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CHALLENGES AND OPPORTUNITIES IN INTERNATIONAL FRANCHISING

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**FRANCHISING'S LAST FRONTIER:
CUBA, IRAN, MYANMAR AND OTHER SANCTIONED COUNTRIES**

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**Junaid Daudpota
Daudpota International
Dubai, UAE
junaid@daudpota.com**

**Alan R. Greenfield
Greenberg Traurig, LLP
Chicago, IL, USA
greenfieldalan@gtlaw.com**

**Tao Xu
DLA Piper LLP (US)
Reston, VA, USA
tao.xu@dlapiper.com**

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1. Introduction

As diplomatic relations between the United States (“U.S.”) and various countries continues to evolve, and in many circumstances, advance, so does the appeal of business opportunities in such countries. Franchising is no exception.

Over the past few years, Iran, Cuba and Myanmar have become countries in which prospective businesses have focused their international expansion efforts, but, have remain relatively subdued as a result of existing (or slowly fading) sanctions regimes imposed by the U.S. and European Union (“EU”). This paper aims to describe such sanction regimes imposed by the U.S. and the EU against Iran, Cuba and Myanmar, and describe the respective franchise markets in each country, as well as the current state of franchise regulation in those countries.

2. Overview of the Sanctions Regime in the United States and the European Union

2.1 Sanctions Programs -- US

This section reviews the various sanctions regimes imposed by the U.S. against Iran, Cuba and Myanmar. In reviewing the myriad of sanctions imposed by the U.S., efforts have been made to highlight the most relevant sanctions programs in terms of franchising, foreign investment, and/or doing business in each country.

a. Iran Sanctions

The U.S. first imposed sanctions against Iran in 1979, following the Iranian Revolution that same year. In 1995, those sanctions were expanded to include U.S. and non-U.S. individuals, and entities conducting business or other dealings with Iran. The U.S. embargo prohibited most Iranian imports from coming into the U.S. and prevented the exportation or re-exportation of most U.S. goods and technology into Iran.¹ Later, in 2006, after the International Atomic Energy Agency (“IAEA”) failed for three consecutive years to certify Iran’s compliance with international nuclear proliferation standards, the U.S., along with China, France, Germany, Russia, and the United Kingdom, submitted a proposal to the United Nations Security Council to curb Iran’s nuclear enrichment programs. The proposal threatened diplomatic and economic sanctions if Iran did not comply with IAEA requirements.²

Shortly thereafter, when Iran refused to suspend its uranium enrichment programs, the U.S. imposed additional sanctions against Iran targeting its oil, gas and petrochemical industries, as well as expressly prohibiting all business dealings with the Iranian Revolutionary Guard Corps and the Central

¹ 31 C.F.R. §§ 560.204-205 (2016) (comprehensive ban against exportation to Iran by U.S. persons; prohibiting the direct or indirect export of any goods, technology or services from the U.S. to Iran made by a person subject to U.S. law “with knowledge or reason to know that the reexportation is intended specifically for Iran”); § 560.510 (Transactions related to the resolution of disputes between the United States or United States nationals and the Government of Iran).

² Press Release, Security Council Demands Iran Suspend Uranium Enrichment by 31 August, or Face Possible Economic, Diplomatic Sanctions, U.N. Press Release SC/8792 (July 31, 2006), available at: <http://www.un.org/press/en/2006/sc8792.doc.htm> (last accessed, Mar. 18, 2016).

Bank of Iran.³ Such sanctions broadly encompassed all banking, shipping and insurance-related transactions with Iran, and remained in place for almost a decade.

On July 15, 2015, China, France, Germany, Russia, the U.K. and the U.S. (collectively known as the “P5+1”) agreed upon a Joint Comprehensive Plan of Action (“JCPOA”) to limit Iran’s nuclear enrichment programs and help ensure that all future nuclear development by Iran would be “exclusively peaceful,” which the U.S. adopted on October 18, 2015.⁴ Under the JCPOA, the U.S., Iran and all interested parties began taking steps to withdraw sanctions against Iran in exchange for Iranian nuclear proliferation compliance. On January 16, 2016 (“Implementation Day”), after the IAEA and the U.S. Secretary of State verified Iran’s compliance with JCPOA requirements, the U.S. announced the official removal of Iran sanctions related to nuclear proliferation.⁵

Contrary to the sanctions relief offered by the EU, U.S. sanctions relief was largely limited to nuclear-related sanctions, leaving in place the comprehensive U.S. embargo against Iran.⁶ Furthermore, U.S. sanctions relief only related to non-U.S. persons⁷ involved in nuclear-related transactions with Iran; U.S. persons⁸ and U.S. companies remained subject to sanctions prohibitions. Therefore, JCPOA has significantly eased the ability of non-U.S. firms to do business with Iran, particularly in the shipping, energy, software and automotive sectors.⁹ The only two exceptions (i.e., areas where U.S. persons may

³ See, e.g., 31 C.F.R. § 560.209 (2016) (prohibited transaction regarding petroleum), §§ .304-.317 (Iran sanctions generally), and § .416 (brokering services).

⁴ U.S. Dep’t of State, “Joint Comprehensive Plan of Action,” available at <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/> (last accessed, Mar.18, 2016) [hereafter “JCPOA Guide”]; U.S. Dep’t of State, “Statement Relating to the Joint Comprehensive Plan of Action ‘Implementation Day’ of January 16, 2016,” available at: <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx> (last accessed, Mar. 18, 2016) [hereafter “Implementation Day Statement”].

⁵ Implementation Day Statement, *supra* note 4.

⁶ Eric de Bie, et al., *Iran Deal is Implemented: U.S. and EU Remove Nuclear-Related Sanctions on Iran*, GT Alert (Jan. 2016) (analyzing nuclear-related sanctions relief), available at: <http://www.gtlaw.com/News-Events/Publications/Alerts/191302/Iran-Deal-is-Implemented-US-and-EU-Remove-Nuclear-Related-Sanctions-on-Iran>.

⁷ *Id.*; see also JCPOA Guide, *supra* note 4 (observing that the sanctions-related commitments described in the JCPOA are directed towards non-U.S. persons, and except for the commitments described in section 5 of Annex II of the JCPOA, do not apply to U.S. persons), available at: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf. “Non-U.S. person” means any individual or entity excluding any U.S. citizen, permanent resident alien, entity organized under the laws of the U.S. or any jurisdiction within the U.S. (including foreign branches), or any person in the U.S. (including U.S.-owned or -controlled foreign entities). However, U.S.-owned or -controlled foreign entities are eligible to participate in transactions or activities subject to the sanctions lifting under the JCPOA only to the extent that the transactions or activities are exempt from regulation or authorized by OFAC. *Id.*

⁸ The term “U.S. person” means “any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.” 31 C.F.R. § 560.314 (2016).

⁹ See JCPOA Guide, *supra* note 4.

engage in transactions with Iran) are transactions related to Iranian commercial aircraft sales and the importation of certain food imports and carpets.¹⁰ Notably, non-U.S. subsidiaries of U.S. companies will be treated as non-U.S. persons for the purposes of nuclear-related transactions with Iran.¹¹

As part of U.S. sanctions relief, the Department of Treasury's Office of Foreign Asset Control ("OFAC") removed many of Iran's largest financial institutions from the Specially Designated Nationals ("SDN"), Foreign Sanctions Evaders ("FSE"), and Non-SDN Iran Sanctions Act lists.¹² These lists were established, in part, to identify and sanction individuals and companies owned or controlled by, or acting for or on behalf of, individuals, groups, and entities, such as terrorists and narcotics traffickers, who have been placed under sanctions by the U.S. government.¹³ Both U.S. and non-U.S. persons remain subject to U.S. sanctions against Iran if they engage in any transaction with an individual or entity on the SDN, FSE or other lists.¹⁴

Otherwise, except where an Iranian individual or entity is listed on an OFAC list, the actions in which non-U.S. persons may now engage with in Iran include:

- Transactions with, or on behalf of, Iranian financial institutions
- Exports of petrochemical products, natural gas, and related services from Iran
- Investment in Iran's energy sector
- Provision of products and services in support of Iran's energy sector
- Iran-related dealings in precious metals
- Transactions with Iran's shipping, shipbuilding, and port sectors
- Sales of goods and services to Iran's automobile sector
- Underwriting services or the provision of insurance or reinsurance regarding Iran's shipping and energy sectors

¹⁰ See 31 C.F.R. § 560.524 (2016).

¹¹ GT Alert, *supra* note 6 (noting that U.S. persons employed by non-U.S. entities, wherever located, still remain subject to U.S. sanctions against Iran); see also JCPOA Guide, General License Authorizing Activities by Non-U.S. Persons that are Owned or Controlled by a U.S. Person, available at: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf (discussing OFAC General License H).

¹² *Id.* (observing that a notable exception from OFAC's financial sanctions releases is Bank Sadarat Iran, one of Iran's largest financial institutions, which remains on the SDN list).

¹³ See U.S. Dep't of Treasury, OFAC SDN List, available at: <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.

¹⁴ *Id.*

U.S. export laws and regulations prohibiting the export and re-export of U.S.-origin goods, services and technologies and goods containing greater than 10% controlled U.S. content remain in place for both U.S. and non-U.S. persons, even for export transactions undertaken entirely outside of the United States.¹⁵

b. Cuba Sanctions

On October 19, 1960, the U.S. imposed an embargo against Cuba. It is one of the longest-running and all-encompassing sanctions of its kind. The Cuban embargo prevented all U.S. exports to Cuba (except food and medicine) and, on February 7, 1962, was extended to include almost all imports from Cuba into the U.S.¹⁶ Six statutes currently enforce the embargo against Cuba: (a) the Trading with the Enemy Act of 1917; (b) the Foreign Assistance Act of 1961; (c) the Cuban Assets Control Regulations (“CACR”) of 1963; (d) the Cuban Democracy Act of 1992; (e) the Helms–Burton Act of 1996; and (f) the Trade Sanctions Reform and Export Enhancement Act of 2000.¹⁷ These statutes have restricted virtually all U.S. commercial activity between Cuba and U.S. persons, including non-U.S. subsidiaries of U.S. companies.¹⁸

Desiring to rekindle relationships between the two countries, on December 17, 2014, U.S. President Barack Obama announced the beginning of U.S.-Cuba sanctions relief to “engage and empower the Cuban people,” facilitate “authorized travel to Cuba by persons subject to U.S. jurisdiction,” conduct “certain authorized commerce,” and “allow the flow of information to, from, and within Cuba.” Following the President’s announcement, the U.S. government began to ease restrictions on trade with Cuba by passing a series of amendments to the Cuban trade restrictions, dated January 16, 2015, September 21, 2015, January 27, 2016, and March 16, 2016.¹⁹ As a result of these amendments, the following categories of transactions are now permitted between the U.S. and Cuba pursuant to a general OFAC license:

- **Educational Travel.** People-to-people educational travel and exchanges may now be conducted without a sponsoring organization, provided the traveler engages in a full-time schedule of educational exchange activities and the educational activities go to support the Cuban people and are not primarily directed toward the Cuban government.

¹⁵ GT Alert, *supra* note 11; 31 C.F.R. § 560.205 (2016).

¹⁶ Hufbauer, et al., *Case Studies in Economic Sanctions and Terrorism: U.S. v. Cuba* (Peterson Inst. for Int’l Economics, Oct. 2011), available at: <http://www.iie.com/publications/papers/sanctions-cuba-60-3.pdf> (providing time-line of U.S. sanction activities against Cuba).

¹⁷ *See id.*

¹⁸ Cuban Asset Control Regulations (CACR), 31 C.F.R. Part 515, available at: http://www.ecfr.gov/cgi-bin/text-idx?SID=8359a69eb280b7bc9bdfb2e945f3319b&mc=true&tpl=/ecfrbrowse/Title31/31cfr515_main_02.tpl; *see also* Hufbauer, *supra* note 16 (observing that, in 1999, President Clinton expanded the trade restrictions against Cuba to make them applicable to non-U.S. subsidiaries of U.S. companies).

¹⁹ *See, e.g.*, 81 FR 13989 (March 2016 Amendments); 81 FR 4583 (January 2016 Amendments); 80 FR 56915 (September 2015 Amendments); 80 FR 2291 (January 2015 Amendments).

- **Non-Tourist Travel.** Although temporary trips to Cuba of aircraft and vessels were already authorized, the amended regulations now explicitly authorize travel-related transactions under a general OFAC license, provided that the travel falls under 12 categories of permissible travel activities under the CACR.
- **Salaries to Cuban Nationals.** Hiring and payment of salaries to Cuban nationals in the U.S. on a nonimmigrant status.
- **Cuban-Origin Merchandise.** U.S. persons located in a third country may now purchase Cuban-origin merchandise for personal consumption in a third country, provided they do not bring it into the U.S.
- **U-Turn Payments.** A funds transfer from a bank outside the United States may now pass through U.S. financial institutions (e.g., through a U.S. correspondent account) before it is transferred to a non-U.S. bank outside the United States, as long as neither the beneficiary nor the originator is subject to U.S. jurisdiction.
- **Processing of U.S. Dollar Monetary Instruments.** U.S. banking institutions are now authorized in connection with authorized transactions to process U.S. dollar-denominated monetary instruments (e.g., cash, certified or official checks, traveler's checks) when presented by banking institutions in third countries from Cuban financial institutions.
- **Bank Accounts for Cuban Nationals.** Cuban nationals may now open and maintain bank accounts in the United States in connection with authorized or exempt transactions. Cuban nationals may receive payments in the United States and remit such payments to Cuba.
- **Physical Presence.** U.S. persons may establish a physical presence, including an office or other physical facility, in Cuba for certain authorized purposes (i.e., non-commercial support activities, humanitarian work, private foundations and research institutions).
- **Telecommunications and Internet-Related Services.** The import into the United States of Cuban-origin software is now authorized.
- **Cargo Transit through Cuba.** The transit of cargo through Cuban territory aboard a vessel that is passing through Cuban territory but destined for other countries is now permissible without a specific license.
- **Export Trade Financing.** Certain limitations removed regarding payment and financing terms (previously required to be cash in advance or third country financing) for the limited categories of permissible exports to Cuba, or re-exports of 100 percent U.S.-origin items from third countries, as long as the items are authorized by the Department of Commerce.

In addition, the Department of Commerce Bureau of Industry and Security ("BIS"), in coordination with OFAC, also amended its Export Administration Regulations (EAR).²⁰ While most items continue to be subject to a licensing policy of denial, BIS will now review applications on a case-

²⁰ See 15 CFR Parts 730-774 (2016), available at: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf.

by-case basis to export and reexport items that will enable or facilitate exports by Cuba's private sector.²¹ The following items, formerly subject to case-by-case review, are now subject to a general policy of approval:

- Items for the safety of civil aviation and safe operation of commercial aircraft engaged in international air transportation;
- Certain telecommunications items;
- Certain agricultural items;
- Items to support certain human rights organizations and nongovernmental organizations; and
- Items for use by U.S. news bureaus.

The following items and activities are subject to case-by-case review by BIS for export and re-export to Cuban state-owned enterprises and agencies of the Cuban government for the purposes of providing goods and services to the Cuban people:

- Agricultural production;
- Artistic endeavors;
- Construction of public infrastructure facilities;
- Disaster preparedness, relief, and response;
- Education;
- Food processing;
- Public health and sanitation;
- Public transportation;
- Residential construction and renovation; and
- Sale by wholesalers or retailers for domestic consumption by the Cuban people.

Currently, however, most transactions between persons in the U.S. and Cuba continue to be prohibited. Despite U.S. sanctions relief, significant restrictions and export controls remain in place, as OFAC continues to enforce the provisions of the CACR.²²

²¹ See Bureau of Industry and Security (BIS) Homepage, available at: <http://www.bis.doc.gov/index.php/policy-guidance/country-guidance/sanctioned-destinations/cuba>.

²² U.S. Dep't of Treasury, Frequently Asked Questions Related to Cuba (Updated March 15, 2016), available at: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf.

c. *Myanmar (Burma) Sanctions*

On May 20, 1997, the U.S. President issued E.O. 13047, declaring a national emergency with respect to the military Junta ruling Myanmar (or Burma, as it is officially known in the U.S.). The President's order prohibited U.S. investment in the country and other economic and financial transactions with Myanmar.²³ Thereafter, the U.S. modified and expanded its sanctions programs against Myanmar through further executive orders and congressional acts.²⁴ On July 28, 2003, and July 29, 2008, respectively, the U.S. passed two legislative embargoes against Myanmar: (1) the Burmese Freedom and Democracy Act ("BFDA") of 2003 (50 U.S.C. 1701, et seq.), which generally banned the importation of Myanmar products into the U.S.; and (2) the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 (50 U.S.C. 1701 et seq.), which banned importation into the U.S. of any jadeite or rubies mined or extracted from Myanmar and any articles of jewelry containing such Burmese minerals.²⁵

On August 6, 2013, President Obama's E.O. 13651 revoked the BFDA's ban on importing Burmese-origin goods but left in place the provisions of the JADE Act.²⁶ Accordingly, the importation of Burmese-origin goods, other than jadeite, rubies, or certain articles of jewelry containing such Burmese-origin minerals, is now permitted without a specific OFAC license.²⁷ Further, due to the extensive amendments following E.O. 13651, OFAC essentially re-wrote the Burmese Sanctions on June 30, 2014, and included several authorizations that eased sanctions related to financial investment in Myanmar.²⁸ For example, the following categories of investment activities between a U.S. person and Myanmar are now permitted under a general OFAC license:

- Exportation or re-exportation of financial services, except for security-related services to Myanmar's military;
- Direct financial transactions (e.g., opening and maintaining accounts, transferring funds, etc.) with non-blocked banks;
- Indirect financial transactions (e.g., fund transfers) with certain blocked banks (Asia Green Development Bank, Ayeyarwady Bank, Myanma Economic Bank, and Myanma Investment and Commercial Bank), provided that fund transfers to or from the U.S. are routed through a third country; and

²³ See E.O. 13047 (codified at 31 C.F.R. Part 537 (2016)) (declaring national emergency in Myanmar and prohibiting new investment in Myanmar by U.S. persons); see also Dep't of Treasury, OFAC, Sanctions Against Myanmar (Sept., 9, 2015), available at: <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/burma.pdf>.

²⁴ See, e.g., E.O. 13310 (July 28, 2003) (blocking all assets and property interests of certain persons); E.O. 13448 (Oct. 18, 2007) (expanding scope of and taking additional steps with respect to national emergency declared in E.O. 13047 and blocking assets and property of certain persons); E.O. 13464 (Apr. 30, 2008) (same); E.O. 13619 (July 11, 2012) (same).

²⁵ See Dep't of Treasury, FAQ, *supra* note 22.

²⁶ *Id.*

²⁷ *Id.* (citing 31 C.F.R. § 537.203 (2016)).

²⁸ *Id.*

- Certain “new investment” (e.g., activities involving natural gas, or minerals in the ground in Myanmar; or acquiring land for the construction and operation of a hotel or factory), provided that transactions with the Burmese military are not permitted, and provided that once a person’s aggregate investment exceeds U.S. \$500,000, they must abide by certain annual reporting requirements to the U.S. government.²⁹

All other financial investment activities by a U.S. person in Myanmar remain prohibited, subject to obtaining a specific license from OFAC.

2.2 Sanctions Programs -- EU

This section reviews the various sanctions regimes imposed by the European Union (EU) against Iran, Cuba and Myanmar. Sanctions imposed by the EU are an essential part of its foreign policy. Sanctions are also referred as the restrictive measures by the EU. The EU uses sanctions to achieve its objectives such as to bring about a change in policy or activity by the target country, part of a country, government, entities or individuals. The sanctions can be preventive, non-punitive, instrument which should allow the EU to respond swiftly to political challenges and developments.

EU sanctions measures are imposed by Resolutions adopted by the UN Security Council under Chapter VII of the UN Charter. The EU can also impose separate sanctions itself in addition to the UN's sanctions autonomously. The EU uses a number of sanctions to assert change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles. Sanctions imposed by the EU are reviewed at regular intervals.

a. *Iran Sanctions*

The EU imposed its first semi-autonomous sanctions on Iran after its non-compliance with rules adopted by the International Atomic Energy Agency (“IAEA”), primarily targeting its nuclear and ballistic missile program on 27 February 2007, through Council Common Position 2007/140/CFSP.³⁰ These sanction also included prohibition of financial and technical assistance related to nuclear or missile activities; and freezing of assets, as well as travel bans, of designated individuals and companies.

²⁹ *Id.*; see also 31 C.F.R § 537.530 (2016) (new investment). “New Investment” is defined as “(1) The entry into a contract that includes the economic development of resources located in Burma . . . ; (2) The entry into a contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Burma; (3) The purchase of a share of ownership, including an equity interest, in the economic development of resources located in Burma; or (4) The entry into a contract providing for the participation in royalties, earnings, or profits in the economic development of resources located in Burma, without regard to the form of the participation.” 31 C.F.R. § 537.311. The term “economic development of resources located in Burma” means “activities pursuant to a contract the subject of which includes responsibility for the development or exploitation of resources located in Burma, including making or attempting to make those resources accessible or available for exploitation or economic use. The term shall not be construed to include not-for-profit educational, health, or other humanitarian programs or activities.” *Id.* at § 537.302.

³⁰Council Common Position 2007/140/CFSP, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007E0140&rid=1>

Since 2010, the EU imposed its autonomous measures in addition to the sanctions adopted by UN Security Council resolutions. In August 2010, through Council Decision 2010/413/CFSP³¹, The EU imposed further sanctions in the form of prohibitions from formation of joint ventures with enterprises in Iran engaged in oil and natural gas industries. It also banned the sale, supply, and transfer of equipment and technology used by the natural gas industry, as well as the granting of insurance or re-insurance to Iranian entities.

In January 2012, the EU announced an oil embargo against Iran in an attempt to curtail its nuclear program through Council Decision 2012/35/CFSP.³² In March 2012, through Council Decision 2012/35/CFSP³³, the SWIFT electronic banking network disconnected all Iranian banks from its international network, that had been identified as institutions in breach of EU sanctions. These have been the most stringent sanctions imposed by the EU on Iran. By October 2012, the EU also banned export of ship building technology to Iran through Council Decision 2012/635/CFSP.³⁴

On 15 July 2015, the E3/EU+3 (China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy), also referred as P5+1, and the Islamic Republic of Iran reached an agreement on a Joint Comprehensive Plan of Action (JCPOA) to ensure the exclusively peaceful nature of Iran's nuclear program.³⁵ On 18 October 2015, the EU adopted the necessary legal acts to lift all EU economic and financial sanctions, which came into effect on 16 January 2016, known as "Implementation Day". On Implementation Day, the EU eased sanctions on the following sectors of Iran:

- Financial, banking and insurance sectors;
- Oil, gas and petrochemical sectors;
- Shipping, shipbuilding and transport sectors; and
- Gold, other precious metals.³⁶

The EU also de-listed persons, entities and bodies that were subject to the asset freeze, prohibition to make funds available and visa bans. However, there are still sanctions remaining in place

³¹Council Decision 2010/413/CFSP, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0413&rid=1>

³² Council Decision 2012/35/CFSP, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0035&rid=1>

³³ Council Decision 2012/35/CFSP, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0035&rid=1>

³⁴ Council Decision 2012/635/CFSP, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0635&rid=1>

³⁵ "Information Note on EU sanctions to be lifted under the Joint Comprehensive Plan of Action (JCPOA)" – available at http://eeas.europa.eu/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcpoa_en.pdf

³⁶ *Id.*

on Iran by the EU in the form of an arms embargo, missile technology and certain individuals and entities subject to restrictive measures.³⁷

b. Cuba Sanctions

Since 1996, the EU policy towards Cuba has been guided by the Council Common Position.³⁸ According to the Common Position, the objective of the European Union in its relations with Cuba is to encourage a process of transition to a pluralist democracy and respect for human rights and fundamental freedoms, as well as sustainable recovery and improvement in the living standards of the Cuban people.³⁹

The EU imposed sanctions on Cuba when the government arrested number of journalists, librarians, and human rights activists during March, 2003. On 5 June 2003, the EU measures included a freeze on visits by high-level officials and the participation of EU diplomats in cultural events in Cuba.⁴⁰ This friction between the EU and Cuba became known as the Cocktail Wars. However, unlike the US embargo imposed in 1962, EU did not prevent trade and investment.

The EU sanctions against Cuba were suspended in 2005, but not completely removed. In 2008, the EU and Cuba re-launched the political dialogue and cooperation and in the same year the EU lifted sanctions completely.⁴¹ Recently, the EU and Cuba have concluded their negotiations for a bilateral Political Dialogue and Cooperation Agreement on 11 March 2016. This agreement has superseded the 1996 Common Position as it offers more comprehensive framework to the EU and Cuba relationship.⁴²

c. Myanmar (Burma) Sanctions

The EU imposed sanction against Myanmar, formerly known as Burma, because of severe human rights violation by military junta initially in 1990. In 1996 the EU adopted a Common Position 96/635/CFSP⁴³ on Myanmar which included a ban on the sale or transfer of arms and weapons expertise to the country. Subsequently, the EU through series of Common Positions has strengthened and extended sanctions on several occasions. The EU measures have focused on individual sanctions as follows:

- an embargo on arms and military equipment;

³⁷ *Id.*

³⁸ Common Position 96/6 97/CFSP, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996E0697&from=EN>

³⁹ *Id.*

⁴⁰ “EU lifts sanctions against Cuba” – BBC News Friday, 20 June 2008, available at <http://news.bbc.co.uk/2/hi/7463803.stm>

⁴¹ “European Union to lift sanctions on Cuba” – CNN, 29 June 2008, available at <http://edition.cnn.com/2008/WORLD/europe/06/19/eu.cuba.sanctions/index.html?iref=hpmostpop>

⁴² “EU Relations with Cuba” - European Union External Action, available at http://eeas.europa.eu/cuba/index_en.htm

⁴³ Common Position 96/635/CFSP, available at http://www.burmacampaign.org.uk/images/uploads/council_common_position_635_cfsp_281096.pdf

- suspension of non-humanitarian aid (exceptions are permitted for projects in support of human rights, democracy, good governance, conflict prevention and building the capacity of civil society, health and education, poverty alleviation and environmental protection);
- visa ban and a freezing of assets of members of the junta and high-ranking military officers, authorities in the tourism sector and family members;
- investment and loan ban, including continuing participation in state-owned enterprises, and a ban on the creation of joint ventures;
- suspension of high-level bilateral governmental visits;
- ban on the attachment of military personnel to the diplomatic representations of Burma in EU member states, as well as on the attachment of military personnel to diplomatic representations of the member states in Burma;
- ban on the export of equipment and technology and the provision of technical or financial assistance destined for enterprises engaged in logging and timber processing and the mining of metals, precious and semi-precious stones; and
- ban on the import of round logs, timber products, metals, precious and semi-precious stones.⁴⁴

In February 2012, the EU suspended the visa ban and asset freeze orders concerning certain key political figures as a result of substantive reforms in economic social development by Myanmar⁴⁵ through Council Decision 2012/98/CFSP.⁴⁶ By May 2012, the EU suspended all sanctions against Myanmar through Council Regulation No. 409/2012⁴⁷, including trade and investment in the sectors of logging, timber processing and mining of precious metals and precious stones, to encourage transition to democracy from the current military regime.⁴⁸ However, the embargo on the sale and supply of arms and related materials is still in place, which might be used in internal repression in Myanmar. Current EU

⁴⁴ “*The EU’s Use of ‘Targeted’ Sanctions Evaluating effectiveness*” - CEPS Working Document by Clara Portela, No. 391 / March 2014.

⁴⁵ “*Council eases restrictive measures on Burma/Myanmar*” – EU Press Release, 17 February 2012, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/128023.pdf

⁴⁶ Council Decision 2012/98/CFSP, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:047:0064:0068:EN:PDF>

⁴⁷ Council Regulation No. 409/2012, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:126:0001:0002:EN:PDF>

⁴⁸ “*Burma/Myanmar: EU sanctions suspended*” – EU Press Release, 14 May 2012, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/130188.pdf

sanctions also prohibit providing technical assistance, financing or financial assistance in respect of such goods.⁴⁹

3. Franchising in Iran

Iran is the 18th most populated country in the world with the total population of over 79 million.⁵⁰ Iran's major population is between the ages of 15 to 35 years old. The language widely spoken in Iran is Farsi, which is also the official language. The local currency of Iran is Rial. The exchange rate as of 4 May 2016, is 1 USD = 30,318 IRR. Iran's GDP was USD 425.3 billion in 2014.⁵¹ It is also ranked 116th in the 2016 Doing Business Report.⁵² Iran's economy is largely based upon the exports of oil and gas.

Although it may be assumed that Iran being under sanctions for over 3 decades, it may not have the demand for international brands, due to the exposure through social media and internet, and the ever growing young population, there seems avid demand for international products. The international businesses that are interested in entering Iran through franchising have to be efficient in their approach to not only protect their business but also their brands and repatriation of the profits from Iran.

3.1 IP Protection

Iran has been a member of the World Intellectual Property Organization (WIPO) since 2001, and, accordingly, is a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁵³ Iran's constitution also expressly provides for "the employment of sciences, technologies, and advanced human experience with the aim of their further development."⁵⁴ Iran offers protection of patents, industrial designs and trademarks through its 2008 Patents, Industrial Designs and Trademarks Registration Act.⁵⁵ The Act provides mechanisms to register and enforce trademark rights, and provides for civil and equitable remedies including damages and injunctive relief.⁵⁶ Any sign, word, expression, design or image capable of distinguishing goods or services of an entity or an individual from the other, can be registered as a trademark. It should be noted that Iran does not allow registration of alcoholic beverages or trademarks comprising of a woman's portrait.

⁴⁹ Council Decision 2013/184/CFSP, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:111:0075:0076:EN:PDF>

⁵⁰ Census report, available at http://www.amar.org.ir/Portals/0/Files/abstract/1390/n_sarshomari90_2.pdf

⁵¹ Country data, available at <http://www.worldbank.org/en/country/iran>

⁵² Doing Business 2016 – Islamic Republic of Iran, available at http://www.doingbusiness.org/data/exploreeconomies/iran/~/_media/giawb/doing%20business/documents/profiles/country/IRN.pdf

⁵³ See WIPO Website, Member States, available at: <http://www.wipo.int/members/en/#13>

⁵⁴ Const. of the Islamic Rep. of Iran (Iran Constitution), Art. 2, Sect. 6.b.

⁵⁵ Patents, Industrial Designs and Trademarks Registration Act (PIDTR), available at: <http://www.wipo.int/edocs/lexdocs/laws/en/ir/ir003en.pdf>

⁵⁶ See *Id.* at Ch. 4, Art. 60-61.

From the franchising perspective, the major focus is going to be on the trademarks protection in Iran. Iran uses the Eighth Edition of International Classification of Goods and Services for registration of trademarks. The trademarks are registered in Iran initially for the duration of 10 years from the date of filing and subsequently can be renewed for 10 years for indefinite periods. The documents required for filing of the trademark in Iran is the Power of Attorney, which has to be notarized and legalized by the Iranian Consulate.

Post registration of the trademark is important to use the trademark within three years from the date of registration. Non-use of a trademark within three years of registration will make it vulnerable and can be cancelled upon request of the third party. The use of a trademark can be demonstrated through sales in Iran, invoices, catalogues, packaging, advertisements, market surveys, use of the mark on the internet and social media sites.

Despite the available trademark protection, IP enforcement remains a major issue in Iran. It appears that due to the sanctions and non-existence of the foreign businesses in Iran, a lot of local infringers are using the names of foreign businesses and also at times claim to be the genuine franchisee as well. In some instances, infringers have gone so far as to register the trademarks of famous foreign brands in their names. In such instances it is recommended to file for cancellation of the registered trademark on the basis of the mark being misleading, deceptive or disparaging, or being a well-known mark, or registration in the name of the agent or other representative of the proprietor of the mark. A cancellation action can be brought at any time.

In the case where a foreign company registered a trademark before the sanctions were imposed in Iran but due to the sanctions is no longer using the trademark in Iran, the sending of a cease and desist notice to the infringers would suffice to demonstrate that the foreign trademark owner is monitoring the use of its trademark and may bring action against infringers once the company re-enters the market.

3.2 Franchise Agreement

Iran does not have a specific franchise law. Franchise agreements are governed by the Commercial Code, are regarded as non-defined agreements under the general rules of contracts in the Civil Code, and are considered to be common modes of licensing trademark rights.⁵⁷ The Code of Commerce, the Islamic Penal and Law on Civil Liability are also applied to franchise agreements. Pursuant to Article 226 of the Iranian Civil Code, however, a franchisor must “fix” the period of time by which a payment obligation becomes due and owing in order to collect damages (e.g., failure to pay royalties or other fees).⁵⁸ In addition, Article 230 of the Civil Code encourages franchisors to stipulate a precise amount of liquidated damages that will adequately compensate the franchisor in the event the franchisee terminates the agreement prematurely.⁵⁹ Choice of law clauses are also generally enforceable in Iran, provided the agreement was not entered into in Iran—in which case Iranian law will apply regardless of the choice of law chosen by the parties in the agreement.⁶⁰

⁵⁷ Iran Civ. Code, Part 2.

⁵⁸ *Id.* at Art. 226.

⁵⁹ *Id.* at Art. 230.

⁶⁰ *Id.* at Art. 968.

The usual franchise agreements in Iran are based on the granting of a license from the franchisor to the franchisee, therefore, the IP protection is essential for the franchisor. A typical franchise agreement in Iran will include clauses related to territorial exclusivity, the payment of a royalty fee and the process for payment to the franchisor, technical assistance and training to be provided, and the term and renewal term of the agreement. The usual duration of franchise agreements in Iran is 5 years.

The Law of Registration of Patents, Industrial Designs and Trademarks, 2008, requires the licensor to have effective control over quality of goods and services of the licensee.⁶¹ This requirement also applies to franchise agreements.

3.3 Foreign Exchange Controls

Although Iran is adverse to any legislation that might permit “the economic dominance of foreigners in the national economy,”⁶² U.S. dollars are generally exchangeable for Iranian Rials, and vice-versa, at the official exchange rate established by the Central Bank of Iran. Foreigners must open an account at a local bank in order to conduct transactions. Caution should be exercised to exchange currency only through an approved process (e.g., a bank or approved currency exchange locations). In 2012, for example, it was reported that the Central Bank of Iran was arresting individuals who were in possession of foreign currency (including U.S. dollars) without a bank receipt.⁶³

The Foreign Investment Promotion and Protection Act (FIPPA) and its Executive Bylaws regulate the general conditions for admission of foreign investment, guarantee and transfer of foreign capital and conditions for admission, importation and repatriation of foreign capital. For repatriation of profits and royalty fees, an audit report from a firm of the Iranian Association of Certified Accounts is required to be submitted to The Organization of Investment, Economic and Technical Assistance of Iran (OIETAI), which will issue the repatriation permit after reviewing the report.

3.4 Enforcement

Courts will generally enforce franchise agreements entered into pursuant to the Iranian Civil Code, including arbitration agreements. Parties to a commercial contract may agree to arbitrate any disputes through arbitration, however, it is advisable for franchisors to reference the application of international arbitration rules and procedures.⁶⁴ Iran is a member of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), provided the commercial award does not conflict with public policy in Iran.⁶⁵ Iran globally stands at 62 in the ranking

⁶¹ Article 44 of The Law of Registration of Patents, Industrial Designs and Trademarks

⁶² Iran Constitution, *supra* note 54, at Art. 43.

⁶³ R. Zamaneh, *Iran’s Central Bank Tries to Control Currency Market* (Payvand Iran News, Jan. 15, 2012).

⁶⁴ *Id.* at Art. 139.

⁶⁵ UNCITRAL, New York Convention Status, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

of 189 economies on the ease of enforcing contracts.⁶⁶ The courts in Iran are fairly fast in resolving the disputes as compared to the other countries in the region.

3.5 Current Status and Possible Future Development

With a population of 77 million, Iran's \$400 billion economy is the second largest in the Middle East behind Saudi Arabia.⁶⁷ As sanctions ease world-wide interest has turned to Iran for potential new opportunities. However, from a U.S. perspective, because JCPOA relief relates only to non-U.S. persons engaged in nuclear-related transactions with Iran, it is not currently permissible for a U.S. franchisor (or a non-U.S. franchisor subject to U.S. jurisdiction) to enter into a franchise agreement in Iran, where such agreement could be construed as violating the comprehensive export ban under U.S. law. Therefore, additional easements of U.S. export restrictions are necessary before Iran can truly be seen as a viable franchise frontier for U.S. franchisors. If relations between the U.S and Iran improve going forward, particularly as a result of larger investments by U.S. companies (or their non-U.S. subsidiaries) in Iran's aircraft, shipping, and petrochemicals industries, it may be possible that other avenues of doing business, including franchising, may open in Iran.

From the EU's perspective, major trade sanctions have been lifted from Iran, which allows the European companies to engage in franchising activities. A recently published World Bank report estimates that foreign direct investment inflows into Iran will reach \$3 billion to 3.2 billion in 2016-17, assuming that sanctions on Iran are lifted and economic growth reaches 5.5% in 2017.⁶⁸

4. Franchising in Cuba

Cuba, officially known as Republic of Cuba, is an archipelago of islands located in the northern Caribbean Sea. The estimated population of Cuba is over 11 million.⁶⁹ Cuba's major population is between 20 to 45 years. The official language of Cuba is Spanish. Cuba has two official currencies, known as Cuban Convertible Peso (CUC) and Cuban Peso (CUP). The exchange rate as of 4 May 2016, is 1 USD = 26.5CUP and 1 USD = 1 CUC respectively. Cuba's GDP was USD 77.15 billion in 2013.⁷⁰

Currently there are no sanctions by the EU on Cuba. The EU remains Cuba's main export and second trade partner after Venezuela. Cuba's main export goods are mineral fuels and mineral oils,

⁶⁶ Doing Business Report 2016 – Iran, available at <http://www.doingbusiness.org/data/exploreeconomies/iran/>

⁶⁷ Ladane Nasser, *Key Facts About Iran's Economy as Red Carpets Replace Sanctions* (Bloomberg Bus., Jan. 28, 2016).

⁶⁸ Economic implications of lifting sanctions on Iran, available at <http://documents.worldbank.org/curated/en/2015/08/24824578/economic-implications-lifting-sanctions-iran>

⁶⁹ The world Factbook, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cu.html>

⁷⁰ Country data, available at <http://data.worldbank.org/country/cuba>

sugars, beverages and tobacco. Since Cuba is a very attractive tourism destination with 3.5 million visitors in 2015⁷¹, it remains an attractive market for foreign investors.

4.1 IP Protection

Cuba has been member of WIPO since 1975 and is a party to most major international treaties concerning trademark and copyright protection, including TRIPS.⁷² In 2000, Cuba's legislature passed Decree-Law No. 203 on Trademarks and other Distinctive Signs,⁷³ which, among other laws, amends Cuba's former 1983 trade mark regulations, and governs competition, copyright and related rights, enforcement of IP and related laws, geographical indications, IP regulatory bodies, trade names and trademarks.⁷⁴ Trademarks are fully protectable in Cuba provided they are registered on a first-come, first-serve basis. Unlike the U.S., Cuba does not recognize common law rights in trademarks. However, Cuba remains a party to the 1930 General Inter-American Convention for Trade Mark and Commercial Protection, which provides a potential basis to challenge infringement of an unregistered mark in Cuba that is registered in the U.S.⁷⁵

Already registered trademarks in Cuba are subject to cancellation through nullity and "*strictu sensu*". Nullity grounds for cancellation is available when registration was granted by Cuban authorities on the basis of false statements or if the registration is identical or confusingly similar to a prior application or registration in the name of a third party, or well known in Cuba, and is applied to identical or confusingly similar goods or services, causing a likelihood of confusion or risk of association between consumers. *Strictu sensu* grounds for cancellation is available when the trademark registration is an element related to a monopoly or unfair competition activities, or when the mark has become generic.

4.2 Franchise Agreement

Cuba does not have any specific law as regards to franchising. Franchise agreements are governed by the Cuban commercial laws.

4.3 Foreign Exchange Controls

On March 29, 2014, Cuba enacted its new Foreign Investment Act ("FIA"), which purposes to encourage foreign investment in Cuba and "contribute to the country's economic development in the interest of a prosperous and sustainable socialist society."⁷⁶ Article 7.1 of the FIA provides that foreign

⁷¹ The Guardian, US Travel to Cuba Surges 36% Following Thaw in Diplomatic Relations, available at, <http://www.theguardian.com/world/2015/may/26/us-american-cuba-travel-tourism-increase>

⁷² See WIPO Website, Member States, available at: <http://www.wipo.int/members/en/#13>.

⁷³ Decree-Law No. 203 on Trademarks and other Distinctive Signs, available at: <http://www.wipo.int/wipolex/en/details.jsp?id=897>.

⁷⁴ *Id.*

⁷⁵ See Article 7 of General Inter-American Convention for Trade Mark and Commercial Protection, 1931 L. of Nations Treaties 259, available at: http://www.wipo.int/edocs/lexdocs/treaties/en/oas-tmcp/trt_oas_tmcp.pdf.

⁷⁶ Law No. 118, Foreign Investment Act, Art. 1.1.

investors “can sell or otherwise transfer . . . rights, in whole or in part, and receive payment for an equivalent price in freely convertible currency”⁷⁷ Furthermore, Article 9 of the FIA guarantees foreign investors “the free transfer abroad [of dividends and profits], in freely convertible currency, free from taxes or any other fees . . . according to all other regulations issued by Banco Centra de Cuba.”⁷⁸ Foreign investors are required to open a local bank account in Cuba to make capital contributions and conduct business.⁷⁹ As noted above, U.S. banking institutions are now authorized in connection with authorized transactions to process U.S. dollar-denominated monetary instruments when presented by banking institutions in third countries from such local bank accounts in Cuba.⁸⁰

4.4 Enforcement

Franchise agreements entered into in Cuba are generally enforceable to the same extent as any other license agreement. International arbitration is the prevailing method for resolving contractual disputes in Cuba, except where Cuban law requires a matter to be brought in its courts (*e.g.*, matters relating to a fundamental domestic policy of Cuba). The Cuban Court of International Commercial Arbitration (CCACI) routinely hears contract and non-contract matters voluntarily submitted by the parties. In addition, Cuba has demonstrated its support for arbitration by becoming a party to the Agreement on Reciprocal Promotion and Protection of Investments, which expressly contains a provision calling for arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law.⁸¹ Cuba is a member of the New York Convention, provided the commercial award does not conflict with public policy in Cuba.⁸²

4.5 Current Status and Possible Future Development

As a result of the recent sanctions relief, U.S. franchisors are permitted to enter into franchise agreements in Cuba, provided the activities in which the franchise engages do not violate OFAC and BIS export controls. To the extent the franchise seeks to engage in activities that are not already granted under a general license, specific licenses and approvals may be considered by OFAC and BIS on case-by-case basis. The potential business opportunities in Cuba appear plentiful for an island nation of its size, given Cuba’s natural beauty, scenic beaches and rustic architecture, which have already drawn non-U.S. travelers for many years, and will likely be attractive to U.S. tourists if the U.S. approves leisure travel between the two countries. On March 21, 2016, President Obama announced that U.S. Airlines would begin regular commercial flights to Cuba in 2016, perhaps signaling a potential lifting of the ban against

⁷⁷ *Id.* at Art. 7.1.

⁷⁸ *Id.* at Arts. 9.1-9.2.

⁷⁹ *Id.* at Art. 18.3 (“Foreign capital contributions made in freely convertible currency shall enter the country through a bank institution authorized to operate within the national territory of Cuba and shall be deposited in said institution in accordance with the regulations in force”).

⁸⁰ *See* 31 C.F.R. 515.584(g) (2016) (allowing indirect financial transactions from Cuba to a U.S. bank).

⁸¹ Agreement on Reciprocal Promotion and Protection of Investments, Art. XII.

⁸² UNCITRAL, New York Convention Status, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

non-business travel.⁸³ Hotel and hospitality franchisors are likely to be the first franchise companies to be able to seize on opportunities in Cuba, judging by the incentives carved into Article 29 of the Financial Investment Act (exempting hoteliers, management companies and professional service providers from making payments to the Ministry of Foreign Trade and Investment's economic incentive fund to support workers permanently residing in Cuba).⁸⁴ To this end, Starwood Hotels and Resorts announced in March that it has entered into three hotel deals in Cuba – the first U.S. hotel company to do so in almost 60 years.⁸⁵ While most U.S. franchisors continue to need specific licenses and approvals from OFAC and BIS to establish a franchise presence in Cuba, if U.S. sanctions with Cuba continue to thaw, franchising in Cuba should become an even more viable possibility.

The EU is the biggest foreign investor in Cuba, which accounts for 20% of total Cuban trade. In 2015, Cuba exported to the EU goods for a total amount of EUR 540 million, following EUR 465 million in 2014.⁸⁶ The number of tourists traveling from Europe continues to increase every year, which provides great opportunity for franchisors looking to tap the Cuban market. At the moment there are no EU sanctions against Cuba, and the trade and development relations between the EU and Cuba have steadily improved since 2008. The EU has allocated 50 million Euros for the period 2014-2020 to support the development of sustainable agriculture and food security; environment; and support to economic and social modernization of Cuba.⁸⁷

5. Franchising in Myanmar

Myanmar, formerly known as Burma, is located in Southeast Asia. The total population of Myanmar, as per the last census in 2014, is over 51 million.⁸⁸ The official language of Myanmar is Burmese. The local currency of Myanmar is Burmese Kyat (MMK). The exchange rate as of 4 May 2016, is 1 USD = 1,175 MKK. Myanmar's GDP was USD 64.33 billion in 2014.⁸⁹ Myanmar is also ranked

⁸³ See Cuba Meeting Between Obama and Castro Exposes Old Grievances, N.Y. Times, Mar. 21, 2016 (attaching video of press conference from Assoc. Press), available at: http://www.nytimes.com/2016/03/22/world/americas/obama-and-raul-castro-to-meet-in-pivotal-moment-for-us-cuba-thaw.html?_r=0.

⁸⁴ *Id.* at Art. 29.2.

⁸⁵ Nancy Trejos, *Starwood: 1st U.S. company to run Cuba hotels in decades*, USA Today, Mar. 21, 2016, available at: <http://www.usatoday.com/story/travel/roadwarriorvoices/2016/03/19/starwood-become-first-us-hotel-company-run-cuba-hotels-decades/82040434/>.

⁸⁶ Trade Relations / Foreign Direct Investment (FDI) Flows, EU Relations with Cuba, available at http://eeas.europa.eu/cuba/index_en.htm

⁸⁷ EU-Cuba Development Cooperation, EU Relations with Cuba, available at http://eeas.europa.eu/cuba/index_en.htm

⁸⁸ The 2014 Myanmar Population and Housing Census Highlights of the Main Results Census Report Volume 2 – A. available at http://unstats.un.org/unsd/demographic/sources/census/2010_phc/Myanmar/MMR-2015-05.pdf

⁸⁹ Country data, available at <http://www.worldbank.org/en/country/myanmar>

167th in the 2016 Doing Business Report.⁹⁰ Since the transition of Myanmar to a civilian era from a military era, there has been number of reforms made on the economic front. Myanmar is a very attractive market for franchisors given its substantial youthful population with demand for foreign brands.

5.1 IP Protection

Myanmar has been a member of WIPO and TRIPS since 2001.⁹¹ The Pyidaungsu Hluttaw – Myanmar’s national legislating body – enacts laws concerning Myanmar’s intellectual property rights, including copyrights, patents, trademarks and industrial designs.⁹² Myanmar generally follows the laws of the U.K. and Ireland in regard to copyright, with certain modifications.⁹³ Myanmar has enacted India’s Merchandise Marks Act of 1889 (the “Merchandise Marks Act”), which governs the protection of trademarks.⁹⁴ Sections 7, 9 and 13 of the Merchandise Marks Act contain provisions concerning remedies against trademark infringement, including false description of goods and other offenses.⁹⁵ Myanmar maintains a system for trademark registration pursuant to the Registration Act of 1908 in conjunction with certain criminal statutes.⁹⁶ This law is for registering conveyance documents and tangible property deeds, etc. The mere fact of registration is not conclusive proof of the ownership of the trademark in Myanmar, however, it may be prima-facie evidence of ownership which may provide assistance in a criminal or civil enforcement proceeding.⁹⁷ Enforcement for trademark infringement in Myanmar can be pursued (a) against passing-off (a person or company that unfairly rides on the reputation and success of the trademark owner) under Sections 478-480 of the Myanmar Penal Code and (b) against infringement under Section 54 of Myanmar’s Specific Relief Act and under the Myanmar Merchandise Marks Act. In the absence of substantive trademark laws, following the registration of the declaration of ownership of the mark, a cautionary notice of the registered mark is published in a local newspaper every three years. It is also important to prove the first use and better rights over the disputed mark.

⁹⁰ Doing Business Report 2016 – Myanmar, available at <http://www.doingbusiness.org/data/exploreeconomies/myanmar/>

⁹¹ See WIPO website, Member States, available at: <http://www.wipo.int/members/en/#13>.

⁹² Constitution of the Republic of the Union of Myanmar, Ch. XV, Sched. 1.3(d)-(f).

⁹³ The Burma Copyright Act (Feb 24, 1914), Ch. 1, Sect. 1 (adopting in substantial part the Act of Parliament of the United Kingdom of Great Britain and Ireland, 1911), available at: <http://www.wipo.int/edocs/lexdocs/laws/en/mm/mm001en.pdf> (observing that copy written works first published in Burma are protected for only 10 years)

⁹⁴ Indian Merchandise Mark Act, 1189, available at: <http://www.wipo.int/edocs/lexdocs/laws/en/mm/mm006en.pdf>

⁹⁵ *Id.*

⁹⁶ The Role of Trademarks in Myanmar: A Glance at the Trademark Registration System of Myanmar, available at: <http://www.lawgazette.com.sg/2012-01/305.htm>. In order to seek protection, every three years, companies must register trademarks under Section 18(f) of the Registration Act of 1908 pursuant to Direction 13 and publish notice in a Myanmar newspaper advising the public of the registration.

⁹⁷ *Id.* (noting that Myanmar’s Penal Code 6 defines trademark as “A mark used for denoting that goods are the manufacture on merchandise of a particular person”).

Myanmar also has a century old Copyright Act 1914 that has not evolved since its enactment. There is no enabling legislation to comply with TRIPS or to afford any national treatment to a foreign copyright holder. Myanmar is a common law country, therefore, the remedy under law of passing off is also available.

5.2 Franchise Agreement

Myanmar does not have a specific franchise law. Franchise agreements are subject to general Myanmar commercial laws governing commercial contracts and license agreements, including the general provisions of Contract Act, 1872.

The franchise agreement in Myanmar does not need to be registered, notarized or legalized before any authority. A foreign company that wants to operate a franchise business in Myanmar must obtain an MIC permit from the Myanmar Investment Commission (the “MIC”). If a foreigner holds at least one share in a company registered in Myanmar, such company will be a “foreign company” under the Myanmar Companies Act 1914. If the franchised business is a restricted business under the MIC Notification No. 49/2014 dated 14 August 2014, issued under the Foreign Investment Law 2012, then the franchisor is not allowed to grant a franchise of such restricted franchised business.

The antitrust rules should also be considered while drafting a franchise agreement for Myanmar as the Competition Law 2015 has come into force on 24 February 2015. A non-compete clause can be included in a franchise agreement, and is generally enforceable if its restrictions in terms of duration, limit and territory are reasonable and fair.

5.3 Foreign Exchange Controls

The Pyidaungsu Hluttaw also enacts laws for the entire country regarding foreign exchange control, capital money markets and other matters involving financial transactions with the Central Bank of Myanmar.⁹⁸ Foreign exchange in Myanmar is regulated by the Foreign Exchange Management Law (FEML) and Foreign Exchange Management Regulations (FEMR). The Central Bank of Myanmar governs FEML. Pursuant to Myanmar’s Foreign Investment Law, foreign currency is generally permitted to be transferred into and out of Myanmar at the prevailing official exchange rate set by the Central Bank of Myanmar, provided the foreign investor open a “kyat account” with a local bank.⁹⁹ Pursuant to the Myanmar Investment Law, foreign investors must submit a proposal to the Directorate of Investment and Company Administration (DICA), which scrutinizes the proposals and issues permits to investors, who must then comply with all areas of Myanmar laws regarding construction, leasing, insurance and employment.¹⁰⁰

⁹⁸ Constitution of the Republic of the Union of Myanmar, Ch. XV, Sched. 1.3(d)-(f).

⁹⁹ Foreign Investment Law, 2012 Union Parliament Law No XXI, available at: <http://www.investinmyanmar.com/myanmar-investment-laws/>

¹⁰⁰ Ministry of National Planning and Economic Development, Notification No.11/2013, “Foreign Investment Rules” (Jan. 31, 2013), available at: <http://www.investinmyanmar.com/myanmar-investment-laws/>.

5.4 Enforcement

According to the World Bank, Myanmar ranks 187 out of 189 countries in terms of enforcing contracts in its local courts.¹⁰¹ This poor ranking is primarily due to long wait times between the filing of a complaint and the enforcement of a judgment -- which on average takes over 3 years in Myanmar -- and judicial inefficiencies (*e.g.*, there is no court dedicated to hearing commercial disputes and no time standards for discovery and adjournments).¹⁰² On the bright side, Myanmar is one of the newest members to the New York Convention, and has adopted it in full,¹⁰³ and Myanmar's alternative dispute resolution procedures and enforcement of arbitration clauses appear to be on par with other East Asia and Pacific countries.¹⁰⁴ Myanmar has enacted the Arbitration Act of 1944 providing the general rules of arbitration.

Under the Sections 13 and 14 of the Civil Procedure Code of Myanmar, it is possible to recognize and enforce foreign decisions if such foreign judgments are (i) pronounced by a court of competent jurisdiction; (ii) decided on merits; (iii) not obtained by fraud; (iv) complied with the principle of natural justice; (v) in accordance with the principles of international law; and (vi) not consisted of a claim which breaches any of Myanmar laws.

5.5 Current Status and Possible Future Development

Myanmar, a member to Association of Southeast Asian Nations (ASEAN), is a very attractive jurisdiction in the growing economic region. A country that is still completing its transition towards democracy and lacking in infrastructure, Myanmar remains a substantial untapped market in the region. The EU and Myanmar are currently negotiating an Investment Protection Agreement. As a part of EU development support in Myanmar, the EU through Multiannual Indicative Programme 2014-2020, will be funding 688 million euros for bilateral assistance in four sectors; education, rural development, good governance and rule of law, and peace building support.

Franchising in Myanmar remains unregulated, and foreign franchisors are increasingly looking toward Myanmar as a potential business opportunity, with a population of over 66 million and a strategic location between China, India and Thailand. For example, Yum! Brands in 2015 established a Kentucky Fried Chicken outlet in Yangon—Myanmar's largest city and commercial hub.¹⁰⁵ In addition, in January 2017, Myanmar will host the International Franchise and SME Expo demonstrating Myanmar's appetite

¹⁰¹ World Bank Group, Doing Business – Economy Rankings, available at: <http://www.doingbusiness.org/Rankings>.

¹⁰² World Bank Group, Doing Business – Enforcing Contracts, available at: <http://www.doingbusiness.org/data/exploreeconomies/myanmar/#enforcing-contracts>.

¹⁰³ UNCITRAL, New York Convention Status, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (observing that Myanmar became a member in 2013).

¹⁰⁴ *See id.* (Myanmar scored 1.5 out of 3 in regard to ADR); *compare* Singapore (ranking highest in doing business in region and yet scoring only 2 out of 3 for ADR).

¹⁰⁵ *See e.g.*, Myanmar smells fast food success as KFC heads for Yangon (Nov. 11, 2014), available at: <http://consult-myanmar.com/2014/11/11/myanmar-smells-fast-food-success-as-kfc-heads-for-yangon/> (last accessed: March 21, 2016).

for franchise investment.¹⁰⁶ As U.S. sanctions have been lifted and the country continues to look to expand its role in international trade, Myanmar presents interesting franchise possibilities.

¹⁰⁶ Myanmar International Franchise and SME Expo in Yangon, available at: <http://www.myanmarfranchise.net/>.

Biographies

Junaid Daudpota

Junaid Daudpota is the partner at Daudpota International, whose practice mainly focuses on Middle East and South Asia. Mr. Daudpota's practice also covers transactional and contentious matters relating to various areas of laws, such as franchising, licensing, distribution, competition, employment, banking, internet, anti-corruption and arbitration. Based out of his firm's offices in Dubai and Pakistan, Mr. Daudpota is expert at counseling clients on all aspects of laws relating to intellectual property prosecutions and enforcement in the gulf countries (including Iran and Saudi Arabia). He has coordinated multiple litigations and advised on IP strategy, portfolio management, and infringement matters in various gulf countries. Mr. Daudpota has also acted as a consultant for the World Bank for Doing Business (country specific) reports. He has also co-authored the books on Competition Law in Pakistan and Anti-Money Laundering Law, and has commented on a number of national legislations around the world. Mr. Daudpota is a member of International Bar Association (IBA), American Bar Association (ABA), and International Trademark Association (INTA), Singapore Institute of Arbitrators (SIArb). He has also been part of number of policy and educational committees.

Alan R. Greenfield

Alan R. Greenfield is a Shareholder in Greenberg Traurig's Franchise & Distribution Practice. He concentrates his practice on international and U.S. franchising, licensing and distribution matters. Alan counsels a broad range of clients in expanding their brands internationally through various means, including master franchising and multi-unit licensing. Alan works with both mature and startup companies in structuring franchise programs and drafting franchise-related documents. He counsels franchisors and manufacturers on everyday compliance and other franchise or distributor-related issues, such as registration and disclosure matters, negotiating agreements, relationship termination laws, maintaining good franchisee/distributor relations, and resolving disputes with franchisees/distributors.

Tao Xu

Tao Xu devotes his practice to franchising and distribution matters, especially international franchising, licensing and distribution transactions. Tao counsels a broad range of clients in their international expansions, including master franchising, multi-unit licensing, area development, single-unit licensing and direct investment (both joint venture and wholly owned). Tao is particularly active in food and beverage, hospitality and leisure, and retail industries, having acted for a number of high profile US brands in their international expansion efforts. Tao is deeply involved in franchising activities in China, having both acted for a number of clients in entering the Chinese market and lobbied on behalf of the International Franchise Association in connection with the Chinese government's franchise regulations and their implementation rules.