputes, subject to exclusion thereof by the parties in favour of **arbitration**. Appeals from the decisions of the trial division of each province's Superior Court lie to the province's Court of Appeal, and ultimately to the Supreme Court of Canada.

Partly as a result of the above-noted absence of government oversight, a robust body of **jurisprudence** continues to develop as franchise legislation is adopted across the country, and a significant number of **class actions** have been commenced by franchisees over the past several years.

Finally, each Disclosure Province's franchise act states that any provision in a franchise agreement purporting to restrict the application of the law of that Province, or to restrict jurisdiction or venue to a forum outside the Province, is void with respect to a claim otherwise enforceable under the franchise legislation of such Province. Accordingly, it is common practice for Canadian franchise agreements to specify that they will **be governed by the law of the Province in which the franchise will be located** and that all disputes will be resolved in the courts, or by arbitration, within such Province.

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currency: Euro (EUR) | **gross national product:** 2,587 bn. USD

Errol Cohen / LE PLAY avocats

FRANCE

There's no specific law regarding Franchise in France. There are only certain formalities to be completed by the franchisor prior to the conclusion of a franchise agreement ("Loi Doubin").

Under the french definition of franchise, franchise is a collaborative model between two legally and financially independent companies (franchisee and franchisor). It is a way that allows an independent undertaking quicker than through non-franchise distribution systems through optimizing its chances of success. In such a system, the franchisor establishes its commercial development through a network of business leaders involved in their local market.

To establish a franchise network and check that the concept works, it is recommended that the franchisor establishes a commercial law company in France. It is recommend to use either a limited liability company ("SARL") or a simplified anonymous company ("SAS") and to test the concept in two or three pilot stores for a period of two years.

The franchisor will thus ensure the benefit of an expansion of its trademarks and signs, architectural design and the visual identity system.

Following the opening of the "pilot", the future franchisor will develop the guidelines of its franchise, espcially through its **"Know-How"** (set of business methods, techniques, logistics, management, tried and tested by the franchisor).

This Know-how is confidential (not easily accessible by anyone outside the network), substantial (a competitive advantage for the franchisee and the consumer) and identified (documented in the **operating manual**). The franchisor shall provide the Know-how to the franchisee upon conclusion of a confidentiality agreement that shall be signed at the beginning of their business relations.

The franchisor provides the franchisee with technical and commercial support to achieve the commercial goals and to open the point of sale. This support allows the franchisee to gain know-how and its developments throughout the term of the agreement. It also allows the franchisor to verify the application of the concept.

Article L 330-3 of the Commercial Code (Doubin law) requires that, before the conclusion of a franchise agreement, the franchisor shall provide its potential franchisees with information that will help to make a diligent decision.
This precontractual phase is to allow each party to confirm their decision to cooperate.
The franchisor must provide true and complete information, which shall be embodied in a document called the "Pre-Contractual Information Document" **("DIP")**. This document shall be transmitted at least twenty days prior to the conclusion of the agreement.

The DIP usually contains :

- The last two balance sheets of the company of the franchisor
- The information necessary to evaluate the financials and history of the brand
- The national and local market
- The full list of franchisees and contact information
- The number of franchise agreements completed in the previous year
- The duration of the proposed agreement, the conditions for renewal, termination and transfer

Pursuant to the conclusion of the DIP, the franchisor shall provide the **written contract** that sets out in full the rights, obligations and responsibilities of the parties. The contract shall also explain the strategy of the franchise network. It shall contain details of the resources needed to achieve the realization of the franchise concept. The agreement shall confirm that the franchisor and the franchisee are two independent, which are not bound by any subordination agreement. Article L 441-1 of the Commercial Code provides that the franchisee shall inform the consumer on all business papers, advertising, as well as inside and outside of its place of sale of its status as independent business man. Note that the drafting of these contracts and the exploitation of these require experience to avoid an employment contract's requalification.

The duration of the agreement is to be set in a manner to allow the franchisee a reasonable capitalisation of its investments. In case the franchisor decides not to renew the agrement (as the franchisor has no obligation to renew a franchise agreement), it shall inform the franchisee of its intention with sufficient notice.. However, if the franchisor without notice terminates the agreement though the franchisee thought the agrement would continue, the franchisor may be

liable for abuse of rights. As part of the termination provisions, the agrement shall give both parties in case of a material breach of the agreement, the opportunity to rectify within a reasonable time any material breaches. In the event of a termination or cancellation of the agreement, the franchisee shall return all franchise elements as otherwise the franchisee may be liable for copyright infringement or breach of trust. Moreover, the franchisee shall also pay the balance of the remaining charges due.

Most of the franchise systems provide a map with a territorial exclusivity. This territory exclusivity depends on the strategy of the franchisor. Some are defined through P.O. Box numbers, others depend on other definitions of a geographical territory. All of them grant the right for the franchisee to develop the business locally without any other competitors in the area.

The financial obligations of franchisees are to be clearly specified and are to be established in order to support the achievement of common goals. Typical payments are **an entrance fee (access to the system, knowledge transfer and benefit of the methods), an ongoing royalty and a contribution to the national advertising fund ("NAF")**. Moreover the agrement generally provides for the **exclusive purchase** of products manufactured by the franchisor or by a supplier but approved by the franchisor.

Most of the services are subject to VAT. Franchisor and franchisee are subject to income tax, social charges and business taxes. Other taxes may be appliable depending on a selling of a goodwill (gain tax) or a shop.

The conditions under which the franchise can be assigned shall be clearly specified, including the conditions for approval of a successor. A right of first refusal (RoFR) may be justified by the network interests of the system. A non-competition clause for the term of the agreement is justified by the protection of the know-how of the franchisor.

The agreement generally provides for the settlement of disputes and the applicable law, it is in most cases the commercial court of the franchisors' headquarter and French law.

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GERMANY

In Germany, there is neither a legal definition of "franchise", nor is German **franchise law** codified; it was essentially developed by court decisions. Various fields of German law are impacted by franchise law (see below). German law does not contain any restrictions on **foreign business entities** as franchisors in Germany.

The most common **corporate** form to set up business in Germany is the private limited liability company, the "GmbH". It is easy to set up by one or more persons and requires a minimum capital of EUR 25,000.-. Solely the company assets are liable to the company´s creditors, not the shareholders personally. The formation costs for a GmbH are very moderate, approx. EUR 1,000.-, plus legal fees. With respect to corporate law aspects, there are no restrictions on **foreign business entities** in Germany.

Under German law and jurisdiction franchisees are not treated as **consumers** since the objective intention of their conduct is business-oriented also in the phase of setting-up their business. However, at that stage, a franchisee may be qualified as "business-founder" and as such may be entitled to revoke the franchise given certain preconditions.

It is acknowledged that only single provisions of the statutory law containing the **law on sales agents** are analogously applicable on franchising if and insofar as the franchisee is obligated to perform tasks regularly to be performed by a sales agent. The key provision is sec. 89b of the German Commercial Code, granting the sales agent a compensation payment upon termination of the agreement in the maximum amount of an average annual remuneration if and insofar as the represented company, after termination of the agreement, has essential advantages from the business contacts solicited by the sales agent, and a compensation payment would be equitable, esp. taking into consideration the sales agent´s loss of commissions. If the franchisee is obligated to transfer his/her customer base to the franchisor after termination of the franchise agreement, it must be assumed that the franchisee is entitled to a compensation payment upon termination of the franchise agreement.

Besides the German law on T&C (below), restrictions regarding provisions in franchise agreements mainly derive from **antitrust/ competition law.** According to art. 101 of the Treaty on the Functioning of the EU ("TFEU"), "all agreements and concerted practices which may affect trade between Member States and which have as their objective effect the prevention, restriction or distortion of competition within the internal market" are prohibited. Franchise agreements may constitute an intrusion into the competition within the internal (EU) market and therefore collide with art. 101 TFEU. Typical restrictions in franchise agreements are clauses on non-competition, fixed prices or exclusive territories. 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 – e.g. provisions dictating fixed prices or prohibiting passive sale outside a designated territory – as well as so-called grey clauses rendering the specific provision in an agreement null and void without affecting the remaining agreement, e.g. provisions prohibiting a franchisee competition for more than five years or for an unlimited time.

Under German **labor law** one should be careful that a franchisee is not qualified as an employee of the franchisor. Decisive criteria is the grade of personal dependency of the franchisee, i.e. in how far the franchisee conducts his business activities bound by instructions of the franchisor. Pursuant to German jurisdiction, someone is considered an independent businessman when he/she is basically free to design his/her activities and to set his/her working hours and assume his/her own entrepreneurial risk. If the franchisee is an entity such as a GmbH, the aforementioned risk will not arise.

Law on intellectual property rights.
See introduction: *The way to Europe*

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 tax-residents in 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 and for trade tax. Trade tax is a municipal tax, the amount of which therefore varies and 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. With respect to a US parent company, the withholding tax can be reduced or refunded in whole or partially, depending on the amount of shares the foreign parent company holds in the German subsidiary.

Individuals conducting business in Germany or being partner in a partnership in Germany are subject to progressive income tax from 14 % up to 45 %, depending on their income.

Remuneration for licensing know-how and rights of use regarding trademarks etc. of non-tax residents, such as a US franchisor, is taxed in Germany at 15 % plus solidarity surcharge thereon by withholding this income tax which is transferred to the tax authorities by the debtor of the remuneration (the franchisee). However, the German/US double tax treaty contains the possibility of obtaining an exemption certificate if the creditor is a US tax-resident and if the license income is not allocable to a permanent establishment located in Germany.

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 pre-contractual information/disclosure affects all necessary data to enable the potential franchisee to generate his/her own calculation of profitability and to draw his/her own conclusions about the prospects of success about the franchise concept. However, there is no statutory list of which information has to be made available. The German Franchise Association ("Deutscher Franchiseverband e.V.") provides a guideline regarding the minimum information on their webpage (www.franchiseverband.com). Also, German franchise law does not recognize a general obligation to continuously inform or update the pre-contractual information; however, such an obligation may arise during the term of the franchise agreement if certain circumstances occur which are recognizably relevant to the franchisee. In Germany, there neither is a specific form in which the pre-contractual duty to inform has to be performed nor is there a standard compliance procedure. 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 claiming back all paid franchise fees (earned income deducted) and all expenses incurred in connection with the franchise business. Both franchisor and master franchisee are each fully liable for the performance of the pre-contractual duty to disclose.

The principle of contractual freedom in German civil law is limited by the German **law on T&C.** Franchise agreements as pre-formulated agreements significantly limit the other party´s contractual freedom. Therefore, T&C are subject to a judicial effectiveness control. This is lessened in b2b-only agreements such as franchisor-franchisee-relationships; however, T&C-clauses that unreasonably disadvantage the other party contrary to the requirement of good faith are ineffective.

There are no laws in Germany regulating the payment of **franchise fees** or restricting a franchisee´s ability to make payments to a foreign franchisor in the franchisor´s domestic currency. The interest rate in Germany for default payments in b2b-transactions is presently nine percent above the base interest rate (currently: - 0.83 % = 8.17 %).

Confidentiality clauses in German franchise agreements are very common and enforceable in Germany; the franchisor may file an interim injunction against a franchisee in breach of a confidentiality obligation and claim damages from the franchisee.

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 unanimously agree on such termination. However, German law stipulates that continuous obligations – such as a franchise agreement – may be terminated by each party without notice if, in short, 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. repeated non-payment of franchise fees, the termination for good cause is only effective after the terminating party has issued a fruitless warning (advisably in writing) and within a reasonable period of time after the terminating party became aware of the circumstances for the termination. Unjustified terminations by a franchisor might entitle the franchisee to claim damages.

In general, Franchisors are 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, it is stipulated that the transfer of the franchise by the franchisee require an explicit prior written approval of the franchisor.

Germany provides one (federal) **court system,** consisting of the local courts (values of up to EUR 5,000.-), the district courts (values exceeding EUR 5,000.-), the higher regional courts (generally courts of appeal), and the Federal Supreme Court. Generally, it is admissible for the parties to a franchise agreement to agree on specific courts as internationally and locally competent and to agree on a **choice of law** to be applicable on their contractual relationship.

It is also admissible to agree on arbitration as the exclusive way of resolving disputes between the parties, thus waiving the regular jurisdiction. This may be favorable as the parties may choose the language of the proceedings and have influence on the arbitrators selected. Also, unlike proceedings before a regular court, arbitration proceedings are not held in public. However, if the value in dispute is rather low, arbitration may often be too cost-intensive. Some franchise agreements also provide for mediation as an attempt to jointly resolve a dispute. As **mediation** proceedings do not effect an enforceable decision, they are regularly followed by arbitration or by legal proceedings within the regular jurisdiction.

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area: 301,338 km² | **population:** 60,782,668 |
official language: Italian | **capital city:** Rome |
currency: Euro (EUR) | **gross national product:** 2,066 bn. USD

Enrica Senini / Studio Legale Senini

ITALY

Franchise is legally **defined** by Article 1 of Law No. 129/2004 which provides that "Franchising is the contract, whatever otherwise defined, between two legal entities, economically and legally independent, under which one of the parties grants the other, upon consideration, a series of intellectual property rights related to trademarks, commercial denominations, signs, utility models, designs, copyright, know-how, patents, technical or commercial assistance or consultancy, by including the franchisee in a system composed of a plurality of franchisees spread in the territory, with the scope of marketing certain goods or services".

Franchising is disciplined by Law No. 129/2004 and by the general principles on contract law contained in the Civil Code. EU Regulation No. 330/2010 on vertical restraints also applies to franchising contracts stipulated among Europe. National franchisor's associations such as the Italian Association of Franchising and the Italian Federation of Franchising have implemented Codes of Conduct with the aim of protecting franchisees' rights and of serving as guideline for franchisors to abide by decency and professionalism.

According to the Decree of the Ministry of the Productive Activities No. 204 of September 2, 2005, **foreign franchisors** willing to establish their first franchise in Italy are requested to deliver to the aspiring franchisee, or publish on its website, a list of operational franchisees and flagship stores divided by single country, a list containing all data related to location and traceability of at least twenty operational franchisees, or a list of all existing franchisees, if less than twenty, provide the franchisee with the description of judicial and/or arbitration proceedings, if any, concluded with a final decision/award in the last three years.

In Italy franchisors normally **operate** either through a limited liability company (S.r.l.), or a company limited by shares (S.p.A.). The first type of company is more suitable for small and medium-size businesses since it is more cost-efficient and has a more flexible management (Board of Directors or single director) and shareholders' meetings system.

S.p.A.s and S.r.l.s are both governed by the Civil Code, which contains all provisions regarding their formation, functioning and liquidation. Regarding formation, both S.p.A.s and S.r.l.s are incorporated by means of a deed of incorporation also containing the by-laws providing for the company's name, the name of founders, the place of business, the scope, the amount of the share capital, and all rules regarding shareholders' meetings, management, and other optional rules such as right of first refusal, options etc. Minimum share capital amounts to € 10.000 for a S.r.l. and to € 120.000 for a S.p.a., 25% of which has to be mandatorily paid before or upon incorporation. In general, there is no restriction regarding formation of a foreign business entity. However, such entities are requested to have an Italian VAT number and may require licenses issued by the competent Authorities in case of businesses involving restricted activities such as banks, financial services, food and transportation.

Article 3 § 1 of the Code on Consumer Protection (Legislative Decree No. 206/2005) defines the consumer or user as "the physical person who acts for purposes different from their entrepreneurial, commercial, artisanal, professional activity". Since the franchisee is certainly considered as an entrepreneur by Law No. 129/2004, consumer protection law does not apply to franchisees.

Competition law affects franchising and franchise agreements should the latter contains provision which may involve anti-competitive issues such as exclusivity, territory and prices. Relevant laws are the Italian Antitrust Law No. 287/1990, and EU Regulation No. 330/2010 on vertical restraints, which directly applies to Italy. The franchisee is an independent entrepreneur and it is not considered an employee of the franchisor. The risk of being deemed as such may arise if the franchisor, in addition to the normal directions regarding the standards to be applied by the franchisee, directly controls, instructs and advices the franchisee's employees.

As per Article 27 of Legislative Decree No. 276/2003, franchisee's employees may request to be deemed as employees of the franchisor by filing a lawsuit against the franchisor before the competent Labor Court. The best way for the franchisor to avoid the risk described above is not to have any direct contact with the franchisee's employees, and not to give them direct instructions and/or directions.

Sales Agent Law (Articles 42 et seq. of the Civil Code) is not applicable to franchise. However some scholars opine that the franchisee may be

entitled to an indemnity upon termination of the franchise contract, should the latter contain a non-competition clause after termination. Article 1751 of the Civil Code may apply in this case.

Foreign resident corporate business entities are requested to have an Italian VAT number, and are levied the following **taxes:** the IRES tax at the flat rate of 27,5% of the profits; the IRAP tax, which is a regional tax applied on the value of the production, at the minimum rate of 3,9%; VAT, which is charged on any sale made or service rendered in the Italian territory. The current ordinary VAT rate is 22%; withholding tax on royalties, at the rate of 30% applied on the gross amount of the payment, subject to double taxation treaties which may provide for prevailing, more favorable tax rates. Individuals are levied the IRPEF tax in a percentage depending on their income.

Trademarks may be protected by means of registration with the Italian Patents and Trademarks Office, which grants exclusivity rights to use the registered trademark, and prevent others to use it, for a period of ten years (renewable for subsequent periods of ten years, without limitation of time) starting from the filing of the application for registration. Application for a trademark registration can also be deposited, with effect in the European Territory, with the Office for Harmonization in the Internal Market (OHIM), or as international trademark under the WIPO rules.

Rules regarding protection and enforcement of trademarks are contained in the Code of Industrial Property enacted by Legislative Decree No. 30/2005.

Unlike trademarks, know-how cannot be registered as such, but Articles 98 and 99 of the Code of Industrial Property nevertheless define and grant a quite adequate protection to know-how and trade secrets.

In addition to protection under the rules on unfair competition (Articles 2598 et seq. of the Civil Code), Article 99 of the Code of Industrial Property entitles the owner of know-how to prevent third parties to use and/or disclose such know-how, provided that it has not been independently acquired by the third party.

The Law on Franchise (Art. 4) provides for **disclosure obligations** upon the franchisor. It must deliver the aspiring franchisee a list of documents indicated at Article 4 of the Law on Franchise, not necessarily in Italian language but it is advisable to do so according to the general principle of good faith. It must contain all information on the franchisor and a copy of its balance sheet of the last three years; the indication of the trademark(s) registered and/or used; the activity and its scope; the list of franchisees and variations thereof; the list of judicial proceedings regarding franchise concluded with a final decision.

Article 7 of the Law on Franchise provides that in case of violation of disclosure requirements by one party, the other party may cancel the contract as per Article 1439 of the Civil Code and apply for damages. If there is no malice in the violation, the franchisor may however be responsible for breach of the general principle of good faith and fair dealing. Damages are normally calculated on the investment and expenses incurred by the franchisee and the loss of profits. Liability of violation of disclosure requirements lies on the subject breaching this obligation, therefore it can be either the franchisor or the master franchisee, or both of them as the case may be. Officers and directors, or employees of a limited liability company or a company limited by shares are not personally liable towards the franchisee in case of breach of disclosure obligations, since such liability lies on the company only. Individual entrepreneurs are personally liable.

There is no specific provision regarding the nature and the amount of **franchise fees.** Unless otherwise provided for by the parties, in case of delayed payments law on overdue payments (Leg. Decree No. 231/2002) applies. Amount of such interest varies each six months depending of the fluctuation of some standard rates. There is no restriction on a franchisee´s ability to make payments to a foreign franchisor in the franchisor´s domestic currency except from anti-money laundering compliance.

Confidentiality clauses are enforceable under both the EU Regulation No. 330/2010 and Article 1455 of the Civil Code if violation of the confidentiality clause can be deemed as a serious breach of contract.

Both parties can **terminate** the agreement in case of non-performance or default of the terms and provisions of the franchise contract. There is no obligation to renew the contract or refuse renewal, but the franchisor must grant the franchisee an initial term of at least three years (Article 3 § 3 of the Law on Franchise).

It is permitted to restrict the franchisee to **transfer or assign** the franchise contract (Article 3 of the Law on Franchise).

In addition to the ordinary **judicial system,** the parties may opt for an arbitration or for alternative dispute resolutions systems implemented by the Chambers of Commerce (Article 7 of the Law on Franchise) and the Federation of Franchising. Franchise agreements fall under the jurisdiction of the ordinary Civil Court, which operates on a three-level system: Court of first instance, Court of Appeal and the Supreme Court. Time of proceedings are quite long-lasting, approx. 3-4 years for each instance. Arbitration is recommendable since it grants a faster dispute resolution, the possibility of choosing the arbitrator(s) and confidentiality.

The parties can freely choose the law to be applicable on the franchise agreement.

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area: 17,820 km² | **population:** 4,044,500 |
official language: Arabic | **capital city:** Kuwait City |
currency: Kuwaiti Dinar (KWD) | **gross national product:** 155 bn. USD

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KUWAIT

There are no specific laws regulating the establishment and operation of franchises in Kuwait. The legal basis of Franchise law in Kuwait is mainly governed by the following laws: (i) Law 36/1964 Regulating the Commercial Agencies; (ii) Law 38/1980 Commercial Code; (iii) Law 25/2012 Companies Law and its amendments; and (iv) Law 67/1980 Civil Code. The following ways define how a foreign individual or legal entity may enter the market and carry out business in Kuwait: (i) Establishing a company; (ii) Concluding a joint venture agreement; (iii) Appointing a Kuwaiti commercial agent; (iv) foreign direct investment.

The basic premise for carrying out business in Kuwait for foreigner including franshisors is identified in the Kuwaiti commercial code. Foreigner (person or corporate) may not carry out business in Kuwait unless he has a Kuwaiti partner or partners, provided that the capital of the Kuwaiti partner(s) in the joint business shall not be less than 51% of the total capital of the business. Further, a foreign company may not incorporate a subsidiary in Kuwait nor carry out commercial business in Kuwait except through a Kuwaiti agent (i.e. in our case the Franchisee). As we stated above, there is no special law regulating franchises, therfore under the Kuwait law, the Franchisor is considered a "Principal" and the Franchisee is an "Agent". The provisions in commercial code defines the general rules governing commercial agencies and their types. One of the common types of commercial agencies is a "contracts agency". In this type, the local agent undertakes to do the following by the contract: a) promoting the principal's business on a continuous basis in the territory, b) entering into transactions in the name of the principal in return for a fee.

The Kuwait government passed law no. 39/2014 "Consumer Protection Law". Under the law, National Committee for Protection of Consumers is to be setup, the committee is under the authority of the ministry of commerce and industry. The members of the committee compose of representative of various government entities and agencies, such as ministry of health, Kuwait municipality, Environment authority, Agriculture and Fisheries authority, etc. The law defines Consumer as "All natural or legal person purchases a commodity or service in monetary payment, or benefits from any of a commodotiy or services for the purpose of consumption or dealing or contracting with him on that regard." This leads that the Franchise sector is covered under this law. While Law 10/2007 Regulates Protection of Competition, and this law does not effect and/or restrict franchising agreements. The law promotes "The freedom to practice the economic activity is guaranteed for all, in a way that shall not lead to curb on free competition or to prevent it or to harm it. This shall be according to the regulations of the constitution and laws, without prejudice to what is ruled by the international treaties and agreements which are enforced in Kuwait."

The Kuwaiti law does not consider Franchisee as employee of the Franchisor, rather the relationship is that of Principal / Agent relationship as stated above. The Labor Law in Kuwait is regulated by the Ministry of Social Affairs and Labor. The franchisor and franchisee may agree in the Franchise Agreement on the legal implications and/or restrictions arising from sales of the franchise entity, provided that it is not in contrary of the Kuwait laws and regulations and not in breach of the franchise agreement. The other issue that franchisors should be in compliance is the tax laws. The tax in Kuwait comprises mainly of corporate income tax. The tax rate has been reduced to flat rate of 15%, there is no taxation on individuals in Kuwait. The income tax law does not impose income or social security taxes on income earned by individuals including non-Kuwaiti employees, however there is social security tax for employees having Kuwaiti nationality.
In regard to intellectual prooerty right issues. The Kuwaiti commercial code governs trademarks registration and the penalties for infringement. Any person may apply for the registration of his trademark at the Register of Trademarks.
The trademark is protected for a period of (10) years, and it may be renewed. "Anyone desires to use a mark to distinguish a commodity of his production, manufacture, work or choice; or was trading in it, or offers it for sale or intends to trade in it, or to offer it for sale, may request to register it in accordance with the Law."

There is no pre-sale disclosure requirement by the law in Kuwait in regard to franchises. As the general contract law terms apply, which the parties to the franchise agreement may agree.
In regard to the calculation of damages, the civil law and the commercial law are generally applied. The court has the discretion in requesting the claimant to submit proof in order to quantify the damages. However, there are some legal restrictions affecting franchise agreements. The franchise contract must be written. Items of fran-

chise contract must define: the territory covered, the agent's fees, the term, the product or service that is the subject of the agreement, and any relevant trademarks. If the agent should establish showrooms, shops, or warehouse facilities, the contract must be valid for a period not less than five years. In regard to the Franchise fees, there is nothing in the law sets the franchise fees, it is agreed by the franchisor and franchisee. Kuwait is an open and free economy and does not have any restriction on currency use/transfer.

The confidentiality is protected under the Kuwait general contract law. The parties to the contract committed to safeguard during and following the termination of agreement the confidentiality of information and data that reached parties due to their contractual relation. No party can use this information to materialize an interest for itself or for others, and it cannot divulge any secrets relating to the franchisor/franchisee relation. If either party commits violation, the other party can claim indemnification if it is necessary. The claimant has to prove before the court that confidential information or data are disclosed and the confidentiality is breached. The law provides that the agent may not disclose principal's secrets which may reach his knowledge because of the implementation of agency, even after the termination of the contractual relation.

The parties to franchise agreement needs to cover the risks involving termination. If the duration of the contract is definite, and the principal decide not to renew it upon the termination of its duration, he must pay the agent an equitable compensation to be determined by the judge even if otherwise agreed upon by the parties. The agent is entitled to compensation provided that no fault or default has occurred by the agent during the execution of the contract, and that the activity by the agent has led to apparent success in the promotion of the merchandise or to the increase of the number of the clients. The amount of detriment incurred to the agent, and the benefit gained to the principal, due to the efforts exerted by the agent in the promotion of the merchandise or service in the increase of the clients, will be observed upon the estimation and quantification of the compensation.

The law in Kuwait provides that if the principal substitute the contracts agent with another new agent, the new agent will be jointly responsible with the principal for the fulfillment of the compensations, if the dismissal of the previous agent is proved to be resulting from collusion between the principal and the new agent. The contracts agency is concluded to the common interest of the two parties. The principal may not terminate the contract without fault on the part of the agent, otherwise he is obligated to indemnify him against the detriment incurred to him due to dismissal. Any contradictory agreement is not valid. The agent is obligated also to indemnify the principal for the detriment incurred to principal due any relinquishment of the agency without a valid reason or justification. However, in Kuwait, it is possible that the Franchisor to place conditions on the Franchisee in the Franchise Agreement covering the events if Franchisee decides to transfers ownership of the franchise entity, provided it is in compliance with the Kuwaiti laws and regulations.

The Kuwait Legal System is based on Civil Law Jurisdiction. The Kuwaiti Laws are derived from the Egyptian Laws, which are in turn derived from the French Law. The Court system in Kuwait is divided into six main divisions, namely - Family, Criminal, Civil, Commercial, Leases and Administrative. There are three levels of courts for the purpose of litigation; the Court of First Instance, the Higher Court of Appeal and the Court of Cassation. A separate division of the court system is the Constitutional Court to review and repeal any unconstitutional laws. The Penal Code governs the general provisions applicable to crimes, penalties and culpable acts. Corporate and Commercial Laws are applicable for commercial disputes which cover Franchises and will be interpreted in accordance to the Code of Civil and Commercial Procedures, the Law of Evidence and the Law of Criminal Procedures besides the underlying laws. The concept of precedent is not generally followed as a mode of practice yet decisions of higher courts are respected.

The applicable law in franchise agreement is Kuwait laws, the commercial states that "In exclusion of the rules of jurisdiction stated in the pleadings Law, all disputes resulting from the agency agreements / proxy contracts, shall be cognized by the court in which area of jurisdiction that the place of execution of the contract is located." However, the parties to franchise agreement may choose Arbitraton as a mean of dispute resolution.

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area: 1,972,550 km² | **population:** 118,395,054 |
official language: Spanish | **capital city:** Mexico City |
currency: Peso (MXN) | **gross national product:** 2,260 bn. USD

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MEXICO

The Mexican 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.

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

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

For franchisors, the laws described above apply. Nevertheless, at the moment when a franchisor wants to start its business in Mexico, it will principally have to observe the IPL in order to register its trademarks and patents, to protect trade secrets and to 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 no restrictions respecting the establishment of franchises in Mexico that are specific to foreign franchisors. It must be observed that the foreign franchisor engages in lawful activities and that these do not invade any rights reserved or restricted to the Mexican State.

The General Corporations Law offers a variety of legal entity forms that differ in terms of the responsibilities which the partners owe to third parties. In some cases, the partners will be liable jointly and severally and in other cases their responsibility will be limited to their portion of capital that they invested into the business. 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, and 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 name. Bylaws of a Mexican company are elaborated through the articles of incorporation, which state the name of the company, the company's domicile, and the social object of the company. The administrators are elected, whether a Board or Sole Administrator as well as their senior officials and commissioner. The grant of power for the representatives of the society is made.

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.

The Foreign Investment Law establishes some activities that are restricted in favor of the Mexican State like hydrocarbons, electric energy, and nuclear energy; in favor of Mexicans, such as national land transportation of people, tourism and cargo, development banking, and the provision of professional services; and in favor of foreigners with percentages of specific participation such as aerial transportation and port services. Outside of these, any foreigner can carry out commercial activities, provided that they are lawful.

Franchisees are not considered consumers, but parties to a private contract. Thus, there exists an equal relationship between franchisor and franchisee, and the rights and obligations that they assume depend on the contents of the contract that regulate their relationship.

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.

Because there is no labor relationship between franchisor and franchisee, there are no legal labor law consequences between them.

The legal nature of the franchise comes from the franchise agreement regulated by the IPL,

unlike commissioned or sales agents, which are governed by a commercial contract under the Commercial Code.

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.

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. That power of exclusive exploitation by the owner is what permits him to license them in favor of franchisees and to oppose third parties' unauthorized use of them.

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.

According to the IPL, the franchisor is obligated to deliver to the future franchisee the information related to the situation that its business is in. The information that the franchisor must deliver must be done in writing with the signature of both parties, at least 30 days before the franchise agreement takes effect.
Once the pre-contractual information required by the Law and contained in the contract is delivered, there is no provision that requires divulgence of additional information to the franchisee. Regulations to the IPL, require information that must be delivered such as 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, and the territory.

If the franchisor fails to truthfully deliver the required information, the franchisee may 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.

The damages caused should be calculated based on material harms directly and immediately suffered or on the legal gains that were lost due to the non-completion of the delivery of the information.

The divulgence of information that has been delivered 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.

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 into Spanish.

The IPL establishes the requirements and minimum contents that a franchise agreement should have. These 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, and causes of termination.

The parties can freely establish the nature, quantity and form of payment of the fees of the franchise as well as 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.

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.

The parties may terminate the contract if they agreed to do 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.

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 very burdensome.

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.

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area: 312,679 km² | **population:** 38,483,957 |
official language: Polish | **capital city:** Warsaw |
currency: Złoty (PLN) | **gross national product:** 896 bn. USD

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POLAND

Poland: Poland has been an attractive location for foreign investment for over 25 years, since the changes to the economic system which commenced in the early 1990s. The country has consistently received more foreign direct investment than any other country in Central and Eastern Europe, and has higher GDP growth rates. Poland has a population of over 38 million and has benefitted substantially from its membership of the European Union in 2004. The economy is now the sixth largest in the EU.

The country has undergone a great many reforms in the economic and legal spheres, most significantly in adapting its laws to the requirements of a market economy and more specifically those of the EU. Foreign franchisors have been active in the Polish market since the 1990s. There are now numerous franchise systems operating in Poland (both foreign and domestic) in various sectors, including food, clothing, retail, financial services, petrol stations, and retail.

Law on franchising: there is no law in Poland dealing specifically with franchising. The relationship between a franchisor and a franchisee is governed by the general civil and commercial laws in Poland. As a franchise agreement does not fall within the categories of "nominate" (named contracts regulated by the law) contracts as contained in the Civil Code, it is relatively unregulated. The parties are therefore free to rely upon the principle of freedom of contract in preparing and negotiating the agreement, subject only to certain mandatory matters of Polish law such as the principles of good faith and social co-existence.

There is no requirement for the franchise agreement to be in the Polish language. A foreign language version may be the governing text: however, in Polish court proceedings an official translation would be necessary.

There are no restrictions or regulations affecting foreign franchisors. A foreign franchisor does not need to have a branch or representative office in Poland.

Franchisor as a Polish company: a franchisor may be a company established in Poland or in a foreign country. If it is to be established in Poland it will most likely use one of the two forms of corporate entity which are commonly used for foreign investments: the limited liability company (spółka z ograniczoną odpowiedzialnością) and the joint stock company (spółka akcyjna). They are governed by the Commercial Companies Code of 2001 (as amended). They can be considered as respectively equivalent to the English private company and public limited company, the French Société à responsibilité limitée and Société Anonyme and the German Gesellschaft mit beschränkter Haftung and Aktiengesellschaft. Other legal forms exist for the carrying out of business activity, such as partnerships or limited partnerships, but these are unlikely to be used by franchisors (unless for tax reasons).

Franchisee as consumer: franchisees are not treated as consumers under Polish law in so far as they act as business entrepreneurs. Therefore, they do not generally have the benefit of the consumer protection laws.

Anti-competition: anti-competition matters are governed by the Polish Unfair Competition Act. Poland is a member of the EU and therefore, where there is an impact on trade between member states, the parties will be subject to the EU regulations on anti-competition. As a general principle EU competition law prohibits vertical agreements which may affect trade by restricting or distorting competition. There are de minimis exemptions and certain block exemptions. In the block exemption on vertical restraints there are provisions applicable to franchises. For example, certain restrictive clauses are permitted if the market share of both parties is beneath a stated threshold.

If the franchisor has a dominant position, stricter rules apply. The general presumption is that there is a dominant position if the market share in question exceeds 40%.

Employment relationship: as a general rule, in the relationship between the franchisor and the franchisee, employment law would not be applicable. If however the franchisee is an individual and the key characteristics of an employment contract were to be met, then there is a risk that the franchise agreement could be considered an employment contract. This would be unusual but to avoid the problem arising the contract should be drafted in such a way to protect against an employment relationship coming into existence.

Agency law: the protections provided under EU law to agents, particularly the compensation payable upon termination, do not apply to franchisees.

Tax Aspects: franchisors established as legal entities in Poland will pay corporate tax at the rate of 19%. Franchisors that are not Polish legal entities and have no permanent establishment in Poland will only pay tax on income which is generated in Poland; this means there will be a withholding tax on franchise fees. This is withheld and paid by the franchisee. Poland has entered into treaties for the avoidance of double taxation with many countries and these treaties will often reduce the withholding tax payable. Hence, in order to reduce withholding taxes it would be preferable for the franchisor to be located in country having such a treaty with Poland. If there is no such treaty the withholding tax rate is 20%.

A franchise established as legal entity will pay corporate tax at the rate of 19%. If the franchisee is an individual he or she will pay personal income tax. Franchise fees will generally be tax deductible.

IP law: as Poland is a member of the EU it is covered by the regime of Community Trademarks which are registered with the Office of Harmonization in the Internal Market. Usually franchisors will register their trademarks at the EU Level. Poland is also a signatory to the Madrid Convention which deals with international trademarks registered with the WIPO in Geneva. If only local protection is required, the trademark may be registered with the Polish Patent Office: this will provide protection for ten years unless renewed. Poland also has laws dealing with the protection of copyrights and patents, and it a party to a number of international agreements and conventions dealing with copyright.

Pre-sale disclosure/pre-contractual information: there are no regulations or procedures relating to pre-contractual disclosure. This is a matter for the parties to decide. The parties should however be aware of the principle under Polish law that prior to conclusion of the contract they are required to negotiate in good faith.

Legal restrictions affecting franchise agreements: as mentioned above there are no laws specifically governing franchise agreements and the parties are free to agree the terms and conditions of the agreement (subject only to certain overriding matters of Polish law, such as the need to avoid the abuse of rights concept and to adhere to the rules of social co-existence – but these are matters that rarely impinge on the contents of a franchise agreement).

In many respect franchise agreements in Poland have followed the model used in other Western countries and because of the freedom of contract principle referred to above, these agreements have adopted wholesale many of the key provisions of international franchise agreements.

The EU data protection regime and the Polish law on data protection may apply to franchising arrangements and the franchisor and the franchisee should be aware of them.

Franchise fees: there are no regulations that impact specifically on franchise fees. The principles of transfer pricing must however be observed. In some cases an initial franchise fee is payable but it is not always the case. Fees may be paid in any currency and periodically as the parties may agree. The interest rate on late payments may be agreed (provided the rules against usury are not infringed); if the agreement is governed by Polish law, the statutory interest rate would apply.

Confidentiality clauses: clauses providing for confidentiality are commonplace in franchise agreements. Enforcement under Polish law would require a claim for breach of contract or a claim under the Law of Combatting Unfair Competition (which also protects certain information belong to an enterprise). As proof of damages may be difficult to establish, the agreement may provide for a fixed penalty for breach. In such a case the agreement can also provide that in the event the actual damages suffered are in excess of the penalty, the excess may still be claimed.

Termination: the agreement can provide for termination by either party in the circumstances as set out in the agreement. Typical grounds for termination would include: any acts or omissions damaging to the reputation of the Franchisor or the products/services in question or the goodwill associated with the business or the trade name; failure of the franchisee to commence trading by a certain date; unpermitted transfer of any of the rights or licences granted under the agreement; loss of right to occupy the premises in question; ceasing to carry on the franchisee's business at the premises; unpermitted disclosure any part of the franchise manual or other confidential information; failure to perform or observe any of the other terms of the agreement when not remedied; insolvency or liquidation. The franshisee's right to terminate is usually limited to material breach of the agreement on the part of the franchisor.

Transfer: this is a matter for agreement between the parties. The franchisor may totally restrict the ability of the franchisee to assign or transfer the agreement or make the transfer subject to conditions; for example, transfer may only take place but only to an affiliated company and/or with consent.

Dispute resolution: the choice for dispute resolution will be between: Polish courts, foreign courts, domestic Polish arbitration or foreign/international arbitration. Polish courts are divided into common courts, special courts, and the Supreme Court. The term "common courts" covers district courts, regional courts, and courts of appeal.
In general, foreign judgments and arbitral awards are enforceable in the Polish courts (subject to certain conditions).

Applicable Law: as a general rule the parties will be free to choose the governing law. In the case of a franchise agreement where the franchisor is a foreign entity, the agreement may be governed by Polish law or the law of the franchisor's jurisdiction.

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official language: Portuguese | **capital city:** Lisbon |
currency: Euro (EUR) | **gross national product:** 285 bn. USD

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PORTUGAL

Legal Basis of Franchise Law

Considered an atypical contract, for this type of contract prevails in Portugal the principle of contractual freedom. In our country, the Franchise Agreement is also highly influenced by the stipulations of the Agency agreement and also by other types of agreements, like the Distribution agreement, the Commercial Concession agreement, and other similar ones.

Specifics regarding foreign franchisors

All companies intending to set up in Portugal should make attention to some official, government, technical and regulating agencies, before the implementation of a business franchising such as a franchisor or as a franchisee:

SAA – Silva Almeida & Associados - www.silvaalmeida.com; AT – Autoridade Tributária; IAPMEI – Instituto de Apoio às Pequenas e Médias Empresas; ISS - Segurança Social; INPI - Instituto Nacional da Propriedade Industrial;

Corporate Law, Consumer Protection Law and Antitrust/Competition Law.

We recommend the incorporation of a private company, limited by shares, or by quotes and we discourage doing business as an individual person. To incorporate a private company within Portugal, it is best to hire a Lawyer, once several steps are necessary to provide. In some particular areas there may be necessary to obtain specific authorizations or licenses (Banks, Insurance Companies, Real estate brokers, Builders, etc.). Franchisees are not treated as consumers by Consumer Protection Law.

As it concerns the clause of non competition, in Portuguese Law we don´t have any specific Clause for this matter, related to Franchise agreements. However, it has been commonly accepted that article 5.º, n.º 3 of Regulation 330/2010 should prevail.

Labor Law Aspects

Portuguese employment law has, in general, been characterized by a certain rigidity which prevents the parties from freely regulating the employment relationship or waiving the compulsory principles and provisions. However, it has been witnessing greater flexibility. Usually, Franchise agreements contain specific clauses that clearly separate the Franchisee from the Franchisor´s organization. By signing the Franchise agreement, both organizations (Franchisor´s and Franchisee's) will be completely separated and independent from each other.

Sales Agent Law

In Portugal, the agency agreement has a legal regime and it has been common ground that to the Franchise agreement is applicable, by analogy, the legal regime of the Agency Agreement. If Parties wish to avoid this particular legal regime, they must agree upon a specific clause through which both Parties will exclude the legal regime of the Agency Agreement in all matters related to the Franchise Agreement. However, we cannot guarantee that this particular clause will be considered valid, by the Portuguese Courts.

Tax Law Aspects

IRC – Corporate income tax: Resident entities, as well as non-resident entities with a permanent establishment in Portugal, are subject to IRC taxation in Portugal on their worldwide income, with some exceptions. Non-resident entities without a permanent establishment in Portugal are subject to taxation only on income from a Portuguese source. Applicable rates - Resident entities and permanent establishments of non-resident entities: 21% in Continent; 21% in Madeira; 16.8% in The Azores. (a) Resident entities that do not carry on a commercial industrial or agricultural activity as their main activity: 21.5% in continent; 21.5% in Madeira; 15.05% in The Azores. Non-resident entities without permanent establishment: 21% in Continent and Madeira; 20% in The Azores. A Municipal Surcharge and a State Surcharge may be added to the normal IRC rate.

Aspects of IPR Law

National Institute of Industrial Property (INPI) ensures an effective and efficient organization, one that would provide a quality government service. The focus of INPI is centered on the grant and protection of Industrial Property rights on a national and international level, in collaboration with the international organizations of which Portugal is a member.

Pre-sale disclosure/pre-contractual information

There are not any legal specific procedures for making pre-contractual disclosure in Portugal. It is current that Confidential Agreements are signed between the parties before the exchange of information. The Pre-sale disclosure/ pre-contractual information should be the most exhaustive possible. The franchisor that satisfies his disclosure obligations never has to face the

potential problems of alleged violations. Conversely, a franchisor that ignores or fails to execute properly his disclosure obligations will face litigation, especially if this violation causes real and serious damages to the franchisees.

To obtain a fair compensation for damages, in court, you must prove at least your real losses, prove the relation between your losses and the franchisor fails and, if any, your potential losses and/ or loss of profits.

All Franchise agreements stipulate the real conditions to terminate the agreement. These conditions are established by both parties, in accordance to negotiating freedom in this type of agreement. Unless the franchisor is a party of the contract between the Master franchisee and the franchisees, the franchisor will not be, in principle, liable before the franchisees, as there is no direct contract between them. It will be different, in case the Parties are, in fact, guarantors of the agreement.

Final disclosure documents and franchise agreements should exist in Portuguese. The final agreement and all of its documents should be signed in the Portuguese language. It is also possible that the Agreement and all of its attached documents are written and signed, both in the Portuguese language, and also in another language.

Legal restrictions affecting Franchise Agreements

Through the franchising agreement is established a relationship of dependency between franchisee and franchisor, becoming the first in the economic dependency of the second, whether in corporate, either under the Competition Law. This dependence raises the need to protect the franchisee in two key moments: in the pre-contractual stage and in the termination of the agreement (compensation for non competition and compensation for loss of Clientele).

Franchise fees

There are no Laws enforceable on these matters.

Both Parties will need to agree on what concerns definition and payment of Franchise Fees. Usually, there is an initial fee and a periodic fee. As it concerns overdue payments, and in case the parties haven´t agreed anything different on the Franchise Agreement, it will be applicable the Portuguese Law on those matters. The interest rate for overdue payment is of 7,05% or 8,05%, according to the situation. As it concerns payments to a foreign franchisor in the franchisor´s domestic currency, we must say that the usual procedure is that all payments are done in Euros. However, it is also possible that payments can be done in a foreign currency, once this currency effectively exists.

Confidentiality Clauses

It is usual that Franchise agreements contain a specific clause related to Confidentiality. Usually, this obligation ceases when the Parties feel the need to move into Litigation with each other, as well as in other situations.

Termination of franchise agreements

At the time of termination of the agreement, it is also necessary to have a particular attention to the franchisee protection. Both Parties have the possibility to agree among each other, in which specific situations they would like the agreement to end.

Transfer of franchise agreements

All parts involved in franchising agreements must do attention to "Intuitus Personae" characteristic of the contract. The contract is concluded between parties that have been specifically chosen for their personal qualities and characteristics, which implies that the transfer of the contractual position is always subject to the previous and written consent of the Franchisor.

Dispute Resolution and Applicable Law

The Parties have the possibility to choose between going before the Judicial Court or to Arbitration. In case the Parties decide to move before the Judicial Court and in case the Portuguese law will be applicable, the parties will litigate among themselves before the First instance of the Portuguese Courts. There will also be a possibility of the Parties to appeal to the Second and Third Judicial instances. Arbitration is always a possibility. It will be a faster way to decide litigation between the Parties, although a much more expensive way.

Applicable Law

Franchising in Portugal is not governed by any specific law, lacking the Portuguese legal system of a "nomen iuris" legally enshrined.

Applicable law: Portuguese Constitution; Portuguese Civil Code; Portuguese Commercial Code; Industrial Property; many other Legal statutes.

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official language: Spanish | **capital city:** Madrid |
currency: Euro (EUR) | **gross national product:** 1,534 bn. USD

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SPAIN

The Spanish franchise legal system is quite similar to the own European Union system. In a crisis situation such current, which common both in Spain and the European Union, the franchise has become an important tool for entrepreneurs and for business developments. Franchise is not only growing in the Spanish territory, but also in the international area. A proof of this is that besides the financing difficulties, franchises have increased in number. In this regard it is worth to highlight that Spanish franchises are present in twenty five countries, export almost three hundred franchise banners in the main economic fields such as fashion, hotel industry, beauty, furniture, restaurant industry, etc. There are more than nineteen thousand Spanish franchise establishments in the external markets, particularly in the European Union, and which is even more relevant, they are still growing. Within the Spanish market, the situation is not that good. It is true that the lack of credit, the decrease in consumption, the lack of support to entrepreneurs, the intrusiveness and the unfair competition have led into a growing standstill of the Spanish franchise. However, entrepreneurs have turned to internationalization, new technologies, new financing systems, search of financial instruments, currently to the bank credits opening, but mainly to the professionalization of the sector and its agents. All this efforts are reversing the trend and again the franchise activity is starting to be felt.

The Spanish legislation is circumscribed to article 62 of Ley 7/96, de 15 de enero de Ordenación de Comercio Minoristas, and especially to Real Decreto 201/2010, de 26 de febrero, which regulates the commercial activity in the franchise regime. Said Real Decreto additionally gathers the European Union law in regard to retail organizing, specifically Ruling 2790/99 and Directive 2006/123. In addition, Spanish Autonomous Communities have some legislative faculties regarding franchises, especially about franchisor registry. Again, said Decreto 201/2010 is the law that rules in detail the commercial activity in the franchise regime. It is a short and systematic law which defines the commercial activity in the franchise regime stating the criteria that allow differentiating between the franchise and the commercial license, the exclusive distribution right, the agency contract and the strict business opportunities, the mere trademark cession, the technology transfer and the manufacturing license. Additionally, the Real Decreto highlights that in order to be a franchise, the franchisor must have (i) the franchise identifying intellectual or industrial property rights, (ii) the franchisor must have an own know-how which must inform to the franchisee, and (iii) the obligation from the franchisor to render commercial and technical assistance. Said regulation is also strict in regard to the pre-contractual information that the franchisor must communicate to the potential franchisee, with a pre-contractual character. This information must be real and without fraud. In the meanwhile the franchisee assumes the confidentiality duty.

The franchisors registry is created under the Dirección General de política comercial del Ministerio de Comercio. This registry is created as a public registry with administrative nature in which all natural or legal persons which pretend to develop in Spain the franchise activity must communicate its data. Franchisors established in other European Union member states that operate in a free rendering regime without a permanent establishment are exempt from this communication duty. The Real Decreto describes in detail the franchisors registry functions and imposes the duty to communicate data from the own franchisor, the industrial or intellectual property rights, the coincidence between franchisor and main franchisee and everything related to the registry information.

Some specialists criticized the law and specifically that it has not been developed in a ruling. However, it is true that it has organized the sector. Even when the franchise contract is atypical and has a content that varies widely depending on the parties agreements, the Real Decreto establishes the necessary contractual requirements for the franchise business development.

Regarding the franchising taxation, it is convenient to distinguish different assumptions. The traditional Spanish franchise contract in which both the franchisor and the franchisee are tax residents in Spain does not involve specific tax features. Meanwhile the franchisor pays Income Tax for both royalties and income from services rendered, the franchisee may subtract from its taxable income both the royalties paid and expenses from services paid to the franchisor. Concerning indirect taxation, Spanish legislation, in accordance with the EU legislation, taxes both the franchise and the services rendered by the franchisor, as long as some formal requests are met.

However, today the most common franchise contract involves international consequences. It is common that the franchisor and the franchisee are resident in different jurisdictions. This of course results in tax complexities, which are mainly solved by double tax treaties. When a contract where franchisor and franchisee reside in different countries takes place, the first question that may arise is which jurisdiction has the right to tax royalties and income from services rendered. In this regard, all tax conventions signed by Spain specify how both concepts are taxed. It is important to enhance that Spain, as an OCDE member, follows the OCDE tax model and has a large amount of operative treaties. Spain has tax conventions in force with most countries of Europe, America, Asia and Oceania and is always working on the renewal of those treaties which may be out of time (for instance, a new tax treaty was approved in 2014 between Spain and the US, replacing the one signed in the early 90's). This regulation without any doubt enhances the needed legal security which is necessary for the franchising market.

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area: 41,285 km² | **population:** 8,183,800 |
official language: German, French, Italian, Romansh | **capital city:** Bern |
currency: Swiss Franc (CHF) | **gross national product:** 444 bn. USD

walderwyss rechtsanwälte

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SWITZERLAND

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" in Swiss law, 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 to the acquisition of real estate by foreign individuals or companies, except for the acquisition of real estate for business activities. 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. The PLA provides for a strict liability for manufacturers, importers, and suppliers for personal injuries and damages to property in private use which are caused by defective products.

According to the PSA, a product can only be put on the market if it does not endanger the safety and health of users and third parties. Once products are on the market, the manufacturer or importer has to take measures to identify and avoid dangers from the products and to implement measures to trace them back.

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.

Under article 418u of the Code of Obligations, a sales agent may be entitled to an inalienable compensation for clientele at the end of the contract. It is controversial if such a claim should be granted to a franchisee by analogy; 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 business secrets, it is partly protected by the Unfair Competition Act and by criminal law. Licensing of know-how is possible.

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 and (if 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, respectively. 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 **legal restrictions** may affect them. Amongst others, general 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 15% 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". 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. 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.

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** its franchise or its ownership interest in a franchise entity. Such (restricted) transfers are often subject to prior written approval of the franchisor.

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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official language: Turkish | **capital city:** Ankara |
currency: Turkish Lira (TRY) | **gross national product:** 1,512 bn. USD

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TURKEY

Legal Basis Of Franchise Law

Under Turkish law, franchise agreements are categorized as sui generis agreements and are not regulated directly by any law or regulation. However, the general provisions of the Turkish Code of Obligations (No. 6098) (**"TCO"**) and the Turkish Commercial Code (No. 6102) (**"TCC"**) are applicable to franchise agreements. Accordingly, the concept and content of franchise agreements are mainly based on case law including the precedents of the Turkish Competition Board and the Court of Appeals (Yargıtay).

Specifics Regarding Foreign Franchisors

It is noteworthy that any company, including companies with foreign shareholding, registered with a Turkish trade registry is admitted as a Turkish company. Nevertheless, Article 5 of the Regulation on the Implementation of Foreign Direct Investment Law stipulates that companies and branch offices subject to such law shall annually submit to the Undersecretariat of Treasury certain forms. The sole aim of this requirement is to maintain statistical data regarding foreign investment activities in Turkey.

To sum up, foreign investors are subject to equal treatment with local investors in Turkey and accordingly, are not required to file an application for any permission prior to making investments.

Corporate Law

Limited Liability Company (**"LLC"**) and Joint Stock Company (**"JSC"**) are the most common types of corporations that can be established by a foreign investor in Turkey. While LLCs are preferred by small and medium size businesses, the JSCs are more suitable for large businesses with a comprehensive shareholding structure and relatively high turnover and has the advantage of placing no liability on its shareholders with regard to the company's public debt.

The franchisor, in consideration of these facts, may establish the type of business entity that serves its needs best.

Consumer Protection Law

In accordance with the Law on the Protection of Consumers "a consumer is a real person or a legal entity who utilizes or benefits from a product and/or a service without any commercial or occupational aim." Based on this definition, a franchisee shall not be treated as a consumer.

Competition Law

According to the Block Exemption **Communiqué** on Vertical Agreements (the "Communiqué"), "a non-compete obligation shall not be introduced for an indefinite period or more than 5 years and shall not forbid the members of the selective distribution system from selling the branded products of designated competing providers." A non-compete obligation that is not in compliance with the above conditions would not be admissible under Turkish law. Additionally, Article 5 of the Communiqué states that: "A non-compete obligation may be imposed on the purchaser provided that it does not exceed 1 year from the expiry of the agreement, with the conditions that the prohibition (a) relates to goods and services in competition with the goods or services which are the subject of the agreement, (b) is limited to the facility or region where the purchaser operates during the term of the agreement, and (c) is necessary for protecting the know-how transferred by the provider (e.g. Franchisor) to the purchaser (e.g. Franchisee)."

Nonetheless, in a controversial judgment of the Court of Appeals it was ruled that the parties' one year post-contractual non-compete clause in the franchising contract was void due to the fact that such obligation is against the freedom to work being protected by the Constitution, and the parties cannot agree otherwise in a contract due to the limits on the principle of contractual freedom regulated under the TCO.

Labor Law Aspects

Turkish Labor Law (No. 4857) identifies the employee as "a natural person working under an employment contract". Considering that the franchisor and the franchisee are two 'business persons' (incorporated in line with the TCC), there is no possibility that the franchisee could be considered an employee of the franchisor.

Agency Law

The franchisee has not been mentioned as one of the prototype business agents in the TCC. However, depending on the nature of the franchise relation and the provisions in the franchise contract, the rules regarding agency may be applicable.

Tax Law Aspects

In the event that the franchise fee is paid to a related party , it will be subject to Turkish transfer

pricing regulations under Article 13 of the Corporate Tax Law (**"CTL"**). Accordingly, all types of royalties should be paid at arm's-length prices.

Additionally, the CTL recognizes the deduction of Intellectual Property (**"IP"**) generation costs if the expenses concerned are related to the generation and maintenance of income in Turkey and if the portion of the costs to be allocated to the Turkish entity is in line with the arm's-length cost allocation keys. On the other hand, as royalties, entry fees and other franchise payments are considered to be 'intangible property income', they are subject to 20% withholding tax, which might be reduced to 10% through double taxation treaties.

Aspects of Intellectual Property Law

In addition to the protection provided by the contractual relationship between the parties, the intellectual property should be registered before the Turkish Patent Institute for protection. Please also note that Turkey is a member of the World Intellectual Property Organization (WIPO).

Disclosure Requirements

Under Turkish law there are no pre-contractual disclosure requirements for franchising agreements, thus the disclosure obligation of the franchisor shall be determined in accordance with the franchise agreement.

Franchise Fee

The amount and currency of the franchise fees can be freely determined by the parties.

Termination of Franchise Agreements

As per the general principles of contractual freedom, the parties are free to draft contracts with a fixed term or an indefinite period. However, the termination procedures of the contract would differ based on the choice of term. Accordingly, a contract executed for a fixed term can be terminated with a justifiable cause or in line with the provisions of the contract whereas a contract executed for an indefinite period can be terminated at any time through a regular termination notice (unless otherwise determined in the contract). However, the termination clauses and the definitions of justifiable causes for termination (if any) set forth in contracts

Confidentiality Clauses in Franchise Agreements

Franchise agreements may contain confidentiality clauses which are enforceable under Turkish law. However, in case the penalty amount determined in the agreement exceeds the damage caused by the breach of the confidentiality covenant, the court may reduce the penalty amounts in proportion with the actual damages.

Dispute Resolution

Both the national courts and arbitration (local and international) may be selected by the parties of a franchise agreement as means of dispute resolution.

In the event that there is a foreign element in the contractual relationship between the parties, the International Private and Procedure Law (No. 5718) (the **"IIPL"**) shall apply in order to determine the applicable law to the agreement. Also, as per Article 24 of the IPPL, the parties may freely choose the applicable law to the agreement. Accordingly parties to such agreement are free to include an arbitration provision and choose the seat and venue of arbitration to be held outside Turkey, provided that there is a foreign element. If the agreement is subject to foreign arbitration (i.e. the arbitration takes place in a foreign country and foreign procedural rules apply to the dispute), the arbitral award would be subject to an enforcement process in Turkey in order to be enforceable against a Turkish party. In Turkey, the enforcement of foreign arbitral awards is regulated under the New York Convention and the IPPL.

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currency: UAE Dirham (AED) | **gross national product:** 570 bn. USD

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UNITED ARAB EMIRATES

Although most countries in the Middle East region - including the UAE - do not have franchise-specific legislation, Dubai remains the preferred base for franchised operations in the region, given its tax status, the comparative stability of its legal and regulatory systems, as well as its it openness to foreign investment.
The Dubai franchise market is dominated by a small number of high-net worth players who own multiple franchise brands and function as Franchise Conglomerates, with some having as many as 50-55 brands in their portfolio. Consequently, Master Franchisee arrangements have taken precedence, but there is now a trend for small franchisees and sub-franchising opportunities picking up with the influx of enterprising expatriates in recent years.

Legal Framework

As there is no one specific franchise law in Dubai, the concept of franchising typically falls within the ambit of federal commercial and agency laws of the UAE, which do not differentiate between franchise, agency or distribution agreements.

Accordingly, there are multiple laws which can apply to franchising relationships in Dubai and these include:

- Federal Law No. 18 of 1981 on the Organization of Commercial Agencies (as amended by Law No. 14 of 1998) and which was further amended by Law No. 13 of 2006.
- Federal Law No. 5 of 1985 on Civil Transactions.
- Federal Law No. 18 of 1993 on Commercial Transactions.

In addition to these laws, the following laws and regulations may be relevant depending on the terms and conditions of the franchise agreement:

- UAE intellectual property laws for trademarks, copyright and patents.
- UAE Labor laws, especially where a franchisor may second staff to the franchisee.
- UAE laws dealing with restraint of trade and rights of assignment in the event of default.
- Local Municipality rules in relation to business names and signage.

UAE Agency Law

According to the Agency Law, a commercial agency is defined as a representation of a Principal by an Agent for the distribution, sale offer or presentation of commodity or service within the Emirate.

In order for the Agency Law to apply to a franchise agreement, the following conditions must be met:

- The Agent must be a UAE national or a company wholly owned by UAE nationals;
- The relationship must be exclusive to either a territory or a product; and
- The agreement between the agent and principal must be registered with the UAE Ministry of Economy.

The Agency Law favors franchisees as agents rather than franchisors and therefore in the context of international brands looking to expand into the Dubai market, consideration needs to be given to whether it is appropriate to have the agreement registered with the UAE Ministry of Economy. For franchisees often the decision often depends solely on whether they are UAE nationals or their company is wholly owned by a UAE national.

Registration of Franchise Agreements

Registration of franchise agreements with the UAE Ministry of Economy can provide both franchisors and franchisees an enhanced ability to prevent parallel trading of goods as well as a clear evidentiary basis upon which to proceed with any actions for trademark infringement.

In the case of franchisors, however, termination of a registered agency agreement is usually difficult as it is governed by the UAE Agency Law which heavily favors franchisees as commercial agents. Consequently, substantial compensation could be awarded to the franchisee upon termination and the franchisee is entitled to commissions from sales made by others in their territory. In addition, it is difficult for franchisors to appoint a replacement agent in the event of termination or failure to renew the agreement.

Nationality

Under UAE law, it is important to note that only UAE nationals or corporations wholly owned by UAE nationals or those with a UAE partner or sponsor are permitted to carry out business operations in mainland Dubai. Therefore, due diligence is required on the part of the franchisor to adhere to prevailing laws especially when selecting the local partner or sponsor.

This, however, is not the case for franchises set up in any of Dubai's economic free zones, which permit 100% foreign ownership of a company as well as tax exempt status. Free zone companies will require a larger capital base, and may be subject to an additional set of business regulations promulgated by the respective free zone authority.

Government Funding

The Dubai government provides generous subsidies for locally-owned franchises to foster growth and development of small- and medium- sized business enterprises among Emirati nationals. Of special note:

- The Mohammed Bin Rashid Establishment for Young Business Leaders provides business training to entrepreneurs, and also encourages women entrepreneurs.
- The UAE Franchise Association was established in 2004 to provide franchising information for local entrepreneurs.
- The Dubai Islamic Bank (DIB) has a program to provide financial assistance to young UAE citizens interested in pursuing franchise opportunities.

Future Outlook

The UAE's franchise business is currently worth over AED 1.1 billion, and franchising in Dubai is on the threshold of remarkable growth. With a tremendous response from wealthy investors in the Gulf region, franchising is an important source of new revenue. The Dubai Chamber of Commerce & Industry (DCCI) currently leads the initiative to compile a body of laws relevant to Dubai's franchise sector in cooperation with local law firms. Dubai Chamber also sponsors workshops to educate entrepreneurs on the legal aspects of franchising in Dubai.

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official language: English | **capital city:** London |
currency: Pound Sterling (GBP) | **gross national product:** 2,435 bn. USD

Taylor Vinters*

Rhys Williams / TaylorVinters LLP

UNITED KINGDOM

There is no statutory definition of a franchise in the UK, although a franchise usually requires the following elements: a) the franchisee is permitted to use the franchisor's name; b) the franchisor exercises continuing control over the franchisee; c) the franchisor provides assistance/knowledge to the franchisee; and d) the franchisee makes payments to the franchisor.

Franchises in the UK are largely unregulated and there are no regulations specifically relating to franchises in the UK; self-regulation applies. The only piece of UK legislation relevant to franchising is the Trading Schemes Act 1996 ("1996 Act"), which applies to pyramid selling and will therefore affect franchises and sub-franchisees, although most single-tiered franchises will fall within an exemption. Otherwise the 1996 Act significantly restricts the franchisor's freedom of action and allows the franchisee certain protections. There is no obligation in the UK to comply with any specific codes, although voluntary members of the British Franchise Association ("BFA") are required to comply with the European Code of Ethics for Franchising.

There is no general restriction on foreign investment in the UK; however, foreign entities should be mindful of overarching legislation, such as the Data Protection Act 1998, which requires the data controller to be based in the UK or EU.

A franchisor may operate in the UK as a sole trader, partnership, company or limited liability partnership. The most common business model for franchisors is as a company limited by shares ("Ltd Company"), where the shareholders' liabilities for the debts of the company are limited to the value of their unpaid shares.

Ltd Companies incorporated in the UK must be registered with Companies House. Formation and on-going requirements of Ltd Companies are governed by the Companies Act 2006. Ltd Companies need at least one director and one shareholder, and certain statutory documentation.

The UK has various consumer protection laws, although there is no consistent definition of a "consumer". Generally, however, a consumer must be a natural person acting for purposes that are outside his trade, business or profession. A franchisee, therefore, is unlikely to be deemed to be a consumer.

On the whole, UK competition authorities have taken a favourable approach to franchising and it is possible to draft a franchise agreement that does not infringe English anti-competition laws. The Competition Act 1998 covers anti-competitive agreements between UK entities and mirrors EU law, which will apply if there is an international element (the "Competition Acts"). The Competition Acts contain two prohibitions that may be relevant to franchise agreements: 1) there is a general prohibition on agreements between undertakings that may affect trade within the UK/EU (as applicable) and that prevent, restrict or distort competition; and 2) there is a prohibition on abuse of a dominant position.

Sanctions for breaching the Competition Acts can be severe and could result in an agreement being held to be void and unenforceable and the parties being fined 10% of their worldwide turnover.

Franchise agreements are by their very nature anti-competitive although they will usually fall within one of the exemptions, the most relevant being for "small agreements" or the block exemption for vertical agreements.

Where the franchisee is a body corporate, it cannot be deemed an employee of the franchisor and it is unlikely that an individual franchisee would be deemed an employee, because the franchisee will be in business on their own account and as such will not be providing a personal service in consideration of remuneration.

An agent under the Commercial Agents Regulations 1993 is defined as a person who has "continuing authority to negotiate the sale or goods on behalf of another person". This is unlikely to apply to a franchisee and therefore, there are no applicable agency laws in the UK that will apply to a franchise relationship.

Foreign businesses that have a permanent establishment in the UK will be taxable in the UK and there are no tax rules that specifically relate to franchising, so franchises will be

subject to taxation in the same way as other entities of that nature. For example, if it has employees, the franchise will be responsible for paying National Insurance contributions and deducting income tax from employees' wages and the franchisee may also need to register for value added tax.

Franchisors can apply to register their trademarks in the UK with the Trademark Registry and such trademarks can be licensed to the franchisee. A successful trademark registration is protected by the Trademark Act 1994 and will confer on the franchisor the right to sue for trade mark infringement. Know-how is protected in the UK under the law of confidentiality. The franchisor should therefore ensure that any information is disclosed to the franchisee in circumstances importing an obligation of confidence and that the information is, and remains, confidential. In practice, the franchisor will enter into a confidentiality agreement with the franchisee.

There are no specific legal formalities for pre-sale disclosure/pre-contractual information in franchise arrangements; the franchisee will be responsible for conducting its own due diligence. If the franchise is regarded as a trading scheme (as above), franchisees will have a 14-day 'cooling off' period before they are bound by agreements and, under the European Code of Ethics for Franchising (as above), the franchisor must provide full and accurate written disclosure of all information material to the franchise relationship to prospective franchisees in English.

The main restrictions on provisions in franchise agreements relate to competition law.
The UK statutes most relevant to franchise agreements are the Competition Acts (as above) and the Enterprise Act 2002, which gave the Office of Fair Trading the power to investigate suspected anti-competitive behaviour.

There are no specific requirements in relation to the nature, amount or payment of franchise fees (although taxation and competition laws will apply); parties are free to agree appropriate payment terms as with any commercial agreement. There are currently no exchange control provisions against other currencies.

Generally, confidentiality clauses are enforceable under English law, provided they are correctly drafted. In practice, however, enforcing confidentiality obligations can be difficult and any restriction on a franchisee's use of confidential information after expiration of the franchise agreement must also comply with English common law on restraint of trade.

English law does not contain any specific provisions relating to the termination of franchise agreements; the franchise agreement itself will however usually contain express termination provisions. In addition, common law principles permit either party to terminate a contract if the other party commits a fundamental breach of the terms of the contract. There is no general obligation on a franchisor to renew a franchise agreement; the franchise agreement will typically contain specific renewal provisions.

In order to protect the goodwill in the franchise, the franchisor may insert restrictions on the franchisee's ability to transfer the franchise or ownership interests in the franchise agreement.

The parties may attempt to resolve their disputes through litigation in the civil courts, subject to any express provisions in the franchise agreement to the contrary. Alternatively, the parties may decide to resolve their dispute through a method of alternative dispute resolution, such as mediation or arbitration. Alternative dispute resolution may be preferable if parties wish to preserve their business relationship or confidentiality, or to avoid the expense of a trial. The BFA offers mediation and arbitration schemes to members.

Civil proceedings may be commenced in either the County Court or the High Court, dependant on the value and complexity of the claim. The Civil Procedure Rules provide the rules and guidance on the litigation process. Prior to commencing proceedings, parties are encouraged to attempt to resolve any dispute by considering the use of alternative dispute resolution. A decision from the High Court or County Court may be appealed to the Court of Appeal if the case raises an important point of principle or practice or there is some other compelling reason.

Arbitration may be preferable to litigation if parties wish to avoid the formality, time and expense of trial. Ease of international enforcement and confidentiality are also important factors in favour of arbitration. Further, the parties are generally free to agree a suitable procedure and they may select an arbitrator or tribunal who has experience in the subject matter of the dispute. However, the binding decision generally cannot be appealed and in some cases the cost of arbitration can exceed the expense of litigation.

There are no restrictions in respect of the choice of applicable law relating specifically to franchise agreements. Generally, the parties are free to choose the law governing the franchise agreement although, in a standard form (non-negotiated) franchise agreement, the choice of governing law for non-contractual obligations may be ineffective, since the right of choice applies to agreements that are "freely negotiated".

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currency: United States Dollar (USD) | **gross national product:** 16,720 bn. USD

FisherZucker

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UNITED STATES

The United States is a federal republic that consists of 50 states and 1 district as well as several dependent territories. Federal law applies throughout the United States, while each state has its own laws that apply within each state. The U.S. legal system is largely derived from the common law system, which can and does vary greatly from one state to the next. The United States Supreme Court is the final arbiter of questions pertaining to federal law, including the U.S. Constitution.

Franchising in the United States

Franchising on the federal level is governed by the Federal Trade Commission ("FTC") Rule on Franchising that requires pre-sale disclosure on 23 items of information, which are disclosed in what is called a Franchise Disclosure Document ("FDD"). The FTC Rule requires that the FDD be presented at least 14 days prior to the signing of the Franchise Agreement and has certain delivery and updating requirements. The FTC Rule also requires that all agreements and audited financial statements be attached to the FDD.

In addition to the federal FTC requirements that apply throughout the country, certain states require presale registration and approval of franchise documents by state authorities. The states that require franchise registration are California, Hawaii, Illinois, Indiana, Maryland, Minnesota, New York, North Dakota, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin. Michigan requires a Notice of Intent to be filed and also requires state-specific language to be included in an addendum to the Franchise Disclosure Document (although the actual addenda need not be filed or registered). A franchisor will also need to submit a filing for an exemption from the business opportunity laws of Florida, Kentucky, Nebraska, Texas, and Utah.

Further, until a franchisor is awarded a federal trademark from the U.S. Patent and Trademark Office, it must comply with the business opportunity registration requirements of Connecticut, Maine, and North Carolina. Until a franchisor obtains a state or federal trademark, it will also be required to comply with the business opportunity laws in Georgia, Louisiana, and South Carolina.

Specifics for Foreign Franchisors

In terms of franchising laws, foreign franchisors are not treated any differently than domestic franchisors. Further, the federal government provides no across-the-board restrictions on foreign investment in the United States. The few statutes that address foreign investment primarily concern disclosure and information gathering, along with those prohibiting investments or transactions that flow to groups or individuals connected with terrorism.

Corporate Law

Each state provides for various types of business entities, include partnerships, corporations, limited partnerships (LPs), and limited liability companies (LLCs), among others. LLCs are generally recommended, as they allow owners to customize the management and ownership structure. Further, LLCs have "pass through" tax status, resulting in profits flowing directly to their owners. Unlike LLCs, corporations are taxed directly on their profits, and owners of corporations must also pay tax after receiving a dividend or selling their interests at a gain.

Business entities are formed at the state level, which requires filing with the appropriate state government office and designating an agent. A business entity may establish its principal place of business outside of its state of formation. The state of formation can play a major role in the life of a business, as it can affect tax levels, applicable laws, and lawsuit location. Certain states have laws more hospitable to business entities than others.

Consumer Protection Law

Whether consumer protection statutes classify franchisees as "consumers" varies on a state to state basis, with varying laws to match.
Antitrust/Competition Law: U.S. franchising in the modern era implicates antitrust laws less so than it did in years past. However, tying arrangements and resale price maintenance may raise antitrust issues. A franchisor can avoid tying claims through disclosure of such arrangements in its FDD. The law surrounding resale price maintenance today remains ambiguous, as various states may categorize a franchisor's practice of setting minimum prices for franchisees as price fixing.

Labor Law Aspects

United States law has seen a recent movement to categorize franchisors as employers of their franchisees, as well as employers or joint employers of their franchisees' employees. If such a relationship exists, a franchisor may face liability for labor law violations; otherwise, franchisees amount to independent contractors, typically insulating franchisors from such liability. In determining the nature of the relationship, courts and agencies may apply a num-

ber of different tests. Generally, they examine some of the following factors: the amount and nature of control franchisors exert over franchisees; the manner in which parties are paid; franchisees' individual investment in equipment, employees, and other capital; the franchisees' opportunity for profit or loss depending on individual skill; and whether the franchisor and franchisee are in the same business. Franchisors can reduce the risk of being classified as an employer by reducing the amount of control over their franchisees and by emphasizing the independent nature of each franchisee's business.

Sales Agent Law

Sales agent laws in the United States generally do not apply to franchisees.

Tax Law Aspects

The federal government and the individual states have the right to tax income, though some states do not impose an income tax. Taxation varies by type of business entity. The federal government generally taxes royalty payments and income from the sale of franchises as ordinary income for US-based franchisors, which may be subject to higher tax rates than income derived from capital gains. Foreign entities must also pay taxes on income generated in the United States.

Aspects of IPR Law

Federal law primarily governs intellectual property in the United States. The Lanham Act applies to trademarks and unfair competition. The Copyright Act and the Patent Act cover their own subject matter. States law exists regarding trademarks, trade secrets, and unfair competition.
The United States, in contrast to most of the world, recognizes trademark rights when a party first uses a unique and distinct mark in commerce connected to a good or service. "Common law" rights offer a trademark owner to pursue infringement claims. The United States Patent and Trademark Office offers federal registration for trademarks, which confers several benefits on the registrant.

A franchisor can protect its trade secrets with non-competition clauses, which prevent former franchisees from operating a competing business based on the confidential knowledge of the franchise. These clauses are typically enforceable if they are reasonable in scope of time and territory. However, certain states refuse to uphold any non-competition clause, other states will refuse to uphold those they find unreasonable, and others will edit the scope of non-competition clauses before they enforce them.

Pre-sale Disclosure/Pre-Contractual Information

As discussed above, the FDD must contain 23 specific items of information, including information about the history of the franchisor, its related entities, and its key business persons, its litigation and bankruptcy history, the fees, expenses, and initial investment required by the franchise, the sources and suppliers, financing arrangements, the obligations of the franchisor and franchisee, the territory, IPR, restrictions on goods and services, associated public figures, financial performance representations, information regarding existing outlets, and financial statements of the franchisor. Franchisors must update their FDD annually or within a certain period measured by the end of their fiscal year. The FDD should be in English.

If a franchisor violates state disclosure requirements during the sale of a franchise, the franchisee typically may seek rescission, as well as actual and punitive damages and attorneys' fees. The particulars of recovery vary between states. Both a franchisor and master-franchisee are liable for failing to properly disclose to subfranchisees.

Legal Restrictions Affecting Franchise Agreements

A few states have enacted franchise relationship laws intended to provide franchisees with extra protection. Some of these laws prohibit franchisors from terminating or refusing renewal without cause or adequate notice, encroaching a franchisee's territory, restricting the formation of franchisee associations, and requiring out-of-state litigation. As with many other laws, these vary by state.

Franchise Fees

Certain state laws limit the interest rate a franchisor may impose on a franchisee's overdue payments. There are no restrictions on making royalty payments in foreign currency.

Confidentiality Clauses

Confidentiality clauses in franchise agreements are generally enforceable.

Termination of Franchise Agreements

As noted above, several states require good cause and adequate notice before a franchisor may terminate a franchisee. Good cause typically includes failure to comply with the material provisions of the franchise agreement. Franchisors are expected to give franchisees notice and the opportunity to cure certain defaults. Certain states require franchisors to purchase any of the franchisee's unused supplies or inventory upon termination.

Transfer of Franchise Agreements

Franchisors may place restrictions on transfers when they have legitimate business reasons, but they may not unreasonably withhold their consent to a franchisee's proposed transfer. Courts will look to the franchisor's good faith intentions in making a determination.

Dispute Resolution and Court System:

The United States has a system of federal courts that hear cases throughout the entire United States and the territories. The United States District Courts constitute the lowest level of federal courts, which hear questions of federal law as well as questions of state law in certain circumstances. Rulings in these courts can be appealed to the United States Circuit Courts of Appeal, which, in turn, can be appealed to the United States Supreme Court. Decisions of the higher courts bind those beneath them. Each state has its own court system similar to the federal courts.

Parties to a franchise agreement may agree to arbitrate or mediate disputes arising under the agreement. Arbitration typically will result in a binding and non-appealable decision, whereas mediation seeks to facilitate an agreement between the parties. Parties may customize the rules governing their arbitration beforehand, including the rules of evidence, and number of arbitrators. Arbitration also offers the advantage of privacy, expediency, and the ability to choose and guarantee a venue.

Applicable Law

Franchisors may choose the applicable law to govern their franchise agreements, which may be superseded by state laws.

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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 first edition of the International Franchise Handbook shall give you first-hand information from local champions on franchise law in as many as 19 countries throughout the world.”