

Franchise

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Quick reference guide enabling side-by-side comparison of local insights, including franchise market overview; key considerations when forming and operating a franchise; offer and sale of franchises; franchise contracts and the franchisor/franchisee relationship; and recent trends.

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MARKET OVERVIEW

Franchising in the market

How widespread is franchising in your jurisdiction? In which sectors is franchising common? Are there any economic or regulatory issues in the market that are more or less hospitable to franchising or make it economically viable in your jurisdiction?

The Franchising Association of South Africa (FASA), the organisation that promotes and supports franchising in South Africa, compiles a list of accredited franchise businesses, which are franchise businesses recognised, assessed, reviewed and monitored by FASA. Based on this list of accredited businesses, it appears that franchise businesses are found across 21 different business sectors in South Africa, including the agricultural, mining, manufacturing and industrial services, office buildings, home services, fast food and restaurants, health, beauty and body culture, and the retail and direct marketing services sectors.

It appears that franchising is most common in the fast food and restaurants sector as well as retail and direct marketing, with more than 30 franchise businesses active in each of these sectors in South Africa.

Franchising is considered an area for potential growth in the South African economic sphere, as well as in Africa as a whole.

Law stated - 12 May 2021

Associations

Are there any national or local franchise associations? What is their role in franchising, including any impact on laws or regulations? Are there any rules of conduct or membership requirements?

FASA was established in 1979 to protect, lobby, promote and develop ethical franchising practices in South Africa.

FASA established a Code of Ethics and Business Practices, with which members agree to comply. Several principles of this code were adopted into the Consumer Protection Act No. 68 of 2008 . This code compels franchisors to provide a prospective franchisee with:

- a disclosure document, containing all the relevant information about the company and the franchise opportunity;
- a fair and equitable franchise agreement; and
- an operations manual, containing policies and procedures for operating a successful franchise business.

Law stated - 12 May 2021

BUSINESS OVERVIEW

Types of vehicle

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

A franchisor would typically operate via a public or private for-profit company incorporated in terms of the provisions of the Companies Act, No. 71 of 2008 (the Companies Act).

For foreign franchisors, an external or branch company could be established as a wholly owned subsidiary of the foreign parent entity. Foreign franchisors may opt for a joint venture arrangement with a local South African entity as a

means to more effectively establish a presence in South Africa. Alternatively, a foreign franchisor may choose to grant rights to a local party (a master franchisee) enabling them to adopt the role of franchisor in South Africa and extend franchise opportunities to sub-franchisees.

Law stated - 12 May 2021

Regulation of business formation

What laws and agencies govern the formation of business entities?

The Companies Act governs the formation and functioning of companies in South Africa.

The Companies and Intellectual Property Commission (CIPC) is tasked with, among other functions, the registration of companies and the monitoring of compliance with the formalities required under the Companies Act.

Law stated - 12 May 2021

Requirements for forming a business

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

The Companies Act sought to significantly streamline and simplify the formal process of establishing a company in South Africa. New companies can be registered in South Africa relatively easily and cheaply.

At least one director is required for a new company, and that individual's identity document or passport, together with proof of his or her residential address must be provided.

A standard form memorandum of incorporation may be used to set up the company.

There are certain ongoing requirements for maintaining a business entity as prescribed by the Companies Act and the Regulations published thereunder, for example, the requirement that a company must lodge an annual return with the CIPC.

Law stated - 12 May 2021

Restrictions on foreign investors

What restrictions apply to foreign business entities and foreign investment?

There are very few restrictions on foreign business entities and foreign investment in South Africa. Foreign individuals and entities may acquire property, including immovable property, in South Africa without restriction.

Certain circumstances, like the payment of royalties to a foreign entity, and the movement of capital, intellectual property and other significant assets out of South Africa, may trigger the requirement for exchange control approvals from the South African Reserve Bank. Otherwise, foreigners may trade in South Africa without restrictions or additional requirements to what may be required of a South African citizen.

Law stated - 12 May 2021

Taxation

What aspects of the tax system are relevant to franchisors? How are foreign businesses and individuals taxed?

The following tax rates apply in South Africa.

- Corporate tax rate: 28 per cent (not applicable to small businesses with less than 550,001 rand in annual taxable income).
- Foreign resident companies that earn income from a source in South Africa: 33 per cent.
- Individuals: taxed at varying rates between 18 per cent and 45 per cent depending on income.
- Standard withholding tax on royalties payable out of South Africa: 15 per cent (in the absence of any taxation treaties).

Law stated - 12 May 2021

Labour and employment

Are there any relevant labour and employment considerations for typical franchisors?

South African labour laws provide quite significant protections to employees via the Labour Relations Act No. 66 of 1995 and the Basic Conditions of Employment Act No. 75 of 1997.

Whether a franchisee could be deemed an employee of the franchisor would depend largely on the measure of control the franchisor exerts.

Under South African law, a distinction is drawn between employees and independent contractors, where, generally speaking, an employer would have more specific control over the day-to-day activities of an employee and how, when and where the employee's tasks should be completed. An employer generally exerts more control over an employee in terms of how an employee executes required tasks.

To reduce the risk of a franchisee being considered an employee of the franchisor, or the employees of a franchisee being considered employees of the franchisor, provisions should be included in the franchise agreement where the parties confirm the nature of these relationships, and specifically that the franchise agreement does not create an employer–employee relationship. However, it is important to note that should the question of the nature of these relationships be considered, a court would, in addition to any contractual arrangements, consider the factual position surrounding the relationships. These positions would bolster an argument for the absence of an employer–employee relationship, but would not automatically confirm such a position.

Law stated - 12 May 2021

Intellectual property

How are trademarks and other intellectual property and know-how protected?

Registered and unregistered trademarks are protected in South Africa – the former in terms of the Trade Marks Act No. 194 of 1993 and the latter in terms of the common law.

The CIPC administers the Trade Marks Register in South Africa. Applicants seeking trademark registration must submit separate applications for each trademarked class of goods or services within which they would like their mark to be protected. Once registered, a trademark holder is issued a trademark registration certificate. Trademarks are valid for a period of 10 years, during which period the trademark holder has exclusive rights to use the relevant mark, subject to any conditions that may be imposed by the CIPC. Trademark registrations may be renewed after every 10-year period, for a further period of 10 years, and effectively a trademark holder could protect its rights indefinitely.

Know-how is protected under the common law, with further protections possible under contractual terms.

Real estate

What are the relevant aspects of the real estate market and real estate law? What is the practice of real estate ownership versus leasing?

There are no real estate laws specific to franchise arrangements.

It is likely that franchise business would be conducted from leased premises with lease rights secured via a lease agreement. General contract laws govern the contractual relationship.

The franchisee is more likely to be the lessee in lease arrangements for leased premises from which a franchise business may be conducted, particularly in relation to franchise agreements where the franchisor is foreign.

The franchisor should prioritise leases as part of its due diligence investigation and, if possible, should ensure that the franchise agreement allows for the lease agreement to be assigned to the franchisor without the landlord's consent.

Law stated - 12 May 2021

Competition law

What aspects of competition law are relevant to the typical franchisor in your jurisdiction? How is competition law enforced in the franchising sector?

The Competition Act No. 89 of 1998 (the Competition Act) applies to franchise agreements as they constitute an economic activity within or having an effect within the country.

In particular, sections of 4(1) and 5(1) of the Competition Act prohibit agreements between firms in a horizontal relationship, or a vertical relationship if it has the effect of substantially lessening or preventing competition in a market unless there is a technological, efficiency or another pro-competitive gain that results from it and outweighs that effect.

The Competition Act contains the so-called rule of reason prohibitions and the so-called per se prohibitions. The rule of reason prohibitions may be justified (ie, where the technological, efficiency or another pro-competitive gain that results from it outweighs any negative effect) whereas the per se prohibitions cannot be justified. Per se prohibitions for firms in a horizontal relationship constitute price fixing, market division (by allocating customers, suppliers territories or specific types of goods and services) and collusive tendering. Minimum resale price maintenance is a per se prohibition for firms in a vertical relationship.

A franchisor is however able to recommend a minimum resale price for a product provided it is not binding on the franchisee and that, if the price is stated on the product, the words 'recommended price' appear next to the stated price. Franchisees cannot be prevented by franchisors from offering discounts to customers at the franchisees' discretion.

An arrangement involving exclusive territories between a franchisor and a franchisee (a vertical relationship) could also be held to be anticompetitive if it cannot be justified by efficiencies in distribution or other pro-competitive effects (eg, inter-brand competition, where the franchise is more competitive with other franchises)

Section 8 of the Competition Act contains provisions for preventing the abuse of a dominant position by, for example, preventing excessive pricing to the detriment of consumers, refusing to give competitors access to an essential facility when it is economically feasible to do so and engaging in any of the above exclusionary acts.

In the application of competition law and policy, there is little differentiation between franchising agreements and other distribution channels. Although franchise arrangements are based on the licensing of intellectual property rights (which

are exclusionary by nature), franchise arrangements are not exempt from competition law. Franchising is therefore seen as an economic activity over which the Competition Act applies.

A proprietor of an intellectual property right seeking to enforce that right in contravention of the Competition Act must seek exemption from the Competition Commission, which considers each matter on its merits under the rule of reason. The use of intellectual property rights can lead to enhanced efficiencies, encourage investment and promote inter-brand competition, making an exemption probable.

Law stated - 12 May 2021

OFFER AND SALE OF FRANCHISES

Legal definition

What is the legal definition of a franchise?

There is no specific legal definition of a franchise under South Africa law.

However, the Consumer Protection Act No. 68 of 2008 (CPA) defines a franchise agreement as follows:

The Franchising Association of South Africa (FASA) loosely defines franchising as the granting of a right to operate a business or licence under certain specific conditions.

Law stated - 12 May 2021

Laws and agencies

What laws and government agencies regulate the offer and sale of franchises?

The CPA and the Regulations published thereunder, together with the common law, regulates the offer and sale of franchises in South Africa.

The National Consumer Commission is the government agency tasked with the regulation of relationships between consumers and businesses in South Africa. Franchisees are, in certain respects, considered consumers pursuant to the definition of a consumer set out in the CPA.

Law stated - 12 May 2021

Principal requirements

What are the principal requirements governing the offer and sale of franchises under the relevant laws?

Section 7(1) of the CPA sets out certain requirements for franchise agreements, which must:

- be in writing and signed by or on behalf of the franchisee;
- include any prescribed information, or address any prescribed categories of information; and
- be in plain and understandable language.

Regulation 2 of the Regulations to the CPA contains further information that must be contained in a franchise agreement as prescribed by the responsible cabinet minister, including information such as the name and description

of the relevant goods and services, the consideration payable by the franchisee under the agreement, and renewal terms.

Law stated - 12 May 2021

Franchisor eligibility

Must franchisors satisfy any eligibility requirements in order to offer franchises? Are there any related practical issues or guidelines that franchisors should consider before offering franchises?

No, there are no such eligibility laws.

Law stated - 12 May 2021

Franchisee and supplier selection

Are there any legal restrictions or requirements relating to the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers? What practical considerations are relevant when selecting franchisees and suppliers?

No, there are no such laws.

Law stated - 12 May 2021

Pre-contractual disclosure – procedures and formalities

What procedures and formalities for pre-contractual disclosure are required or advised in your jurisdiction? How often must the disclosures be updated?

Generally speaking, parties are not required to make any pre-contractual disclosures in South Africa, save for certain specific types of agreements such as insurance, partnership or agency agreements, wherein parties are required to act in the utmost good faith and therefore to disclose any information that may be considered material for the other party in entering into the agreement.

Specific disclosures are required for franchise agreements in the terms of Regulation 3 to the CPA, including:

- the goods or services to which the franchise applies;
- any territorial restrictions that apply;
- the renewal terms for the agreement;
- the specific obligations of, and restraints on, each party; and
- the details of all the financial contributions that will be required of the franchisee.

There is no requirement that this disclosure document should be updated at any point.

Law stated - 12 May 2021

Pre-contractual disclosure – content

What information is the disclosure document required or advised to contain?

The disclosure document must contain the information stipulated by Regulation 3 to the CPA, including:

- the goods or services to which the franchise applies;
- any territorial restrictions that apply;
- the renewal terms for the agreement;
- the specific obligations of, and restraints on, each party; and
- the details of all the financial contributions that will be required of the franchisee.

FASA makes a disclosure document available on its website, which includes the information referred to above, as well as various other recommendations for information to be provided. This aims to assist a potential franchisee in evaluating the franchised business.

Law stated - 12 May 2021

Pre-sale disclosure to sub-franchisees

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

The CPA does not directly address this issue. The sub-franchisor would have the direct contractual nexus with the sub-franchisees and, therefore, it is reasonable to argue that the obligation would fall on the sub-franchisor. It is recommended that the master franchisor include a provision in the master agreement obliging the sub-franchisor to fulfil the disclosure obligations and to indemnify the master franchisee if it fails to meet the disclosure obligations.

Law stated - 12 May 2021

Due diligence

What due diligence should both the franchisor and the franchisee undertake before entering a franchise relationship?

A franchisor should conduct at least basic due diligence into the party or parties wishing to become a franchisee. In the case of individuals, a credit check and criminal check are relatively easy and inexpensive to do. The individual directors of potential franchisee companies could be similarly investigated.

Potential franchisee companies should be asked about details of directors and shareholders, and to share company documents including financial statements. A major potential drawback is that franchisee companies are likely to be new companies set up for the particular purpose of operating the franchisee business. It is, therefore, important to look at the individuals involved and any other businesses or companies with which they may be involved.

Franchisees could verify and evaluate the intellectual property rights that form the subject of the licence granted in the franchise arrangement. Franchisees can also, more generally:

- contact existing franchisees, suppliers, employees and customers;

- study the disclosure documents and financial statements carefully in conjunction with professional advisers to check on financial health and forecasted profitability;
- check whether the franchisor is a member of any industry bodies with enforceable codes of conduct;
- check for any court judgments or poor credit records against the franchise;
- visit franchised stores with a view to experiencing the goods or services from the perspective of a consumer;
- consider the broader market and how competitive it is; and
- consider the regulations and potentially forthcoming regulations that may affect the industry.

Law stated - 12 May 2021

Failure to disclose – enforcement and remedies

What actions may franchisees or any relevant government agencies take in response to a franchisor's failure to make required disclosures? What legal remedies are available? What penalties may apply?

The prospective franchisee can report a failure to issue such notice or particular violations of disclosure requirements to the National Consumer Commission. A person failing to comply would first be issued a compliance notice. It is not clear whether a franchise arrangement would be void or voidable as a result of a failure to supply a disclosure notice.

If the franchisor is a member of FASA, their failure to disclose can be reported to FASA. Although not a government agency, FASA's Code of Ethics and Business Practices provides for the payment of a fine of up to 10,000 rand or termination of membership of the association if members contravene the CPA.

Where a franchisor has omitted certain information or provided incorrect or false information, the franchisee could pursue delictual remedies. To this end, the franchisee would need to prove the damage it suffered as a result of the franchisor's failure to supply the required or correct information.

Law stated - 12 May 2021

Failure to disclose – apportionment of liability

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

This issue is not specifically addressed in the relevant sections of the CPA.

Liability of this nature should be specifically addressed in the franchise agreement, failing which the ordinarily delictual remedies will apply.

Law stated - 12 May 2021

General legal principles and codes of conduct

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

The offer of a franchise is regulated by the CPA and its Regulations. Regulation 3 sets out all the information that must be contained in the franchisor's pre-sale disclosure and the documentation that must accompany such a disclosure, including:

- the goods or services to which the franchise applies;
- any territorial restrictions that apply;
- the renewal terms for the agreement;
- the specific obligations of, and restraints on, each party; and
- the details of all the financial contributions that will be required of the franchisee.

South African law does not specifically recognise the doctrine of culpa in contrahendo . Furthermore, there is no legally recognised general duty of good faith in contracts.

FASA has a Code of Ethics and Business Practices that sets out the manner in which it expects members to establish, structure and implement franchise relationships.

Law stated - 12 May 2021

Fraudulent sale

What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises?

In this instance, franchisees would be entitled to sue in delict for fraudulent misrepresentation.

Law stated - 12 May 2021

FRANCHISE CONTRACTS AND THE FRANCHISOR/FRANCHISEE RELATIONSHIP

Franchise relationship laws

What laws regulate the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

Section 48 of the Consumer Protection Act No. 68 of 2008 (CPA) provides that the terms of the franchise agreement must not be unfair, unreasonable or unjust.

Regulation 2 of the Regulations to the CPA contains further information that must be contained in a franchise agreement as prescribed by the Minister, including information such as the name and description of the relevant goods and services, the consideration payable by the franchisee under the agreement, and renewal terms.

Law stated - 12 May 2021

Operational compliance

What mechanisms are commonly incorporated in agreements to ensure operational consistency and adherence to brand standards?

Franchise agreements often incorporate provisions granting the franchisor rights of inspection and the ability to audit the franchisee in relation to compliance with certain operational standards or requirements. Reporting requirements are often provided for in the most detail in franchise agreements as this gives the franchisor the most insight into the

commercial health and success of the franchise business as run by the franchisee. Reporting provisions are also the most useful rights, particularly for foreign franchisors who may have less opportunity to conduct audits and physical inspections.

Law stated - 12 May 2021

Amendment of operational terms

May the franchisor unilaterally change operational terms and standards during the franchise relationship?

In terms of the provisions of Regulation 44 (3)(h) and (i) of the CPA, any provisions of a franchise agreement purporting to allow the franchisor to increase the prices of any goods or services without giving the franchisee the right to terminate, or enabling the franchisor to unilaterally alter the terms of the agreement (including the characteristics of the product or service) would be presumed not to be fair and reasonable. Accordingly, such provisions would be prohibited under the CPA.

Law stated - 12 May 2021

Policy affecting franchise relations

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

No, there are no such policies. Membership of the Franchising Association of South Africa (FASA) is voluntary.

Law stated - 12 May 2021

Termination by franchisor

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

A franchise agreement may only contain a provision for the franchisor to terminate such agreement at will where the same right is afforded to the franchisee.

A franchisor may further only terminate an open-ended franchise agreement on reasonable notice to the franchisee, save where the franchisee has materially breached the franchise agreement.

Law stated - 12 May 2021

Termination by franchisee

In what circumstances may a franchisee terminate a franchise relationship?

In terms of section 7(2) of the CPA, a franchisee may cancel a franchise agreement within 10 business days of signing the agreement, by written notice to the franchisor but without any cost or penalty to the franchisee.

The exact text of section 7(2) must appear at the top of the first page of the franchise agreement, together with a reference to the section and the CPA.

If a franchise agreement contains a provision allowing a franchisor to terminate the franchise agreement at will, then the same right must be afforded to the franchisee.

Renewal

How are renewals of franchise agreements usually effected? Do formal or substantive requirements apply?

Formal or substantive requirements are governed by the terms of the relevant provisions of the franchise agreement.

In terms of the Regulations to the CPA, if a franchise agreement contemplates renewal, both the franchisor and the franchisee must be able to renew the agreement.

Law stated - 12 May 2021

Refusal to renew

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

If a franchise agreement does not contain any renewal provisions with which the franchisor is obliged to comply, then there is no specific obligation on the franchisee to renew. Franchisors typically consider the franchisee's business performance during the initial term to determine whether or not to renew.

A franchisor may also refuse to renew a franchise agreement where there has been a material breach of the agreement by the franchisee.

Law stated - 12 May 2021

Transfer restrictions

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

Yes, a franchisor may impose these restrictions.

Law stated - 12 May 2021

Fees

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

Other than exchange control laws, there are no specific laws or regulations affecting the nature, amount or payment of fees.

Law stated - 12 May 2021

Usury

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

In terms of the Prescribed Rate of Interest Act, the interest on debts where no rate is agreed upon is the repurchase agreement rate plus 3.5 per cent per annum. The prescribed rate of interest on debt in South Africa is currently 10.25

per cent. A different rate may be applied by law, trade custom or agreement between the parties.

This prescribed rate of interest applies to all debts outstanding in terms of a franchise agreement unless the parties agree to another interest rate.

The National Credit Act limits the amount of interest that can be charged on unpaid amounts to 2 per cent per month; however, this only applies where the National Credit Act applies to the franchise agreement. It is unlikely to apply in many instances given that a requirement is that the franchisee would either need to be an individual or a juridical person with an annual turnover of less than 1 million rand per annum.

Law stated - 12 May 2021

Foreign exchange controls

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

Exchange control approvals from the South African Reserve Bank (SARB) are required where royalties are to be paid to a foreign entity. The Department of Trade and Industry (DTI) acting on behalf of SARB must grant approval for any arrangement, including a franchise arrangement, in which products are manufactured locally under licence from a foreign licensor. The DTI has provided guidelines regarding licence terms that it deems to be acceptable and unacceptable, particularly relating to the structure of the licence fee payable and the quantum of any licence royalties payable.

Law stated - 12 May 2021

Confidentiality covenant enforceability

Are confidentiality covenants in franchise agreements enforceable?

Yes, confidentiality covenants are generally enforceable.

Law stated - 12 May 2021

Good-faith obligation

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

Good faith is recognised as an underlying concept of South African contract law.

Law stated - 12 May 2021

Franchisees as consumers

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

Yes, in terms of the definition of consumer under the CPA, a franchisee is included as a consumer.

Law stated - 12 May 2021

Language of the agreement

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

There is no specific statutory requirement that these documents or agreements need to be in any particular South African language. However, FASA does require that disclosure documents and supporting documents should be in English.

South Africa has 11 official languages, with English, Afrikaans, Zulu and Xhosa being the most widely used. English is considered standard for use in business communication and legal agreements.

Law stated - 12 May 2021

Restrictions on franchisees

What types of restrictions are commonly placed on the franchisees in franchise contracts?

Particular restrictions are specific to the requirements of the franchisor and the concerns they may have for the protection of their brand. Territorial restrictions are particularly common and foreign franchisors often want to provide that the governing law of the franchisor's country of origin would apply.

Certain restrictions are legally prohibited, such as restrictions related to the minimum prices that franchisees can charge to their customers. While franchisors can issue a recommended retail selling price, prescribing a particular minimum sales price is prohibited under South African competition laws.

Law stated - 12 May 2021

Courts and dispute resolution

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

The judicial system in South Africa is established in the Constitution of the Republic of South Africa, 1996 (the Constitution) as follows:

- the Constitutional Court is the highest court in the land as regards constitutional matters;
- the Supreme Court of Appeal (SCA) is the highest court in the land for all matters other than constitutional matters: as the name implies, this court deals exclusively with appeals, where a bench of three to five senior and experienced judges decide on matters;
- a number of High Courts have jurisdiction throughout the various provinces in South Africa, dealing with serious criminal offences and civil matters: there are also a number of specialist High Courts – in this regard the Labour Court, the Tax Court and the Competition Court may be relevant and of interest to a franchisor in South Africa; and
- there are various lower courts, known as magistrates' courts (regional and district), which are mandated to hear matters involving claims of up to 200,000 rand.

Parties to a franchise agreement may choose to include mediation and arbitration proceedings as options for dispute resolution.

Mediation may be less formal and would essentially be a continued negotiation between the parties overseen by an

independent third party with relevant experience, as agreed between the parties.

Arbitration is a more formal and adversarial process than mediation.

Law stated - 12 May 2021

Governing law

Are there any restrictions on designating a foreign governing law in franchise contracts in your jurisdiction? How does the governing law affect the contract's enforceability?

In the matter of *Foize Africa v Foize Beheer and others* 2013 (3) SA 91 (SCA), it was held that although parties can agree to the governing law and jurisdiction of a particular country with respect to an agreement, this does not exclude the South African courts' jurisdiction. South African courts still hold the discretion to exercise, or refrain from exercising, jurisdiction in a matter where there is a jurisdictional link to the South African courts.

In the event that the governing law in respect of an agreement is foreign and the agreement is subject to South African jurisdiction, South African courts would give effect to the choice of law exercised by the parties. However, this would not exclude the application of relevant South African statutes (eg, the CPA).

Law stated - 12 May 2021

Arbitration – advantages for franchisors

What are the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction? Are any other alternative dispute resolution (ADR) procedures particularly favoured or disfavoured in your jurisdiction?

The main advantages of the settlement of disputes via arbitration proceedings in South Africa include:

- that parties are free to choose (and include in any relevant contract) the particular rules that will be applicable to and govern any arbitration;
- that arbitration proceedings are generally shorter, or have a known time frame for their conclusion, or both;
- that an appointed arbitrator to a dispute will have specialist knowledge and skill relevant to the dispute;
- that arbitration proceedings offer a more private, closed forum, which is particularly important where sensitive commercial information is to be dealt with;
- that, in some instances, arbitration is likely to be less costly than litigation proceedings, or at least the costs can be estimated ahead of time (because time frames for arbitrations are often more circumscribed); and
- that, in international disputes, there may be a perceived sense of neutrality given that both parties have chosen the particular forum and rules and parameters that apply (as opposed to the authority of a court of local jurisdiction of one of the parties).

The primary disadvantages include that, in some instances, arbitration could be a more expensive avenue. Where third parties become embroiled in a dispute, these relevant parties must consent to participate in arbitration proceedings as they cannot simply be joined in a matter as they would in court proceedings.

Law stated - 12 May 2021

National treatment

In what respects, if at all, are foreign franchisors treated differently (legally, or as a practical matter) from domestic franchisors?

Except for the effect of the exchange control regulations, foreign and domestic franchisors are not treated differently in any respect, legally or otherwise.

Law stated - 12 May 2021

UPDATE AND TRENDS

Legal and other current developments

Are there any proposals for new legislation or regulation, or to revise existing legislation and regulation? Are there other current developments or trends to note?

From a legislative and regulatory perspective, there are no new developments on the horizon in the franchising space.

The Franchise Association of South Africa predicts that franchising in education will become popular, spurred on by the online schooling required during covid-19 lockdown measures. Vendors of meat-free food products and green technologies are also expected to gain support. The use of data analytics and artificial intelligence to identify customer buying patterns and improve business efficiencies are highlighted as trends. The importance of having an online presence and making use of social media marketing remains in the spotlight.

Law stated - 15 June 2022

Jurisdictions

	Australia	Norton Rose Fulbright
	Canada	Lapointe Rosenstein Marchand Melançon LLP
	China	Jones & Co
	Finland	ADVOCARE Law Office
	France	Bersay
	Germany	Taylor Wessing
	India	G&W Legal
	Israel	Gilat Bareket & Co, Reinhold Cohn Group
	Italy	Rödl & Partner
	Japan	Anderson Mōri & Tomotsune
	Malaysia	Wong Jin Nee & Teo
	Mexico	Gonzalez Calvillo SC
	Netherlands	Parker Advocaten
	New Zealand	Stewart Germann Law Office
	Norway	CLP
	South Africa	Spoor & Fisher
	South Korea	Lee & Ko
	Switzerland	Kellerhals Carrard
	Turkey	Özdağıştanlı Ekici Attorney Partnership
	United Kingdom	Ashtons Legal
	USA	Lathrop GPM