

# VIRTUAL ROUND TABLE

CORPORATE *LiveWire*

## FRANCHISE LAW 2015



## MEET THE EXPERTS



Mercedes Clavell - Arco Abogados  
 T: +34 93 415 10 20  
 E: mercedesclavell@arcoabogados.es

**M**ercedes Clavell is a lawyer with more than 25 year experience in cross border transactions, both in large international firms and well known domestic firms. She has advised many foreign companies in their operations in Spain (franchising & distribution, but also M&A, commercial litigation, start up projects and real estate transactions). Now she's also advising Spanish franchising companies on their internationalization processes.

From 2011 to mid-2013 she joined, as General Counsel, one of the biggest franchisors in Spain, a leading urgent courier & logistics company with more than 750 franchisees in that moment, in order to prepare this company for its internationalization. She got a deep knowledge of all the areas in this company: franchising, marketing, sales, accounting & finances, IT, operations, Human Resources, Corporate Social Responsibility, etc. Some of the most interesting projects developed by her during this period were: re-structuration of the franchises network; implementation of several tools to mitigate late payments and improve performance by franchisees; negotiation of joint venture agreements with IT partners; sale & lease operations of an amount of logistic platforms, implementation of new data protection policies (the company provides courier services to the most important B2C sites), etc. It was a very useful experience that completed her know-how as legal advisor.

She also lectures on international distribution and franchising matters, to either young foreign graduates and to directors of franchising companies.



Jasmine L. Solivas-Dayacap - Bengzon Negre Untalan IP Attorneys  
 T: +63 2 813 0120  
 E: jsolivas@iplaw.ph

**J**ASMINE L. SOLIVAS-DAYACAP is a Senior Associate in Bengzon Negre Untalan IP Attorneys, a boutique law firm focused on the practice of intellectual property law.

Jamie received her Juris Doctor degree from the University of the Philippines College of Law in 2008 and her degree in Economics (cum laude) from the University of the Philippines Los Baños in 2004. She is a member of the Licensing Executives Society International, and the committee chair of the Licensing Executives Society of the Philippines.

Jamie has handled various licensing and franchising projects, inter partes cases, administrative complaints for IP violations, infringement and unfair competition cases, and enforcement proceedings. She has received WIPO training on copyrights, and general IP. She has been lecturing in universities, government agencies and private organizations on licensing and franchising, trademarks, and copyrights.



Peter Dillon - Siskinds LLP  
 T: +1 519 660 7818  
 E: peter.dillon@siskinds.com

**P**eter Dillon (www.franchiselaw.ca) is a recognized expert on franchise, licensing, distribution and MLM law in Canada. Former member of the Franchise Advisory Board of the North American Securities Administrators Association, and Governmental Expert to the International Organization for the Unification of Private International Law (UNIDROIT) in Rome. He is called to the Bars of Ontario and New York. Mr. Dillon is a widely published author, including Franchise Legislation in Canada, Canada's leading legal commentary on provincial franchise legislation. He is listed in L'Expert as an expert in franchise and distribution law, is ranked in the top 100 franchise attorneys in North America by Franchise Times, and is listed in the International Who's Who of Franchise Lawyers.

**MEET THE EXPERTS**



Dan-Michael Sagell - Sagell & Co  
 T: +4686115542  
 E: dms@saglaw.se

**J**unior Judge, District Court Huddinge County 1984-1987

Legal Counsel, The Stockholm House Property Owners Association 1987-1988  
 Legal Counsel, Foreningsbankernas Bank 1989-1990

Associate with Hedberg & Co. Advokatbyrå 1990-1992  
 Associate with Bjorn A Marklund Advokatbyrå 1992-1996  
 Partner at Sagell & Angsmark Advokatbyrå 1997-2001  
 Partner at Sagell Angsmark Anell Advokatbyrå 2001-2006  
 Partner at Sagell & Co. Advokatbyrå 2006



Juan Carlos Uribe - Triana Uribe & Michelsen  
 T: +57 1 601 9660  
 E: jcu@tumnet.com

**F**rom my involvement on copyright and trademark matters I have developed a strong practice on franchising and advertising law that focus on compliance with consumer protection statutes and third parties rights.

Recently advised the most important credit card brands, and companies involved in cutting edge technology and social media such as Intel and Facebook, as well as many other with equally demanding high standards of legal counsel.

Also with my IP expertise and contractual background I have helped foreign and local companies implement franchise operations in our country that take advantage of of the current propitious business climate. To name a few of the recent Franchise companies that have initiated their operations in Colombia with our help we have The Gap, P.F Chang's, Johnny Rockets, Villa Pizza, Engel & Volkers, Hard Rock Hotels, Hertz.



Paulo Yamaguchi - Tess Advogados  
 E: pyamaguchi@tesslaw.com.br

**E**xpertise in merger and acquisition transactions and in preventive contractual and corporate consulting, in addition to experience in litigation. Also active in the fields of energy, information technology, infrastructure and realty law.

Member of the International Relations Committee of the Studies Center of Law Firms (CESA).

Member of the OAB (Brazilian Bar Association) since 1998.



Stewart Germann - Stewart Germann Law Office  
 T: +64 9 308 9925  
 E: stewart@germann.co.nz

**S**tewart Germann who is acknowledged as New Zealand's leading franchising lawyer with over 35 years experience in this area, is a recognised national and international guest speaker at franchise conferences (New Zealand, Australia, USA).

Stewart Germann Law Office is New Zealand's longest established specialist franchising law firm and Stewart is one of only two New Zealand lawyers included in the International Who's Who of Franchise Lawyers for 2014.

Stewart's clients include many of New Zealand's best known national and international franchise brands and he has extensive franchising contacts worldwide and locally.

He is actively involved in international franchising and has published articles in the International Journal of Franchising Law.

# Franchise Law 2015

In our Franchise 2015 Roundtable we spoke with seven experts from around the world to discuss a broad range of topics including: labour and joint-employer issues in Spain, recent franchising trends in Canada, and an outlook on the advantages and disadvantages of owning a franchise. Featured regions are: the Philippines, Spain, Sweden, Canada, Brazil, Colombia and New Zealand.

## 1. Can you outline the main laws affecting franchising in your jurisdiction?

**Clavell:** In Spain we have Royal Decree 201/2010. It defines the franchising activity and establishes the minimum content of the disclosure document and the prohibition for the franchisor to receive any monies from any prospective franchisee before 20 days from the date when the disclosure document has been delivered to the prospective franchisee.

It also includes some clauses regarding registration of franchisors and the updating of the information provided to the Franchisors' Registry.

Apart from this basic law, there are many other laws affect franchising: IP, consumers' rights, unfair competition, etc. For the moment there is not any law establishing labour liabilities for franchisors derived from the franchisees' employees.

**Solivas-Dayacap:** There are no franchise-specific laws in the Philippines, but there is a hodgepodge

of statutes that affects franchising. In the main, the Intellectual Property Code of the Philippines (IP Code) has provisions that regulate technology transfer arrangements, including franchises. The National Internal Revenue Code (NIRC) and rules of the Bureau of Internal Revenue (BIR) regulate the tax aspect of a franchise relationship. The general rules on obligations and contracts outlined in the Civil Code of the Philippines apply to the aspects of the franchise relation where there are no specific statutes controlling.

**Sagell:** In Sweden, there is a disclosure law containing a list of information that the franchisor must present about the franchise system and the franchise agreement to a potential franchisee in good time before the signing of the franchise agreement, but a failure to hand over this information does not make the franchise agreement automatically null and void. The remedy is a fine to be paid to the government. However, there is also a possibility for a franchisee that has signed a franchise agreement with an onerous clause and that has not been informed

about the clause in question before the signing to claim that this clause is unreasonable because the franchisee was not informed about it beforehand, and consequently should be deleted from the agreement or adjusted by the court or the arbitral tribunal. Otherwise franchising is affected by the general commercial laws that are not aimed against certain kinds of business.

**Dillon:** The regulation of franchising in Canada is primarily a matter regulated by provincial law. To date, five provinces (Alberta, Manitoba, Ontario, Prince Edward Island and New Brunswick) have adopted franchise specific legislation, with another (British Columbia) on the way. Franchise legislation in Canada is primarily aimed at ensuring that adequate presale disclosure is provided to prospective franchisees, prior to signing a franchise agreement, or paying money to a franchisor. Provincial franchise laws also impose a duty of good faith and fair dealing in the performance of each party's obligations under the franchise agreement, and provide a right of free association amongst franchisees.

A wide variety of other laws may affect a franchise system, depending upon the nature of the franchised business. Laws of general application include the Federal Competition Act (price maintenance, refusal to deal, market restrictions, tied selling, and misleading advertising) the Trademarks Act, and Personal Property Security Registration statutes. Nine of Canada's provinces are common law jurisdictions, while the province of Québec is a civil law jurisdiction. In addition, Québec has rather onerous laws regulating the use of the French language in business for those systems doing business in Québec.

**Yamaguchi:** The main law is the Brazilian Franchise Law (Federal Law No. 8,955 of 15 December 1994). The existence of a franchise and franchisor as a business entity is regulated Brazilian Civil Code (Federal Law No. 10,406 of 10 January 2002) and/or Brazilian Corporations Law (Federal Law No. 6,404 of 15 December 1976), depending of the entity form (ex: limited liability company (limitada) and the corporation (SA)) The guidelines and rules of Brazilian Franchise Association

(ABF) are also relevant and applicable for the franchising activities.

**Uribe:** In Colombia, there is no specific legislation governing commercial franchise agreements. However, considering that franchise agreements usually involve the performance of other contracts regulated by law, such as distribution and trademark licenses, the articles contained in the Commercial Code for these contracts may affect the development of the franchise relationship.

Applicable trademark law demands that a trademark license agreement shall be executed in writing. Therefore, it is arguable that a franchise contract must be in writing to be valid.

Colombian legislation requires registration of trademark license agreement before the local Trademark Office (Superintendence of Industry and Commerce), to make the agreement opposable to third parties. This registration is not mandatory for the enforcement of the agreement between the parties, but it will be convenient to carry it out, to prove the use of trademark registrations of its relevance as evidence to defend the trademarks against potential cancellation actions.

In summary, the omission to register the agreement will not hinder either party's right to file claims against the other and to enforce the agreement, in accordance with the Decision 486 of the Andean Community, but neither party could blind third parties.

## 2. Have there been any recent regulatory changes or interesting developments?

**Clavell:** It is interesting to mention what is the situation in Spain regarding labour and the joint employer issues, which is not new, but related to some important changes in the US. In Spain there is not any law or regulation establishing the joint liability for labour issues between franchisor and franchisee. However, some judgements have jointly sentenced the franchisor to pay compensations to the franchisees' employees. The reason is because the labour court proceedings allow employees to file their claims not only against the employer but against any other related company without having to provide too many proofs at the starting point. Then it becomes the franchisor's responsibility to prove in court that it had not any direct relationship with the employee. On the other hand, labour regulations and case law provide that when a new

company develops the same activity in the same premises than a former company, this new company is liable for the first company's debts, especially those related to labour, social security and tax matters, but this joint liability affects all type of companies and not only the franchising ones. There are several tools to minimise this risk, from monitoring the fulfilment of the legal obligations by the franchisee, to acquiring the franchised business through a bankruptcy procedure of the franchisee.

In 2013 there was a very interesting judgment from the European Court of Justice (case C-117/12), that imposes an important limit to the scope of the non-competition covenants applicable after the termination of a franchise agreement: they should exclusively apply to the premises where the franchisee developed its activity, not to the whole territory where the franchisee was authorised to operate according to the franchise agreement (as it was understood prior to this judgment). Moreover, the non-compete post term obligations in franchise agreements should fulfil these other requirements in order to be valid:

a) To refer to goods or services which compete with the goods or

services included in the franchise agreement.

b) To be essential for the protection of the technical know-how transferred by the franchisor to the franchisee.

c) The duration of the non-compete obligation is limited to one year after the termination of the agreement.

These rules are applicable to all EU countries.

**Solivas-Dayacap:** Recently, the Philippine government signed into law the Philippine Competition Act. This Act aims to regulate, prohibit or penalise anti-competitive agreements, abuse of dominant position, certain anti-competitive mergers and acquisitions, among others. A Philippine Competition Commission shall be created to implement the national competition policy and the provisions of the Philippine Competition Act.

The exact impact of the Philippine Competition Act on the Philippine franchising framework is not yet clear. But it is interesting to note that while the Philippine Competition Act prohibits "imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom,

or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially,” it further states that nothing contained in the said law shall prohibit or render unlawful permissible franchising, licensing, exclusive merchandising or exclusive distributorship agreements such as those which give each party the right to unilaterally terminate the agreement; or agreements protecting intellectual property rights, confidential information, or trade secrets.”

**Sagell:** No.

**Dillon:** Unfortunately, most of the recent Canadian developments have not been positive from the perspective of franchising in general, and franchisors in particular. Canadian judges have taken a technical and mostly pro-franchisee approach to the interpretation of these relatively new statutes. This has resulted in fairly easy access by franchisees to the right to rescind the franchise agreement within two years of signing a franchise agreement, and thereafter to receive back all monies invested

in the business. Examples of minor defects that have allowed franchisees to rescind include a failure to sign the Certificate of Disclosure, even if the disclosure document is otherwise flawless and complete, and a wife being able to rescind an agreement even when compliant disclosure was provided to her husband. It has also resulted in personal liability for the full amount of the franchisee’s claim being affixed to the two officers and directors who signed the disclosure document.

**Germann:** In New Zealand a recent proposed change is to cartels, and the Commerce (Cartels and Other Matters) Amendment Bill 2011 could have a huge impact on franchising. The Bill was introduced into Parliament on 13 October 2011 but it has not yet been passed. Franchised businesses in New Zealand need to come to grips with the proposed legislation as there will be serious civil and criminal penalties for transgressors in the future. The Bill will introduce a new cartel prohibition, replacing the current prohibition on price fixing. The overall purpose of the Commerce Act which has existed since 1986 is to promote competition in markets for the greater benefit of the consumer. The Bill provides three exemptions for vertical supply contracts, joint buying arrangements,

and collaborative activities. Usually and in most franchise systems a franchisor will not be in competition with its own franchisees but that is not always the case. If a franchisor owns its own outlet then it might be found to be in competition with its franchisees. Similarly, where a franchisor sells online direct to the end consumer it may be in competition with its franchisees who will also be selling to the same consumers. The strict cartel provisions would include price fixing, restricting output and allocation of markets. Therefore, in my opinion at this point in time franchise agreements are at risk under the proposed Bill which could still be amended before becoming law.

**Yamaguchi:** No recent regulatory changes have occurred related to franchising. Nonetheless, there are currently two bills (PL Nos. 3234/2012 and 4.386/2012) which intend to revoke and replace the Franchise Law. The most significant changes proposed are:

- (i) broadening the concept of franchising to include production of goods;
- (ii) franchise agreements will not constitute a consumer relation, nor the formation of an economic group;

- (iii) improvement of the franchise offering letter (in Portuguese, *Carta de Oferta de Franquia* – “COF”) to require disclosure of additional and more detailed information;
- (iv) franchises may only be offered at least two years after (a) conclusion of the franchise business concept; (b) the company name or brand have been explored in Brazil or abroad by the franchisor; (c) a related company, or another company of the economic group;
- (v) the possibility for state-owned or partially government-owned companies to adopt franchise system in their operations;
- (vi) franchise contracts producing legal effects only in Brazil to be governed by Brazilian law;
- (vii) franchise contracts that produce cross-border legal effects will be governed by Brazilian law, unless the parties expressly agreed otherwise;
- (viii) a foreign party in a franchising business must permanently hold a qualified attorney-in-fact resident in Brazil, with powers to represent such party in or out of court, including powers to receive service of justice and summons; and

(ix) the possibility for parties to settle disputes by arbitration.

**Uribe:** No

**3. What impact could the National Labor Relations Board’s “joint-employer” decision have on franchise businesses in the United States, with particular reference to minimum wage laws and Obamacare’s definition of full time employees?**

**Dillon:** Although the NLRB decision only affects US franchisors and franchisees, the same issues pertain to people engaged in franchising in Canada. In a “joint employer” relationship, the franchisor could be held jointly liable with the franchisee for the enforcement of labour, wage and health and safety legislation, amongst other things. The scenario also exists for franchisees themselves to be found to be employees of a franchisor, and not independent contractors. I’m not aware of any Canadian decision that has yet found a franchisor to be a joint employer of a franchisee’s employees, nor to my knowledge has there ever been a decision in which a franchisee was found to be an employee of the franchisor. This is generally because the franchise agreement itself will

usually clearly specify that the parties are independent contractors. It’s also a result of the fact that the franchise relationship does not typically satisfy the test for employee status in Canada, which is a fourfold test. First, in most franchise relationships, the franchisor does not come close to exercising the kind of control over a franchisee’s day to day operations (as opposed to prescribing the System and general parameters) that would be necessary to create a joint employment relationship. Second, franchisees typically own all of the tools and other equipment necessary to perform their functions. Third, the franchisee typically bears the chance of profit and risk of loss arising out of the operation of the business. Fourth, franchisees typically run independent businesses that are not integrated into the operations of the franchisor. Given these facts, I think it unlikely that a decision similar to that of the NLRB will make its way into Canada and for that I’m grateful.

**Uribe:** The decision had no impact in Colombia. However, in such case that the Franchisor imposes global labour policies applicable to the Franchisee’s employees, in the event of a claim arising from a dismissal caused in compliance with those policies, liability between the Franchisee and the Franchiser may

exist.

**4. What are the advantages and disadvantages of owning a franchise?**

**Clavell:** For the franchisor, the advantages are that a franchisee usually is more involved in the development of the business than an employee, and that it provides a quick expansion of the business without a high need of capital.

The disadvantages are the less control that the company can have over a franchisee, the necessity that the financial model includes an allocation of the costs and profits that is fair and attractive for the franchisee, and the risk of competition by the franchisee, especially at the end of the agreement. For the franchisee, the advantages are the possibility of having a business that has already been proved to be successful, the prestige of the brand, the support and innovation provided by the franchisor and possibility of sharing experiences with other franchisees.

**Sagell:** The main advantage from owning a franchise is that you will operate under a well-known trade mark and receive know-how and support from your franchisor compared to starting

your own business from scratch under a trade mark nobody so far has heard of and that you must build up your own know-how by yourself. The main disadvantage is that you must strictly conform to the franchise concept and that your business can be harmed by another franchisee in the franchise network who does not comply and thus disappoints the customers.

**Dillon:** This question depends on the perspective taken; i.e., whether the question is asked from the perspective of the franchisor, or from the franchisee.

From the perspective of the franchisor, the greatest single advantage to franchising is the opportunity to access the capital of individual investors in order to fund system growth. Without access to such capital, the system must either grow organically from its retained earnings (typically a slow process), or access the capital markets, like Starbucks did (which requires a certain market capitalisation in order to accomplish).

From the perspective of the franchisee, there are numerous advantages. The greatest single advantage is brand awareness. An economic study conducted in Ontario a number of years ago disclosed that sales by franchise

systems were typically substantially higher than non-franchised systems. This is because consumers have become extremely brand conscious. In simple terms, consumers are willing to sacrifice the occasional high quality product that they might have to search out from a non-franchised vendor – but risk a highly unsatisfactory purchase – in favour of a more mediocre but consistent and predictable product from a well-known (franchised) brand. Franchisees also benefit from a number of economies of scale, such as bulk buying, lease negotiating power, centralised marketing and experience with design and build, to name just a few.

The greatest single disadvantage facing franchisors in Canada is the cost, complexity and risk associated with franchise disclosure. This includes the risk of personal liability to the signatories of the franchise disclosure document. Another significant downside to franchising is the growing difficulty in finding good franchisees; i.e., people who are willing to work hard and follow a system. Both of these qualities seem to be in short supply.

**Germann:** If you choose a solid brand protected by a registered trademark and you go with an experienced franchisor

then you should be more successful than if you purchase a non-franchised business. There are many operational advantages including faster network expansion, better distribution facilities, better training, being provided with manuals, better quality control, more consistent standards and products, more back-up from a franchisor who will help eliminate errors and find shortcuts to improve your business, and better service for customers. Like any business there are disadvantages which include having to follow procedures as stipulated and set out in the manuals, completing financial reports for the franchisor, attending ongoing training, and having to attend annual conferences. However, in my opinion the advantages far outweigh the disadvantages. The key thing to remember is that a franchisee operates an independently-owned business but under a brand and subject to rules. If a franchised business fails then the franchisor has no legal liability but will often come to the party to minimise brand damage.

**Yamaguchi:** Owning a franchise brings consolidated trademark and products/services, structured under a business plan, cooperation and coordination of the franchisor.

Access to the already existing trademark, products and services may have an additional cost (franchising fees), a more restricted space for design and marketing development (once all those are already created and established in the franchise system) when compared to developing a new idea from scratch.

**Uribe:** The advantages are the ease of obtaining and comprehending know-how that could be achieved only through a trial and error basis and the fact that it provides the Franchisee with consumers that are already familiar with the product.

On the other hand the main disadvantage is the lack of flexibility in implementing changes that the Franchisee might require pursuant with shortfalls that have been identified through its experience.

### 5. Is now a good time to start a franchise?

**Clavell:** Yes, subject to the performance of careful market analysis and the adaptation of the financial model. The franchised businesses have proved, during all these years of deep economic crisis in Spain, to perform better than non-franchised business. Now that

Spanish economy is recovering, it would be easier to start and run a profitable franchised business. This is also applicable to the launch of foreign master franchises in Spain.

**Dillon:** Again, the answer to this question depends on the perspective of the person asking the question.

From the perspective of a franchisee, whether it's a good time to start a franchise depends on two factors. First, the personal attributes of the franchisee prospect. Does he have adequate capital? Adequate experience? Relevant experience? The support of his family? The personality type that suits him to the business under consideration? Some considerable soul-searching needs to be done in order to determine that the answers to these questions are all answered in the affirmative. Second, the franchise prospect needs to satisfy himself that the franchisor and its concept is sound, and that the particular location to be operated by the franchise prospect either has a demonstrated history of profitability, or there are solid bases to believe that it will be profitable. This requires some considerable due diligence by the franchise prospect (most notably speaking to numerous existing and former franchisees and

reviewing their financial statements) and the enlistment of capable professional advisors, both legal and financial.

From the perspective of the franchisor, the matter is perhaps more complex. First, Canada's franchise laws have created high barriers to entry. Disclosure laws must be scrupulously complied with and the consequences of a failure to comply are severe (including personal liability of officers and directors). However, if financial forecasts demonstrate a superior profitability under a franchise model and hence disclosure and compliance costs can be managed, the next question becomes whether the concept will be capable of duplication, whether there is an expanded market for the goods and services of the franchisor, and a ready market of franchisees willing to purchase franchises. Again, the answers to these questions must be strongly in the affirmative prior to commencing franchise activities. The rule of thumb is that any concept should have operated for a minimum of two years with a minimum of two locations prior to any steps being taken toward franchising.

**Yamaguchi:** Considering the current bad economic scenario in Brazil,

we believe starting a franchise will bring more chances of success when compared to developing an idea from scratch, since the franchisee will start with a more developed idea.

**Uribe:** Yes, mainly for three reasons. The first is that local customers feel more attracted to products with recognised prestige that have created a name for themselves in the market combined with the fact that Colombian people tend to prefer international over national products; the second is the internationalisation process of the economy that has led to an access to international markets and easy movement of capitals; and the third is the current legal environment that allows conducting businesses in a friendly manner.

**6. What questions should you ask before buying a franchise?**

**Clavell:** In Spain it is mandatory for the franchisors to provide the *Documento de Información Pre-Contractual* (Disclosure Document), whose minimum content is defined by the law. Apart from this, it is necessary to make a prospective profit & loss account, and last but not least, to talk to several franchisees and also, if possible, to those persons who have terminated

the franchise relationship.

The minimum content of the Disclosure Document should be:

- (i) Information regarding the characteristics of the franchisor
  - Name, address, and franchisor's ID number.
  - Data of inscription at the company's register.
  - Last balance sheet approved with description of the paid up and subscribed capital.
- (ii) Evidence of property of trade marks for Spain, the title of property of trademarks under which the franchise is being ruled, and information about any claim against them.
- (iii) A general overview of the business sector to which the franchise belongs and an estimated investment and expenditure plan to be carried out by the franchisee for the setting up of a standard establishment.
- (iv) An explanation of the franchisor's experience, including:
  - Date when the franchise was created
  - Main phases of its evolution

- Development of the network

- (v) A general description of the franchise including an explanation of its know-how and technical and commercial assistance that will be parted by the franchisor
- (vi) Structure and size of the net in Spain, including:
  - An explanation about how the net is organised in Spain
  - Number of establishments that form part of the franchise in Spain, mentioning those franchises owned by the franchisor and those owned by independent franchisees.
- (vii) A list of franchisees who have terminated their franchise contracts in the two previous years, as well as the cause of termination
- (viii) A statement of the franchise contract, with a specific mention to:
  - Rights and duties which it grants and imposes
  - Termination and renovation clauses
  - Economic terms and conditions
  - Exclusivity requirements

- Any limitation to the franchisee’s right to transfer the franchised business

**Solivas-Dayacap:** The Department of Trade and Industry (DTI) has issued an “Advisory on Due Diligence to be Undertaken by a Prospective Franchisee,” which enumerates what potential franchisees must secure from the franchisor before acquiring a franchise, including but not limited to: Franchisor’s DTI/SEC registration, Franchisor’s contact details and background information; Contact number and business location of existing franchisees, description of the business concept, including brand image, brand personality, unique selling proposition, target market, mission and vision; full disclosure of the franchise business’ financial requirements and fees; draft franchise agreement; etc. In addition, potential franchisees should always confirm what they will get out of the franchising relationship, such as marketing/technical support, training, use of intellectual property. Franchisee should also double-check if the IP being licensed is in fact valid and enforceable.

**Sagell:** There is of course a list of questions that should be asked but it is very important that you get from

the franchisor a list of the present franchisees in the network and that you contact them and ask if the franchisor is trustworthy and keep his promises.

**Dillon:** The decision to buy a franchise should not be made hastily. The prospective franchisee should take his time and carefully assess at least four or five different prospective investments. Franchising is typically a long-term relationship and there needs to be an excellent match of personality type, skill level and financial commitment. Here’s a brief overview of some of the issues to consider:

- what is the reputation of the company and its products or services?
- how long has the franchisor been in business?
- is the franchisor financially stable?
- does the concept seem like one that will endure, or is it more of a fad?
- what is the success rate of franchisees of the system?
- why have the franchisees who have left the system or failed, done so?
- what territorial rights will I receive?
- what competition from other sources exists within my territory?
- how much initial training and ongoing support does the franchisor offer?

- speak to at least six existing and former franchisees of the franchise and review their financial statements. Ask them what their experience has been with the franchisor and with the success of the concept being franchised.
- what is the term of the franchise agreement; can I earn a respectable return on investment during that period of time?
- what renewal rights do I have?
- what are all of the costs of acquiring and operating the franchise?
- do I have an accountant and lawyer experienced in franchising to help me review the proposal and negotiate the best deal possible?

The Michigan Atty. Gen. has an excellent checklist for those considering the purchase of a franchise that can be found at [www.michigan.gov/documents/mifran\\_guide\\_40368\\_7.pdf](http://www.michigan.gov/documents/mifran_guide_40368_7.pdf).

**Yamaguchi:** Besides technical points of the business, the Brazilian Franchise Law sets out the information that must be contained and provided in the COF in clear and accessible written language and include the detailed description of the business.

COF must contain the following

information on the franchisor:

- (i) summarised background, type of company and full corporate name of the franchisor and of all the companies directly connected with, as well as the names by which they are known and their addresses;
- (ii) the balance sheets and financial statements of the franchisor for the two previous years;
- (iii) an accurate description of all the judicial claims involving the franchisor, the controlling companies and the owners of trademarks, patents and copyrights related to the operation and their sub-franchisors related to the franchise system, or claims which may prejudice its functioning;
- (iv) a detailed description of the franchise and a general description of the business and activities to be carried out by the franchisee;
- (v) a profile of the ‘ideal franchisee’: previous experience, level of education and other requirements he or she should hold;
- (vi) requirements about the direct involvement of the franchisee in the operation and management of the business;

- (vii) specifications concerning: the estimate of total initial investment for the acquisition, implementation and start-up of the business; the value of the initial fees and guarantee, if applicable; and the estimated value of the premises, equipment, initial stock, and payment conditions;
- (viii) clear information about applicable charges and other amounts to be paid by the franchisee to the franchisor or to third parties designated by the franchisor, detailing the respective basis for the calculation and purposes, indicating: (a) the regular remuneration for using the system; (b) the trademark or for the services effectively provided by the franchisor to the franchisee (royalties); the rent for equipment or premises; (c) the marketing fee or similar; (d) the minimum insurance; and (e) any other amounts due to the franchisor or to related third parties;
- (ix) a complete list of all the franchisees, sub-franchisees and sub-franchisors of the franchise system, as well as any that have left the franchise system in the

- preceding 12 months, with names, addresses and telephone numbers;
- (x) information regarding the territory, namely: whether the franchisor guarantees to the franchisee exclusivity or preference over a certain territory and, if so, in what conditions; and whether the franchisee is allowed to sell products or provide services outside the territory or whether the franchisee is allowed to export;
- (xi) clear and detailed information about the franchisee's obligation to acquire any property, services or products necessary for the implementation, operation or management of the franchise, exclusivity from suppliers designated and approved by the franchisor, providing the franchisee with a complete list of these suppliers.
- (xii) a description of what is effectively offered to the franchisee by the franchisor, concerning: system supervision; instruction services and others provided to the franchisee; training programme for the franchisees; training programme for the franchisees' employees;

franchise manuals; assistance in the analysis and selection of the area where the franchise will be installed; and layout and architectural patterns of the franchisee's premises;

- (xiii) the situation with the Brazilian Patent Office of the trademarks or patents whose will be authorised by the franchisor;
- (xiv) information on the situation of the franchisee after the termination of the franchise agreement, particularly regarding: know-how or industry service to which the franchisee had access during to the franchise operation; and any non-compete provisions; and
- (xv) a draft of the franchise agreement and, if applicable, the standard franchise pre-contract, with the full text, including appendices and duration.

Besides that, from a legal perspective, seeking for information about disputes between franchisor and franchisees, franchisor and suppliers would be relevant. Reputational issues, disputes on intellectual property and others should also be considered as part of an initial background check.

**Uribe:** There are several questions that

should be asked:

- Do you have the financial resources required to buy a franchise?
- Are you aware of the economical and emotional sacrifices required for the operation of a franchise?
- Have you drafted a complete financial model?
- Do you have additional sources of financing?
- Do you have past experience in business that will allow you dully operate the franchise you wish to purchase?
- Are you planning on becoming an employee in the type of business you are contemplating entering into?
- Are you planning on being and employee of the franchise?
- Have you contemplated whether the product or service you propose to sell has a market in your territory?
- Have you determined the range of prices on which the product or service of the franchise you intend to buy can be sold to consumers?
- Are you being advised by an experienced franchise attorney?
- Have you inquired the success of the franchise over the subsequent three years after purchase?
- Have you inquired about the costs and demonstrated results of the

previous years of the franchise?

- What information and know-how will be provided by the Franchisee without and additional value?
- Pursuant with the franchise agreement, what are the renewal policies?

**7. Are you noticing any current trends or strategies?**

**Solivas-Dayacap:** It appears that many foreign businesses have been entering the Philippine market by finding a local franchise partner. There are many local business groups that already have a good business track record, and these established business groups are often tapped by the foreign business for the Philippine expansion. On the other hand, local entrepreneurs /small and medium enterprises usually look to Philippine companies when seeking franchising opportunities.

**Dillon:** In Canada, there does seem to be something of a trend toward the franchising of professional services and in particular, accounting services. These professionals want the expanded brand power and resources that come from a franchise organisation, while retaining the independence of an independently owned and operated office at the franchisee level.

There is, frankly, also a trend away from franchising, in response to Canada’s very strict franchise regulatory requirements. I have seen more systems move in the direction of distributorships in order to avoid the regulatory burdens of franchising.

**Yamaguchi:** In recent years, franchising sector obtained steady and strong growth on both number of franchisees’ establishments and revenues. However, due to the economic crisis, we believe the growth will reduce. In accordance to the Brazilian Franchising Association (in Portuguese, *Associação Brasileira de Franchising – “ABF”*), the franchising sector had in 2014 a development of 8.8% in revenues compared to 2013, and expects to increase in 2015 around 7.5% in 2015, in comparison with 2014.

**Uribe:** Currently the trend is franchise fairs held by groups of Franchisors seeking to jointly present business opportunities.

**8. What kind of franchise is currently proving popular at the moment, and why?**

**Solivas-Dayacap:** Food and beverages is still one of the most popular franchises in the Philippines, owing most likely to the Filipinos’ love affair with food.

**Dillon:** It seems like we can’t get enough franchised food concepts. If I had a nickel for every new hamburger franchise that started up, I’d be wealthy. The trend generally is toward more niche marketing. So the burger concept sells organic beef with a complex menu to cater to discerning burger diners.

Staying with the food segment, there is also a discernible trend toward organic food generally. Several new concepts I’ve seen include home delivery of organic, gluten-free, antibiotic free etc. fresh or frozen foods.

All kinds of services continue to be franchised. Many in the home service sector. Many of these services are home-based or vehicle based. The entry cost is relatively low. In many cases, the income potential is also relatively low and franchisees may find that they are “buying themselves a job.”

**Yamaguchi:** Food sector is traditionally the one proving to be the biggest and showing the biggest growth. IT sector is also showing great improvement, with focus on cloud services and security.

**Uribe:** As per the information provided by the Colombian Chamber of Franchises (COLFRANQUICIAS), during the last

Andean Fair of Business and Franchises of Bogotá (FANYF) the sector with the greatest movement was services, with innovative proposals and solutions in health, education, childcare, language centres, advertising services, office solutions, gyms, beauty salons, car washes among others.

**9. Is franchising more secure than an independent start-up company in the current economic climate?**

**Clavell:** There is an economic environment where obtaining a master franchise could be an excellent deal during a long term, and it is in developing countries. Nowadays we are seeing that many countries are increasing their wealth year by year and a huge number of citizens are joining the middle class and have a big appetite for quality but reasonably priced products and services. In this context, the local entrepreneur who is able to bring and expand a franchised business to these territories has many possibilities of being very successful. On the other hand, in more mature economies, like the Western Europe and US countries, there are always good opportunities to succeed with a franchise thanks to the innovative spirit of these businesses, but more accurate

market research should be done.

**Dillon:** Logically, franchising will always be more secure than an independent startup company. This conclusion is based on a couple of fundamental assumptions however. One is that the franchise concept has been in existence for a few years, and has been replicated at one or more corporate locations. This means that the franchisor has had some experience in scaling its operations, and testing its concepts in different markets, and in ensuring that the successful locations not based on its unique location or his individual personality. If these assumptions don't apply to the franchise concept under consideration, then again, logically, a franchise system would not be more secure than any other independent startup.

**Yamaguchi:** Regardless of the economic climate, a franchise tends to be safer than an independent start-up company, once the franchise holds a brand and more developed business structure and know-how that will have to be conquered by the independent start-up company during its development.

**Uribe:** Yes, provided that the products to be sold (if that is the case) should not be acquired abroad, as the current

devaluation of the Colombian peso is making merchandises purchased abroad non-competitive.

#### 10. What are the main difficulties surrounding cross-border franchise agreements?

**Clavell:** Apart from selecting the right franchisee, from the business point of view, I'd mention to bridge the cultural gap, to conduct thorough market research and to be ready to adapt the operations, goods or services.

The agreement should include the necessary flexibility to allow the network to grow and the ability to manage it properly in changing circumstances, for example, allowing the reduction or the extension of the territory initially granted to the franchisee, depending on its performance. In the case of master franchisees, the agreement should facilitate the assignment of the franchise agreements to a new master franchisee or to a subsidiary of the franchisor when necessary.

Finally, I'd mention the protection of the know-how and the brand, and the risks related to litigation and the enforcement of the judgment in a foreign country.

**Solivas-Dayacap:** In terms of regulation, foreign franchisors have a difficult time contending with some statutory regulations governing franchise agreements that are apparently unique in the Philippines. There are certain typical franchising clauses found in most franchise agreements that are actually prohibited under Philippine law. Philippine law also mandates the inclusion of certain clauses in all franchise agreements. These idiosyncrasies are some of the regulatory hurdles that foreign franchisors must contend with.

In practice, since most foreign franchisors do not have physical presence in the Philippines, it is obviously difficult to ensure that the franchisees are truly complying with the regulations and standards of the franchisor. Some approach this hurdle by combining physical monitoring (going to the Philippines to physically inspect franchisee's operations and compliance) with technologies like centralized POS system and cloud computing. And of course, it is crucial to find the correct franchising partner.

**Sagell:** The main difficulty is to really understand the business mentality in the market you are looking at and also the preferences the consumers have in

that market. A franchise concept that is well-known and popular in the home market of the franchisor can really run into trouble in a foreign market if the consumers there cannot understand what needs the franchise concept in question is trying to satisfy.

**Dillon:** There really is no such thing as a "cross-border" franchise agreement. Franchise agreements must always respond to the legislative and cultural needs of the jurisdiction in which they are intended to apply. A franchisor who does not conform his documents to the local jurisdiction is at considerable risk of having his documents found to be unenforceable.

Occasionally, one does find "multijurisdictional" franchise agreements. These are agreements that are prepared with the intention that they will be used in multiple jurisdictions. The same basic principle applies to these agreements; namely, that the legal and cultural requirements of each jurisdiction in which they are to be used must be considered and included in the document. The challenge is to maintain clarity and conciseness in these types of documents, and to ensure that a provision intended to apply in one jurisdiction does not nullify or negate a provision intended

to apply in another jurisdiction.

**Germann:** The main difficulties include clauses in cross-border franchise agreements covering restraint on competition, enforcement of minimum performance objectives, providing security for when monies are owed on products supplied by one party, governing law and dispute resolution. Restraint on competition is particularly important when a franchisor empowers a person or company in an overseas jurisdiction to act as an area developer or master franchisee in promoting and developing the system in that particular jurisdiction. Restraint of trade or restraint on competition clauses can be too widely drafted making them ineffective or unenforceable. In New Zealand the courts do not like restraints per se and section 8 of the Illegal Contracts Act 1970 allows the courts to strike out or edit restraint clauses which are too wide. Governing law is an interesting topic and overseas franchisors often tend to prescribe that the governing law or choice of law must be the laws of where the franchisor operates. That sounds good but when the going gets tough and an overseas franchisor needs to take swift action in another country against a defaulting party then I prefer the governing law to be the law of the local country. The

franchisor can easily instruct local counsel to act on its behalf against the defaulting master franchisee or area developer and often the result is a lot quicker and less expensive.

**Yamaguchi:** Besides the fact the both the disclosure documents and franchise agreements must be clearly and accessible written in Portuguese, with detailed description of the business (it can also be written in more than one language), the franchise contracts that produce cross-border legal effects will be governed by Brazilian law, unless the parties expressly agreed otherwise. Specifically for Brazil, the use of foreign jurisdiction will make execution of the agreement and enforcement of an award difficult. The process of obtaining the exequatur (enforcement of a foreign decision or arbitral award) may take years.

**Uribe:** There are four main difficulties. The first is the erroneous idea that a franchise can be granted without the previous registration of the trademark before the local Trademark Office (Superintendence of Industry and Commerce); the second are the difficulties related to tax, customs and foreign exchange regulations in Colombia; the third are local licensing regulations that seem like contradictory

to the business essence such as the prohibition of non compete clauses; and the fourth are cultural aspects that should be taken into account before initiating any negotiation.

### 11. What should be included in a well-drafted franchise agreement?

**Clavell:** A well drafted franchise agreement should have three main parts:

- (i) Clauses regarding the commencement of the relationship: territory, trademarks, know how, fees and royalties, training, exclusivity, starting of operations, etc.;
- (ii) Clauses regarding the development of the relationship: products and services, prices, minimum sales figures, marketing actions, support, innovation, adaptation, reporting, audits, etc.;
- (iii) Clauses regarding the end of the relationship: term, renewal, causes and consequences of termination, transfer of the franchised business, non-competition, dispute resolution, etc.

Besides, an initial part containing

the definitions, and a final part with miscellaneous clauses and the guarantees to be provided by the franchisee and/or its shareholders are usual in franchise agreements.

Some clauses that require special attention are those related to exclusivity and non competition after the agreement is terminated, and to what persons this clause should affect: the franchisee and all its partners, if the franchisee is a company, and maybe relevant employees of the franchisee.

**Solivas-Dayacap:** Every well-drafted franchise agreement should clearly define, among others, the system and IP being licensed/franchised; territory; the term of the agreement and options for renewal; termination and its effects; events of default; obligations and covenants of each party; franchisor's performance and operation standards which franchisee must comply with to ensure uniformity; effective control by franchisor of the quality of the goods or services offered by franchisee under the franchise; franchisee's specific obligations with regard to using and protecting franchisor's IP; trade secrets and other proprietary and confidential information; the assistance (training, commercial, technical) which franchisee should receive; the consideration/fees,

method of payment, and tax incidence of all payments relating to the franchise agreement; monitoring and inspection requirements; options in case the parties are unable to comply with their obligations; warranties; governing law, venue of litigation, and dispute resolution; and indemnification.

Of course, specific to the Philippine setting, it should contain all the mandatory provisions and none of the prohibited provisions specified in the IP Code.

**Sagell:** A well drafted franchise agreement shall contain all the franchisor's and the franchisee's respective rights and obligations in a clear and understandable way. No rights or obligations shall come as a surprise to the other party and shall not be opened to different interpretations.

**Dillon:** I believe that a well-crafted franchise agreement will protect the system. Protection of the system is of paramount importance not just to the franchisor, but to all other franchisees. In every system, at one time or another, franchisees with destructive personalities will attempt to undermine the franchisor. This may be through a class-action lawsuit, the formation of a franchisee association, or some

other attempt to gain disproportionate control over a process which, frankly, was never intended to be democratic. The best course of action for a franchisee who has lost faith in the leadership of the franchisor, or in the potential of the system in concept, is to sell as quickly as possible and move his investment into a different vehicle – whether that is a different franchise system or different investment altogether. In order to protect the system, the agreement must contain adequate measures to direct if the quality of goods and services in the manner in which they are distributed. It should also provide for adherence to an operations manual, because the franchise agreement itself cannot prescribe operational standards. Finally, it should have consequences for a failure on the part of the franchisee to adhere to the agreement. Unfortunately, in a common-law jurisdiction, any such agreement ends up being quite lengthy!

**Germann:** The franchise agreement is the key legal document necessary to protect the franchisor and the franchisee. The first clause is usually the grant of franchise whereby the franchisor will grant a licence to use the intellectual property including the trade mark and the system to a franchisee who must follow the obligations as set

out in the franchise agreement. Key obligations on the franchisee include promotion of the business, not to prejudice the franchisor's intellectual property, to pay all fees including royalty, training and marketing, to participate in promotions and programmes, to maintain secrecy and confidentiality about the system and the manuals, to act in good faith by acting loyally and faithfully towards the franchisor, to adhere to all relevant laws including health and safety, to attend meetings and conferences, and to handle customer complaints on a timely basis so there is no brand damage. The agreement must contain obligations by the franchisor including to train franchisees, to provide management assistance, to promote good relations between all franchisees, to act in good faith towards the franchisee, to provide the manuals and update them from time to time, and to protect the intellectual property of the system. The agreement must include provisions allowing for transfer or assignment by either party, what happens upon termination, restraint on competition, how to handle social media, and compliance with the code of practice and code of ethics as published by the Franchise Association of New Zealand (FANZ). It is also essential for the agreement to contain a dispute resolution clause and

the usual mode of resolving disputes is by way of mediation.

**Yamaguchi:** In addition to the regular and common topics expected in any agreement, we highlight the need to include the following terms:

- acquisition of products and services providers from specific suppliers and clear restrictions to buy from third-parties;
- limitation for tax and labour liabilities;
- clear definition of ownership of copyrights, trademarks, know-how and intellectual property material used by the franchisee, and developed by the parties;
- non-compete;
- non-soliciting;
- dispute resolution method;
- the applicable laws for the agreement.
- ethical practices, compliance and applicable anti-bribery and corruption laws;
- clear definition for assignment, transfer or termination of the agreement, penalties;
- establishing the franchisor rights to access to franchise's information;

**Uribe:** The following clauses should be included in any franchise agreement:

- Scope of the agreement;

- Definitions;
- Territory;
- Term;
- Documents to be delivered;
- Initial franchise fees and payments;
- Other fees;
- Payment procedures;
- Taxes;
- Obligations of the Franchisor;
- Obligations of the Franchisee;;
- Trademarks, service marks, trade names and logotypes;
- Patents and copyrights;
- Restrictions on foods and services offered by the Franchisee;
- Renewal, termination, repurchase, modification and assignment of the agreement;
- Publicity and marketing;
- Sub-franchising dispositions;
- Audit rights over the Franchisor by the Franchisee;
- Breach of the terms of agreement;
- How communications among the Parties should be conducted;
- Indemnification;
- Applicable law, and;
- Dispute resolution;

**12. How important is it to develop a financial model?**

**Clavell:** It is essential, because the essence of franchising is that they are “successful” business models,

therefore the franchisee should obtain a reasonable profit or the franchise would disappear. To have a good financial model allows the franchisor to appoint the right franchisees and to provide them with the necessary advice and support. A balanced (which does not necessarily mean equal) distribution of the profits obtained from each product or service between franchisor and franchisee is essential for the success of the network, and here the financial analysis are essential.

**Dillon:** The old adage goes: “fail to plan, plan to fail.” Financial modelling needs to be conducted at all stages of franchise development, both at the franchisor and the franchisee level. In theory, an accurate financial model would tell a franchisor or franchisee whether the concept and system, or a particular location under consideration, was viable. The financial model that the suggested non-viability should likely prevent any further steps being taken toward investment or implementation. Failure to properly model following startup can spell financial disaster. Ironically, this sometimes befalls very successful franchisors and franchisees. One franchisor I represented years ago had been remarkably successful and sold hundreds of franchises. However, the franchise system was very capital

intensive and required a lot of cash to keep running. At a certain point, the sale of franchises tailed off and income from new franchise fees dropped. Unfortunately, the franchisor did not have an adequate financial model, and the royalty income from the existing franchisees was not adequate to keep the franchise system running.

**Yamaguchi:** A well-developed financial model is paramount for a clear and precise analysis of the business, seriousness and professionalism of the franchisor. As described in item “vii” in response to question 6, the business plan is an essential part of the franchise system once it is a mandatory item to be provided in the COF for the applicants.

**Uribe:** It is essential as either way accusations of deception may arise from the franchisee to the franchisor alleging lack of clarity in the information provided by the latter.

**13. How is cloud computing changing the way franchises do business?**

**Clavell:** Not necessarily cloud computing, but internet and the development of software which the franchisees should mandatorily use, allow franchisors to monitor on real

time many aspects of the franchisees’ activities. This access to timely and accurate information should lead to an optimisation of the management of the network by the franchisors.

**Solivas-Dayacap:** Cloud computing has opened up some barriers to cross-border franchising relationships. By using remote servers hosted on the internet to centralise data processing, franchisors are able to ensure compliance without actually having to go to the Philippines. Monitoring has become more cost-efficient. This does not only benefit the franchisor, since such cost-efficiency actually trickles down to the franchisee.

**Dillon:** For the most part, cloud computing does not directly change the way most franchises do business. However, it has provided a tremendous resource, particularly to franchisors, to provide additional computing backbone and bench strength to their system, at a relatively reduced cost (remember those rooms full of servers? They’re all gone). I always encourage my franchisor clients to provide as much of the computer resources needed by the franchisee as possible. This keeps the franchisee’s costs down. It also provides the franchisor with enhanced control over the information generated by his

franchisees. This is vitally important in order to understand what's working and what's not. It's also an invaluable service that the franchisor can provide to franchisees, by doing such things as benchmarking costs, and advising franchisees when they are out of line with the average costs throughout the system.

**Yamaguchi:** We believe the cloud computing tools can help both the franchisor and franchisee to exchange information faster and more easily. The storage of information in cloud, helps the franchisor and franchisee to supervise and manage sales, inventory, activities, employees and economy wirelessly, which can be used to accelerate the franchise's growth and/or the overcome of possible issues.

**Uribe:** I have not faced cases in which cloud computing has been essential in the way franchises do business, however I believe it could gain a major importance in the services sector.

**14. Can you outline how disagreements or disputes are resolved?**

**Clavell:** Some franchise networks have a kind of advisory board formed by members representing franchisees

and franchisors who generally deal with actions that affect the whole network. However, in Spain serious disagreements between franchisors and franchisees used to be solved in Court, because commercial mediation is not usual in Spain and arbitration is unpopular for these cases.

**Solivas-Dayacap:** The IP Code requires all franchise agreement to stipulate that the laws of the Philippines shall govern the interpretation of the agreement and in the event of litigation, the venue shall be the proper court in the place where the franchisee has its principal office. Thus, the weapon of choice in resolving disagreements and disputes has been through arbitration. If the franchise agreement provides for arbitration, the IP Code requires that either the Procedure of Arbitration of the Arbitration Law of the Philippines or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) shall apply. It also requires that the venue of arbitration shall be the Philippines or any neutral country.

**Sagell:** Since most franchise agreement have dispute clauses that refer all disputes under the agreements to

arbitration proceedings there are few franchise cases in the public records. However, a majority of disputes are settled by amicable out-of-court agreements. The most common cases before the arbitration tribunals according to my experience are disputes where a franchisee claims that the franchisor has not met its contractual obligations. It could be insufficient training in relation to the fees being paid or that the franchisor's suppliers are supplying inferior products compared to the products sold by the competitors. Furthermore, there are disputes whether the franchise agreement has been terminated correctly or not.

**Dillon:** Easily the most frequent dispute arising in Canada these days is the allegation by franchisees that the disclosure document delivered to them prior to purchasing their franchise was somehow inadequate. Faced with such an allegation, the franchisor and its counsel must carefully assess the quality and quantity of disclosure that was provided to the franchisee, and determine whether to negotiate a resolution, in the case of inadequate disclosure, or to stand their ground, in the case of what appears to be compliant disclosure.

Another common complaint of

franchisees is the retention of rebates by franchisors, and/or a lack of savings from the bulk buying power of the franchisees collectively.

Prior to commencing any confrontation, the franchisee in question and his counsel must perform a fearless self-inventory to assess what, if any, behaviours of the franchisee are contributing to the problem being complained of. To the extent possible, these behaviours should be identified and rectified. In my experience, most franchisors are quite willing to extend a helping hand in order to do so.

If it appears that the problem is beyond the means of the individual franchisee to rectify, then it should be brought the attention of the franchisor. If the franchisor is unwilling or unable to act, then the franchisee needs to assess whether to stay or go. If the franchisee stays, it's usually because the franchisor is willing and able to rectify the problem.

**Germann:** The dispute resolution clause in a franchise agreement will normally prescribe the procedure to be followed if there is a disagreement or dispute. When a dispute arises between the parties they must make every effort to resolve the dispute by

mutual negotiation. Usually if this is not possible within 21 days then either party may by notice in writing notify the other party that it seeks to have the dispute resolved by mediation. The parties need to appoint an agreed mediator but if they cannot agree then there is normally a procedure set out for a third party to determine the mediator. In any mediation everything that occurs will be in confidence and in closed session and confidentiality is normally the key advantage of a mediation. All discussions will be on a “without prejudice” basis and no documents brought into a mediation can be called in evidence in any subsequent litigation by either party. Each party to a mediation must have a proper opportunity to present its case and the mediator will be required to act fairly and without bias for the purpose of seeking a resolution of the dispute. Normally the costs of any mediation will be borne equally by the parties unless the mediator determines otherwise. In New Zealand mediations have a very high success rate and a recent franchise survey confirmed that the overall level of disputation per franchise unit was less than 1.5% which is very low.

**Germann:** In New Zealand there are no franchise-specific laws and we follow the United Kingdom and Singapore who

do not have franchise laws. However, franchisors who belong to the FANZ must adhere to the code of practice and code of ethics and must publish a disclosure document. The code of practice covers compliance, disclosure, certification, a seven day cooling off period and dispute resolution and its main aim is to encourage best practice throughout franchising. The main laws which are applicable to franchising in New Zealand include the Commerce Act 1986, the Fair Trading Act 1986, the Contractual Remedies Act 1979 and the Illegal Contracts Act 1970.

**Yamaguchi:** Disagreements or disputes can be resolved through legal procedures (lawsuits), mediation or arbitration. However, labour disputes between franchisee and its employee must necessarily be resolved in labour courts.

The Brazilian judicial system is complex, abounding in divisions and formalities. To summarize, there is the division of the courts, where all cases commence in the first to the third courts of instance. The major obstacle caused by this system is that it is slow. This is mainly due to the large number of appeals they handle and the subsequent compliance with all the instances. A simple point of order can take over 10 years to be

judged.

In an ongoing conflict situation, we believe that the most reliable method of resolution is by mediation or arbitration. This would enable them to settle the matter in the speediest, least bureaucratic and most efficient manner compared with the court system. Certain arbitration centres in Brazil have been created to deal with lower-profile cases, with lower costs and would be the ideal forum for disputes among franchisors and franchisees.

**Uribe:** There are two main systems under Colombian law for dispute resolution. The first is the ordinary system, in which the parties bring their disputes before a national judge to solve the controversy. Under this system, the proceedings take a significant amount of time because there are numerous cases assigned to each judge.

The other is when the parties decide to go to arbitration, in which case they waive their right to go to a national court and submit their disputes to an arbitration tribunal.

The main advantage of going to arbitration is that the controversy is resolved through a much faster

procedure than before a national court.

According to the Colombian legal system, the agreement is to be governed by the laws and regulations of the country where it will be performed. Accordingly, if the agreement is to be performed in Colombia it shall be governed by the Colombian laws and regulations. Nevertheless, the parties are able to choose a different jurisdiction provided that there is a foreign element in the given contract such as the franchisor having its domicile in a foreign country. This is the only way to modify the Colombian jurisdiction over the agreement.

When choosing international arbitration, the principal advantage for foreign franchisors is that Colombia is a signatory of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. A final judgment or award granted outside Colombia pursuant to the applicable foreign laws, which is obtained without fraud and rendered after due notice, would be capable of being enforced in the courts of Colombia, provided that a judgment rendered by a court of Colombia would be enforceable in the given foreign jurisdiction, on a reciprocal basis, and that the judgment or award:

- Does not relate to rights over real property located in Colombia at the time the suit was filed;
- Does not contravene any public policy laws or regulations of Colombia, other than those governing judicial proceedings;
- Is a final judgment or award not subject to appeal in accordance with the applicable foreign laws;
- Does not refer to any matter upon which Colombian courts have exclusive jurisdiction;
- Does not refer to any matter subject to a lawsuit brought in Colombia already decided by any court of Colombia;
- Was obtained upon complying with the applicable foreign laws relating to service of process to the defendant, which compliance is presumed if the judgment or award is not subject to appeal; and
- Is submitted to the exequatur procedure before the Supreme Court of Colombia.

demanding and strict, and even though the Supreme Court does not re-examine the merits of the case, a substantial number of applications for exequatur are rejected for lack of compliance with the applicable formalities, particularly for lack of sufficient evidence to prove the applicable foreign law. Assuming the exequatur is obtained, the foreign judgment shall, as a general rule, be enforced by means of an executive judicial action.

While it is impossible to say how long it will take to enforce an international award, because that depends a lot on whether such award is contested or not before the Supreme Court, it is fair to say that it will not take less than two years, which might be the main disadvantage of going to arbitration.

**15. In an ideal world what would you like to see implemented or changed?**

**Clavell:** I'd like to see much faster Court proceedings and that all judgments were of the best quality, which implies that

the judges should have time enough as to examine each case carefully. I'd also like to see fewer misunderstandings between franchisees and franchisors, especially at the early stages of their relationships, and less regulatory protectionism in some countries.

**Dillon:** In an ideal world, I would like to set the clock ahead 25 years, to a point in time when Canadian legislators, judiciary and the franchise bar has gained adequate experience in order to temper the altruistic desire to help the "little guy" franchisee. Oppression of franchisees is frequently touted as a basis for franchise legislation. In reality, much of the oppression is anecdotal are indeed mythical. The reality is that the management of franchising via laws and the judicial process needs to be balanced. Franchisees need to be held accountable for the deals they have made, and for their own business failings or lack of performance. Franchisor's are not insurers and operating a franchised business is not without risk. Canada remains a wealthy, brand conscious

market. Franchising has the means to make a considerable contribution to the economy and should be supported whenever possible as a means to distribute goods and services.

**Yamaguchi:** In our view, we would see with good eyes the auto-regulation of the sector by the organizations, such as ABF, providing their terms and rules to be applicable to all its members. The risk of a new regulation to bringing further problems than solutions is rather high.

**Uribe:** I would like some limits on the global expansion of the franchises, considering that the sharp increase of a franchise leads the consumer to a psychological state of satiety as he might feel that the experience lost any dynamism. I think a common element should remain among franchises but experiences shall differentiate among themselves.

The exequatur procedure is very



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