



GETTING THE  
DEAL THROUGH 

# Franchise 2016

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# The president of the company just left a message for you...

Philip F Zeidman

DLA Piper LLP (US)

You are in-house counsel for Worldwide Franchise Corporation – which, despite its name, has only franchised in its own country. You’ve handled its legal needs, including the legal aspects of its domestic franchising operations, relying principally on yourself and your small staff. You have occasionally called upon The Good Local Law Firm, which has some franchising expertise.

When you arrive in the office on Monday morning, a telephone message from the president is already awaiting you.

*‘Bob, I’ve spent a lot of time over the weekend thinking about our expansion. We still have plenty of territory to fill in this country, but I can see the day coming when we will be nearing saturation.*

*‘If we want to maintain our growth, it’s pretty clear that the time has to come to look internationally. Some of our competitors already are, and others certainly will soon. That’s exciting, but obviously also more than a little intimidating.*

*‘I think our initial country targets should be [A, B, C and D], with the next wave probably to be [E, F, G, H and I]. But that’s just based on my general knowledge, and what I’ve read.*

*‘I’ll take responsibility for the ultimate selections, of course, but I need your input on the legal considerations – both as to where and when and as to the structure. My guess is that we will go with an area development approach; but in [C, F, and I] it may be appropriate to consider sub-franchising. As I’m sure you would expect, I want to do this as rapidly and as economically as possible.*

*‘Call me.’*

(And now, in the spirit of candour, let us acknowledge that the message may have been more along the lines of:

*‘I got an e-mail from some guy who’s ready to pay a boatload of money for the rights to X. I’ve never heard of X, but work up some papers this afternoon.’*

But I digress.)

What do you do now? If the Good Local Law Firm has any experience in international franchising, you may want to call your principal contact there. But unless that experience is both broad and deep, you know that you are highly unlikely to be able to tap into knowledge covering all the countries in which the president is interested, and what you will hear will be largely anecdotal. You recall that there are some publications that rank lawyers in jurisdictions around the world on their experience and reputation in a range of disciplines – and, indeed, that two of them, *Who’s Who Legal: Business Lawyers* and *Chambers*, have a component on franchising.

But you know the president expects more of you than just to serve as a source of referrals to other lawyers. After all, that’s why he hired you. And, in any event, it runs against your nature just to turn a new and interesting matter over to an outside lawyer, not to speak of the likely cost (a subject always high on the president’s list of priorities).

At a minimum, then, you are going to want to learn something about the questions he’s posed: Where can we safely and profitably franchise? Are there considerations that will dictate targeting A before C, or postponing G? And are there arguments militating in favour of one structural approach over others?

You know you will be turning to outside counsel, local or otherwise or both, but first you want to feel some level of comfort with the subject matter. A crash course on franchising in all the countries he’s identified would be useful, but not realistic even if one were available. You recall a series on *Doing Business in...*, covering all those countries and more, published by one of the international accounting firms, but you would have to go through separate volumes; and, you now remember, much of the coverage relates to

taxation, and there is nothing on franchising. The *Martindale-Hubbell Law Digests* are more manageable logistically, but give you nothing of any depth on the subjects of your interest.

Your *CCH Business Franchise Guide* reprints several franchise statutes in other countries. But there is understandably little on case law or implementing regulations, and very little commentary. And, as it turns out, most of the countries targeted by the president do not have franchise-specific statutes.

You recall having seen, or seeing a reference to, some surveys of franchise laws in other jurisdictions, both statutes and case law. You locate a couple of them on a shelf in your office, and see that they are regional, apparently produced as a series of papers for a conference on franchising in Asia, or in Latin America. Here is another, purporting to cover more countries; but it’s out of date, and the treatment is both inconsistent among the countries, and much too perfunctory for your needs.

What you need, you realise, is a treatment that covers franchise statutes, if they exist, both of the ‘disclosure’ and the ‘relationship’ types; implementing regulations; the principal statutes of a non-franchise nature but which will have a bearing on the transaction; key court decisions; and some practical guidance on the legal requirements to enter into the contemplated transaction. You want all that in a standardised format, so that you can draw distinctions and determine the availability of economies of scale. And you want it in a sufficiently distilled and focused form that you won’t need to read a treatise to find the few passages of direct relevance.

You listen again to the president’s final words:

*‘Call me.’*

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Welcome to *Getting The Deal Through*, and especially to *Franchise 2016*. In content and in format it’s been designed to meet the needs you have just identified.

There are two ways to use this volume and its complementary website [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com):

The traditional technique might be thought of as ‘vertical’. As to Country A, for example, you can simply read how the questions have been answered by a lawyer from that country who specialises in franchise law. You’ll find that the questions proceed roughly in the order you are likely to have posed yourself. And you’ll see that the answers seek to pinpoint what you need to know; where to learn more; and for what purposes you will most need outside counsel.

By the time you’ve read the chapters on Countries B, C, and D, you will have a pretty clear idea of whether there are any ‘show-stopper’ countries. And, short of those, you will have identified trouble spots that may dictate deferring consideration of one or more countries until some threshold issues can be explored.

But there is another, and less conventional approach, which might be thought of as ‘horizontal’. This is especially useful to the in-house counsel whose company executives – like your president – are considering a programme of entry into a number of countries and want to structure a plan that will not need to be redone ‘from scratch’ in the case of each country.

Consider how you can utilise this approach to make decisions that would otherwise need to be revisited in the case of each country:

- What structure will be most readily acceptable?
- Which provisions of my franchise agreement will most frequently raise issues of concern?

- How shall I organise and administer our franchise programme to minimise compliance problems?

Let's look at some specific examples of the questions you will be asking yourself, and how this book and [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com) can guide you to the answers:

- Perhaps my deal can be structured so it will not be a 'franchise' at all. That will certainly be a help in those countries with franchise-specific laws. If there is a recurring pattern in the definitions within the franchise statutes in a number of countries, that might well dictate reconsidering how to structure the fees, for example. See question 9.
- Even if it is a 'franchise', are there any exclusions or exceptions that can avoid coverage in A? Even better, is there a recurring pattern across countries, so that I should consider it in structuring the programme? See question 12.
- What are the language requirements? If virtually every country will require use of its own language, I might as well know that now. See question 38.
- I am especially concerned about confidentiality, because of the structure of my system. In how many of these countries should I anticipate problems? And how might that affect even our initial contacts? See question 35.
- What about the terms of the agreement? If I am going to be constrained in that regard in a number of countries, that may have a bearing on such decisions as the initial fee, the royalties and a range of other matters. See question 39.

- This is a new ball game for us. We need to know how to extricate ourselves if we've selected the wrong candidates, and we need to know what the ground rules will be as to termination in the event of default. See questions 20 and 28.
- What could be just as threatening to us as difficulty in terminating would be a requirement of unending renewals, which amounts to imposing a relationship in perpetuity. See questions 28 and 30.
- And what law will govern? If only lip service will be paid to the notion of the parties selecting the governing law, it's better to know that at the outset. See question 39.

Make no mistake about it. This slender volume will not make you an expert in the 'law of franchising' in A or B. And it will certainly not make you authoritative on the many other disciplines that will have a bearing on your franchise programme. What it can do, however, is to distil from otherwise inaccessible or indigestible masses of material what you would need to know about the interface between franchising and, for example, the choice of business form (see question 3); the tax system (5); trademark law (7); and competition law (40).

You may – ultimately you almost certainly will – need to consult with local counsel and tax counsel as well as your principal franchise counsel. And, you may well conclude that, with respect to any particular country, the author of the chapter in this book is the logical point of contact. But, armed with the material provided here, you will be able to do so in a far more informed, disciplined and cost-effective manner.

Now, Bob, it's time to return that call.

## Getting the Deal Through

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