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Challenges and Opportunities in International Franchising

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KEY PROVISIONS IN INTERNATIONAL FRANCHISING AGREEMENTS

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## 1. Introduction

This paper highlights certain key provisions in international Franchise Agreements that may differ from, or be in addition to, those generally included in domestic Franchise Agreements. Included are examples of provisions that international franchisors often require in their form agreements as well as some samples of negotiated versions of such provisions.

## 2. Language and Translation

Language is an obvious issue that must be addressed in international Franchise Agreements. Even if the official language of both the franchisor's and the franchisee's countries are the same, the meaning and use of certain terms may be different.

One issue related to language is which version of the Franchise Agreement is controlling if it is signed in multiple languages. Following is an example of a provision addressing this:

- “Official Language. The English language version of this Agreement shall be the official version and all constructions and interpretations shall be made from this version, whether or not the parties agree to have translations made for their convenience.”<sup>1</sup>

A variation on this after negotiation between the parties resulted in the following provision that had the same legal effect, but accorded the franchisee the concession of having a second agreed-upon version in its language:

- “Official Language. The English language version of this Agreement shall be the version accepted and approved by the parties, and all constructions and interpretations shall be made from it, and the parties agree to translate it into the Arabic language. However, the English version of the Agreement shall remain the version approved by the parties, and to the extent that there is a conflict between the two versions, the English version shall prevail.”

In some instances, a party wants to test the accuracy of the translation. This may be motivated by a desire to prevent misunderstandings or to avoid disputes. One tool is to have the translated version re-translated into the original language by a different translator. This can help focus the parties on provisions that may be difficult to capture in another language.

Another language issue relates to the translation of various materials. An example of a provision addressing this is:

- “Language.  
(a) The System Manuals, and all other materials and information provided to Franchisee by Franchisor pursuant to this Agreement, are provided to Franchisee in the English language. Franchisee shall translate these materials into a local language and bear the cost of such translation. After the materials have been translated from English into such other language, Franchisee shall submit the revised materials to Franchisor for Franchisor's approval, which approval shall not be unreasonably withheld. All original and translated materials shall belong exclusively to Franchisor.

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<sup>1</sup> The authors have included sample clauses in this paper for illustration only, and do not necessarily recommend them as clauses to be included in every agreement.

(b) Any materials or information which must be provided to Franchisor by Franchisee pursuant to the terms of this Agreement, including without limitation a copy of the lease for a particular Restaurant site, shall be provided to Franchisor in the English language.”

Following is an example of a provision that addresses both of these concerns:

- “Translations. Most written materials relating to the Franchised Business and the System, including the Franchise Agreement, the Standards, the Software, and advertising materials provided by Franchisor will be in the English language. Franchisee may, at its cost, translate such materials into another language. Franchisee will obtain Franchisor’s approval before using any translation. Franchisor will own all translated materials, and any related copyrights will be assigned to Franchisor on Franchisor’s request. Franchisee will obtain any agreements necessary from third parties to convey such rights. The English version of all translated materials will control.”

One language issue that is often overlooked is the language in which initial and ongoing training and other in-person assistance is provided. It can be a shock when franchisee representatives arrive in the franchisor’s country for training without sufficient fluency in the language of the host country, and no interpreters are available. Following is a provision that addresses this concern:

- “All meetings between representatives of Franchisor and Franchisee shall be conducted in English and all training and assistance by Franchisor shall be conducted in English, and Franchisee shall bear the cost of any interpreters, if necessary. In particular, and not in limitation of the foregoing, Franchisee agrees and acknowledges that Franchisor shall determine the number of interpreters and the duration of time they will be required during training including without limitation a minimum of one interpreter per training location during initial training in California and several interpreters at the Franchised Business during a three (3) week training period. Franchisee shall use its best efforts to place non-English speaking trainees together to minimize the interpreters needed.”

Units and measures can also differ from country to country and should be addressed. An example follows:

- “Units of Measure. Any materials and information provided to Franchisee by Franchisor pursuant to this Agreement, including without limitation the System Manuals and any plans and specifications for the Franchised Business, shall be provided to Franchisee in U.S. units. If Franchisee desires to convert these materials into metric units, Franchisee shall bear the cost of such conversion. After the materials have been converted from U.S. units into metric units, Franchisee shall submit the revised materials to Franchisor for Franchisor’s approval, which approval shall not be unreasonably withheld, prior to the use thereof by Franchisee. All original and converted materials shall belong exclusively to Franchisor.”

### 3. **Anti-Corruption and Anti-Terrorism Law Compliance**

Franchisors in the U.S. and other countries already typically provide that their domestic franchisees must comply with all laws, including those relating to anti-terrorism. For example Franchise Agreements in the United States should include representations and warranties from franchisees and an agreement not to transfer to certain parties, such as the following:

- “Franchisee is not: (i) a person designated by the U.S. Department of Treasury’s Office of Foreign Assets Control from time to time as a “specially designated national or blocked

person” or similar status, (ii) a person described in Section 1 of U.S. Executive Order 13224, issued on September 23, 2001, or (iii) a person otherwise identified by government or legal authority as a person with whom Franchisor is prohibited from transacting business (“Specially Designated National or Blocked Person”) or a person in which a Specially Designated National or Blocked Person has an interest.”

- “Prohibited Transfer to Specially Designated National or Blocked Person. Notwithstanding anything to the contrary in this Agreement, no transfer by Franchisee shall be made to a Specially Designated National or Blocked Person or to a person in which a Specially Designated National or Blocked Person has an interest.”

In international Franchise Agreements, franchisors will want to include additional provisions. Embargos and anti-money laundering laws are an example. Following is a representation and warranty that addresses these issues:

- “Franchisee represents and warrants that neither Franchisee nor any of its affiliates is directly or indirectly owned or controlled by the government of any country that is subject to an embargo by the United States government. Neither Franchisee nor any of its affiliates is acting on behalf of a government of any country that is subject to such an embargo. Franchisee further represents and warrants that it is in compliance with the anti-money laundering law of Saudi Arabia issued by the Royal Decree No. M/39 dated 25.06.1424H.

Due to the broad jurisdictional reach of the UK Bribery Act of 2010, many international franchisors include a specific provision addressing it. Here is one example of this:

- “UK Bribery Act 2010. Franchisee represents, warrants and covenants that it will comply with all Legal Requirements relating to anti-bribery and anti-corruption, including the laws of the United Kingdom, including the UK Bribery Act 2010 and applicable EU laws and regulations. The Franchisee further warrants, represents and covenants that it has or will have and will maintain in place throughout the Term of this Agreement its own policies, and procedures, including adequate procedures under the UK Bribery Act 2010 and any similar legislation within any territory where the Franchisee and its Affiliates operate. Franchisee will ensure that its Affiliates comply fully with such policies and procedures.”

Anti-corruption laws such as the U.S. Foreign Corrupt Practices Act necessitate specific representations from franchisees and local counsel. One of them relates to any relationship with government officials, such as the following:

- “Franchisee represents and warrants that it has no direct or indirect legal, financial or other relationship(s) with any government official (or member of their family) involved with or affecting the Franchised Business. The term ‘government official’ means any person exercising a public function and/or acting in an official capacity on behalf of a government agency, department, or instrumentality, political party, or candidate for political office, and includes officials or employees of federal, state, provincial, county or municipal governments or any department or agency thereof; any officers or employees of a company or business owned in whole or in part by a government; any officers or employees of a public international organization; any political party or official thereof; or any candidate for political office. Government officials include officials at every level of government, regardless of rank or position.”

#### 4. Trademarks and Intellectual Property

A franchisor will need to include many of the same provisions in an international Franchise Agreement that it uses domestically. There are some additional issues it will face internationally. For example, a trademark license will trigger protections for the franchisee under technology transfer laws in at least one jurisdiction, requiring specific changes to the Franchise Agreement to comply with those laws.

It is more likely that the franchise program will require modification to meet market demands in another country. Therefore, the Franchise Agreement should address ownership of those changes since it is likely the franchisee shall develop them.

- Franchisee has no Ownership Interest, and will not obtain any, in any part of the system (including any modifications, derivatives or additions made by or on behalf of Franchisee or its Affiliates). Franchisee assigns, and will cause each of its employees or independent contractors who contributed to System modifications to assign, to Franchisor, in perpetuity throughout the world, all rights, title and interest (including the entire copyright and all renewals, reversions and extensions of such copyright) in and to such System modifications. Except to the extent prohibited by Legal Requirements, Franchisee waives, and will cause each of its employees or independent contractors who contributed to System modifications to waive, all rights of “droit moral” or “moral rights of authors” or any similar rights in such System modifications.

A franchisor should also reserve the right to modify its system itself. This may cause a franchisee in another country to balk if there are no limitations on that right. Following is an example of a negotiated provision that addresses these concerns:

- “Additions and Changes. Franchisor may from time to time during the Term in its sole discretion revise, amend, add to or delete entries from the list of Trademarks on Exhibit A to reflect changes in the System Manuals’ schedules of Approved Menu Items, or in the advertising, promotion, marketing and merchandising programs of Franchisor, or for any other purpose. These revisions, amendments, additions and deletions shall be incorporated by reference into this Agreement when made. Franchisee shall bear any costs associated with such revisions, amendments, additions and deletions; provided, however, that if such costs exceed Twenty-Five Thousand Dollars (US\$25,000.00) in any calendar year, Franchisee shall not be required to comply until Franchisor has complied with such changes or committed to comply with such changes within a twelve (12) month period for at least twenty-five percent (25%) of its then-existing full-service, sit-down Franchisor-owned restaurants in the United States. Nothing contained in this Agreement shall be deemed to require Franchisor to offer new or revised Trademarks to Franchisee without new or additional consideration therefor, or in any event if Franchisor does not deem it appropriate to do so in its sole discretion, except as expressly agreed in writing otherwise.”

The Franchisor may not have completed its registration of its marks in the franchisee’s country. It is essential to confer with local counsel on how best to protect trademark ownership. In some jurisdictions, it is necessary to record or register the Franchise Agreement or a short form trademark license agreement. In those jurisdictions, some franchisors separate the trademark license provisions from the rest of the Franchise Agreement and make it an exhibit to the main agreement. This allows for compliance with the registration requirement without making the rest of the Franchise Agreement public. Following is a provision for a situation in which the franchisor has not completed the registration process:

- “Registration of Trademarks. Franchisee expressly acknowledges that, except for the Trademark described in Exhibit A, Franchisor’s affiliate’s application for registration of certain of the Trademarks in \_\_\_\_\_ has been denied and that neither Franchisor nor its affiliate may have an effective registration of the Trademarks in \_\_\_\_\_. Franchisee further acknowledges that if Franchisor or its affiliate does obtain a registration, it may be on the B Trademark Register. Accordingly, Franchisor and its affiliate may not have certain presumptive legal rights in these Trademarks. Franchisor may contest the denial and may apply for registration of other Trademarks.

Notwithstanding, Franchisee expressly acknowledges that Franchisor’s affiliate is the beneficial owner of all rights, title, interest and benefit in and to the Trademarks and the goodwill associated with and symbolized by them. Franchisee shall not acquire any right, title or interest of any kind in the Franchisor System or the Trademarks or the goodwill associated with them except as has been expressly provided in this Agreement. Franchisee agrees to sign a separate trademark license agreement in a form acceptable to Franchisor upon Franchisor’s request.”

Registration requirements must be addressed in the Franchise Agreement and monitored closely. One type of registration a franchisor generally wants to avoid is registration of the franchisee as the franchisor’s commercial agent in a country. The effect of these laws is to protect the franchisee and its efforts to develop the brand in the country, and to require payment to the franchisee agent upon expiration of termination of the Franchise Agreement. Following is an example of a provision addressing this issue:

- “Independent Contractor. Franchisee is an independent contractor and is not authorized to make any contract, agreement, warranty or representation on behalf of Franchisor, or to create any obligation, express or implied, on behalf of Franchisor. Franchisee is not, and shall not represent or hold itself out as, an agent, legal representative, joint venturer, partner, employee or servant of Franchisor for any purpose whatsoever and, where permitted by law to do so, shall file a business certificate to such effect with the proper authorities. In particular, and not in limitation of the foregoing, Franchisee shall not represent, apply, register or take any action indicating that it is a commercial agent of Franchisor. Franchisee does not act as Franchisor’s agent and the parties acknowledge and agree that no compensation will be payable to Franchisee upon the termination or expiration of this Agreement under any commercial agency or similar laws. Franchisor shall not be deemed to be in a special relationship with Franchisee, or to be the trustee or fiduciary of Franchisee, or be held to any elevated standard of conduct.”

If a franchisor has concerns with the enforceability of a provision relating to a commercial agency, law, one possible way to address it is a liquidated damages provision such as the following:

- “Liquidated Damages. Franchisee recognizes and acknowledges that the Trademarks and the System are critical assets of Franchisor and that Franchisee’s failure to comply with any or all of its obligations on termination or expiration of this Agreement or its demand for compensation upon termination or expiration of this Agreement would cause significant harm to Franchisor. The parties further acknowledge that it would be extremely difficult and impractical to ascertain the extent of detriment and damages that would be caused by such a breach by Franchisee. Therefore, in order to avoid such difficulties, and notwithstanding any other provision in this Agreement, the parties agree that in the event Franchisee does not comply with such obligations, including without limitation continuing with any use of the Trademarks or System, or makes such a demand, Franchisee shall pay Franchisor the sum of

Five Hundred Thousand Dollars (\$500,000.00) and any and all legal fees and expenses Franchisor may incur in seeking to enforce this provision. The parties further agree that payment of such amount shall not entitle Franchisee to continue to use the Trademarks and the System or to have any further rights whatsoever under this Agreement or otherwise.”

## 5. **Tax Withholding**

Many countries impose tax on non-residents who receive income from sources outside of the country such as dividends, interest, royalty, service and technical fee payments. To facilitate collection of this tax imposed on non-residents, the country's taxing authority generally requires the resident payor to withhold the required tax from the payment and remit it to the applicable tax authorities. As a result, international franchise operations often involve payments which are subject to withholding tax in one or more jurisdictions.

Dealing with the economic impact of the withholding tax obligations may require negotiation as well as suitable provisions in the franchise agreements. There are two main alternatives. Either the payment is reduced by the amount of withholding tax, or else the contract requires the payment to be increased, or “grossed up”, so that the full agreed amount is received even after the withholding tax is deducted. In one case the franchisor who receives the payment bears the economic cost of the withholding tax, and in the other case the franchisee who makes the payment bears the economic cost of the withholding tax.

Some franchisors may be entitled to a foreign tax credit for the withholding tax which has been deducted from payments they receive. In that case, even though the payment to the franchisor is subject to withholding tax, the withholding tax typically should not have a net negative impact on the franchisor. There will, however, be a negative financial impact if the franchisor is not able to obtain a full tax credit in its own country for the withholding tax that has been deducted from the payment.

The rate of withholding tax will vary on a case-by-case basis, depending upon the country of origin, type of payment, status of the franchisor, and whether or not there is any income tax treaty in effect between the jurisdictions involved. Franchisors should review the tax laws of the country in which the franchisee is located to determine whether the payments contemplated by the franchise arrangements are subject to withholding tax and whether exemptions or reduced rates are available. For example, in some countries, a technical assistance fee is taxed at a lower rate than a royalty fee. However, franchisors and their counsel need to ensure they understand the exact scope of the applicable withholding tax rules. For example, some countries may include a variety of fees, such as service or technical assistance fees, in the definition of “royalty” and apply a royalty fee based withholding tax, regardless of how the payments are designated by the parties. The franchise agreements should deal with the way in which payments will be treated, taking into account how they will be characterized for tax purposes in both the franchisor’s country and the host country.

Some franchisors require franchisees to “gross up” their royalty fee payments to the franchisor, in effect making the franchisee responsible for paying the tax while keeping the franchisor whole. It is typical for the franchisee to request the removal of a gross up clause. For example, if the franchisor is entitled to and can utilize a foreign tax credit for the withholding tax, a gross-up would constitute a windfall to the franchisor and therefore most gross up clauses have the ability to adjust the amount to the extent the franchisor can utilize the tax credit. Whether or not there is a gross up clause, the franchisee is required to remit the tax to the appropriate taxing authority on behalf of the franchisor. It is advisable for the franchisor to obtain a receipt showing the tax was paid in the event that a taxation authority makes an inquiry.

In some cases, tax treaties or the structure of the franchise program may materially reduce tax withholding obligations. Many countries have double taxation treaties that reduce the withholding rates or eliminate such taxes altogether. For example, the United States has taxation treaties with a number of countries which reduce, if not eliminate entirely, withholding taxes on royalties and other fees. Any double taxation treaty should be taken into consideration to ensure that excess withholding tax is not deducted or remitted. The franchisee may require proof that the franchisor qualifies for a reduced treaty rate of withholding tax or qualifies for an exemption. The franchise agreements should contemplate the possible application of a tax treaty and any required documentation or procedure to obtain relief. A reduction of withholding tax will usually require a sophisticated analysis of tax credits, tax treaties, the nature of the payments involved, and of the sources of the franchisor's income.<sup>2</sup> Taxation is of considerable importance and therefore these issues should be thought out in advance and contemplated in the franchise agreements. Two sample provisions addressing these considerations follow:

- **Taxes.** Master Franchisee will make all payments hereunder free and clear of any tax, deduction, penalty, offset or withholding of any kind (including any taxes, deductions, offsets or withholding taxes incurred from collecting fees from Subfranchisees). It is the parties' intention that all payments due shall be increased to the extent necessary to provide Franchisor with the same net amount it would have received had no such taxes or other withholdings been applicable to such payments. If Master Franchisee or any other person is required by law to make any deduction or withholding on account of any tax, assessment, duty or levy charged against any payments, Master Franchisee will pay any such tax, assessment, duty or levy before the date on which a penalty for nonpayment or late payment attaches. Payment of such tax, levy, duty or assessment is to be made (if the liability to pay is imposed on Master Franchisee) for Master Franchisee's own account or (if the liability to pay is imposed on Franchisor) on behalf of and in the name of Franchisor. Master Franchisee will immediately furnish to Franchisor certified receipts of the payment of any deduction, withholding or payment made, on its account or Franchisor's account.
- **Withholding Taxes:** If the Developer is required by law to withhold or deduct any withholding Taxes from any amount payable by the Developer to the Company, then (i) the Developer shall pay promptly when due the full amount withheld or deducted to the appropriate Governmental Authority according to Applicable Law; and (ii) the Developer shall promptly deliver to the Company a receipt or similar documentation from the Governmental Authority evidencing payment of such withholding Taxes; and (iii) the applicable payment by the Developer to the Company shall be increased by an amount equal to the withholding Taxes paid. To the extent and at such time as the Company receives the benefit of the amount of such withholding Taxes as a tax credit on its tax returns, the Company shall allow the Developer an equal credit against amounts thereafter due to the Company pursuant to this Agreement.

## 6. Currency

When embarking on an international agreement with a foreign partner, consideration must be given to which currency is used in the transaction. Given the longevity of these contractual agreements, the risk of a change in currency can have a substantial impact on the position of the parties.

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<sup>2</sup> UNIDROIT International Institute for the Unification of Private Law, Guide to International Master Franchise Agreements (second edition) (Rome, 2007).

The parties should consider foreign exchange controls, the effect of change of laws on payment and taxation policy when negotiating the agreement – all of these can have an influence on the terms of the agreement. Additionally, special provisions may be required if either party's home country has currency restriction laws in place. For example, where financial authorities regulate the flow of funds into and out of the country, a provision may be included in the agreement which stipulates, for example, that any amount payable to the franchisor should be deposited in a bank account in a country so designated by the franchisor. Two sample provisions follow:

- **Currency.** Except as otherwise provided herein, all payments made pursuant to this Agreement shall be paid to Franchisor in U.S. Dollars and deposited, wire transferred or transferred by other means (including electronic fund transfers) to such bank account(s) in the U.S. or elsewhere as Franchisor shall designate. All continuing fees and other amounts payable to Franchisor hereunder on the basis of a percentage of Gross Sales or the currency of the Territory shall be initially calculated in the currency of the Territory and then converted to U.S. Dollars as of the date upon which such payments are paid hereunder (or if the authorized foreign exchange bank designated by Franchisor is not open on such date, then the immediately preceding day on which such authorized foreign exchange bank is open) as long as such payments are timely made. Conversion shall be based on the telegraphic transfer rate at which the currency of the Territory can be converted to U.S. Dollars for transfer to the U.S. at an authorized foreign exchange bank designated by Franchisor from time to time. All fees assessed in connection with conversion of currencies or transmittal of payment shall be borne by Master Franchisee. If any payment is made after the due date and the applicable exchange rate in effect on the due date varies from the rate in effect on the date of actual payment, the exchange rate most favorable (of those on the due date and on the date of actual payment) to Franchisor shall be used in calculating the amount of the payment to be made by Master Franchisee.
- **Currency Requirements.** If at any time legal restrictions shall be imposed upon the purchase of U.S. Dollars or the transfer to or credit of a non-resident corporation with payments in U.S. Dollars, Master Franchisee shall notify Franchisor immediately. Master Franchisee shall use its best efforts to obtain any consents or authorizations which may be necessary in order to permit timely payments in U.S. Dollars of all amounts payable hereunder. While such restrictions are in effect, Franchisor may require Master Franchisee to deposit all amounts due but unpaid as a result of such a restriction in any type of account, in any bank or institution in Canada designated by Franchisor and in any currency designated by Franchisor that is available to Master Franchisee. Franchisor shall be entitled to all interest earned on such deposits. Franchisor shall bear all risk of loss with respect to the deposited funds and interest payable thereon once such funds have been properly deposited in the designated account by Master Franchisee.

## 7. **Governing Law**

Many foreign franchise laws will require the use of local governing law, venue and jurisdiction. There is no substitute for obtaining local counsel experienced in franchising to advise on the requirements of and practice under local franchise laws.<sup>3</sup>

In negotiating the choice of law to apply to the agreement, each of the parties will tend to press for the choice to fall on the law of its own jurisdiction. There are many possible reasons for this; the familiarity of that legal system to the legal representatives of the parties, the assumption that that particular body of law will offer advantages, or, in the case of franchisors, because they want the same

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<sup>3</sup> International Franchise Association 41st Annual Legal Symposium, Enforcing International Agreements: Non-Litigation Issues, online (2008).

law to apply to all of the agreements they have in place around the world. Rather than proceed on this largely intuitive basis, the parties would be better served by considering, in a systematic way, the situations in which disputes are likely to arise and where the law falls on these matters.

Drafting the Agreement. The governing law chosen will impact the style in which agreements are drafted. In countries governed by a civil law system, a large number of issues are regulated by legislative instruments and there is less need for the contracts to enter into great detail except where the parties feel that a certain amount of detail is necessary or desirable. This may be the case where the parties desire to give a precise indication of their agreed will to any court that may come to analyze the agreement in the future. It is noteworthy that courts in some jurisdictions have the power to interpret contracts and to modify the terms of the agreement if they are considered unfair. Further, if an item that is dealt with in the non-mandatory provisions of the codes is not provided for more specifically in the contract, the provisions of the codes will apply.<sup>4</sup>

Competition Law. Antitrust, or competition, laws often affect practices that are inherent in many franchise systems, such as exclusive dealing arrangements, tying arrangements, price fixing and covenants not to compete. Laws outside of the franchisor's home jurisdiction may differ substantially and, it may be necessary to adapt agreements to ensure that they do not fall under the applicable competition law. For example, in the European Union, the *Vertical Agreements Block Exemption* prohibits certain issues that, in Canada and the United States would typically be "freedom of contract issues".<sup>5</sup>

## 8. **Dispute Resolution**

There is an ongoing debate amongst franchise practitioners on preferences regarding the use of the courts, arbitration, mediation or other forms of dispute resolution in International franchising. What dispute resolution method is best should be determined on a case by case basis and in conjunction with the advice of local counsel. However, for the purposes of this paper, the focus will be on arbitration. Typically parties to international licensing agreements will agree to arbitration because: it allows the parties to dictate the dispute process to a significant extent, and the dispute will remain confidential. The agreement to arbitrate should preclude either party from by-passing arbitration by seeking redress in a court of law except as explicitly set out in the agreement. In countries where franchising is a relatively uncommon or new business method and where national courts may have a lack of experience in dealing with franchise issues, arbitration is often perceived as a better alternative.<sup>6</sup>

It should be considered that injunctive relief and other interim measures in the case of non-performance may be necessary. While both judges and arbitrators may be able to grant interim measures, from the perspective of enforceability, court systems are normally more efficient and effective. It is not unusual for the convening of an arbitral tribunal to involve an element of delay. Therefore, if the parties do opt for arbitration, it may be prudent to allow for the exclusion of any matters requiring urgent and interim relief measures from the application of the arbitration clause.<sup>7</sup>

When parties choose arbitration, they should select whether arbitration will be by a specified body, one arbitrator, three persons (one selected by each party and a third by the selected persons), or some other formation. Typical administrative bodies selected include: the International Court of Arbitration of the International Chamber of Commerce, the American Arbitration Association, the London Court of International Arbitration, the Arbitration Institute of Stockholm Chamber of Commerce, the Cairo Regional Centre for International Commercial Arbitration or the Australian Centre for

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<sup>4</sup> UNIDROIT, *supra*.

<sup>5</sup> Jeffrey R. Wahl, *Understanding International Commercial Contracts*, (United States: Thomson Reuters/Aspatore, 2015).

<sup>6</sup> UNIDROIT, *supra*.

<sup>7</sup> UNIDROIT, *supra*.

International Commercial Arbitration. A relatively recent addition is the Singapore International Arbitration Centre and in the Middle East, the Dubai International Arbitration Centre is often utilized. Depending on the administrative body selected, the arbitration rules to be followed must also be selected. There are also the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) which may be selected regardless of which administrative body is chosen.

The parties should review whether the applicable foreign jurisdiction is a party to the *New York Convention of 1958* or another treaty that provides for the enforcement of arbitration awards from foreign jurisdictions. The parties should also determine whether the arbitration decision can be appealed (and if so, where the appeal is permitted to) or whether it is final and binding. Dispute resolution clauses give certainty as to what rules apply in the case of conflict; they should be carefully considered when forming an agreement. Three sample provisions that provide for arbitration follow:

- Arbitration. Arbitration: Except as precluded by Applicable Law, any dispute, controversy or claim between Company and Developer arising out of or relating to this Agreement or any alleged default under this Agreement, including any issues pertaining to the arbitrability of such dispute, controversy or claim and any claim that this Agreement or any part of this Agreement is invalid, illegal, or otherwise voidable or void, shall be submitted to binding arbitration administered by JAMS pursuant to its International Arbitration Rules. The arbitration shall be conducted by one arbitrator. The arbitrator must be fluent in English. The proceedings shall be held in Los Angeles, California, USA. The arbitration shall be conducted in English, provided, however, that testimony or documentary evidence may be made or provided in any other language; provided that the party submitting such evidence, at its own cost, also furnishes to the other party or parties, as applicable, a translation of such testimony or evidence into English. In no event may the material provisions of this Agreement, or any ancillary agreement executed in connection with this Agreement, including, the method of operation, authorized product line sold or monetary obligations specified in this Agreement, amendments to this Agreement or the Manuals be waived, modified or changed by the arbitrator at any arbitration hearing. The substantive law applied in such arbitration shall be as provided in Section \_\_. The arbitration and the parties' agreement to arbitrate shall be deemed to be self-executing, and if either party fails to appear at any properly-noticed arbitration proceeding, an award may be entered against such party despite said failure to appear. Failure by either party to pay the fees (or provide a required deposit) of the arbitrator and/or the arbitration administrator in accordance with the rules and policies of the applicable Entity shall result in a forfeiture by the non-paying party of the right to prosecute or defend the claim which is the subject of the arbitration, but shall not otherwise serve to abate, stay or suspend the arbitration proceedings. The arbitral decision shall be binding and conclusive on the parties. A judgment confirming the award may be given by any court having jurisdiction.
- Equitable Relief. Nothing in this Article shall prejudice the right of any party to obtain provisional relief or other equitable remedies from a court of competent jurisdiction as shall otherwise be available under the Applicable Law.
- Arbitration. Subject to Section 17.3 [injunctive relief] and upon written notice to all parties, all controversies, disputes or claims arising between Franchisor, any of its Affiliates or any of their respective officers, directors, agents, employees and attorneys and Master Franchisee, any of its Affiliates or any of their respective Owners, arising out of or related to the relationship of the parties hereto or this Agreement (the "Dispute") shall be settled by binding arbitration in accordance with the then-current Commercial

Arbitration Rules (“Rules”) of the American Arbitration Association (“AAA”), in [city, state/province] or at such other location as the parties may mutually agree. Such arbitration proceedings shall be conducted by one (1) neutral arbitrator appointed in accordance with the Rules. This provision shall be governed by, and enforced in accordance with, the United States Arbitration Act (9 U.S.C. §§ 1-16) (the “Federal Arbitration Act”). The arbitration proceedings shall be conducted on an individual basis and not on a multi-plaintiff, consolidated or class-wide basis.

The arbitrator shall be bound by, and shall strictly enforce the terms of this Agreement and shall not limit, expand or otherwise modify its terms. The arbitrator shall have sole authority to resolve any and all issues as to the arbitrability of any Dispute, including the application or running of any statute of limitations and all questions involving issue preclusion. The arbitrator shall have the power to determine the nature and extent of any discovery and to resolve all issues of admissibility of evidence. The arbitrator shall not have the power to award damages in connection with any Dispute in excess of actual compensatory damages, which may include interest on unpaid amounts from date due, and consequential damages. The arbitrator shall not have the power to award punitive damages or to multiply actual damages. The arbitrator shall be permitted, where warranted, to also award specific performance and/or injunctive relief.

The decision and award of the arbitrator shall be in writing and state the reasons for such decision and award. The decision and award shall be conclusive and binding upon all parties and judgment upon the award may be entered in any court of competent jurisdiction. The arbitrator, the parties, their representatives and participants shall hold the existence, contents and result of any arbitration in confidence, except to the limited extent necessary to enforce a final settlement agreement, to obtain enforcement of the arbitrator’s decision and award, or as otherwise required by law. Franchisor, its Affiliates and their respective officers, directors, agents, employees and attorneys and Master Franchisee, and its Affiliates and their respective Owners hereby waive any right to contest the validity or enforceability of such award, except as provided in the Federal Arbitration Act. This provision shall continue in full force and effect subsequent to and notwithstanding expiration or termination of this Agreement.

- Dispute Resolution. Except as required by any Legal Requirements, any dispute arising out of or relating to this Agreement, including the breach, termination or validity thereof, which has not been resolved by pre-arbitral referee procedures as provided in Section \_\_\_ within thirty (30) days following the submission of Findings of Relevant Facts, will be finally resolved by arbitration in accordance with the procedures set forth in this Section \_\_\_ and the Rules of Arbitration of the International Chamber of Commerce presently in force. The arbitration will be heard and determined by one arbitrator; provided, however, that if one party fails to participate in either the pre-arbitral referee procedures or arbitration as agreed herein, the other party can commence arbitration prior to the expiration of the time periods set forth above. The arbitration will be governed by the Federal Arbitration Act, 9 U.S.C. §§1–16, and judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. The arbitration will be heard and determined by one arbitrator. The place of arbitration will be in \_\_\_\_\_, USA. The English language will be used in the arbitration proceedings. The arbitrator will have the right to award or include in his or her award any relief which he or she deems proper in the circumstances including, without limitation, money damages (with interest on unpaid amounts from the due date), specific performance, injunctive relief and attorneys’ fees and costs, provided that the arbitrator will not award exemplary or

punitive damages. Any award of money damages will be in U.S. Dollars. The award will include interest from the date of any breach or other violation of this Agreement. The arbitrator will also fix the appropriate rate of interest from the date of breach or other violation to the date the award is paid in full. In no event, however, should that interest rate during such period be lower than the prime commercial lending rate announced by [Bank] (or its successor), at its office in [city and state], United States of America, for ninety (90) day loans for responsible and substantial commercial customers. The award and decision of the arbitrator will be conclusive and binding upon each of the parties and judgment upon the award may be entered in any court of competent jurisdiction. Franchisor and Master Franchisee both agree to be bound by the provisions of any statute of limitations applicable to this Agreement or, if shorter, any statute of limitations that would otherwise be applicable to the controversy, dispute or claim which is the subject of any arbitration proceeding initiated hereunder. Without limiting the foregoing, Franchisor and Master Franchisee both will be entitled in any such arbitration proceeding to the entry of an order by a court of competent jurisdiction pursuant to an opinion of the arbitrators for specific performance of any of the requirements of this agreement. This agreement to arbitrate will continue in full force and effect subsequent to and notwithstanding the expiration or termination of this Agreement. The scope of any arbitration hereunder and the authority of any arbitrator to act with respect to all arbitrations before any arbitration organization is defined by the specific provisions of this Section \_\_\_ and any arbitrator will be required to execute an acknowledgment of applicability of the provisions of this Section \_\_\_ to any arbitration proceeding under this Agreement.

This arbitration provision will be self-executing and will remain in full force and effect after the expiration or termination of this Agreement. If either party fails to appear at any properly noticed arbitration proceeding, an award may be entered against such party by default or otherwise notwithstanding said failure to appear.

The provisions of this Section \_\_\_ will be construed as independent of any other covenant or provision of this Agreement; provided, however, that if a court of competent jurisdiction determines that any such provisions are unlawful in any way, such court will modify or interpret such provisions to the minimum extent necessary to have them comply with the Legal Requirements.

Except as otherwise set forth in Section \_\_\_, the arbitrator is empowered to include in any award made hereunder, such relief as the arbitrator deems appropriate, including, without limitation, injunctive relief, in addition to or in lieu of monetary damages and reasonable attorneys' fees and expenses.

## 9. **Conclusion**

While this paper does not cover all the provisions generally found in an international Franchise Agreement, it should serve as a good resource for in-house as well as outside counsel representing a franchised business that is expanding internationally. Examples of provisions commonly included in such agreements as well as negotiated provisions should be of particular value.

## **BIOGRAPHIES**

Session Chair:

### **JANE W. LAFRANCHI**

Jane LaFranchi became the Vice President, Secretary and General Counsel of Hershey Entertainment & Resorts in Hershey, Pennsylvania on June 17, 2016. Previously, she was Vice President and Assistant General Counsel at Marriott International, Inc. in the Franchise Development practice group. Ms. LaFranchi joined Marriott in 2005 and recently retired from Marriott in March 2016. Before that, she was a partner in Strasburger & Price, LLP (Mexico City and Washington, DC). Ms. LaFranchi received a J.D. with honors from the University of Texas School of Law and a B.A. with highest honors from the University of Texas.

Ms. LaFranchi was a founding member of the Steering Committee for the International Franchise and Distribution Division of the ABA Forum on Franchising and served as a Regional Editor for the ABA's publication on International Franchise Sales Laws. She currently serves as the Membership Officer of the International Bar Association's Committee on Franchising and has participated as a faculty member of the American University Washington College of Law's program on Hospitality and Tourism Law.

Speakers:

### **SUSAN GRUENEBERG**

Susan Grueneberg is a Partner at the law firm of Snell & Wilmer L.L.P. in Los Angeles, California and is a certified specialist in franchise and distribution law. Ms. Grueneberg serves as Chair of the Industry Advisory Committee to the North American Securities Administrators Association (NASAA) Franchise Project Group and is a Past Chair of the American Bar Association Forum on Franchising. She is also a member of the International Franchise Association's Legal/Legislative Committee. She previously served as Chair of the California State Bar Franchise and Distribution Law Commission, the commission that oversees the certification of legal specialists in franchise and distribution law in California. Ms. Grueneberg was also a member of the California State Bar Business Law Section Executive Committee, Chair of the California State Bar Franchise Law Committee and a member of the Board of Governors of the Century City Bar Association. She has written and lectured extensively at programs conducted by the California State Bar, the ABA Forum on Franchising, the International Franchise Association and California Continuing Education of the Bar. A graduate of UCLA Law School, Ms. Grueneberg also taught at the Chinese University of Hong Kong as a U.S. State Department Fellow, and received a National Academy of Sciences Fellowship for post-graduate study in economics at the University of Beijing. She is co-editor of the ABA publication "The FTC Franchise Rule".

### **PETER V. SNELL**

Peter V. Snell is a partner at Gowling WLG. He is based in Gowling WLG's Vancouver office and also works out of the firm's Calgary and Toronto offices. Peter specializes in Canadian franchise law, international and Canadian business transactions, licensing, product distribution and intellectual property. Peter is chairman of the Intellectual Property Committee of the Business Law Section of the American Bar Association and he is on the Board of Directors of the Canadian Franchise Association (CFA). In 2015 Peter was appointed as the CFA's General Counsel. He is recognized as a leader in franchise law in Chambers, The Best Lawyers in Canada, Canadian Legal Lexpert, Who's Who Legal:

Canada, Who's Who Legal: The International Who's Who of Business Lawyers, Franchise Times Legal Eagles, and the Expert Guides, World's Leading Franchise Practitioners. Peter is a special advisor to the Government of British Columbia in the drafting of new franchise legislation.