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BASICS TRACK: INTERNATIONAL GROWTH

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I. Industry Overview

In the last twenty years, franchising has grown around the globe as a popular business model. As businesses continue to seek opportunities to expand their brands across oceans, their need to understand how to navigate foreign regulations becomes inevitable. Almost eighty percent of the world resides in "emerging markets" and the U.S. Department of Commerce estimates that in the next twenty years developing countries will be responsible for over seventy five percent of the expected growth.[2] So while some regions of the world, namely North America and Europe, have existing and developed franchise markets, the real economic opportunities and franchise growth and development lie outside Western nations. For example, the emerging Asia region, which includes Southeast Asia, China and India, is projected to grow by 6.3% in 2017.[3] As of July 2016, African nations represented four of the world's ten fastest-growing economies.[4] Regions such as the Middle East have experienced franchise expansion as more nations make an effort to shift economic dependence away from the sale of oil. In Latin America, as franchise industries continue to emerge, countries are moving slowly towards developing legal frameworks specific to franchise arrangements.

Some countries have established franchise-specific programs to encourage citizens, and sometimes foreign investors, to participate in their economies. Malaysia, for example, set specific franchise industry goals in 2013 to contribute 9.4 percent to the country's GDP and to become a leading franchise hub in the Southeast Asia region by the year 2020.[5] In order to accomplish that goal, Malaysia adopted the National Franchise Development Blueprint: 2012–2016 which provided clear goals and a strategic direction for the franchise industry in the country. The Malaysian Ministry of Domestic Trade, Co-operatives and Consumerism established a specific unit within the ministry, the Perbadanan Nasional Bhd (PNS), to oversee and facilitate franchise development. The

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[1] Portions of this paper are based on excerpts from INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 209 (Kendal H. Tyre, Jr, Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[2] Kerry Pipes, *Why Franchising is Going Global*, Franchising.com, *available at* http://www.franchising.com/howtofranchiseguide/why_franchising_is_going_global.html (last visited March 28, 2017).

[3] *Economic Outlook for Southeast Asia, China and India 2016,* OECD, *available at* http://www.oecd. org/ dev/economic-outlook-for-southeast-asia-china-and-india-23101113.htm (last visited March 28, 2017).

[4] Chloe Pfeiffer, *These are the '10 emerging markets of the future'*, BUSINESS INSIDER, July 6, 2016, *available at* http://www.businessinsider.com/the-10-emerging-markets-of-the-future-2016-7 (last visited March 28, 2017).

[5] *See* Kendal H. Tyre, Jr. and Pierce Haesung Han, *Tapping Into Malaysia's Aggressive Franchising Goals*, LAW 360, http://www.law360.com/articles/491545/tapping-into-malaysia-s-aggressive-franchising-goals (last visited March 28, 2017); *see also* Kendal H. Tyre, Jr. and Pierce Haesung Han, *Malaysian Government Actively Promotes Growth in Franchise Sector*, NIXON PEABODY FRANCHISE LAW ALERT (October 2013).

PNS provides training for franchisors, franchisees, franchise consultants, and the public on issues related to the operation and management of franchise businesses.

Mexico has been committed to expanding its franchise industry as well, offering financial incentives to encourage participation in the national economy. The "National Franchise Program" was established by the Mexican Ministry of Economy and focused on acquiring franchises in Mexico.[6] The National Franchise Program provides a number of incentives, one being a federal credit to potential franchisees interested in the franchises included in the Ministry's "Certified Franchises Catalog." These types of programs encourage not only franchise expansion, but also the need for more comprehensive regulatory standards governing franchises and franchise relationships.

To address the ever-changing business and legal landscape in the franchise industry, nations across the globe continue to enact legislative reform. For example in 2016, after more than fifty years, the Kuwait National Assembly ratified a new Commercial Agency Law in Kuwait that clarified the terms "franchisee" and "licensee." The new legislation treats them as commercial agents subject to any restrictions or requirements as well as the protection of the new law.[7] In Africa, some governments have enacted legislative reforms to amend laws that previously hindered the repatriation of royalties and franchise fees. In addition, some African nations have enacted franchise specific legislation. For example, South Africa enacted franchise legislation in 2008,[8] Tunisia drafted a legislative framework for franchising that took effect in 2010,[9] and Angola has had franchise laws in place since 2003.[10]

Not all legislative reform takes place in developing countries however. Western nations continue to develop new laws and modify existing legislation that impact the franchisor and franchisee relationship. For example, in July 2016, Ontario, Canada amended Regulation 581/00 under the *Arthur Wishart Act (Franchise Disclosure), 2000* Although not a particularly substantive change, the new amendment permits delivery of franchise disclosure documents through electronic mediums, a convenience for both parties. In February, 2017, franchise legislation in the Province of British Columbia came into force. In the United States, in a decision known as *Browning-Ferris Industries*, the

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[6] Richard A. Walawender, *Franchising in Mexico*, MILLER CANFIELD, June 2011, *available at* http://www.millercanfield.com/resources-241.html (last visited March 28, 2017).

[7] Kendal Tyre and Nia Newton, *New Commercial Agency Law Enacted in Kuwait*, NIXON PEABODY LLP, *available at* https://www.nixonpeabody.com/en/ideas/articles/2016/04/28/new-commercial-agency-law-enacted-in-kuwait (last visited March 28, 2017).

[8] *See* Taswell Papier, *Franchising in South Africa*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 209 (Kendal H. Tyre, Jr, Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[9] *See* Yessine Ferah, *Franchising in Tunisia*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 228 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[10] *See* João Afonso Fialho, *Franchising in Angola*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 80 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

National Labor Relations Board overturned long standing precedent by ruling that a small business franchisee was considered a "joint employer" with the franchisor.[11] The decision significantly expanded the scope of who could be considered a joint employer by adopting a "reserved" or "indirect" control standard and eliminating the requirement that a company actually exercise control to be deemed a joint employer.[12] Changes in these legal landscapes directly affect the approach both domestic and foreign businesses must take to explore franchise expansion opportunities.

II. International Franchising

A. How to structure the deal – methods of international expansion

The method chosen for international expansion will depend upon a whole host of factors, including proximity of the target market, local laws and customs as well as the resources, financial and human, available to be devoted by the franchisor in its expansion efforts. These considerations are often the same as those used by a franchisor to determine its domestic means of expansion.

In addition, the type of structure will determine the nature and extent of the legal documentation and protection required to ensure compliance by the franchisee/developer in the target market with the agreement and to provide the franchisor with the necessary enforcement mechanisms to enforce compliance.

Regardless of the method chosen to expand, however, it is most important that the franchisor does not allow the legal structure of the arrangement to dictate the terms of the business arrangement. Instead, the franchisor should be comfortable that the business arrangement is worth pursuing and only then take steps to ensure that the legal documentation reflects the business relationship, subject to compliance with any franchise-specific legislation in the target jurisdiction. Most significantly, the relationship to be pursued should be one that is profitable for both parties; otherwise, the relationship, no matter the model chosen for expansion, is doomed to fail.

Franchisors must always be adequately capitalized before embarking on international expansion and must be able devote both the financial and human resources necessary to the expansion depending upon the geographic proximity of the target market to the franchisor's home jurisdiction and the similarities or differences in language, customs and culture. Each method of expansion requires varying yet significant degrees of capital to ensure the success of the strategy ultimately adopted by the franchisor.

Following is a general description of the different structures used for international expansion and the advantages and disadvantages of each. The use of these forms of

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[11] *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (August 27, 2015).

[12] Tara E. Daub, Michael R. Lindsay, Irene Scholl-Tatevosyan, Craig Tractenberg, *What Browning-Ferris Means to You: The NLRB's New Test for Joint Employer Status*, NIXON PEABODY LLP, *available at* http://www.nixonpeabody.com/Browning-Ferris-NLRB-new-test-for-joint-employer-status (last visited March 28, 2017).

franchising are not limited to international expansion as they are also used by U.S. franchisors to expand domestically:

- Unit Franchising
- Area Representation;
- Area Development;
- Master Franchising;
- Joint Venture Franchising

1. Unit (or Direct) Franchising

Unit franchising, also called direct franchising, involves the grant by the franchisor to a franchisee of the right to establish a single franchised unit. This method is used most often when the target country is of close proximity to the franchisor's home jurisdiction and where there are similarities in language, culture and customs. Franchisors are often required to make minimal changes to their domestic franchise agreements and work directly with local counsel to ensure compliance with the requirements of local laws including pre-sale disclosure legislation in the target country. Unit franchising can be used to test the system in the target market and, if successful, jump-start future expansion through the other methods, discussed below. However, during the initial stages, expansion is most often slower than through the other methods of expansion, particularly if the franchisor's personnel are used for both its domestic and its international expansion efforts.

While unit franchising is arguably the simplest method of franchising, it can also be the most time consuming and expensive. The franchisor will be required to invest significantly in the franchise development process by modifying, if necessary, its product or service offering to the tastes of the target market, seeking prospective franchisees, establishing sources of supply, and supply arrangements, and providing the franchisees with training and ongoing operational support. Oftentimes with unit franchising, the first few franchisees may be granted an option, or a right of first refusal, to establish additional franchised units within a certain designated territory and within a specified timeframe.

2. Area Representation

In this arrangement, the franchisor grants a local third party, the area representative, the right to serve as the franchisor's representative in the target market, and to provide both pre-sale and post-sale services on behalf of the franchisor. The area representative has no right to contract directly with franchisees, each of whom enters into a franchise agreement directly with the franchisor. The area representative is responsible for sourcing and qualifying prospective unit franchisees in a designated (usually exclusive) territory, subject always to the approval of the franchisor. The area representative may also assist with the development of the system in the territory by sourcing approved suppliers to the system and establishing supply arrangements. In addition, certain of the franchisor's obligations under the franchise agreement are delegated to the area representative. These obligations can include all or a portion of the initial training, site location assistance, unit construction and development and ongoing supervision and assistance. The services provided by the area representative are compensated through the sharing of the initial franchise fees and royalty fees payable under the franchise agreement and, in some case, transfer and renewal fees. If the target jurisdiction is located far from the franchisor's home territory, the area representative may also be responsible for advertising and promotion in which case all or a portion of the advertising fees payable by the unit franchisees may be administered by the area representative.

The area representative arrangement allows for the franchisor to maintain a "boots on the ground" presence in the target market without having to invest directly in the operational costs. However, the franchisor gives up a certain level of control over the operation of the franchise system in the territory and must maintain strict control over the information that an area representative relays to prospective franchisees, which must be limited to the information provided in the franchisor's franchise disclosure document. The franchisor must also ensure that the area representative adequately and satisfactorily provides the initial and on-going services to the franchisees which are delegated to it. Without this assurance, a franchisor could be subject to vicarious liability claims asserted by the franchisees. Further, if the area representative does not satisfactorily perform its obligations, there could be damage to the brand and the franchisor may be required to immediately marshal its resources and assume direct responsibility for the operation of the franchise system.

In certain jurisdictions, the area representative may be required to be registered as a broker in the jurisdiction. A franchisor's disclosure document will generally contain information regarding the area representative arrangement as certain of the post-sale obligations of the franchisor will be provided by the area representative on the franchisor's behalf.

3. Area Development

In an area development arrangement, the franchisor and the third-party franchisee or area developer enter into a development agreement pursuant to which the area developer agrees to establish and operate a specified number of franchised units within a designated geographic area, which may be an entire country or a defined region within the country. The area development agreement governs the overall relationship between the franchisor and the area developer and sets out the designated territory for development, the number of units to be established, and the time period for development. Each franchised unit is subject to a separate unit franchise agreement between the franchisor and the area developer or an affiliate of the area developer. The development fee payable by the area developer is often based upon the number of franchised units to be established and represents a portion of the initial franchise payable under each franchise agreement with the balance of the initial franchise fee payable at the time that a unit franchise agreement is entered into. An area development arrangement is often used where there are significant differences in culture, customs and laws between the target market and the franchisor's domestic market. The area developer can provide significant assistance to the franchisor when necessary to modify the product and service offering of the franchise system to reflect the culture and customs in its territory.

One of the principal advantages to the area development arrangement is that the franchisor need only deal with one franchisee who is likely a sophisticated party with knowledge of the local market and with the resources available to expand the system within its designated territory. In addition, the franchisor is able to maintain control over its system by contracting with only one party to whom it provides training and ongoing supervision. Further, once satisfactorily trained and experienced in the operation of a franchised unit, the area developer can assume greater responsibility for the management of the system in the territory by undertaking its own site selection, construction and development of the franchised units, training of key staff members and ongoing supervision of all franchised units established pursuant to the development schedule. This is cost-effective to the franchisor and, over time, the franchisor can reduce the use of its personnel and other support in the area developer's territory. Further, the area development model may encourage faster growth as the franchisor does not have to source (and support) numerous franchisees to develop the territory.

There are, however, significant disadvantages to the area development arrangement that must be weighed against the benefits of such an arrangement. An area development arrangement could result in slower growth of the system in the designated territory. The developer is responsible for securing locations and opening each of the units in accordance with its development schedule. This typically proceeds much more slowly than the establishment of units by a number of franchisees under an area representation or master franchise arrangement, discussed below, which can occur concurrently. Furthermore, each outlet in the area development territory will be operated and managed by a manager, rather than by the developer itself as "owner-operator." Such managers may be less motivated and have less of an entrepreneurial spirit for the management of the outlet than would an owner-operator, which could ultimately affect the success of particular units or the long term success of the system in the territory.

The nature of the relationship between the franchisor and the area developer is also prone to considerable risk as the developer is likely a more sophisticated, "well-heeled" investor (as opposed to the unit franchisee) and thus may be more accustomed to being his own boss. The developer may therefore be less inclined to follow the franchisor's rules and guidance, thereby placing significant strain on the parties' relationship with the potential for harm to the brand in the area developer's territory.

Furthermore, if the developer fails to meet its obligations under the area development agreement, there is a real risk that the whole system within the developer's territory will also fail unless the franchisor has the financial and human resources to step in and assume operation of the established units. Choosing the right "partner" in the target market to serve as area developer and establishing a realistic development schedule is critical to the success of the area development arrangement. This is often the subject of extensive negotiations between the franchisor and the area developer.

The consequences of the area developer failing to meet the development schedule must be clearly set out in the area development agreement so that the franchisor does not find itself shut out from the market for a significant period of time. The franchisor must have the right to assume rights to the undeveloped territory if the area developer fails to meet the development requirements or its other obligations under the agreement. For example, the franchisor should have the right to reduce the developer's exclusive territory or to remove the exclusivity altogether in lieu of its right to terminate the development agreement upon the failure of the developer to meet the development schedule. Such a right need not be characterized or perceived as a threat or penalty, but rather as a mere logical consequence of the area developer's inability to meet its development obligations. If the area developer cannot develop its territory within the prescribed timeframe, then the area developer should understand that the franchisor will need to step up and fill the gap instead.

4. Master Franchising

Master franchising, also called sub-franchising, is the most common structure used for international expansion. It is an arrangement in which a franchisor enters into an agreement generally for a designated, exclusive territory and often with certain development requirements. The master franchisee is granted the right to establish, own and operate units in the territory as well as the right to grant sub-¬franchises to third parties to do the same.

A master franchisee essentially becomes the "franchisor" in the territory with responsibility for managing and controlling the pace of development in its territory as well as many aspects of the franchise system, including training, site selection, construction and development, sourcing and supply of products and as well where necessary, the right to modify the system to meet local market tastes and preferences. The franchisor, however, retains ultimate control over the system through ownership of the trade-mark(s) and other proprietary elements of the franchise system. During the initial stages of development, the franchisor may also assume responsibility for the initial training of franchisees and the right to approve the unit locations.

Master franchising allows for accelerated market penetration and for rapid growth of the franchise system within the target market and typically attracts sophisticated investors with financial resources and business acumen. However, the franchisor gives up control over development and the day-to-day operation of the system in the territory. The master franchise model allocates risk between the parties with the master franchisee assuming significant responsibility for the development and expansion of the franchise system in the target market.

The master franchise agreement sets out the master franchisee's obligations for development in the target market including the number of units required to be established in the territory, the time frame for development and the fee sharing arrangement. The master franchise agreement will also specify the franchisor's rights if the master franchisee fails to meet its development obligations as well as what rights the franchisor has to the unit franchise agreements if the master franchise agreement is terminated.

Generally, the franchisor would be granted the option to assume all of the master franchisee's rights under the unit agreements or to assign those rights to a new master franchisee. The franchisor may reserve to itself certain rights, including the right to approve unit locations, at least for the first few, to establish or to approve suppliers and supply arrangements, and to approve any modifications to the system necessary to reflect the customs and preferences in the territory. The master franchisee assumes all obligations for compliance with all laws in the territory including with all pre-sale disclosure legislation and for translation of the franchise agreement, operations manuals and advertising and promotional materials.

The master franchisee will pay to the franchisor an initial master franchise fee in consideration for the rights granted which fee is often based upon the size of the geographic area granted, the development requirements imposed on the master franchisee, the projected royalty revenues to be generated from the franchised units in the territory and the projected long-term rate of return on investment for both parties.

The franchisor will typically share in the initial franchise fee and the royalty stream generated in the territory as well as in other fees payable to the master franchisee under the unit franchise agreement, such as advertising contributions and renewal and transfer fees. Experience has shown that it is critical for franchisors to ensure that the fee sharing between the franchisor and the master franchisee be done with the utmost of care and attention, with consideration to the industry and to the nature of the target market. The master franchisee must be assured of a stream of income that would sustain the continued development of the system in the territory. The master franchisee's failure to continue to fund growth of the system may seriously impact the franchisor's bottom line but may also ultimately lead to the collapse of the entire master franchising arrangement. Franchisors are therefore advised to refrain from allocating a lower percentage of the shared fees to their master franchisees in an attempt to take a larger and disproportionate share of the profits for themselves. This is particularly the case where the master franchisee is not benefiting from other aspects of the franchise system, such as deriving any rebates from product sales to its franchisees (where they are required to purchase product directly from the franchisor for example) or where there is no other stream of revenue available to the master franchisee.

One important prerequisite for granting master franchise rights often imposed by franchisors is that the prospective master franchisee demonstrate its commitment and aptitude as a franchisee by first opening and operating a unit franchise for a period of time. Some franchisors may even require their master franchisees to establish, own and operate a number of units before embarking on any sub-franchising efforts. This is good practice as it permits both the master franchisee and the franchisor to better work out any issues prior to taking the more serious step of sub-franchising the business to a whole host of unit franchisees. This also allows the franchisor to "test drive" the master franchisee before allowing the master franchisee the right to pursue master franchising.

5. Joint Venture Franchising

Joint venture franchising is an approach to expansion that represents shared risk but also shared control of development in the target market.

In joint venture franchising, the franchisor takes on a partnership role or an equity position in the franchisee entity. The franchisor brings to the venture its proprietary franchise system and knowledge and may, as well, contribute capital to the franchisee entity. The local joint venture partner will be the operator and manager of the franchise system in the territory and will have greater responsibility for funding the development. The joint venture entity, which may be a corporation, partnership, limited liability company or other legal organization, will be established in the target market with ownership interests held by the franchisor and the local partner. This joint venture entity will then be granted area development, master franchise or area representative rights for the expansion of the franchise system in the target market. Each franchise outlet is governed by a separate unit franchise agreement, either with the franchisor (in a territorial development arrangement) or with the joint venture entity (in a master franchise arrangement). The joint venture entity should also be the subject of a shareholders' or partnership agreement in order to govern the relationship between the franchisor and the local partner.

Many initial foreign transactions have been structured as joint ventures, rather than true franchises, for a number of reasons. Under the law of certain countries, the joint venture is the only structure under local law open to foreign investors. A joint venture arrangement may also permit easier access to government subsidies and favorable tax status, which may not be available with other structures.

A joint venture franchise arrangement permits a franchisor greater control or influence over the franchise entity and a greater participation in the anticipated return from development than is available through direct franchising. Further, if there are difficulties at the unit franchisee level, the franchisor will have an opportunity to identify them earlier and will likely have greater contractual rights to step in and assume full control. However, by having more "skin in the game," the franchisor also has greater exposure to liability, reducing many of the benefits franchisors seek by franchising in the first place.

B. Choosing the Right Franchise Partner

Once the franchisor has completed its due diligence on the target market and is ready to move forward with its international expansion, the franchisor must then focus its attention on sourcing a local candidate to develop the target market, whether it will be a development arrangement where the franchisee will be the unit owner or will serve as master franchisee for the system in the development territory. Many of the same considerations for choosing a unit franchisee, area developer or master franchisee for the franchisor's domestic market are applicable to choosing a partner for international development.

There have been numerous studies conducted to determine what makes an ideal franchisee and a number of assessment mechanisms used by franchisor to evaluate a candidate's psychological make-up and whether the candidate is a suitable fit for the franchisor's system, based upon its experience, financial resources, family support, character and temperament. Not everyone is suited to be a franchisee, such as those who are highly entrepreneurial, but also, not every otherwise qualified candidate is the right franchisee for a particular franchise system. These factors are the "base" considerations for franchisee prospects. There are additional considerations when choosing the right partner for international expansion.

A candidate for international expansion of a foreign-based franchise system must have tremendous knowledge of the local market, including the culture, tastes, preferences and demographics of the inhabitants of the territory, management skills, business acumen and adequate financial resources to sustain long-term growth of the franchise system in its territory. The degree or extent required of each of these factors will depend upon the franchise structure to be entered into, the size of the territory, the number of units to be established and the extent of the obligations to be assumed by the franchisee for establishment of units in the territory, for sourcing prospective franchisees and for training, supervision and support to be provided to the franchisees.

The franchisor will want to independently verify the information that has been provided by the franchisee, in its application or during in-person interviews. This investigation can be conducted through independent sources, such as the U.S. Commercial Service, credit verification services, as well as speaking with the references provided by the prospective franchisee. U.S. franchisors must satisfy themselves that that they are able to conduct business with the proposed candidate and that it would not violate anti-terrorism laws or other restrictions.

C. Franchising in Developed Markets

1. Typical Target Country Legal Issues

A franchisor expanding internationally must review and analyze the laws and regulations of the target country that impact the documents used for international expansion. Often, these laws and regulations dictate the modifications and changes to the franchise system that are necessary for its successful deployment in the target country.

a. Pre-Sale Disclosure

Many countries require disclosure of specific information to potential franchisees prior to the execution of an agreement or the payment of any money by the franchisee. The scope and types of information vary from country to country (see Exhibit A). The goal of most disclosure laws is to ensure that franchisees receive information necessary to make an informed investment decision. Compliance with some disclosure laws can be difficult due to the vague wording of the relevant legislation. In the case of newly enacted legislation, government regulators may not have had sufficient time to consider how the disclosure law should be interpreted and this may exacerbate the problem. Experienced local counsel should be retained if there are any questions regarding the interpretation of a country's disclosure requirements.

Many foreign laws specify that a certain number of days must pass between delivery of the disclosure document to the franchisee and the execution of an agreement or payment of money by the franchisee (e.g., Australia—14 calendar days; Brazil—10 calendar days; Indonesia[13]—14 calendar days; Mexico—30 business days). Some countries (e.g., Romania) have no specified waiting period after the disclosure document is delivered. Jurisdictions that require disclosure to potential franchisees include Australia,[14] Argentina,[15] Belgium,[16] Brazil,[17] Canada (Alberta, Ontario, Prince Edward Island, New Brunswick, British Columbia and Manitoba),[18] China,[19] France,[20] Germany,[21]

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[13] See Nurdin Adiwibowo, Freddy Karyadi, and Gustaaf Reerink, *Franchising in Indonesia*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 411 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[14] *Franchising Code of Conduct, Competition and Consumer (Industry Codes—Franchising) Regulation 2014*.

[15] *Código Civil y Comercial de la Nación - Artículos 1,512-1,524. See also* Mario Eduardo Castro Sammartino, *Franchising in Argentina*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 267. (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[16] The *Law of 19 December 2005*.

[17] *Brazilian Federal Law Number 8955/94* adopted on December 15, 1994, and effective as of February 14, 1995. *See also* Luiz Henrique O. do Amaral and Luciana Bassani, *Franchising in Brazil*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 286 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[18] *Franchises Act, RSA 1980 cF-17* (Alberta); *Arthur Wishart Act (Franchise Disclosure), 2000* (Ontario)*; Franchises Act R.S.P.E.I. 1988, Cap. F14.1* (Prince Edward Island); *The Franchise Act, S.N.B. 2007, c. F-23.5, Mediation Regulation—Franchises Act, N.B. Reg. 2010-93 and Disclosure Regulation—Franchises Act, N.B. Reg. 2010-92* (New Brunswick); *The Franchises Act*, SBC 2015, c 35 (British Columbia); *The Franchises Act, C.C.S.M. c. F156* and Man. Reg. 29/2012 (Manitoba). *See also* Tanya Walker and KJ Chong, *Franchising in Canada,* INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 303 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[19] *Measures for the Administration of Commercial Franchise*, effective as of February 2005; *Regulations on the Administration of Commercial Franchise*, effective as of May 1, 2007; *Administration of Commercial Franchise Operations Registration Procedures*, effective as of February 2012; and *Administration of Information Disclosure for Commercial Franchise Operations Procedures*, effective as of April 2012. *See also* Kelly F. Xiang, *Franchising in China*, INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 391 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[20] *Articles L330-3 and R-330-1* of the Commercial Code of France.

[21] German pre-contractual disclosure requirements have been derived from German case law and from the German Franchise Association's code of ethics.

Indonesia,[22] Italy,[23] Japan,[24] Kazakhstan,[25] Macau,[26] Malaysia,[27] Mexico,[28] Romania,[29] South Africa,[30] South Korea,[31] Spain,[32] Sweden,[33] Taiwan,[34] Tunisia,[35] United States,[36] and Vietnam.[37]

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[22] *Regulation of the Minister of Trade No. 53/M-DAG/PER/8/2012*, dated August 24, 2012. *See also* See Adiwibowo, Karyadi, and Reerink, *supra* note 13, at 410.

[23] *Law Number 129/04*, effective as of May 25, 2004.

[24] *Medium-Small Business Retail Commerce Promotion Act* supplemented by the *Ministerial Order to Implement the Act*; *Guidelines on Franchising under the Antimonopoly Act*. *See also* Kakuji Mitani, *Franchising in Japan*, INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 423 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[25] Article 18 of the *Law of the Republic of Kazakhstan 'On Complex Entrepreneurial Licenses (Franchise)' No.330-II, dated June 24, 2002. See also* Saule Akhmetova, *Franchising in Kazakhstan*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 430 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[26] *Macau Commercial Code*, Book III, External Activity of an Enterprise Title VIII, Franchising Contract.

[27] *Franchise Act 1998* as amended by the *Franchise (Amendment) Act* 2012; *see also* Wong Sai Fong and Michelle C.Y. Loi, *Franchising in Malaysia*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 438 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016.

[28] Article 142 of the *Mexican Industrial Property Law* and the *Regulations of the Industrial Property Law*. *See also* Ramiro Rangel Sánchez, *Franchising in Mexico*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 354 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[29] *Government Ordinance number 52/1997*, as amended by *Law number 79/1998*.

[30] *Consumer Protection Act 68 of 2008*, and related regulations. *See also* Papier, *supra* note 8, at 209.

[31] *Act on Fairness in Franchise Transactions* as amended in February 2014. *See also* Brendon Carr, *Franchising in South Korea*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 469 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016

[32] Article 62 of *Spanish Act 7/1996 of January 15, 1996*, as amended by *Act 1/2010* and the *Royal Decree 201/2010 of February 26*.

[33] *Act on franchisor's Obligations to Provide Information* (*lagen 2006:484 om franchisegivares informationsskyldighet*), effective as of October 1, 2006.

[34] *Rules on Disclosure of Information by Franchisors*, effective as of June 2, 1999 and further amended. *See also* Patricia Ginsburg, *Franchising in Taiwan*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 475 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[35] *Law n° 2009-69*, Article 15, dated August 12, 2009.

[36] 16 C.F.R. Part 436, *Disclosure Requirements and Prohibitions Concerning Franchising*, effective as of July 1, 2007, ("FTC Franchise Rule"). There are also 15 U.S. states that have adopted their own disclosure, registration, or notice laws. *See also* Steven B. Feirman, Keri A. McWilliams, and Nia D. Newton, *Franchising in the United States*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS

b. Government Approvals, Registrations, Filing Requirements

An increasing number of countries have enacted regulations specifically affecting franchising. Some countries have self-regulatory or voluntary disclosure requirements issued through government agencies or promoted through franchise associations. Often, these laws include disclosure document requirements requiring the preparation and delivery of a disclosure document at a certain time before the execution of the definitive franchise documents. Certain countries have enacted franchise laws requiring registrations, approvals, and/or filings with local government authorities before the offer or sale of a franchise (see Exhibit A). Other typical requirements could include, for example, competition authority approvals, trademark license filings, and central bank approvals. Compliance with these laws is important to ensure the enforceability of the franchise agreement. A few examples of these regulatory requirements are explored below:

1. Franchisor Registration

Before expanding to the target country, franchise counsel must determine whether the franchisor needs to register with any governmental authorities prior to offering or selling franchises in that jurisdiction. For example, a franchisor planning to sell franchises in Indonesia,[38] Malaysia,[39] or Vietnam[40] must first complete a filing with the relevant governing authority. Some registrations and filings must be updated annually and/or when an individual franchise is sold.[41] Compliance with registration requirements is critical. Franchisors may be prohibited from entering into or enforcing a franchise agreement before the approval of the franchisor's registration or filing. In some jurisdictions, the

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CONSIDERATIONS 362 (Kendal H. Tyre, Jr, Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[37] *Commercial Law*, effective June 14, 2005*; Decree No. 35/2006/ND-CP*, dated March 31, 2006; *Circular No. 09/2006/TT-BTM*, dated May 25, 2006. Regulations on franchising are also found in the *Intellectual Property Law*, dated November 29, 2005, and the *Technology Transfer Law*, dated November 29, 2006. *See also* Mai Thi Minh Hang, *Franchising in Vietnam*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 506 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[38] *Regulation of the Minister of Trade No. 53/M-DAG/PER/8/2012*, dated August 24, 2012; *see also* See Adiwibowo, Karyadi, and Reerink, *supra* note 13, at 411.

[39] Section 6(1) of the *Franchise Act 1998* as amended by the Franchise (Amendment) Act 2012; *see also* Fong and Loi, *supra* note 27, at 439.

[40] *Commercial Law*, adopted by the National Assembly on June 14, 2005; *Decree No. 35/2006/ND-CP* dated March 31, 2006, and *Circular No. 09/2006/TT-BTM* of the Ministry of Industry and Trade, dated May 25, 2006. S*ee also* Hang *supra* note 37, at 508.

[41] *See Section 6(1) of the Franchise Act 1998* as amended by the Franchise (Amendment) Act 2012 (Malaysia) and *Regulation of the Minister of Trade No. 53/M-DAG/PER/8/2012*, dated August 24, 2012 (Indonesia); *Commercial Law*, adopted by the National Assembly on June 14, 2005; *Decree No. 35/2006/ND-CP* dated March 31, 2006, and *Circular No. 09/2006/TT-BTM of the Ministry of Industry and Trade*, dated May 25, 2006 (Vietnam).

approval process may focus on one specific aspect of the franchise agreement. Registration is required or recommended in many of the surveyed countries.

2. Government Approvals

Many countries regulate the franchise relationship itself, as opposed to or in addition to regulating the offer and sale of the franchise opportunity. These countries require the franchisor to submit transactions for approval of their specific terms and conditions, including types and amounts of fees, choice of law provisions, termination rights, non-competition provisions, and/or remittance of payments abroad.

Some countries also require central bank approval to remit payments abroad. For example, Bangladesh,[42] China,[43] India,[44] Indonesia,[45] Japan,[46] Kazakhstan,[47] Malaysia,[48] Nepal,[49] Philippines,[50] South Korea,[51] Taiwan[52] and Thailand[53] require central bank approval to remit payments abroad. In the Americas, only Argentina[54] and Brazil[55] required such registration. In Africa, central bank approval is required in Angola,[56]

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42 *See* Dr. Mariam Khatoon and Nasir Doulah, *Franchising in Bangladesh* , in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 381 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

43 *See* Xiang, *supra* note 19, at 392.

44 *See* Preeti Mehta, *Franchising in India*, INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 403 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

45 *See* Adiwibowo, Karyadi, and Reerink, *supra* note 13, at 414.

46 *See* Mitani, *supra* note 24, at 424.

47 *See* Akhmetova, *supra* note 25, at 431.

48 *See* Fong and Loi, *supra* note 27, at 443.

49 *See* Devendra Pradhan and Shirshak Shimire, *Franchising in Nepal*, INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 450 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

50 *See* Maria Teresa D. Mercado-Ferrer, *Franchising in the Philippines*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 460 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

51 *See* Carr *supra* note 31, at 469.

52 *See* Ginsburg *supra* 34, at 477.

53 *See* Sriwan Puapondh and Alan Adcock, *Franchising in Thailand*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 494 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

54 *AFIP, General Resolution Number 3,276/2012*, as amended. *See* Castro Sammartino, *supra* note 15, at 268. (noting that filing is required if the funds to be remitted exceed certain thresholds).

55 *See* Amaral and Bassani *supra* note 17, at 290.

56 *See* Fialho, *supra* note 10, at 81.

Burundi,[57] Cape Verde,[58] Egypt,[59] Kenya,[60] Mozambique,[61] Nigeria,[62] South Africa,[63] Tunisia,[64] and Zimbabwe.[65] Certain countries surveyed have only required approvals for payments over a specific threshold.

3. Trademark License Filings

Trademark offices in some countries require the filing of the franchise agreement or a short form license agreement that shows that the trademarks used in the franchise system have been licensed to the local franchisee for use in the target country. Generally, the documents must be translated into the local language before their submission.

Although some trademark offices provide only a ministerial review of the terms and conditions of the licensing arrangement, failure to file with these authorities can have serious repercussions. In Mexico, for example, and which is typical of many countries, the filing is not technically required but is highly recommended because the failure to file can result in an inability to pursue claims against third-party infringing parties.[66] In Russia, approval of a trademark license agreement by the trademark office must occur prior to the granting of a valid trademark license. A failure to register will invalidate the trademark license portions of the franchise agreement.[67]

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[57] *See* Gilbert Nyatanyi, *Franchising in Burundi*, INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 122 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[58] *See* João Afonso Fialho, *Franchising in Cape Verde*, INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 129 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[59] *See* Girgis Abd El-Shahid, *Franchising in Egypt*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 143 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[60] *See* John Syekei and Joseph Githaiga, *Franchising in Kenya*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 171 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[61] *See* Diogo Xavier da Cunha, *Franchising in Mozambique*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 179 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[62] *See* Theophilus Emuwa and Tiwalola Okeyinka, *Franchising in Nigeria*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 192 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[63] *See* Papier, *supra* note 8, at 211.

[64] *See* Ferah, *supra* note 9, at 234.

[65] *See* Nellie R.F. Tiyago-Jinjika, *Franchising in Zimbabwe*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 252 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[66] *Industrial Property Law* (as last amended April 2012).

[67] *Part IV of the Russian Civil Code*, which came into effect on January 1, 2008.

In almost all countries surveyed, most require (or the authors recommend) the filing of a registered user agreement or a short trademark license agreement with the trademark authorities. In many cases, such a filing would enable parties to pursue claims against third-party infringers.

c. Currency Restrictions and Funds Repatriation

Some target countries require that any commercial transactions within their borders be conducted in the domestic currency of the country. Other countries restrict the amount of domestic currency that can be converted into foreign currency, restrict the amount of foreign currency that can be withdrawn from the country, or prohibit funds to be expatriated at all.

If appropriate funds cannot be withdrawn from the target country, it may be necessary to leave all profits earned in the target country for further expansion opportunities or as an offset against expenses incurred in the country. As an alternative, the franchisor may acquire products available in the target country with domestic currency, and thereafter sell such products in the free market to obtain freely tradable currency.

Of those African countries surveyed, there are specific restrictions concerning the exchange, repatriation, or remittance of payments under the franchise agreement in immediately available U.S. Dollars in Angola,[68] DRC,[69] Egypt,[70] Mozambique,[71] and Zambia.[72] In the Americas, only Argentina,[73] the Bahamas,[74] Cuba,[75] and Mexico[76]

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[68] *See* Fialho, *supra* note 10, at 82.

[69] *See* Emery Mukendi Wafwana, Nady Mayifuila Dina, Jonathan van Kempen, Edouard Laddy Tshishimbi Mpamba, Emmanuel Otshudiema Bengu and Dr. Sancy Lenoble Matschinga, *Franchising in Democratic Republic of the Congo*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 137 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[70] *See* El-Shahid, *supra* note 59, at 143.

[71] *See* Cunha, *supra*, note 61, at 179.

[72] *See* Mabvuto Sakala, *Franchising in Zambia*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 243 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[73] See Castro Sammartino, *supra* note 15, at 269 (franchisee must access funds through the foreign exchange market regulated by the Central Bank).

[74] *See* Archer-Glasgow and Audley D. Hanna, Jr., *Franchising in The Bahamas*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 281 (Kendal H. Tyre, Jr, Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[75] *See* Gisela María Agramonte Urra and José María Viñals Camallonga, *Franchising in Cuba*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 333 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[76] *See* Rangel *supra* note 28, at 355.

impose certain requirements or restrictions on the exchange, repatriation, or remittance of funds in U.S. Dollars. However, Brazil[77] and the United States[78] may impose some requirements or restrictions on payments to certain nonresidents, regardless of currency. In the Asian countries surveyed, Bangladesh,[79] China,[80] India,[81] Indonesia,[82] Japan,[83] Kazakhstan,[84] Malaysia,[85] Nepal,[86] Philippines,[87] South Korea,[88] Taiwan[89] and Thailand[90] have currency restriction or requirements.

d. Anti-trust, Competition, and Trade Practice Laws

Most developed countries have anti-trust, competition, or trade practice laws that are applicable to franchise operations. For example, laws impacting suggested pricing, misleading advertising, price discrimination, co-operative advertising allowances, telemarketing, tying, exclusive dealing, and market restriction must be analyzed and incorporated as necessary into the franchisor's documents and into the franchise system.

Anti-trust or competition laws typically address two types of activity: collusion among parties that limits consumers' choices in selecting products or services, and abuse of franchisor's superior bargaining position to the detriment of the other party to an agreement.

Most franchisors use in-term and post-term covenants not to compete to protect their systems. Typically, non-compete covenants are enforceable if they include reasonable limitations as to the time, geographic area, and the scope of activity restricted. Some countries, however, have additional restrictions on non-compete provisions. For

77 *See* Amaral and Bassani *supra* note 17, at 290.

78 *See* Feirman, McWilliams, and Newton *supra* note 36, at 365.

79 *See* Khatoon and Doulah, *supra* note 42, at 381.

80 *See* Xiang, *supra* note 19, at 392.

81 *See* Mehta, *supra* note 44, at 403.

82 *See* Adiwibowo, Karyadi, and Reerink, *supra* note 13, at 414.

83 *See* Mitani, *supra* note 24, at 424.

84 *See* Akhmetova, *supra* note 25, at 431.

85 *See* Fong and Loi, *supra* note 27, at 443.

86 *See* Pradhan and Shirshak Shimire, *supra* note 49, at 450.

87 *See* Mercado-Ferrer, *supra* note 50, at 460.

88 *See* Carr, *supra* note 31, at 469.

89 *See* Ginsburg, *supra* note 34, at 477.

90 *See* Puapondh and Adcock, *supra* note 53, at 494.

example, in certain circumstances, European Union countries may restrict in-term covenants not to compete to five years (and post-term covenants to one year).[91]

In those Asian and African countries surveyed, with a few exceptions, covenants not-to-compete are generally enforceable, so long as the restraint is reasonable, limited in scope and geography, and necessary to protect the interests of the individual or entity who seeks to enforce the restraint. In those countries in the Americas, of those countries surveyed, only El Salvador generally forbids agreements that would limit competing activities between competitors and non-competitors.[92] In Brazil, Canada, Haiti, Mexico, and the United States, policies and regulations align with those in Asia and only call for any non-competition provisions to be reasonable in time and territory.

e. Agency Laws

The relationship between franchisor and franchisee is not typically considered an agency relationship in most countries. In certain countries, however, franchisees are deemed agents of the franchisor and are subject to commercial agent or sales representative laws. These laws protect sales agents who market and distribute the products or services of a principal. They often entitle the franchisee to reasonable compensation or indemnification, which is triggered upon a termination of the relationship without "good cause." Compensation in some instances may be triggered regardless of the reason upon any termination or expiration of the franchise agreement. Other agency laws in some countries define "good cause" narrowly such that a franchisee will almost certainly be entitled to compensation upon any expiration or termination of the agreement.

For example, in several Middle Eastern countries, the amount of compensation that may be owed to the franchisee under an agency law varies from country to country. However, it is often left to the discretion of local courts. They typically consider the circumstances as a whole. This would include the franchisee's actual investment and a reasonable prediction of future profits. A standard award would be the equivalent of one year's total profits (averaged over four to five years) of the franchisee. Compensation for the goodwill of the business and any unused inventory could also be awarded.[93] The amount of compensation may be higher if the parties have a long-term relationship and the franchisee shows extensive investment in the franchise.

If agency laws are deemed applicable in certain target countries, local courts may assume jurisdictions notwithstanding a contrary jurisdiction and/or venue clauses in the

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[91] Frank Zaid and Kendal Tyre, International Franchising Basic Track Workshop: *A World Tour of The Basics of International Franchising*, (Paper Presented at the International Franchise Association's 38th Annual Legal Symposium, May 2005) at 7.

[92] Presidential Decree No. 126. 5 December 2006.

[93] Zaid and Tyre, *supra* note 91, at 8.

parties' agreement. Moreover, there are even special agency law courts that are made up of agents who hear the cases.[94]

One method for avoiding registration is to ensure that the franchisee itself is at least partially owned by foreign nationals of the target country, and thus ineligible to serve as a commercial agent. Alternatively, franchisors include features in the agreement that would make the overall relationship more difficult to register, refrain from execution formalities required in the registration process, and seek protection against the exposure arising out of registration under the commercial agencies law.

f. Arbitration

Many international franchisors turn to arbitration as a means of dispute resolution due to the uncertainty and lack of development of judicial systems in a number of foreign countries. A franchisor expanding internationally should review the local laws of the target country with respect to the ability to enforce arbitral decisions. International treaties or target country laws relating to the enforcement of an international arbitration award must also be analyzed. Over 148 countries have adopted the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention"). Under the New York Convention, arbitration awards are recognized and enforced with little interference from foreign courts in the signatory countries.

Arbitration is popular because of the perception that it will be conducted in a neutral setting, and because the parties can tailor the procedural rules to be used in their arbitration. Some of the disadvantages of arbitration include the potential high costs, the potential for unpredictable results stemming from the arbitrators not being bound by legal precedent, and the concern that arbitration awards are not generally appealable.

Of those Asian countries surveyed, all but Taiwan[95] are signatories to the New York Convention. Taiwan is not a party to the convention because it is not a member of the United Nations, however, foreign arbitral awards are nevertheless recognized and enforced in Taiwan.[96] In the Americas, foreign arbitral awards are enforceable in all of the jurisdictions surveyed. In Africa, most courts in the countries surveyed would likely honor an election of international arbitration dispute resolution and enforce arbitral judgments.

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[94] Joyce Mazero and J. Perry Maisonneuve, *Franchising in the Middle East and North Africa*, (Paper Presented at the American Bar Association 32nd Annual Forum on Franchising, October 14–16, 2009) at 10.

[95] *See* Ginsburg*, supra* note 34, at 480*.*

[96] *Id.*

Moreover, Botswana,[97] Egypt,[98] Ghana,[99] Kenya,[100] Mozambique,[101] Nigeria,[102] Rwanda,[103] South Africa,[104] Tunisia,[105] and Zambia[106] are signatories to the New York Convention so an arbitral award will likely be enforced in these jurisdictions.

g. Execution Formalities

Each country has its own execution formalities, including witness requirements, spousal acknowledgements, notarization requirements, legalization requirements, or payment of stamp duties. Franchise agreements may also need to be authenticated before they are deemed enforceable by the courts of a particular jurisdiction. In some countries, the execution procedures differ depending on the location of the party when it executes the agreement. Others require that any documents required for government approval must be translated into the local language and that the translated form of the agreement must be signed. If possible, franchisors should specify in their franchise agreements that regardless of whether the agreement is translated into another language, the English language version of the document must be executed by the parties and will govern any dispute between the parties.

In many countries, there are no requirements that a franchise agreement be translated into the local language to be enforceable. English is generally acceptable. However, in those Asian countries surveyed, the franchise agreement must be executed

[97] *See* Bonzo Makgalemele, *Franchising in Botswana*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 119 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[98] *See* El-Shahid, *supra* note 59, at 145.

[99] *See* Divine K.D. Letsa and Elizabeth Ashun, *Franchising in Ghana*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 165 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[100] *See* Syekei and Githaiga, *supra*, note 60, at 174.

[101] *See* Cunha, *supra*, note 618 at 183.

[102] *See* Emuwa and Okeyinka, *supra*, note 62, at 195.

[103] *See* Désiré Kamanzi, *Franchising in Rwanda*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 205 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[104] *See* Papier, *supra* note 8, at 216.

[105] *See* Ferah, *supra* note 9, at 237.

[106] *See* Sakala, *supra* note 72, at 247.

in the local language in China,[107] Indonesia,[108] Japan,[109] Kazakhstan,[110] South Korea,[111] Tajikistan,[112] and Vietnam.[113] For all of the surveyed countries in the Americas, translation into the local language is recommended or required.[114] As noted above, where an agreement is required to be filed or registered with a government authority or enforced by a local court, local laws often require that the agreement must be translated into the local language.

h. Country Spotlight: Canada

With similarities in culture, customs and language and proximity to the United States, Canada is the natural first destination for U.S. franchisors seeking to expand internationally. The regulation of franchising in Canada is at the provincial level, with 6 provinces with franchise-specific franchise legislation - Ontario, Alberta, British Columbia, New Brunswick, Prince Edward Island and Manitoba. The legislation in each of the provinces prescribes, among other things, pre-sale disclosure with no requirement that the franchise disclosure document ("FDD") be registered with, or vetted by, any regulatory authority. The rights and obligations of a franchisor and a franchisee under the franchise legislation in each of the provinces are substantially similar. All disclosure provinces, other than Ontario, permit the use of an FDD prepared in another jurisdiction so long as the document is modified to include the specific requirements of a province's legislation. Most franchisors in Canada who offer franchises throughout Canada have prepared a national FDD which contains the requirements of all disclosure provinces.

The general aim of the legislation is to ensure that prospective franchisees have the information necessary to make an informed investment decision. The legislation adopts the following three key principles:

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[107] *See* Xiang, *supra* note 19, at 394.

[108] See Adiwibowo, Karyadi, and Reerink, supra note 13, at 427.

[109] See Mitani, supra note 24, at 418. Although not required by Japanese law, it is standard practice to translate the franchise agreement into Japanese to make the franchisee "fully understand" the terms and conditions of the agreement.

[110] *See* Akhmetova, *supra* note 25, at 435.

[111] *See* Carr, *supra* note 31, at 471.

[112] *See* Rustam Nazrisho and Sherzod Sodatkadamov, *Franchising in Tajikistan*, INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 489 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

[113] *See* Hang, *supra* note 37, at 513.

[114] *See* Castro Sammartino *supra* note 15, at 275 (Argentina language requirements); Archer-Glasgow and Hanna *supra* note 74, at 284 (Bahamas language requirements); Amaral and Bassani *supra* note 17, at 297 (Brazil language requirements); Walker and Chong *supra* note 18, at 327 (Canada language requirements); Urra and Camallonga *supra* note 75, at 338 (Cuba language requirements); Romero *infra* note 156, at 343 (El Salvador language requirements); Vaval *infra* note 157, at 351 (Haiti language requirements); Rangel *supra* note 28, at 358 (Mexico language requirements); and Feirman, McWilliams and Newton *supra* note 36, at 369 (United States language requirements).

- The obligation imposed on franchisors to provide disclosure.
- The duty of good faith and fair dealing imposed upon franchisors and franchisees.
- The right of franchisees to associate.

Failure to comply with any of these obligations gives rise to significant remedies available to franchisees. Furthermore, a franchisee cannot contract out of the rights granted to it or grant a waiver of the obligations imposed on franchisors under the legislation. Furthermore, the legislation in each of the 6 provinces deems unenforceable any provision in a franchise agreement that restricts the application of the laws of the province or that restricts the jurisdiction or venue to a forum outside of the province with respect to claims enforceable under that province's franchise legislation.

1. The Disclosure Obligation

A franchisor offering a franchise in any of the disclosure provinces must provide a prospective franchisee with an FDD at least 14 days before the earlier of either: (i) the signing of the franchise agreement, or any agreement relating to the franchise, by the prospective franchisee, or (ii) the payment of any consideration relating to the franchise. Some of the provinces allow for a deposit prior to expiry of the 14-day disclosure review period provided that the deposit is fully non-refundable and does not obligate the franchisee to enter into a franchise agreement.

A disclosure document must contain all of the information prescribed by the regulations, as well as all other "material facts" that would reasonably be considered relevant to a prospect's decision to acquire the franchise.

a. Material facts

"Material fact" is broadly defined to include any information about the business, operations, capital or control of the franchisor or franchise system that would reasonably be expected to have a significant effect on the value or price of the proposed franchise, or on the decision to acquire the franchise. The requirement to disclose material facts in addition to the information prescribed by the legislation requires that an FDD used in Canada be updated on a regular basis.

This requirement has also resulted in some of Canada's most significant franchise-related decisions. As a result, disclosure documents must, in many circumstances, be customized to include information applicable to the actual subject matter or location of the proposed franchise.

b. Certification

A disclosure document must be certified as complete disclosure in accordance with the applicable provincial statute by two officers or directors of the franchisor (or one, if there is only one), in their personal capacity and not on behalf of the franchisor. A signed and dated certificate by 2 directors or officers of the franchisor (or 1 if there is only 1 director or officer) is not a mere formality but a mandatory requirement. Failure to provide a proper certificate will result in a determination that a franchisee did not receive an FDD prior to it entering into the franchise agreement.

c. Remedies

If a franchisor fails to comply with its disclosure obligations, there are two separate remedies available to a franchisee: rescission and claims for misrepresentation.

A franchisee can rescind the franchise agreement where the franchisor has failed to comply with the disclosure requirements. Upon rescission, the franchisor is required, within 60 days of receipt of the notice of rescission to:

- refund all monies paid to the franchisor by the franchisee;
- purchase all inventory, equipment and supplies bought by the franchisee pursuant to the franchise agreement at the price paid by the franchisee; and
- compensate the franchisee for all losses incurred to establish and operate the franchise

Two separate time periods are available to a franchisee to rescind: (i) within 60 days following its receipt of the FDD, if the FDD did not comply with the delivery requirements of the legislation or if the contents of the FDD did not meet the legislation's requirements, or (ii) within 2 years of entering into the franchise agreement, if the franchisor never provided the FDD. However, if an FDD is substantially non-compliant, the courts have deemed this to be no disclosure and allowing the franchisee to avail itself of the 2 year rescission period. Accordingly, strict compliance by a franchisor with the prescribed disclosure requirements is a necessity. The use of a generic "standard form" disclosure document will not suffice to protect a franchisor from claims of non-compliance — particularly in cases where additional material information regarding the proposed franchise is known to the franchisor and is not fully disclosed.

In addition to the rescission remedy, franchisees have the right to bring a claim for damages for misrepresentations made in the disclosure document or for a franchisor's failure to comply with the disclosure requirements. Accordingly, if a franchisee misses the time period for rescission, it can still claim damages arising from a franchisor's failure to properly comply with the disclosure requirements. Under this remedy, the franchisee must prove its damages while damages pursuant to a rescission claim are prescribed.

Claims for misrepresentation can be made against not only the franchisor, but also against individuals, including any director or officer of the franchisor who signed the certificate of disclosure. "Misrepresentation" is defined broadly to include an omission, and a franchisee is deemed to rely on a misrepresentation in a disclosure document and on the information contained in the disclosure document provided.

2. The Duty of Fair Dealing

The franchise legislation in the 6 disclosure provinces in Canada imposes on all parties to a franchise agreement a duty of fair dealing in the performance and enforcement of the franchise agreement. The duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

A breach of the duty of fair dealing is imposed on both the franchisor and a franchisee, and entitles the non-breaching party to claim damages arising from the breach.

3. The Right of Association

Franchisees have the right to associate with other franchisees and to form or join an organization of franchisees without penalty or interference from the franchisor. Any provision in a franchise agreement that restricts this right is void, and a franchisee has a claim for damages against the franchisor for breach of this right. The Courts have held that the right of association protects a franchisee's right to participate in a class action.

4. **Non-waiver**

Under the franchise legislation, rights given to a franchisee and obligations imposed on a franchisor cannot be waived. Only as part of a negotiated settlement of known claims is a release given by a franchisee enforceable as it relates to a franchisee's claims and rights under the franchise legislation. Accordingly, a release required to be delivered by a franchisee as a condition to the renewal or transfer of its franchise must expressly exclude any rights under or claims that the franchisee (or the guarantors) may have under the applicable franchise legislation.

Although the disclosure requirements in the disclosure provinces are substantially similar to that required in a franchisor's U.S. FDD, franchisors are cautioned to be aware of the significant remedies available to franchisees under the provincial franchise legislation and to seek local counsel to ensure that the FDD is compliant with the provincial requirements.

2. Drafting International Franchise Agreements - Typical Legal Terms

The primary purpose of a franchise agreement is to put into writing the understandings between the franchisor and franchisee in the franchise relationship. While it could be argued that franchise agreements should be short and concise, experienced franchise counsel understand that certain terms, conditions and obligations should be included in the franchise agreement. It is not always easy to decide where to draw the line on various terms, and the decision will turn on various factors, including the size and complexity of the franchise system and the duration of the term. Franchise agreements for international franchises will often include provisions that do not appear in domestic franchise agreements, due to certain cross-border considerations. Franchise counsel will want to try to maintain a balance between a fully comprehensive yet unworkable or unwieldy agreement and one that is concise, but lacks certain essential terms. Both types of contracts could result in later heartache for one or both parties to the agreement.

While it often is the case when entering into franchise agreements in the United States, which is a more developed market than most international markets, that the franchisor may have better leverage to require the franchisee to accept certain provisions in the franchise agreement for the deal to move forward, this is not necessarily the case in developing markets outside of the U.S. Internationally, the franchisor's brands may not be well known, or franchising may not be standard practice, which may give franchisees a stronger bargaining position. However, the franchisor may be able to help the franchisee understand that whether domestic or global, the uniformity of the franchise system is a necessity so terms of various franchise agreements must be uniform to a certain extent, and that this uniformity will protect the franchise system and proprietary marks of the franchisor. The balance between acknowledging the potential difference in leverage balanced against the necessity of ensuring a certain degree of uniformity in the system will instruct both parties in their actions during negotiations. The following is a discussion of some standard terms that may be included in an international franchise agreement.

a. Territorial Rights and Limitations

A territorial restriction limits the franchisor's ability to add an outlet in a certain geographic territory near an existing outlet of the same brand for a certain period of time. There may be exceptions to this restriction, such as outlets under the same brand that already exist in the territory, replacement of existing outlets and new concepts that may be developed or acquired by the franchisor in the future. Franchisees generally negotiate to have a territorial restriction in the agreement because it prevents the franchisor from adding additional outlets in close proximity to the franchisee's existing outlet that could compete with the franchisee's outlet for the same customers.

A territorial restriction is often based on location, but sometimes may also be based on type of services provided. For example, if the outlet is in a fixed location, such as a restaurant, the territorial will likely encompass either a radius around the outlet or an area measured by roads, rivers or other boundaries around the outlet. If measured by such landmarks, then the territorial should specify that the scope of the territory will be measured on the date the franchise agreement is signed. If the outlet is not in a fixed location, such as a food truck, then there may be a larger area of responsibility for the franchisee.

The territorial provision will also expressly reserve for the franchisor the right to operate and grant others the right to operate same brand outlets outside the territory at all times during the term of the franchise agreement and within the bounds of the territory once the territorial rights have expired or been terminated (the "reservation of rights" clause). Moreover, if the franchisor wants to have the ability to operate in non-traditional contexts or alternative channels of distribution, such as on the internet, then these rights should be specifically reserved. Franchisors should make the reservation of rights as explicit and complete as possible to defend against a claim by a franchisee that the franchisor's rights cannot be determined by implication from the limited territorial protection granted in the territorial. Franchisors in the U.S. learned after Scheck v. Burger

King Corp.[115] that if a franchisee is granted a territory but a franchise agreement is silent about any rights the franchisor reserves for itself, then the franchisee may have a claim in some jurisdictions that the franchisor has violated the implied duty of good faith and fair dealing when expanding the franchised business to the possible detriment of the franchisee and its business. While the law will vary in different international jurisdictions, to avoid a similar type of claim, franchisors should include a broad and clear reservation of rights provision whether or not a territorial is granted to the franchisee.

The territorial restriction should state when the restriction will begin (such as when the franchise agreement is signed or when the outlet opens), the duration of the territorial (for the term, several years, with a burn-off for certain conditions, or upon termination of the franchise agreement), and the geographic scope or other area that is protected. If the territorial restriction begins when the outlet opens, then the franchisor should have a specific date on which the territorial will expire. If there are significant delays in opening the outlet, if the franchisor has not established a specific date for the expiration of the territorial, then the delays will push back the date on which the territorial will expire, thus tying up that portion of the market much longer than anticipated.

In addition to a reservation of rights, if the franchisor intends to reserve specific other rights or exceptions to the territorial, these rights should be specifically stated as well. For example, a franchisor that may be contemplating a merger or other acquisition may desire to state as an exception that if it acquires another system with at least a certain number of outlets, that type of acquisition would be an exception to the franchisee's territorial rights. While this is not always desirable for the franchisee, if the franchisor is expanding its system through acquisitions, then it would not want to be restricted from such expansion by the provisions in the franchise agreement of one outlet.

b. Fees

A franchisor must determine an economically competitive but realistic fee structure for its franchise agreements and system. In determining a fee structure, the franchisor must consider its costs to enter and remain in the international market, such as trademark filings, product and inventory supply, travel and other personnel expenses, establishing local offices, tax and currency exchange issues, translations of agreements required under local law, training manuals and other documents, advertising and marketing, training, and operations support.

In all franchise models discussed above, the franchisor will require its counterparty to pay an initial, or affiliation, fee as a lump sum either in two payments (submitting an application and signing the agreements) or when the counterparty executes the operative agreement. In addition to the initial fee, franchisors will charge franchisees and other counterparties a recurring franchise fee that will be a percentage of gross sales or a similar type of calculation. Franchisors will also likely charge franchisees for training, review of a franchisee's designs and plans in connection with building an outlet to ensure the outlet complies with brand standards, and charges that are reimbursements of costs

[115] *Scheck v. Burger King Corp.*, 756 F. Supp. 543 (S.D. Fla. 1991).

incurred by the franchisor, such as marketing and advertising, reservation and system fees, and charges for supplies and products.

c. Development of Territory

In Section II.A. of this paper, we discuss the common methods for developing a territory internationally: Unit Franchising; Area Representation; Area Development; Master Franchising; and Joint Venture Franchising. With all of these models, if the counterparty is not complying with its development responsibilities, the franchisor has several enforcement options. The franchisor may draft into the operative agreement that the territory will either be reduced or terminated, or in a single unit franchise agreement, the franchisor may establish a default for which it can terminate the agreement. In a master franchise agreement, it is more difficult to unwind the master franchise structure unless the franchisor has another master franchisee lined up, because the master franchisee is acting on the franchisor's behalf, and not only does the franchisor need to terminate the master franchise agreement, but the individual outlet agreements may need to be transferred back to the franchisor or to another master franchisee.

d. Choice of Law and Venue

The choice of law provision establishes the applicable law that will govern disputes and claims in connection with the franchise agreement. Selecting the applicable law is important because courts often give great deference to the parties' selection of the law that will govern the agreements.

Franchisors, especially U.S. franchisors, may desire to use the law of their own country when drafting franchise agreements for an international system. This enables franchisors to use their standard forms and can keep costs down because franchisors can use their customary counsel. However, even with these favorable factors, it is recommended that franchisors seek the guidance of local counsel to ensure that the choice of law provisions in their franchise agreements do not conflict with, or are unenforceable under, laws of other jurisdictions.

The franchisor and its local counsel must determine whether applying the franchisor's home laws is in the franchisor's best interest. Applying the law of the franchisor's jurisdiction, as opposed to the law of the location of the outlets, may make negotiations with the prospective franchisee more difficult. In many other countries, franchisees and their counsel may be wary of the litigious culture in the U.S., the high amount of damages awarded by juries that is reported in the press, and the fact that the prevailing party may not always be awarded attorney's fees.

Moreover, many international franchise disputes are a result of franchisors seeking to recover payment from overseas franchisees, to terminate the agreement and collect damages, and to protect the franchisor's trademark rights. It is more common for franchisors to bring claims against franchisees than vice versa. As a practical matter, if a franchisee is unhappy with the performance of the franchisor, the franchisee is likely to practice "self-help" by withholding payment of fees (even if there is no right to do so under the franchise agreement), or to remove the brand and continue operating without a brand. What options does a franchisor have?

Some franchisors elect to use the law of a neutral jurisdiction, as this option is often more acceptable to franchisees. In making this determination, however, the franchisor must understand the law of the neutral jurisdiction and ensure that these laws will be no less favorable to the franchisor than its local laws. This often requires the hiring of local counsel to analyze the law, which results in increased costs to the franchisor. If the choice of venue is also the neutral country, this will result in additional costs to both the franchisor and the franchisee. Using the law of a neutral jurisdiction may also bring up questions as to whether there is any relationship between the parties, the business being operated, and the choice of law.

Some franchisors select their own local law, if agreed to by the franchisee. If a franchisor selects its local law, it must ensure that this choice of law will be enforceable in the franchisee's jurisdiction. In many jurisdictions, the choice of law is enforceable if properly documented and the nexus to the transaction is sufficient. In some jurisdictions, the only choice of law acceptable is the law of that country.

If a franchisor contemplates agreeing to the law of the franchisee's country, the franchisor must work with local counsel in the franchisee's jurisdiction to ensure that the franchisor will not be at an undue disadvantage if it must file a dispute in the franchisee's jurisdiction. The franchisor must take into consideration whether the jurisdiction is a common law jurisdiction or a civil law jurisdiction, and whether there is developed law with respect to franchising and injunctive relief, in the event that the franchisor needs to pursue this avenue of enforcement.

e. Venue and Forum Selection

A forum selection provision permits the parties to agree that any dispute related to the franchise agreement will be heard by decision-makers in a specific jurisdiction. Franchisors usually prefer the forum to be the franchisor's home country and state or province, if applicable, as it is more convenient for the franchisor and can give the franchisor "home court advantage." However, it may be preferable to select the jurisdiction in which the franchisee's assets and/or bank accounts are located, because if a judgment needs to be executed in favor of the franchisor, it is faster and more cost efficient to secure the judgment in the same jurisdiction in which the judgment will be enforced.

For example, if a judgment is rendered in the U.S. against a franchisee in Colombia, the U.S. judgment would have to be enforced through the Colombian courts, which would result in a two-step process, increased costs and more protracted proceedings. Therefore, in determining the venue for judicial proceedings, some issues a franchisor should consider are:

- Where the franchisee's assets and bank accounts are located;

- Whether there exists a reciprocal enforcement of judgments convention between the franchisor's and franchisee's country (such as the New York Convention);

- If it is likely that most disputes will center on payment of monies owed to the franchisor, whether the selection of venue will reduce issues related to enforcement of judgments in the franchisor's favor;

- The impact of the applicable laws and approach by the courts in the franchisee's territory on the terms of the franchise agreement;

- Whether the franchisee's jurisdiction enforces intellectual property rights; and

- Whether court decisions are made quickly or slowly in the franchisee's jurisdiction.

Some franchisors do not have a specific forum selection clause in the franchise agreement. The result of this is that while this may not be a point of negotiation for the franchisor and franchisee before agreements are signed, each party will be entitled to file a dispute in that party's desired jurisdiction, which could result in unforeseen outcomes during litigation. If it is more likely that a franchisor rather than a franchisee would bring a claim, then it may be a benefit in the end to the franchisor if there is no forum selection clause in the franchise agreement.

f. Term and Post-Term Rights and Obligations

The franchise agreement must establish a term for the agreement. The franchisor will need to decide whether to grant any renewal terms and whether such renewals will be at the sole option of the franchisor or by mutual agreement. The decision could have an impact on the valuation of the deal, including the calculation of stamp duties, if applicable. In some jurisdictions, the franchisor may be required to renew the agreements unless there is good cause not to renew.

The franchisor should include provisions that address the franchisee's post-closing obligations, such as complete de-identification of the outlet, payment of all amounts due (including liquidated damages if termination was due to the franchisee's default), and relinquishing to the franchisor all originals and copies of any confidential information and system materials provided by the franchisor relating to the operation of the outlet.

The franchisor should also determine whether to draft into the franchise agreement a covenant not to compete. A "non-compete" provision prohibits the franchisee (and potentially certain principals or managerial employees) from selling products or services that are similar to the franchisor's business during and after the end of the franchise relationship. Generally, non-compete provisions within the contract term are enforceable. Post-term non-competes are not always enforceable and vary from jurisdiction to jurisdiction. In the U.S., the enforceability of non-competes is usually a function of state law and is more developed than in international jurisdictions. Covenants not to compete are often disfavored because of the restraint on a party's ability to compete in the market and the public policy implications that go along with such restraint. The more narrowly drawn and reasonable a non-compete clause is with respect to duration, geographic area, type of business activity, and specifying the individual or entity restricted from competing, the more likely it is that it will be upheld. It is beneficial for counsel for both franchisors and franchisees to review not only the chosen governing law but the jurisdiction of the location of the franchisee in deciding the applicability of any in-term and post-term covenants not to compete.

g. System Adaptations and Modification

The franchisee should include language in the franchise agreement permitting it to modify the system as it deems appropriate. This is especially true for an international system, as there can be more variability as to different factors in an international system. The franchisor will need to consider what types of modifications will need to be made to the system. If the system has fixed outlets, then the franchisor may need to modify the design specifications of the outlets to take into account materials available in the various local markets, the demand in the local market (for example, if the system includes restaurants, whether there are certain foods that should be substituted or served to cater to the local market would be a consideration) and other cultural variations.

The franchisor should also be aware of modifications it may need to make to its trademarks in international jurisdictions. For example, while the franchisor may be able to obtain a registration for a particular trademark in the U.S., the same mark may be unavailable in other countries, necessitating a change to the name in those countries. The franchisor will need to determine if different brand names for the same or a similar product are workable for its system.

h. Governmental Approvals

Some jurisdictions require certain governmental approvals before payments may be made under the franchise agreement or the proprietary marks may be used. If a franchisor wishes to enforce its rights in a brand name or trademark, there will be certain filing requirements with the local patents and trademark office. Further, it may be required or recommended for the franchisor or franchisee to file either the full franchise agreement or a summary trademark license agreement in the local language to protect against infringement actions by third parties. These requirements vary from country to country. Also, in some countries, such as Brazil and the Bahamas, before the franchisee may make any royalty payments under the franchise agreement, the agreement or franchisee must be registered with the Central Bank. While the franchisor may not have the obligation to make such a filing, it should include provisions in the franchise agreement requiring the franchisee to complete any required registrations or other filings so there will be no delay in royalty or other payments to the franchisor.

i. Proprietary Marks

The franchisor's trademarks, trade names, trade dress, symbols and other designs ("Trademarks") are at the heart of the franchise business. The strength, distinctiveness and recognition of the franchisor's Trademarks are usually what drive franchisees to the franchisor's brand, so it is essential that the franchisor include various provisions in the franchise agreement to govern the franchisee's use of the Trademarks. In addition to granting use of the Trademarks to the franchisee, the franchisor usually will require the franchisee to (i) use the Trademarks only in connection with the franchise business, (ii) conform its use to the graphic and other standards the franchisor has established, (iii) not represent that the franchisee owns the Trademarks, (iv) not transfer or sublicense the Trademarks, unless permitted to do so by the franchisor, (v) not use or register any names or other marks that are confusingly similar to the franchisor's Trademarks, (vi) not use any of the Trademarks in connection with the franchisee's corporate or legal name, and (vii) not use the Trademarks together in combination with any franchisee marks, unless permitted to do so by the franchisor. Franchisors should also consider adding provisions about protecting use of the Trademarks on the internet, particularly in websites and domain names.

The franchisor will want to include provisions in the agreement requiring the franchisee to notify the franchisor promptly of any third-party litigation related to the Trademarks, requiring the franchisee's cooperation in defending the litigation and prohibiting the franchisee from agreeing to any settlements without involvement by the franchisor. For mature systems with registered Trademarks, the franchisor may agree to indemnify the franchisee for third-party infringement suits. Franchisors that include these provisions in the agreement often condition indemnification on certain conditions, such as the franchisee providing prompt notice to the franchisor of the claim and the franchisee not being in default of the franchise agreement.

j. Franchisor's Obligations

The franchise agreement will include provisions requiring the franchisor to provide certain assistance to the franchisee both before the opening of the outlet and during the term of the franchise agreement. For example, if the outlet is brick and mortar, then the franchisor will likely provide product review and technical assistance during the design and construction of the outlet, and review and approve the interior design for compliance with system standards. The franchisor probably will also visit the outlet during construction and immediately prior to opening to confirm compliance with the standards in the construction and equipping of the outlet. If the franchisor is providing this assistance, it should determine whether it will charge the franchisee for the assistance and if so, define the payment terms and conditions in the franchise agreement.

The franchisor will also be obligated to provide, either digitally or in any other manner the franchisor deems appropriate, a compilation of the franchisor's then-current manuals, standard operating procedures, systems, guides, programs (including the franchisor's quality assurance program), design criteria, and any other information and controls necessary for operating the outlet.

The franchisor will provide various types of training for the franchisee, including pre-opening training on operations, sales and marketing, use of the various electronic systems required for operation of the franchise, and training on handling food and beverages, if applicable. The franchisor will also likely require ongoing training after the outlet has opened for both managers and other staff.

After the outlet has opened, the franchisor will provide in-person assistance, either through its employees in a direct franchising structure or via a master franchisee, updated manuals, updates to required systems used for the franchise, marketing and advertising assistance, and will take actions to continue to protect the trademarks.

k. Franchisee's Reporting and Payment Obligations

The franchise agreement should include provisions regarding the franchisee's payment obligations. As a general matter, because the franchisee maintains the records of its revenues and profits, it will be in the best position to calculate royalty fees. Some franchise systems have a direct feed of revenues so the franchisor can confirm the accuracy of the royalty fees paid. Many franchise agreements will provide for the franchisor to invoice the franchisee for royalty fees, advertising and marketing fund charges, and other amounts, such as training and electronic systems support charges. The agreement should establish a time period, such as 30 days after an invoice is issued, within which the franchisee must pay the applicable charge. With respect to incoming payments from international jurisdictions, sometimes the franchisee needs additional time to issue payments, and this should be taken into account in the agreement. Further, the franchise agreement should contain a provision permitting the franchisor to charge interest, in an amount that is not usurious, for late payments.

The franchisor will want to include in the franchise agreement provisions requiring the franchisee to account for it sales so that the franchisor can confirm the calculation of royalty fees and other payments. The franchisee should be obligated to maintain books and records for a certain minimum period of time (such as three years) in accordance with generally accepted accounting principles ("GAAP"), either of the franchisor's home country or the franchisee's local jurisdiction. The franchisee should also be required to provide to the franchisor periodic (such as monthly) statements and annual statements according to the applicable GAAP, and the franchisor should specify accounting for any particular item for which payment is required under the franchise agreement.

The franchisor should have examination and audit rights over the franchisee's accounting and records, and there should be a provision in the franchise agreement providing that the franchisee will cooperate with the franchisor (and if applicable, an independent third-party auditor) in connection with the examination of the books and records. Finally, the franchisor may desire to put provisions into the agreement (i) requiring the franchisee to pay for the franchisor's costs if the audit demonstrates underreporting of a certain percentage, or if there is insufficient information to determine whether the reporting has been accurate, (ii) requiring the franchisee to remit payment to the franchisor if an audit reveals underpayment by the franchisee, and (iii) providing the franchisor with remedies, such as termination for recidivism or if the franchisee fails to make the franchisor whole for any underpayments.

l. Other Franchisee Obligations

Basic to the obligations of the franchisee is to fully participate in the mandatory programs for the system, offer customers all required services and products, make all required payments to the franchisor, and use the outlet only for the intended operational purpose. Conversely, the franchisee will be prohibited from operating the outlet contrary to the terms of the franchise agreement, and will be restricted from providing any services not permitted by the standards. The franchisee should also be prohibited from using any part of the outlet or system to promote any other business that is not associated with the system, and the franchisee should be required to encourage and promote the patronage of the other outlets in the system.

m. Supply and Suppliers

Careful selection of the products and services a franchisee will offer is essential to the success of a franchise system. A primary reason customers of franchise concepts patronize outlets is the consistency in the products and services purchased. Customers will be disappointed if there is variation between the quality and quantity of products or services from outlet to outlet, and the success and reputation of the brand will suffer. For these reasons, it is important for a franchisor to include provisions in the franchise agreement imposing restrictions and requirements on sources of supplies and services and the types of supplies and services used. The franchisor may require franchisees to purchase certain proprietary products and supplies from the franchisor itself or from certain designated suppliers. Franchisors also may negotiate agreements with certain suppliers and will require all franchisees to use these suppliers. While outside the scope of this paper, franchisors should be aware of potential antitrust issues raised by these structures.

The process of locating suppliers and products internationally can be one of the most difficult and time-consuming tasks a franchisor faces when expanding internationally. Sometimes the franchisor may be able to find suppliers that can provide products and services in multiple countries, but other times it may be costly and logistically difficult to accomplish this. Franchisors will want to draft provisions in the agreement to address hurdles to moving products and supplies across borders (e.g., expensive tariffs), such as permitting franchisees to procure supplies from alternate suppliers that are approved in advance by the franchisor on an ad hoc basis. Franchisors will also want to include provisions that give the franchisor the ability to seek remedies if either suppliers or their products do not comply with system standards or if franchisees use suppliers or supplies that have not been approved by the franchisor. These issues can often arise with the procurement of food products. There may be religious restrictions on certain food products, or the laws of one country may prohibit the importation or exportation of certain agricultural products.

n. Advertising and Marketing Fund

The franchisor must determine how much control it will exercise over advertising and marketing activities of the franchise system, and include applicable provisions in the agreement. If the franchisor will conduct marketing activities for the system, then the franchisor will likely establish a marketing fund to which franchisees must contribute. This amount is often based on a certain percentage of sales or gross revenues. The franchise agreement should contain language defining the amount the franchisee will pay to the marketing fund, if and when the franchisor will be able to modify the amount the franchisee must contribute during the term of the agreement, and the general scope of the marketing activities conducted by the franchisor. The franchisor may use the funds to focus its efforts on system-wide, country-specific, or regional marketing activities, and this should be generally described in the franchise agreement. If the franchisor's system is in countries that speak language different from the language of the franchisor's country, the franchisor likely will need to conduct marketing and advertising and produce marketing materials in several languages, and will need to take into account cultural differences when producing the content of such materials.

o. Transfer and Assignment

A franchisor should consider carefully (i) the content of the transfer provisions in the franchise agreement, (ii) what transfer rights a franchisee should have, and (iii) what type of restrictions should be imposed on these rights. Transfer sections in franchise agreements are often relatively long, as the franchisor attempts to address a number of different transfer scenarios. Most franchise agreements give the franchisee some transfer rights, even if subject to certain conditions. Franchisors generally do not want to stand in the way of transfers if they are from one capable franchisee to another, as it will generate more value for the brand if a well-operated outlet continues to operate within the system. Transfer provisions may require that at the time of transfer (i) the outlet be updated or renovated to bring the outlet into compliance with brand standards, (ii) the transferee sign a new updated form of franchise agreement instead of a simple assignment of the existing agreement, and (iii) the payment of a new application fee in connection with the transfer.

Transfer scenarios that come up frequently involve transfer of the franchised business or a controlling ownership interest in the franchisee, and transfer upon the death or disability of the franchisee.

All franchise agreements are personal in nature and the franchise is granted based on the business experience, financial standing and other qualifications of the particular franchisee and its principals. Therefore, the franchise agreement should address the process by which the franchisee may sell the franchise business, either by selling the actual real estate and outlet where the franchise business is located, or by transferring the ownership shares in the franchisee entity. Many franchise agreements provide that this type of transfer is subject to the franchisor's prior consent, and while many agreements will give the franchisor broad discretion to approve or disapprove the transfer, other agreements state that the consent is in the franchisor's reasonable discretion. Some franchise agreements prohibit transfer altogether, but there may be applicable laws affecting the franchisor's ability to prohibit transfers outright.

p. Transfer upon Death or Disability of the Franchisee

Most franchise agreements contemplate the untimely death or disability of the franchises if it is an individual, or of the principal owner of the franchisee, if it is an entity, as both the franchisor and franchisee have an interest in the orderly continued operation of the franchise business by either a new principal or franchisee. Franchise agreements usually provide that the agreement may be transferred within a finite period of time after death or disability to a franchisee that is qualified to operate the franchise and approved by the franchisor. The franchisor will want to require that the transferee complete training and other requirements and if applicable, retain a qualified operator to operate the franchise. Franchisors should be aware, however, that certain jurisdictions have laws that give heirs of a franchisee certain (sometimes automatic) rights as potential transferees that may conflict with the provisions of the franchise agreement.

q. Taxes and Currency Provisions

1. Taxes

With cross-border transactions, the franchisor must be aware of tax implications when drafting the franchise agreement, and will want to plan accordingly when valuing a franchise deal. When payments are transferred from one country to another, the tax authorities in the originating country may require payment of a withholding tax. If a franchisor is located outside of the country in which an outlet is located, the franchisor will not pay income tax to the originating country, and imposing withholding taxes is a way for the tax authorities in the country where the outlet is located to be able to receive a portion of the profits of the deal. For example, if the withholding taxes in Country A, where the franchisee is located, are 20%, and the franchisor is located in Country B, then for every US$100 the franchisee pays to the franchisor, 20% of that payment is deducted for remittance to Country A's tax authorities and the franchisor will receive less than the US$100 owed to it. If the franchisee must "gross-up" the payments, then the franchisee will be responsible for paying the full US$100 to the franchisor and the 20% withholding taxes to Country A's tax authorities. This amount can add up, so both the franchisor and franchisee must determine the impact of the withholding amounts. Many countries have varying tax rates (or no tax imposition) for royalty fees vs. technical services, reimbursable expenses or other charges. There are also double taxation treaties between various countries that reduce the tax rates, and tax credits that the franchisor may take advantage of to reduce its burden if the franchisee does not gross-up certain fees paid to the franchisor. The gross-up question is often negotiated between the parties and the franchisor must be sure to include language that accurately reflects the final terms agreed to by the parties.

While not necessarily a "tax," but characterized as a duty in many jurisdictions, the parties should be aware of stamp tax payments, and the franchise agreement should include a provision about whether one or both parties will be responsible for payment of the stamp tax. While the amount is nominal in some countries, in other countries, such as Argentina, the stamp tax can add up quickly, because the amount to be paid is calculated based on the value of agreement. For example, if the parties sign a 10-year agreement for an outlet to be located in the province of Buenos Aires, where the stamp tax is .75% of the value of the contract, then the stamp tax will be based on the value of the agreement, or a percentage of the fees paid, for the entire 10-year period. There are various mechanisms for reducing or avoiding the stamp tax in Argentina and other countries, and both the franchisor and franchisee should consult with experienced counsel on this issue.

2. Currency Considerations

Currency provisions usually specify (i) the currency to be used for payments, (ii) which measurement will be used to determine the exchange rate (e.g., WSJ, Bloomberg), and (iii) the conversion date to be used for different categories of payments. The calculation date for the exchange rate for royalty fees and other periodic payments to be made under the franchise agreement is generally determined as of the date a payment is invoiced or the date payment is due. For ad hoc payments, such as reimbursement for travel charges, it is generally most straightforward for the conversion calculation to be made as of the date the expenses were incurred.

For international transactions, the franchise agreement should also include a provision governing situations in which funds cannot be transferred between countries. If there is a restriction on the transfer of funds from one country to another, the parties should be required to cooperate with each other to ensure full and timely payment. The franchisor may require the franchisee to deposit payments into a local account until the currency restrictions are lifted. The franchisor should also include remedies for a situation in which it seems that currency restrictions will be in place for a long time. Some options are curtailing certain services or performance obligations, and terminating the agreement. If the franchisor is aware of currency restrictions when the franchise agreement is signed, the franchisor may require the franchisee to make payments in currency not of the restricted country from accounts outside of the franchisee's country. This solution and others should be vetted by tax counsel from both jurisdictions.

r. Indemnification

The goal of the indemnification provision in the franchise agreement is to protect the franchisor from any liability arising from the franchisee's acts and omissions. The provision serves to protect franchisors and its officers, directors, affiliates, successors and assigns from third-party claims. The indemnification clause requires the franchisee to indemnify and hold the franchisor parties harmless from such claims. Some indemnification provisions require the franchisee to also defend third-party claims at the franchisee's cost and expense, rather than simply requiring indemnification. If there is an obligation to defend against claims, it is preferable for the franchisor to have the right to control the defense, including selecting applicable counsel. The franchisor often must consider issues beyond the specific claim raised based on the franchisee's actions because the franchisor must determine how the outcome of the claim may affect the franchise system overall. For example, even if a settlement may make sense in a particular case, it may not be advisable, as it could encourage other plaintiffs to make claims against the franchisee and franchisor.

Third parties often will bring a claim against both the franchisor and the franchisee, not understanding the nature of the franchise relationship. As a result, the franchise agreement must have a sufficiently broad but clear indemnification provision. The indemnification provision should expressly require indemnification for claims of the franchisor's negligence because in many suits, claims of negligence are standard, and the franchisor does not want a claim of negligence to result in the franchisee avoiding the obligation to indemnify.

s. Dispute Resolution

The dispute resolution provision establishes the process that will be used for dispute resolution, be it litigation, mediation and/or arbitration. Franchisors have been inclined to prefer arbitration to litigation, on the long-held theory that arbitration is a cleaner, quicker and less expensive process. This has not always been borne out to be true, especially in situations in which the arbitrator imposes a process similar to what occurs in litigation, such as extended prehearing discovery and motions practice. However, if the parties are located in member countries to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), then arbitration may be desirable, as the New York Convention requires member countries to recognize and give effect to arbitral awards of other member countries. As of the writing of this paper, at least 156 countries are members of the New York Convention. A benefit of selecting arbitration, therefore, is that the prevailing party will not face the hurdle of filing a separate action in a local court to enforce a foreign judgment. Additionally, a franchisor may select arbitration because it is not certain how local courts will apply the governing law if it is the law of the franchisor's jurisdiction. Other benefits of arbitration are that arbitration awards are generally final, therefore not appealable, arbitration awards are generally confidential, the forum is generally neutral, and the process may be more flexible than a full-blown litigation. The franchisor may also identify in the franchise agreement the procedural rules that will govern arbitrations.

Three institutions that commonly administer arbitration rules are the International Court of Arbitration of the International Chamber of Commerce ("ICC") (most well-known), the London Court of International Arbitration ("LCIA") (Europe's second leading international arbitration institution (after the ICC)), and the International Centre for Dispute Resolution ("ICDR") (part of the American Arbitration Association). The rules of all three institutions may be used around the world, under a number of different languages, and under the governing laws of various countries. If franchisors do not use the rules of these institutions, they may instead decide to use an "ad-hoc" system such as the UNCITRAL Rules (developed by the United Nations Commission on International Trade Law). While outside the scope of this paper, there are benefits to using each system.

When including an arbitration provision in the franchise agreement, the franchisor should strive to draft a provision that is clear and concise. The arbitration provision should provide a framework, process and timing for the arbitration, and should include the right of the franchisor to seek injunctive relief without first going through the arbitration process. The arbitration provision should include a provision defining the time frame in which the arbitration should be commenced, the seat of the arbitration, the number of arbitrators (franchisors usually select one or three), the process for selecting the arbitrator(s), and whether the arbitrator is permitted to award attorney's fees. The arbitration provision should include a prohibition on class actions, a jury trial waiver clause, and consolidation, joinder and confidentiality requirements. Finally, the arbitration provision should include a clause deeming arbitration to be the exclusive remedy (except for injunctive relief) and that the decision will be final and binding on all parties.

A franchisor may also include a provision in the franchise agreement requiring mediation before arbitration. Mediation can be a desirable option, as it gives the parties the ability to jointly determine a mutually agreeable resolution to a dispute, which could help maintain their working relationship better than litigation or arbitration would. However, when a franchise agreement includes mediation before arbitration, the franchisor should ensure that the mediation provision is drafted so that mediation is not always a necessary precursor to arbitration. This way, the franchisee would not be able to use the mediation process to delay a resolution of the issues under arbitration.

t. Default and Termination

The more precisely and thoroughly the obligations, restrictions and causes of termination are drafted, the easier it will be for the franchisor to establish a default and terminate a franchise agreement. This ability is essential, as it provides the franchisor one of the primary avenues for maintaining and enforcing system standards. If a franchisor is able to terminate franchisees that are not performing under the standards, the result will be better protection of other franchisees that are in compliance with the system and standards, and a stronger and better performing franchise system.

The franchisor may structure the franchise agreement so that there are certain defaults for which termination is automatic without notice from the franchisor (transfer of the outlet to a lender in foreclosure or prohibited transfers), certain defaults for which termination is immediate upon notice from the franchisor (felony conviction of the principal of the franchisee or failure of the franchisee to continue to operate the outlet under the system's proprietary marks), and other defaults for which the franchisor will terminate only after providing the franchisee with notice and an opportunity to cure the default (failure to pay royalty fees on time or failure to open the outlet by the deadline defined in the contract).

In the U.S., various states have relationship laws and permit termination of the franchise agreement by the franchisor only upon good cause, notice and an opportunity to cure the particular default, and this is true in some international jurisdictions (e.g. Australia, Italy), Therefore, when drafting the franchise agreement, the franchisor should consult with local counsel to determine whether there are any local restrictions on termination even if the governing law is not local law.

u. Consequences of Termination

The franchisor will want to provide for an orderly transition if a single-unit franchise agreement is terminated. The franchisor will need to consider drafting post-termination obligations into the franchise agreement. Some examples of post-termination obligations are that the franchisee should be required to (i) immediately stop using any of the system's trademarks in connection with the outlet and remove any signs or other characteristics that would identify the outlet as part of the franchise system, (ii) immediately stop operating the outlet as part of the franchise system, (iii) take down all internet sites the franchisee controls that indicate the outlet is part of the franchisor's system, (iv) return originals and any copies of all manuals, marketing and advertising collateral, and any other documentation, in any form, related to the operation of the outlet under the franchise system, (v) reaffirm its commitment to maintaining continued confidentiality of all aspects of the franchise system, and (vi) going forward, advise customers that the outlet is no longer part of the franchisor's system. Many franchisors will also require the franchisee to execute a termination agreement, which will include a release of claims against the franchisor.

In the context of a master franchise agreement or similar agreement, the franchisor must consider its plan for termination if the master franchisee is not complying with its obligations. The franchisor should determine the process and basis for terminating the master franchise agreement and must also determine whether it will have a concurrent right to terminate single-unit agreements, permit the master franchisee to continue to operate the individual outlets, or require the master franchisee to transfer the outlets (which should be at the option of the franchisor) back to the franchisor or to a new master franchisee, if one has been selected. Prior to the start of the master franchise relationship, the franchisor should review local laws to determine whether there are any laws that could restrict such transfers, such as franchise or business relationship laws, corporate statutes, agency laws and the like.

v. Liquidated Damages

Many franchise agreements include provisions permitting the franchisor to collect not only direct damages, but also consequential damages, which would likely include lost royalty fees for the anticipated term of the agreement. If a franchisor does not want to leave this determination to a court or arbitrator, the franchisor may include a provision stating that upon termination based on a default by the franchisee, the franchisor may collect liquidated damages. A liquidated damages provision is more likely to be upheld if (i) it would be difficult to quantify the impact and damages of a termination in an agreement, (ii) the amount of liquidated damages is reasonable and considers the actual or anticipated harm caused by the contract breach, the difficulty of proving the loss, and the difficulty of finding another, adequate remedy; and (iii) the damages are structured to function as damages, not as a penalty.

The calculation of liquidated damages should take into account future lost profits, which could include royalty fees for single unit franchises, lost profit of supplies or products the franchisor or its affiliate may anticipate that it would have sold to the franchisee in operating the outlet, the franchisee's anticipated payment into any marketing and advertising fund, and the franchisor's portion of any or all of the above for termination in the context of an area development agreement or master franchise agreement. If the parties agree in the contract on a calculated amount for liquidated damages, then if there is a dispute, the determination of damages will not be left to an arbitrator or other decision-maker.

Conversely, the franchisor should seek to limit its own damages, on the theory that the franchisee is the party operating the outlet and therefore would control much of what can go right and wrong during the operation of the outlet. A typical provision may require the franchisee to waive exemplary, punitive, incidental and consequential damages as to any claim against the franchisor or its affiliates, and limit the franchisee's recovery either to actual damages the franchisee can demonstrate or to the total amount the franchisee has paid to the franchisor in application fees, training, and design review services.

w. General Agreement Provisions

Other general provisions the franchisor should consider adding to the franchise agreement include clear definitions, confidentiality and data privacy and protection provisions, insurance provisions that support the franchisee's indemnification obligations, interest charged in the event of a late payment, a requirement that the franchisee provide notice of third-party legal actions, addresses for notices, representations and warranties about the franchisee's corporate formation and authority to enter into the franchise agreement, if the agreements are in dual column format or a language other than the language of the franchisor's jurisdiction, which language will apply, a counterparts provision, integration clause, and amendments and survival provisions. The franchisor should also be aware of whether the country in which the outlet will be located requires certain provisions under that country's franchise laws (e.g., Mexico) so these types of provisions can be included as well.

PART II: HOT TOPICS IN INTERNATIONAL FRANCHISING

I. Franchising in Emerging Markets such as Africa and the Caribbean (including Cuba)

A. Regional Overviews

1. Americas and the Caribbean

The Americas cover two continents, include more than 40 nations and territories, and are inhabited by over 950 million people.[116] The Americas include four distinct

[116] *The Americas and the Caribbean*, NATIONS ONLINE, *available at* http://www.nationsonline.org/oneworld/america.htm. (last visited March 28, 2017)

regions: North America,[117] Central America,[118] South America[119] and the Caribbean.[120] The Americas are home to some of the richest and poorest countries in the world. While the United States has the largest economy in the world,[121] countries like Haiti and Guyana are considered some of the poorest countries.[122]

Despite global economic struggles, the economies of Central America and the Caribbean region, Mexico, Canada, and the United States have all experienced modest growth in recent years. However, Latin America[123] as a whole has experienced less growth and its economic prospects have not been especially positive.[124] In 2015, economic activity in Latin America decreased by 0.1%, following a relatively successful annual growth of 3.6% in each of its prior five years.[125] This was the first regional contraction in the economy since the 2009 global financial crisis, and was driven largely by poor performance by the economies of Brazil and Venezuela. Political developments within the region do not help the stagnant economy, as events like the recent leak of documents better known as the "Panama Papers," have revealed potentially illegal activities of financial leaders and businessman across the region.[126] Brazil's recent impeachment of President Dilma Rousseff, Peru's presidential election run-off between right-wing Keiko Fujimori and center-right Pedro Pablo Kuczynski, and political tensions between Venezuela's executive branch led by Nicolás Maduro and the opposition-run National Assembly have also caused concerns for the region's economic stability, leading some analysts to predict a 0.3% decline in Latin American GDP in 2016.[127] The economies of Central America and the Caribbean region have been more stable than

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[117] North America includes Canada, Mexico, and the United States.

[118] Central America includes Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.

[119] South America includes Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, French Guiana, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

[120] The Caribbean region includes Anguilla, Antigua and Barbuda, Aruba, Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Cuba, Dominica, Dominican, Republic, Grenada, Guadeloupe, Haiti, Jamaica, Martinique, Montserrat, Netherlands Antilles, Puerto Rico, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and the U.S. Virgin Islands.

[121] *The World's Most Powerful Economies*, THE TELEGRAPH BUSINESS, available at http://www.telegraph.co.uk/business/2016/02/11/the-worlds-most-powerful-economies/. (last visited March 28, 2017)

[122] *The Poorest Countries in the World*, GLOBAL FINANCE, *available at* https://www.gfmag.com/global-data/economic-data/the-poorest-countries-in-the-world?page=12. (last visited March 28, 2017)

[123] "Latin America" generally refers to the countries and territories in the Americas where the Spanish and Portuguese languages dominate. However, for purposes of this article, "Latin America" refers Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, Venezuela.

[124] *See Economic Snapshot for Latin America*, FOCUS ECONOMICS (April 20, 2016), *available at* http://www.focus-economics.com/regions/latin-america (last visited March 28, 2017).

[125] *Id*.

[126] *Id*.

[127] *Id*.

Latin America, with overall GDP growth of 3.2% in 2015.[128] Mexico experienced growth of 2.5% in 2015,[129] the United States growth of 2.4%,[130] and Canada growth of 1.2%.[131]

***Recent Expansion into the Americas*.** Franchising is a well-established business practice in North America and franchises continue to expand across the continent. For example, according to the Mexican Franchise Association, Mexico has over 13,000 franchise concepts.[132] Approximately 15% are international brands.[133] The Mexican franchise sector has had double digit growth in recent years.

Canada has also experienced major franchise expansion.[134] In 2014, Canada recognized that six franchise groups were experiencing substantial growth and increased franchise listings over a span of five years. These franchise groups included business consultants/services/training franchises where franchise listings grew 211%, hair and nail salons/spas grew by 188%, senior/home care and related services saw a growth of 121%, restaurants experienced 88% growth, home-based businesses increased by 83%, and health and fitness franchises expanded by 82%.[135]

South America is steadily becoming more attractive for franchise expansion. The International Trade Administration, a bureau within the U.S. Department of Commerce, has identified Columbia, Brazil, and Argentina in the top twelve international franchise markets.[136] Despite its economic struggles, Brazil remains a very appealing market for franchise expansion.[137] Experts consider the Brazilian franchise sector to be among the world's largest and most sophisticated franchise markets.[138] According to the Brazilian

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[128] *Economic Snapshot for Central America*, FOCUS ECONOMICS (Apr. 20, 2016), *available at* http://www.focus-economics.com/regions/central-america (last visited March 28, 2017).

[129] *Mexico Economic Outlook*, FOCUS ECONOMICS (Oct. 11, 2016), *available at* http://www.focus-economics.com/countries/mexico (last visited March 28, 2017).

[130] *United States Economic Outlook*, FOCUS ECONOMICS (Sept. 27, 2016), *available at* http://www.focus-economics.com/countries/united-states (last visited March 28, 2017).

[131] *Canada Economic Forecast*, FOCUS ECONOMICS (Sept. 27, 2016), *available at* http://www.focus-economics.com/countries/canada (last visited March 28, 2017).

[132] *See* 2016 Franchising Top Markets Report, U.S. Department of Commerce, International Trade Administration, Industry & Analysis at 27 (May 2016), *available at* http://www.franchise.org/sites/default/files/uploaded_documents/Franchising_Top_Markets_Report.pdf (last visited March 28, 2017).

[133] *Id*.

[134] Ned Levitt, *Canada: Franchise Law in Canada: Where We Are And Where We Are Headed*, MONDAQ (Apr. 29, 2014), *available at* http://www.mondaq.com/unitedstates/x/310188/Franchising/FRANCHISE+LAW+IN+CANADA+WHERE+WE+ARE+AND+WHERE+WE (last visited March 28, 2017).

[135] *Id*.

[136] *See* supra note 132.

[137] Brazil – Franchising, October 14, 2016, *available at* https://www.export.gov/article?id=Brazil-Franchising (last visited March 28, 2017).

[138] *See supra note 132*.

Franchising Association, the Brazilian franchise industry has grown between 10% and 20% annually over the last ten years.

Franchisors are also looking to Central America and the Caribbean as potential markets for further expansion. The United States Franchise Trade Mission responded to this interest when it planned a mission to Costa Rica, Guatemala, and El Salvador, focusing on selected franchises in industries spanning from restaurants to beauty cosmetics to extermination companies.[139]

Hotel franchise expansion is climbing in Cuba particularly in response to the December 2014 push from President Barack Obama to lift the United States' embargo against Cuba.[140] On March 19, 2016, after receiving special approvals from the Office of Foreign Assets Control of the U.S. Department of the Treasury (OFAC), Starwood Hotels and Resorts executed historic agreements in Cuba, announcing a multi-million dollar investment to operate certain Havana hotels.[141] With OFAC's recent approval, Marriott International has also started talks with Cuban officials to manage local hotels in Cuba and one day potentially franchise.[142]

***Franchise Specific Programs in the Americas*.** Certain countries in the Americas have recognized that growth of the franchise industry can spur overall economic growth in the country. Canada, for example, through the Canadian Franchise Association (CFA) and the Department of National Defence has encouraged Canada's growing franchising industry while addressing its veterans' need for work by creating a targeted incentive program.[143] The CFA and the Department of National Defence recognized the advantages of reintroducing Canada's honorably discharged veterans back to the work force and have used the "CFA Military Veterans Program" to connect veterans with franchisors across Canada who offer veterans discounts and franchising opportunities.[144]

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[139] *See* 2016 Top 100 Global Franchises: International Expansion & Looking Forward, FRANCHISE DIRECT (Feb. 11, 2016), *available at* http://www.franchisedirect.com/information/2016top100globalfranchisesinternationalexpansionlookingforward/?r=5187 (last visited March 28, 2017). Franchises that went on the mission included Arby's, Berlitz Franchising Corp., Bonchon Chicken, FASTSIGNS, Fuddruckers, Kona Grill, Mosquito Squad, Russo's New York Pizzeria, Signal 88 Security, Sky Zone, Smashburger, Wayback Burgers and Xtreme Lashes.

[140] *Starwood Hotels and Resorts Announces Groundbreaking Expansion to Cuba*, BUSINESSWIRE (Mar. 19, 2016), *available at* http://www.businesswire.com/news/home/20160319005015/en/ (last visited March 28, 2017).

[141] *See* Kendal H. Tyre, Jr., Alexandra López-Casero, and Pierce Haesung Han, *Hotel and Franchise Expansion into Cuba*, NIXON PEABODY (Apr. 15, 2016), *available at* https://www.nixonpeabody.com/en/ideas/articles/2016/04/15/hotel-and-franchise--expansion-into-cuba (last visited March 28, 2017).

[142] *Id*.

[143] *Veterans in Franchising Feature*, CANADIAN FRANCHISE (Sept. 4, 2015), *available at* http://www.canadianfranchisemagazine.com/expert-advice/veterans-franchising-feature (last visited March 28, 2017).

[144] *Id*.

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In the United States, the International Franchise Association provides similar opportunities for veterans through its VetFran incentive program.[145] The U.S. Small Business Association provides government loan guaranties that can assist franchisees seeking financing to invest in franchise opportunities.[146]

Mexico understands the importance of the franchise industry for its own economy. In 2008, the National Franchise program was established by the Ministry of Economy and focuses on the creation and acquisition of franchise concepts in Mexico.[147] In addition, in 2014 the National Institute of the Entrepreneur announced the Financing Program for Franchises, which supports investors and entrepreneurs through finance programs for the acquisition of franchise concepts.[148]

***Legislative Reforms*.** While many countries in the Americas recognize the benefits of supporting and encouraging the franchise model, some countries also have concerns about possible abuses. As the franchise model has expanded across the world, legal reforms have often followed to ensure that franchisees are protected.

All of the countries in North America have now enacted legislative and economic reforms specifically governing the franchise industry. The United States passed the first laws regulating franchising when the state of California passed the *California Franchise Investment Act* in 1974.[149] National regulation followed in 1979 when the U.S. Federal Trade Commission issued the *Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures*.[150] Currently, more than 20 other U.S. states have laws regulating some aspect of the franchise relationship. In Canada, six provinces have now passed pre-sale disclosure laws regulating the franchise relationship.[151] Alberta adopted legislation in the 1970's while Ontario followed suit in 2000. Prince Edward Island and New Brunswick created their franchise laws in 2007. Manitoba enacted a franchise law in 2012. British Columbia has a new franchise law which came into effect in 2017.[152] In Mexico, under Article 142 of the Mexican Industrial Property Law, franchisors are required to provide to the prospective franchisee certain information at least 30 business days prior to the date of execution of a franchise agreement.[153]

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[145] *See Message from the VetFran Committee*, INTERNATIONAL FRANCHISE ASSOCIATION, *available at* http://www.franchise.org/vetfran (last visited March 28, 2017).

[146] *See* Priyanka Prakash*, Franchise Financing: Top Options & How They Work*, FIT SMALL BUSINESS (Aug. 29, 2016), *available at* http://fitsmallbusiness.com/franchise-financing/ (last visited March 28, 2017).

[147] *See* supre note 132.

[148] *Id*. at 27-28.

[149] Cal. Corp. Code § 31000 et seq.

[150] 16 C.F.R. 436.1 et seq.

[151] *See* Walker and Chong, *supra* note 18, at 2926

[152] *Id.* at 292.

[153] *See* Rangel, *supra* note 28, at 347.

Unlike the countries in North America, most other countries in the Americas lack a legal framework specifically for the franchising industry. In countries such as the Bahamas,[154] Cuba,[155] El Salvador,[156] and Haiti,[157] the principles of freedom of contract predominate with respect to franchise relationships. However, there are some notable exceptions. Since the passage of *Law 8,955 of December 15, 1994*, Brazil has maintained a robust disclosure regime requiring certain standard disclosures to franchisees prior to any franchise sale.[158] In addition, all franchise agreements in Brazil must be filed with the National Institute of Industrial Property.[159] In August 2015, Argentina's new *Civil and Commercial Code* became effective and applicable to all franchise agreements. Among other things, Argentina's *Civil and Commercial Code* governs franchise relationships and ensures that agreements abide by matters of public concern.[160] The new franchise law mandates minimum four-year terms for most franchise agreements, and requires franchisors to provide detailed financial information to franchisees prior to any franchise sale to demonstrate that the franchisor has experience with similar operating units.[161]

The continued evolution of laws related to franchising reflects the franchise industry's growth and its potential impact on the economies of the Americas. As South American and Central American countries become more involved with the franchise industry, we are bound to see additional legislative changes. It will be interesting to observe how these laws may differ across regions and determine what that means for future franchising in the Americas.

2. Asia

Asia is currently home to the world's second-, third-, and seventh-largest economies[162] measured by gross domestic product (GDP) and five of the twenty G20

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154 *See generally* Archer-Glasgow and Hanna *supra* note 74, at 272.

155 *See generally* Urra and Camallonga, *supra* note 75, at 323.

156 *See generally* José Roberto Romero, *Franchising in El Salvador*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 339 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

157 *See generally* Christelle Vaval, *Franchising in Haiti*, in INTERNATIONAL FRANCHISING 2016: LEGAL AND BUSINESS CONSIDERATIONS 345 (Kendal H. Tyre, Jr., Diana Vilmenay-Hammond, Keri A. McWilliams, Pierce Haesung Han, and Nia D. Newton eds. LexNoir Foundation 2016).

158 *See* Amaral and Bassani *supra* 17, at 286.

159 *Id*. at 288.

160 *See* Castro Sammartino, *supra* note 15, *at* 266.

161 *Id*. *See also* Bret Lowell and Abshiske Dubė, *Argentina's new Franchise Law: Unusual and Unclear*, DLA PIPER (May 4, 2015), *available at* https://www.dlapiper.com/en/us/insights/publications/2015/05/argentina-new-franchise-law (last visited March 28, 2017).

162 Andrew Bergman, *World's largest economies*, CNNMONEY, available at http://money.cnn.com/news/economy/world_economies_gdp/ (last visited March 28, 2017).

Members.[163] The emerging Asia region, which includes Southeast Asia, China and India, is projected to grow by 6.4% in 2016 and 6.3% in 2017.[164]

Despite the global economic downturn, the economies of the Association of Southeast Asian Nations (ASEAN),[165] which includes Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), Philippines, Singapore, Thailand and Vietnam, have continued to experience steady growth, supported by strong domestic consumption and investment. The Asia Pacific region as a whole was forecasted to experience 4.7% retail growth in 2014, up from 4.3% in 2013.[166] However, the International Monetary Fund has expressed concern over the region and the "middle-income trap" where rapidly growing economies become stagnate at middle-income levels and fail to graduate into the high-income levels of advanced economies.[167]

***Recent Expansion into Asia*.** Against this backdrop, franchising in Asia has experienced consistent and exponential growth in recent years. The news headlines cite the growth taking place.

Starbucks recently opened its 625th store in South Korea, after first arriving in the country in 1999.[168] Additionally, the company plans to open 500 new stores in China every year for the next five years, more than doubling the current count of about 2,000 Starbucks stores across 100 Chinese cities.[169] Berkshire Hathaway Inc., which owns Dairy Queen and operates more than 600 stores in China, is expanding into Taiwan and Vietnam.[170] Johnny Rockets opened its second location in Malaysia less than six months

[163] *G20 Members and Participants*, G20, *available at* https://www.g20.org/Webs/G20/EN/G20/Participants/participants_node.html (last visited March 28, 2017).

[164] *See* OECD s*upra* note 3.

[165] *ASEAN Member States*, ASEAN, *available at* http://www.asean.org/asean/asean-member-states (last visited March 28, 2017).

[166] Raphael Moreau, *Year of the Horse: Outlook for Retailing in Asia Pacific in 2014 and Beyond*, EUROMONITOR INTERNATIONAL, *available at* http://blog.euromonitor.com/2014/02/year-of-the-horse-outlook-for-retailing-in-asia-pacific-in-2014-and-beyond.html (last visited March 28, 2017).

[167] *I.M.F. Warns of 'Middle-Income Trap' in Asia*, THE NEW YORK TIMES, *available at* http://www.nytimes.com/2013/04/30/business/global/30iht-asiaecon30.html (last visited March 28, 2017).

[168] Matt Viser, *Dunkin' Donuts jumps on Asia's coffee craze*, BOSTON GLOBE, Mar. 30, 2014, *available at* http://www.bostonglobe.com/news/world/2014/03/29/from-massachusetts-seoul-dunkin-donuts-finds-new-markets-coffee-craze-sweeps-asia/aykwWhGnFNjG85ahVxJIFL/story.html (last visited March 28, 2017).

[169] Shuai Zhang, 1 U.S. brand booming China, in spite of economic woes, CBS NEWS, Jan. 14, 2016, *available at* http://www.cbsnews.com/news/starbucks-china-open-2500-new-stores-chinese-customers-coffee-culture/ (last visited March 28, 2017).

[170] Alexandria Baca, *Buffett's Dairy Queen Targets Asia With Red-Bean Flavor*, BLOOMBERG L.P., Jan. 21, 2014, *available at* http://www.bloomberg.com/news/2014-01-22/buffett-s-dairy-queen-targets-asia-with-red-bean-flavor.html (last visited March 28, 2017).

after opening its first restaurant in the country on October 28, 2013.[171] The company has 11 total restaurants in Southeast Asia, with six outlets in the Philippines and three in Indonesia.[172] Johnny Rockets' expansion has continued into India, first opening its doors on January 28, 2014, with multiple other locations set to open over the next several months.[173] The world's largest food chain, Subway, has an ambitious target of 10,000 stores by 2020 in Asia.[174]

International franchisors expanding across the region are not limited to food and beverage franchises but range from clothing retail to luxury hotels.[175]

***Franchise Specific Programs in Asia*.** Certain Asian countries have focused on the growth of the franchise industry to spur overall economic growth. Malaysia, for example, has set specific franchise industry goals to contribute 9.4 percent to the country's GDP and to become a leading franchise hub in the Southeast Asia region by the year 2020.[176] In order to accomplish these goals, Malaysia has adopted the National Franchise Development Blueprint: 2012–2016 to provide clear goals and a strategic direction for the franchise industry in the country. The Malaysian Ministry of Domestic Trade, Co-Operatives and Consumerism has also pledged to double its efforts to meet these targets. It has established a specific unit within the ministry, the Perbadanan Nasional Bhd (PNS), to oversee and facilitate franchise development. The PNS provides training for franchisors, franchisees, franchise consultants, and the public on issues related to the operation and management of franchise businesses.

Several development programs have also been created to help spur franchise growth. For example, the Franchise Development Programme is a marketing program aimed at bringing together franchisors with prospective franchisees that operate small and medium enterprises in the commercial, service, and industrial sectors. Another program assists local entrepreneurs who have products that have the potential to be franchised but who do not possess the know-how or capabilities to franchise these

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[171] *Johnny Rockets Continues To Sizzle In Malaysia*, PR NEWSWIRE, Mar. 28, 2014, *available at* http://www.prnewswire.com/news-releases/johnny-rockets-continues-to-sizzle-in-malaysia-252964471.html (last visited March 28, 2017).

[172] *Id.*

[173] *International Restaurant Chain, Johnny Rockets, Opens First Restaurant In India*, PR NEWSWIRE, Feb. 4, 2014, *available at* http://www.prnewswire.com/news-releases/international-restaurant-chain-johnny-rockets-opens-first-restaurant-in-india-243571211.html (last visited March 28, 2017).

[174] Liz Lee, *Up close and personal with Fred DeLuca*, STAR PUBLICATIONS, Apr. 6, 2013, *available at* http://www.thestar.com.my/Business/Business-News/2013/04/06/Up-close-and-personal-with-Fred-DeLuca/ (last visited March 28, 2017).

[175] Gap Inc. announced plans to open five franchise operated stores in the Philippines in 2014, with continued expansion in Japan and its first store in China. *Gap Inc: Old Navy's New Asian Expansion Story*, Mar. 31, 2014, *available at* http://www.forbes.com/sites/greatspeculations/2014/03/31/gap-inc-old-navys-new-asian-expansion-story/#1d83e7692ee0 (last visited March 28, 2017). Hyatt Hotels Corporation has aggressive overseas expansion, with Asia as its focus. Anjali Raval, *Hyatt opens up and bets on expansion*, THE FINANCIAL TIMES LTD, Mar. 18, 2014, available at https://www.ft.com/content/99c6bdf4-ae45-11e3-974d-00144feab7de (last visited March 28, 2017).

[176] *See Tyre and Han supra* note 5.

products. Through the program, eligible local entrepreneurs are appointed a qualified franchise consultant to guide them through the process, such as work documentation and procedures, until the opening of a prototype outlet or store and the entering into a contractual arrangement with a prospective franchisee. The cost of the consultation is borne by the program.

Several financial schemes have also been created to help franchises find financing. The Franchise Development Assistance Fund encourages local entrepreneurs to turn their conventional businesses into franchised businesses. Through the fund, businesses that have successfully been developed as franchises are eligible for reimbursements of up to 90 percent for the overall franchise system development costs incurred for a maximum amount of approximately US$31,118. To provide yet another option for financing, the PNS has also launched the Franchise Micro-Financing Scheme that allows prospective entrepreneurs to use microfinancing for franchises. This allows those with lower incomes the opportunity to start businesses and learn a trade with less business risk. In 2012, the PNS allocated approximately US$2.5 million, of which approximately US$ 1.9 million was disbursed as of early April 2013. The ministry has stated that it is not averse to pumping more funds into the scheme.

Legislative Reforms. The robust growth of franchising is likely to continue as legislative and economic reforms take hold on the Asian continent. Some Asian governments have enacted legislative reforms to address the ever changing business and legal landscape in the franchise industry. For example, in February 2014, South Korea amended the Fair Transactions in Franchise Business Act to better address franchise relationship issues and heighten disclosure requirements.[177] The Fair Transactions in Franchise Business Act first became effective on November 1, 2002 and was amended in 2008 and again in 2010.

This amendment added several new provisions to the Fair Transactions in Franchise Business Act. It requires franchisors to bear up to 40% of the remodeling costs of the franchised business and to restrict franchisors from requiring their franchisees to remodel only once every five to seven years and for justifiable reasons. These restrictions would not apply to situations where the franchisee voluntarily remodels or must remodel to improve conditions due to sanitary or other safety concerns.

The amendment further restricts franchisors from requiring franchisees to operate the franchised business during specific business hours under certain circumstances. For example, franchisees will be permitted to reduce their business hours if profits generated from operation of the franchised business during night hours do not cover or are not greater than losses for operating at night. In addition, a franchisee may also reduce business hours if there are unavoidable circumstances, such as illness or the treatment of an illness that prevents normal operation during business hours.

Additionally, the amendment requires franchisors to specifically define the business area or territory of the franchisee in each franchise agreement. During the term

[177] *See* Kendal H. Tyre, Jr. and Pierce Haesung Han, *South Korea Adopts Major Amendments to the Fair Transactions in Franchise Business Act*, NIXON PEABODY FRANCHISE LAW ALERT (January 2014).

of such franchise agreement, the franchisor is restricted from directly or indirectly (through affiliates or other related entities) operating a similar business within the franchisee's territory without justifiable reasons.

The amendment requires franchisors over a certain size to provide additional information to prospective franchisees on projected sales revenue and the relevant calculation methods for these projections. A franchisor must maintain such information for five years from the date of execution of the franchise agreement.

The heightened disclosure obligations also include the requirement of franchisors to specify whether they have violated the Fair Transactions in Franchise Business Act's general terms and conditions, information regarding business support received by the franchisor from affiliates or third parties and details about the closest 10 franchised businesses.

The amendment permits franchisees of the same franchise system to form trade associations or organizations similar to a trade union to protect their rights. These franchisee organizations can collectively consult and negotiate with the franchisor to amend the terms and conditions of their franchise relationship. Franchisors are restricted from penalizing franchisees on the grounds of forming or becoming involved with such organizations and will be subject to corrective measures or fines, when and if they do so.

The amendment requires franchisors to refund franchise fees under certain circumstances. For example, franchisees are now entitled to request refunds of franchise fees within four months of execution of the franchise agreement if franchisors provide false, exaggerated, or misleading disclosures. The amendment now grants the chairman of the board of audit and inspection and the administrator of the small and medium business administration the right to file criminal complaints of violations of the Act with the Korea Fair Trade Commission, which previously was an exclusive right of the prosecutor general. These amendments to the Act represent a substantial shift to protect franchisees in South Korea.

Coupled with the aforementioned legislative reforms, South Korea has also increased fines and the power of regulatory entities. In October of 2014, the South Korea Fair Trade Commission, the country's antitrust agency, fined the largest coffee franchise in South Korea for violating the Fair Transactions in Franchise Business Act.[178] Caffe Bene, a company worth 176.2 billion won (approximately US$171 million), has more than 1,860 stores in 14 different countries worldwide, with 735 franchisees throughout South Korea.

The South Korea FTC fined Caffe Bene the maximum possible penalty of 1.9 billion won (approximately US$ 1.88 million) for passing costs on to its franchisees. The FTC found that Caffe Bene violated the Fair Transactions in Franchise Business Act and

[178] *See* Kendal H. Tyre, Jr. and Pierce Haesung Han, *South Korea's Fair Trade Commission Imposes Largest Possible Fine on Franchise for Unfair Practices*, NIXON PEABODY FRANCHISE LAW ALERT (October 2014).

specific provisions of its franchise agreements with franchisees that provided that the costs of marketing and promotions would be shared equally.

Upon further investigation, the FTC also found that Caffe Bene required its franchisees to redesign their store locations, purchase "necessary equipment" from headquarters or a designated third-party, and purchase additional items that were actually listed as "optional" in the franchise agreements. Caffe Bene attained sales of 181.3 billion won (approximately US$ 176 million), nearly 56% of its total sales, during the period between November 2008 and April 2012, largely due to the interior remodeling and equipment sales to its franchisees. The fine imposed on Caffe Bene is the largest fine ever levied by the South Korea FTC and clearly shows the agency's intent to enforce the act and stop abusive franchisors from overpowering their franchisees.

3. Middle East

The Middle East is a transcontinental region that touches parts of three continents, Western Asia, Northern Africa and Southeastern Europe.[179] The Middle East consists of approximately 22 countries, 60 languages, and is inhabited by over 690 million people.[180] The Middle East economy is extremely diverse with many countries' wealth and economy dependent upon the sale of oil.[181] However, oil revenues have seen a downturn in the past ten years, and many Middle Eastern countries become increasingly dependent on foreign borrowing.[182] Oil price fluctuation, potential for terrorist attacks, and possibly the United Kingdom's recent exit from the European Union could all trigger economic peril in the Middle East.

Some countries whose economies are oil-sale dependent have begun to expand into other industries in order to stabilize the economy. Sectors that have experienced some growth include hotels, food and beverage, and fashion retail.[183] In Israel, studies show that three major exports that have created economic value for the country include software, cut diamonds, and pharmaceuticals.[184] In Afghanistan, approximately 15% of its export revenue depends on the sale of its most popular cash crops, like Opium.[185] The industry of franchise continues to grow as well among the region. For example, the Middle East and North Africa (MENA) Franchise Association (MENAFA) reports that the

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179 *What is the Middle East and What Countries Are Part of It?*, WORLDATLAS, *available at* http://www.worldatlas.com/webimage/countrys/me.htm (last visited March 28, 2017).

180 *Id*.

181 *Economic Snapshot for the Middle East and North Africa*, FOCUS ECONOMICS, *available at* http://www.focus-economics.com/regions/middle-east-and-north-africa (last visited March 28, 2017).

182 *Id*.

183 *International Brand Expansion*, BIRD AND BIRD, *available at* http://www.twobirds.com/en/news/articles/2014/global/brandwrites/international-brand-expansion--q-and-a-on-middle-east-franchising (last visited March 28, 2017).

184 Jeff Desjardins, *This One Map Sums Up the Economy of the Middle East*, VISUAL CAPITALIST, *available at* http://www.visualcapitalist.com/map-sums-economy-middle-east/ (last visited March 28, 2017).

185 *Id*.

franchise sector of MENA is growing at a rate of 27% annually, and further describes the MENA region as a "one-stop shop for anyone considering new business opportunities in the franchise sector."[186] The Gulf Cooperative Council, a political and economic alliance of Saudi Arabia, the United Arab Emirates (UAE), Kuwait, Qatar, Bahrain and Oman, has accessed opportunities in the franchise sector as well, with franchise-driven revenues estimated at $30 billion dollars.[187]

Recent Expansion into the Middle East. For many franchisors, the Gulf Cooperation Council (GCC) is a prime attraction for franchise opportunities. The region's love of expensive Western brands, emerging high-net worth individuals, and an upwardly mobile consumer market has made the region a hotspot for retail and hospitality franchises.[188] The most popular brands expanding enormously include large food franchises like McDonalds and Pizza Hut and hotel franchises like the Sheraton and Holiday Inn. In the GCC, 50% of retail sales are generated from international brands and proportionally can take up to 80% of the retail space (as opposed to the 20% occupied by home-grown brands).[189] Additionally, franchising countries like the UAE and Qatar continue to experience franchise growth in their countries as they prepare for the UAE Expo 2020 and Qatar 2022 World Cup.[190] For brands that are hoping to expand quickly into the region, the most popular form of franchise has been made through master franchising.[191]

Legislative Reforms**.** Currently, few laws specifically regulate franchises in the Middle East. In the GCC, there are no franchise laws in force at all. However, some countries do have a number of laws that are applicable to franchise arrangements.[192] For example, in Kuwait, after more than fifty years, the Kuwait National Assembly ratified a new Commercial Agency Law to address evolving issues and questions related to its commercial agencies.[193] One of these issues was whether franchises were covered by the original regulation. Kuwait addressed this question by amending and clarifying the

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[186] *Introduction to MENAFA*, MIDDLE EAST & NORTH AFRICA MENAFA FRANCHISE ASSOCIATION, *available at* http://menafa.com/about-us/ (last visited March 28, 2017).

[187] Tracey Furey, *Franchise in the Middle East, Dubai and Beyond*, INTERNATIONAL FRANCHISE ASSOCIATION, January 2007, *available at* http://www.franchise.org/franchising-in-the-middle-east-dubai-and-beyond (last visited March 28, 2017).

[188] Joycia Young and Ben Smith, *Franchise in the Middle East: Taking Advantage of Opportunity Carefully*, MENA LEGAL UPDATE, September 2013, *available at* http://the-mea.co.uk/sites/default/files/LU%20-%202013%20-%20Sep%20-%20085%20-%20Franchising%20in%20the%20Middle%20East%20taking%20advantage%20of%20opportunity,%20carefully%20-%20MEA%20-%20Eng.pdf (last visited March 28, 2017).

[189] *The MENA Franchising Opportunity and Success Factors*, ARAB BUSINESS REVIEW, *available at* http://www.arabbusinessreview.com/en/article/mena-franchising-opportunity-and-success-factors (last visited March 28, 2017).

[190] *International Brand Expansion*, *supra* note 183.

[191] *Id*.

[192] *Id*.

[193] *See* supra note 7.

terms “franchisee” and “licensee,” in the new Commercial Agency Law, ensuring that the two were treated as commercial agents and expressly subjected to any restrictions or requirements as well as the protection of the new laws.[194] The country of Oman also made significant amendments to its Commercial Agency Law in July 2014.[195] Prior to its amendment, a franchisor or any foreign principal who tried to terminate an agency agreement with an agent in Oman, who had a profitable agency, without a good reason could be brought to court by the terminated agent.[196] However, the 2014 amendments repealed that law and left it free to the parties to decide the terms of the renewal. This change, although less favorable to the franchisee, was made in an attempt to attract foreign investors. Although many Middle Eastern countries have relied on their commercial agency laws to provide franchisees or distributers certain protections, most have not adopted pre-contractual disclosure requirements and do not require disclosure documents be provided to prospective franchisees.[197] As countries look to new ways and non-oil industries to stimulate their economy, there is a good chance that franchise law will become more developed in the Middle East.

4. Africa

Burgeoning African economic growth has had a tremendous impact on franchising in Africa and it will likely continue in the future. As of June 2015, African nations comprised six of the world’s thirteen fastest-growing economies.[198] Wholesale and retail commerce, transportation, telecommunications, and manufacturing are the biggest driving forces on the continent.[199]

By 2030, much of Africa will attain lower-middle to middle class majorities and consumer spending will expand from US$680 billion in 2008 to US$2.2 trillion.[200] According to McKinsey & Company, Africa currently has more middle class consumers than India, which has a larger population.[201]

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[194] *Id*.

[195] Abdelrahman Elnafie*, Significant Amendments to Oman’s Commercial Agencies Law become effective in July 2014 by Sultani Decree 34/2014*, DENTONS, August 27, 2014, *available at* http://www.dentons.com/en/insights/alerts/2014/august/27/significant-amendments-to-omans-commercial-agencies-law (last visited March 28, 2017).

[196] *Id*.

[197] Bachir Mihoubi*, Expanding Your Brand in the Middle East: A Fresh Prespective*, INTERNATIONAL FRANCHISE ASSOCIATION, January 2012, *available at* http://www.franchise.org/expanding-your-brand-in-the-middle-east-a-fresh-perspective-0 (last visited March 28, 2017).

[198] Elena Holodny, *The 13 fastest-growing economies in the world*, BUSINESS INSIDER, June 12, 2015, *available at* http://www.businessinsider.com/world-bank-fast-growing-global-economies-2015-6 (last visited March 28, 2017).

[199] Howard Fench, *Seven Of The World's 10 Fastest-Growing Economies Are African*, BUSINESS INSIDER, May 21, 2012, *available at* http://www.businessinsider.com/seven-of-the-worlds-10-fastest-growing-economies-are-african-2012-5 (last visited March 28, 2017).

[200] *Id.*

[201] *Id.*

Recent Expansion into Africa. Against this backdrop, franchising in Africa has experienced phenomenal growth in recent years and news headlines highlight this growth.

Yum Brands, the parent company of KFC, has expanded the fast-food brand and plans to open outlets in Senegal, Ethiopia, and the Democratic Republic of Congo.[202] Dunkin' Brands, the parent company of Dunkin' Donuts and Baskin-Robbins, announced in January 2016 that it had signed a master franchise agreement to develop more than 250 Dunkin' Donuts restaurants and more than 70 Baskin-Robbins shops in South Africa over the coming years, with an initial focus on Cape Town and Johannesburg.[203] Kahala, the parent company of Cold Stone Creamery, debuted on the African continent in Egypt in June 2012 when it signed a 10-year master franchise agreement that included the goal of opening eight stores in the first four years. It expects to continue expanding throughout the continent of Africa and recently entered the South African and Kenyan markets.[204]

Subway, the U.S. fast-food sandwich franchisor, continues to expand in Africa. As of April 2013, it had four units in Egypt with plans for further growth in North Africa, as well as two units in Tanzania and plans to develop up to twenty outlets in East Africa.[205] After entering the South African market in 2011, Burger King announced its plans for expansion to six new African countries before the end of 2015.[206] International franchisors expanding across the continent are not limited to food franchises but cover rather a broad

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[202] Alex Park, *How Bill Gates Is Helping KFC Take Over Africa*, MOTHER JONES, Jan. 10, 2014, *available at* http://www.motherjones.com/environment/2014/01/kfc-africa-chicken-usaid-gates-foundation?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+motherjones%2Fmain+(MotherJones.com+Main+Article+Feed) (last visited March 28, 2017).

[203] *Dunkin' Brands and Grand Parade Investments Announce Plans to Open Hundreds of Dunkin' Donuts and Baskin-Robbins Restaurants in South Africa*, Jan. 21, 2016, *available at* http://news.baskinrobbins.com/news/dunkin-brands-and-grand-parade-investments-announce-plans-to-open-hundreds-of-dunkin-donuts-and-baskin-robbins-restaurants-in-south-africa (last visited March 28, 2017).

[204] *Cold Stone Creamery Enters Continent of Africa with Egypt Expansion Plans*, BUSINESS WIRE, June 5, 2012, *available at* http://www.businesswire.com/news/home/20120605006456/en/Cold-Stone-Creamery-Enters-Continent-Africa-Egypt (last visited March 28, 2017). *Cold Stone Creamery Enters South Africa Market*, VENTURES-AFRICA, Sept. 10, 2013, *available at* http://www.ventures-africa.com/2013/09/cold-stone-creamery-enters-south-africa-market/ (last visited March 28, 2017). *COLD STONE CREAMERY EXPANDS INTO KENYA*, COLD STONE CREAMERY, July 25, 2014, *available at* https://www.coldstonecreamery.com/press/press-room/content/2014/kenyarelease7-25finalwithkahalabrands.pdf (last visited March 28, 2017).

[205] *Subway Chain Reveals MENA Growth Plans*, ARABIANBUSINESS.COM, Oct. 17, 2010, *available at* http://www.arabianbusiness.com/subway-chain-reveals-mena-growth-plans-356867.html (last visited March 28, 2017). Dinfin Mulupi, MARITZ AFRICA, April 3, 2013, *available at* http://www.howwemadeitinafrica.com/interview-the-man-who-is-bringing-the-subway-franchise-to-kenya/ (last visited March 28, 2017).

[206] Analeigh Vallie, *Burger King Eyes Expansion into SA*, BUSINESS DAY, SOUTH AFRICA, June 15, 2011, *available at* http://www.iol.co.za/business/international/pick-n-pay-stretches-its-african-footprint-1.1088051 (last visited March 28, 2017). *Burger King to expand to six new African countries before the end of 2015*, AFRICAN BUSINESS CENTRAL, Mar. 9, 2015, *available at* http://www.africanbusinesscentral.com/2015/03/09/burger-king-to-expand-to-six-new-african-countries-before-the-end-of-2015/ (last visited March 28, 2017).

range of services and products, including tutoring, home maintenance and repairs, hotels, grocery chains, and automotive products and services.[207]

***SMEs in Africa*.** African Development Bank research related to business failures has revealed that only 15% of franchised small and medium business enterprises ("SMEs") folded compared to an 80% failure rate among independent businesses.[208] This data point shows the significant impact that franchising could have on the growth and stability of new business ventures on the continent.

Currently, SMEs account for more than 90% of private business in Africa. The franchising framework can be viewed as an effective tool to promote SME and private sector development, contribute to poverty reduction and wealth creation, and even promote quality health care.[209]

The potential opportunities under the franchising model are not only with international franchisors expanding into African markets but also domestic African SMEs adopting the franchise framework. Existing indigenous businesses in target countries

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[207] In November 2013, Marriott International, Inc. announced that it signed a letter of intent with South African Protea Hospitality Holdings to acquire Protea Hotels' brands and its management business that operates or franchises approximately 116 hotels in South Africa and six other Sub-Saharan African countries. *Marriott Signs Letter of Intent to Acquire Protea Hotel Group's Hotel Operations and Brands*, PR NEWSWIRE, Nov. 7, 2013, *available at* http://www.prnewswire.com/news-releases/marriott-signs-letter-of-intent-to-acquire-protea-hotel-groups-hotel-operations-and-brands-231044341.html (last visited March 28, 2017). Tutor Doctor, a global tutoring franchise that provides home-based instruction to learners of all ages, recently announced the opening of its first franchise location in Tunisia. *Leading Tutoring Franchise to Debut in North Africa*, GLOBE NEWSWIRE, Nov. 14, 2013, *available at* http://globenewswire.com/news-release/2013/11/14/589990/10057655/en/Leading-Tutoring-Franchise-to-Debut-in-North-Africa.html (last visited March 28, 2017). In 2011, Gap, Inc. announced its plans to open its franchised GAP stores in Egypt and Morocco. *Gap, Inc. Prepares to Open Its First Stores in Africa*, GAP INC., June 29, 2011, *available at* http://www.gapinc.com/content/gapinc/html/media/pressrelease/2011/med_pr_Gap_Inc_Stores_In_Africa.html (last visited March 28, 2017). Pick n Pay, a large South Africa retailer, proposed plans in 2011 to expand its franchise operations elsewhere in Africa, particularly Mauritius and Mozambique. Samantha Enslin-Payne, *Pick n Pay Stretches Its African Footprint*, BUSINESS REPORT, June 24, 2011, *available at* http://www.iol.co.za/business/international/pick-n-pay-stretches-its-african-footprint-1.1088051 (last visited March 28, 2017).

[208] In Kenya, research has revealed that nine out of ten bar and restaurant start-ups fail in their first nine months. Sarah Rundell, *More Chains for Africa*, AFRICA INVESTOR, Mar. 1, 2010, *available at* http://www.africainvestor.com/article.asp?id=6490 (last visited March 28, 2017).

[209] Health franchises are an attractive example of SMEs that have proven successful in various African communities. They help to encourage business development while also serving the dual goal of promoting quality health services and care. By collaborating with local medical clinics and converting them to franchisees, nonprofit organizations like LifeNet International aspire to increase patient count, quality of patient care, and build sustainable franchises. Center for Health Market Innovations, *Can Primary Care Franchising Work in East Africa? The LifeNet Model.* Apr. 1, 2011, *available at* http://healthmarketinnovations.org/blog/2011/apr/1/lifenet-international (last visited March 28, 2017). In Ethiopia, the Biruh Tesfa (Ray of Hope) program has increased contraceptive use by 30% in the population of 10 million covered by its 92 clinics. In Zimbabwe, a franchise program called New Start, which tests and counsels for HIV, saw a great increase in visits from 1999 to 2003.

have knowledge of the specific local market demands. They have a proven product to be offered to consumers and a proven business format to offer to future franchisees.[210]

In fact, indigenous franchising should prove more attractive to local consumers and be less sensitive to the need for product testing and adaptation in African markets, which may result in shorter gestation periods and lower failures rates for such franchises.

***Legislative Reforms*.** The robust growth of franchising is likely to continue as legislative and economic reforms take hold on the African continent. For example, some African governments have enacted legislative reforms to amend laws that previously hindered the repatriation of royalties and franchise fees. In addition, some countries have also enacted franchise specific legislation. For example, South Africa enacted franchise legislation in 2008.[211] Tunisia drafted a legislative framework for franchising that took effect in 2010,[212] and Angola has had franchise laws in place since 2003[213]. Other countries on the continent are likely to follow their lead.[214]

***Franchise Industry Associations*.** In some African countries, franchise associations provide industry oversight and also assist in the promotion of franchising. For example, well-established franchise associations such as the Egyptian Franchise Development Association[215] and the Franchise Association of South Africa[216] has played an important role in promoting compliance with codes of ethics and industry standards, whether they relate to disclosure obligations by the franchisor or the resolution of disputes.[217] As is commonplace in other parts of the world, franchisors face losing association membership if they flout convention or commit abuses.

For several years, advocates for franchising on the African continent have lobbied for the creation of a Pan-African franchise association to serve as a resource center for

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[210] For example, Zain Nigeria, a mobile-telecommunications company (now known as Bharti Airtel Limited), had grown to more than 1,000 franchisees in rural Nigeria and the average franchised site produced a 160% return on original investment within the first year of launch. Jamie Anderson and Ronan Moaligou, "*Slums and Warzones Create New Frontiers for the Industry*," Global Telecoms Business, Jan. 15, 2010, *available at* http://www.globaltelecomsbusiness.com/Article/2373676/Regions/5191/Slums-and-warzones-create-new-frontiers-for-the-industry.html (last visited March 28, 2017).

[211] *See* Papier, *supra* note 8, at 209.

[212] *See* Ferah, *supra* note 9, at 221.

[213] *See* Fialho, *supra* note 10, at 110.

[214] David J. Saunders, *Franchising Opportunities: Unlocking Africa's Potential*, AFRICA TRAVEL MAGAZINE, http://www.africa-ata.org/franchising.htm (last visited March 28, 2017).

[215] *See also* the Egyptian Franchise Development Association website, www.efda.org.eg (last visited March 28, 2017).

[216] *See also* the Franchise Association of South Africa website, www.fasa.co.za (last visited March 28, 2017).

[217] *See also* the Nigerian International Franchise Association website, www.nigerianfranchise.org (last visited March 28, 2017).

the African franchise industry and for practitioners throughout the continent to foster an understanding of franchise "best practices."[218]

In May 2013, the creation of such an association became a reality. The Pan African Franchise Federation ("Federation") held its inaugural meeting in South Africa with delegations from Egypt, Ethiopia, Mauritius, Tanzania, and Nigeria. The Federation was originally formed as a result of a mandate issued by the World Franchise Council's (WFC) executive committee, which has sought to establish a franchise federation representing the franchise sector in Africa. Delegates believed that, because economic growth in developing countries is overtaking established economies, it was time that Africa formed an organization to assist with spearheading franchise growth throughout the continent.[219] The Federation will eventually join the European Franchise Federation and the Asia Pacific Franchise Confederation by applying to become a member of the WFC. The countries in the federation would then share the objectives of the WFC, including the desire to provide a leading and educational role in franchising on their home continent.

In the future, the Federation could potentially arbitrate disputes between franchisors and franchisees. This would be particularly important in those African countries where the judicial system is not particularly efficient. Chapter affiliates of the Federation could also, in effect, become self-regulatory bodies of the franchise sector in each country where it has a presence. Among other things, chapters could facilitate growth in the industry by organizing franchise shows and/or meetings between prospective master franchisees and international franchisors, managing the qualification process of interested franchisors, and organizing international trade missions and seminars on topics of interest.[220]

***Challenges*.** Franchising in Africa is not without its challenges. A basic understanding of any franchise arrangement, for example, is that the intellectual property of the franchisor is licensed to franchisees for a limited time and under certain terms and conditions. To protect its intellectual property, the franchisor reserves sweeping rights in its franchise agreements. The "rule of law" is critical to maintaining and protecting property. Without the franchisor's ownership of its intellectual property, the franchisor would have no interest in teaching a potential competitor its proven trade secrets.

Concerns over the weak protection of intellectual property in Africa have been expressed by several brands, such as McDonald's.[221] McDonald's is in countries such as Egypt, Algeria, and South Africa, but as of 2014 Kenya, for example, still did not meet

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[218] African Development Bank, *Study on Franchising Opportunities in Africa*, 23 (*Background Paper for Franchise Africa Symposium*, 2002).

[219] Kendal H. Tyre, Jr. and Courtney L. Lindsay II, Pan African Franchise Federation Holds Inaugural Meeting, NIXON PEABODY FRANCHISE LAW ALERT (June 2013).

[220] An effective way to attract prospective franchising partners within a particular market is through the use of trade missions. These are sponsored by organizations such as the International Franchise Association. Randolph M. Wright and Scott D. Relf, *International Franchising: Expanding to Emerging Markets*, 84 MI BAR JNL. 18, 20 (2005).

[221] Rundell, *supra* note 208.

that particular franchisor's market entry criteria regarding the protection of intellectual property.[222] Moreover, examples of recent court decisions underscore the fact that intellectual property expertise varies in Africa.[223]

Capital is another worry. Franchisors generally request franchisees commit over 50% of the total investment, but African banks are cautious lenders to SMEs and start-ups. However, reforms in the African banking industry are changing the lending landscaping. Local banks in Kenya now have franchise departments and are starting to look at franchising not as a business start-up, but as a support system for business enterprises that may merit a closer inspection.[224]

Supply chain issues present yet another challenge. For example, many sub-Saharan Africa countries are still in the early stages of supply chain development.[225] African franchisees are required to maintain adequate supplies of the products that fuel their businesses and those products must also meet the franchisor's particular quality standards. For example, KFC and other fast food brands require adequate supplies of chicken that meet their standards.[226] This may be difficult in certain African countries where the supply of chickens from local chicken farmers fail to meet the franchisor's criteria for not only food safety and security but also quality and quantity.[227] For example, South African KFCs sell almost 10% of the nation's commercially grown chickens.[228] In these instances, local franchisees are required to purchase their supply from outside the

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[222] The franchisor has expressed its plans to enter the market in Zimbabwe. Roadwin Chirara, *Whet your appetite, McDonald's coming*, DAILY NEWS ZIMBABWE, Aug. 17, 2010.

[223] In *Mega Power Centre CC t/a Talisman Plant and Tool Hire v. Talisman Franchise Operations (Pty) Ltd.*, a Namibian company, which was a franchisee of a South African company, provided large, "operator-intensive" tools and equipment to the Namibian building industry under the name "Talisman Tool Hire" for a number of years. When it discovered that a South African company intended to start a business with smaller, "non- operator-intensive" tools under the name "Talisman Hire," the Namibian company sued for "passing off." Passing off is a common law action. To maintain a suit for passing off, the plaintiff does not need to have a trade mark registration. Instead, the plaintiff must establish: (1) that it enjoys a reputation or goodwill in a name; (2) that the other party is, through the use of a similar name, misrepresenting that there is a connection with plaintiff's business; and (3) that plaintiff is likely to suffer damages. The Namibian judge, relying heavily on South African law, determined that no passing off had occurred despite the strength of common law decisions in favor of the plaintiff and the strength of the *Talisman* name. This case emphasizes the need for companies to register their marks in Africa. Had the plaintiff been able to rely on a registered trade mark instead of a common law claim for "passing off," the outcome would have likely been different. *See* Ilse Du Plessis, Edward Nathans Sonnenbergs, *South Africa: Namibian IP Case Highlights Pitfalls In Africa*, MONDAQ, July 29, 2013, *available at* http://www.mondaq.com/x/254536/Trademark/Namibian+IP+Case+Highlights+Pitfalls+In+Africa (last visited March 28, 2017).

[224] Rundell, *supra* note 208.

[225] Tielman Nieuwoudt, *Think Juba Not Jacksonville—supply chain trends in Africa*, HOW WE MADE IT IN AFRICA, Aug. 14, 2013, *available at* http://www.howwemadeitinafrica.com/think-juba-not-jacksonville-supply-chain-trends-in-africa/29094/ (last visited March 28, 2017).

[226] Park, *supra* note 202.

[227] *Id.*

[228] *Id.*

country from franchisor-approved suppliers.[229] To ensure adequate supply needs are met and to cut costs, some franchisors are working with their franchisees to secure local suppliers.[230]

B. Micro-Franchising

Micro-franchising is a business model and development tool that applies tested concepts and methods of conventional franchising to small and medium enterprises in the developing world. Micro-franchising usually targets the delivery of development-related services such as water, sanitation, health care, energy, and transportation.

Successful micro-franchising requires several key elements: uniform branding, systems, and training; careful location screening; and rigorous quality controls enforced through regular inspections. In addition to their minimal initial costs, micro-franchises provide franchisees with a significant portion of the required start-up capital, and encourage owners to raise the equity through family and friends. The price of services charged includes the franchise fee. Using this system instead of calculating franchise fees as a percentage of gross receipts removes the owners' incentive to under-report sales or deviate from franchise-wide price schedules. The ability to purchase quality inventory wholesale and inexpensively distribute to outlets enables micro-franchisees to maintain competitive prices, while paying franchise fees and interest, and earn a profit.[231]

Micro-franchise competitive advantages include the ability to source low-cost, high-quality inventory; centralized management of political and regulatory issues; and a critical mass of branches that can share best practices and leverage economies of scale. Further, franchisees enjoy training, marketing support, technical counsel, and a reputable, trusted brand name.[232]

Micro-franchise models are gaining popularity in African markets because they enable local entrepreneurs to own and operate sustainable, lucrative businesses. Micro-franchising discourages corruption because noncompliance with the franchisor can result in the franchisee losing its franchise. The risk of losing their investment and business is more powerful than any short-term gains from dishonesty. By aligning the incentives of clients, government regulators, and franchisees, micro-franchises can deliver high quality service to underserved communities, while maintaining a profitable return on investment, particularly in complicated and unprofitable endeavors such as health care distribution.[233]

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[229] Dinfin Mulupi, *KFC Expects More Global Fast-Food Chains to Enter the Kenyan Market*, MARITZ AFRICA, July 24, 2012, *available at* http://www.howwemadeitinafrica.com/kfc-expects-more-global-fast-food-chains-to-enter-the-kenyan-market/18698/ (last visited March 28, 2017).

[230] *Id.*

[231] *About the HealthStore Foundation*, *available at* http://www.cfwshops.org/how_you_can_help.html (lasted visited March 28, 2017).

[232] *Id.*

[233] *Id.*

II. Future of Franchising

A. Legislative and Case Developments

With the arrival of the 2017 New Year, international franchisors should be aware of potential changes to franchise legislation in a number of countries and how they may impact franchisors entering or expanding into certain jurisdictions.

1. British Columbia

British Columbia (B.C.) is the second most populous province in Canada after Ontario. The new *Franchises Act* for B.C. came into force February 1, 2017. The Act brings the province in line with the 5 other Canadian provinces with franchise-specific legislation. Some highlights of the *Franchises Act* include the following:

There is the disclosure requirement of franchisors to provide financial and other information to prospective franchisees at least 14 days before any franchise agreement is signed or any amount paid by the franchisee. There is also the duty of fair dealing by both the franchisee and franchisor regarding the performance and enforcement of the franchise agreement. A franchisee has a right to rescind if the disclosure document provided by the franchisor fails to comply with the disclosure requirements.

A franchisee will have a right of action against the franchisor or other personnel if the franchisor's misrepresentations or failure to provide sufficient disclosure caused the franchisee to suffer a loss. Any restriction of the franchise agreement on B.C. law will be void.

2. Angola

Franchise-specific regulations have been in force in Angola since 2003. Law 18/03, of August 13, 2003, governs franchise transactions in Angola, as well as distribution, agency and commercial concession agreements.

Due to the increasing relevance of franchise arrangements in the Angolan market, the Ministry of Commerce Dispatch 78/15 of March 2, 2015, created the Technical Multidisciplinary Group to review new proposed Angolan franchising regulations. These regulations are expected to be approved in the near future.

3. Ethiopia

Ethiopia does not currently have a body of law specifically governing the franchise sector. In fact, the term "franchise" or "franchise law" does not appear in the Commercial Code. The use of the term franchise and the manner of registration of franchise businesses in Ethiopia appeared for the first time in the Commercial Registration and Business Licensing Proclamation adopted by Parliament on August 5, 2016 (2016 CRBL Proclamation).

The 2016 CRBL Proclamation provides a definition of what constitutes a franchise agreement. It defines it as an agreement concluded for consideration between the franchisor and the franchisee in order to undertake business activities by using the trade name of the known product or service in order to share the nature and experience of the work under the leadership of the owner of the recognized products and services.

The 2016 CRBL Proclamation legislation, though encouraging, has been criticized for being too general. Despite this critique, it provides an important general principal: the franchisee is required to function on the same standards as the franchisor and the consumer must obtain the same products and services from the franchisee as they would have received from the franchisor. Until the issuance of the 2016 CRBL Proclamation, review of published legal commentaries on the Commercial Code and contract law also reveal no reference to franchise law. However, there exist patchworks of disparate laws that collectively affect the activities of franchisors in Ethiopia.

The 2016 CRBL Proclamation indicates that registration of franchises will be required pursuant to regulations to be issued by the Council of Ministers. The regulations have yet to be issued but could issue later this year.

4. Kuwait

For more than fifty years, commercial agencies in Kuwait were governed by Law No. 36 of 1964. As of March 13, 2016, this long-standing law has been overturned and superseded. After years of deliberation and research, the Kuwait National Assembly has ratified a new Commercial Agency Law (CAL), Law No. 13 of 2016, to address the evolving issues and questions that relate to the country's commercial agencies.

Under the new law, the definition of "commercial agency" has been amended and clarified to specifically include the terms "franchisee" and "licensee." Due to their inclusion in the commercial agency definition, franchisees and licensees are now treated as commercial agents and are expressly subject to any restrictions or requirements as well as the protections of the new law.

The newly enacted commercial agency law includes core elements of the prior Law No. 36 of 1964. Nevertheless, those companies or individuals that may engage in commercial activity within Kuwait, particularly those interested in licensing and franchising, should be aware of the important changes made to this new rule. The Ministry of Commerce will issue executive regulations to Law No. 13 of 2016 within six months from March 13, 2016. No such executive regulations have been issued to date but they could be issued in 2017.

5. Cuba

Cuba's Ministry of Tourism reports that with a record four million tourists in 2016, up 13% over 2015, the island set a record for international visitors, exceeding projections by approximately six percent. Tourism is the second source of revenue in Cuba, following the export of doctors and other medical services.

One factor contributing to the increase in visitors is the surge in U.S. visitors resulting from the restored relations with the United States—a thaw first announced by U.S. President Barack Obama and Cuba's President Raul Castro almost two years ago. President Obama has eased many trade and travel restrictions, which has opened access to the communist island for many Americans. Nearly 137,000 Americans came to Cuba in the first half of 2016, an 80% surge from the same period in 2015.

The growth in the tourism industry could pave the way for increased franchising on the island in 2017. In general, franchising contracts in Cuba are atypical. They are not mentioned in Cuban legislation, but rather in an internal regulation of the Cuban Ministry of Tourism. This internal regulation is not published in the Official Gazette of the Republic and it only applies to franchises in the tourism sector. The regulation covers the main features of franchising and outlines the entire process for the negotiation of a franchise contract, including the required information that a foreign franchisor must submit to the government.

Cuban foreign investment laws were reformed in 2014. The publication of Law No. 118, March 29, 2014, "Regarding Foreign Investment," (Law No. 118), established the current framework for foreign investment in the country. It is an attempt to instill greater confidence in foreign investors with the hope that foreign capital will soon follow and strengthen the Cuban economy. Under Law No. 118, foreign investment must adopt one of the following three forms: (i) a mixed joint venture with state-owned companies, (ii) a 100% foreign owned company, or (iii) an international economic association partnership contract—the typical structure for energy contracts and hotel management arrangements in Cuba.

Currently, Cuba does not have any specific franchise laws, such as registration or disclosure requirements. The foreign investing mode of choice for the Cuban government is the joint venture, with the foreign investor as one partner and the state-owned companies as the other. This is also the preferred choice of the Cuban government when structuring franchise arrangements. If relations with the U.S. continue to thaw in 2017, franchisors should monitor the opportunities for franchising, as the Cuban government continues to update and revise its foreign investment laws and franchising regulations.

6. Thailand

Thailand has no specific legislation or set of regulations that deal with franchising. Accordingly, the ordinary principles of contract and the common law will apply to franchises in Thailand.

However, the country has a draft Franchising Business Act, which was first released to the public in 2006 and held a public hearing in March 2011, organized by the Ministry of Commerce. The most recent draft of the new franchise legislation defines a franchise as:

> *"[...] the operation of a business in which one party called a "franchisor" agrees to let the other party, the "franchisee," use its intellectual property rights, or to use its*

rights to operate a business during a specified time or in a specified area, such operation being under the direction of the franchisor's business plan, and the franchisee having a duty to reimburse the franchisor."

It remains to be seen if, and when, such legislation will be enacted in the country in 2017.

B. Impact of Brexit

The full impact of the United Kingdom's vote to leave the European Union is uncertain, affecting trade between the UK and the other member countries of the European Union as well as international trade between the UK, the EU and other countries who have trading relationships with EU members. US businesses are reporting that the uncertainty over trade with the EU is directly impacting their investment decisions. Where there has been traditionally bi-lateral trade between the U.S. on the one hand and the EU (including the UK) on the other will become a three-sided trade relationship.

Although the changes anticipated to flow from Brexit will continue for many years, franchisors can take precautions now by assessing the following key elements of their franchise program:

Governing law and jurisdiction

Many international franchise agreements are governed by UK law. The enforcement of these agreements in any of the EU countries may be in doubt and franchisees in an EU member state could challenge the governing law of their contracts and the jurisdiction of the English courts. Given the uncertainty of the impact of Brexit, franchisors should not yet change their approach to governing law and jurisdiction provisions but need to be mindful of the enforceability of their existing agreements in place in the EU.

Supply Agreements

It is unclear what trade barriers or trade duties may be imposed as part of the Brexit process. Franchise systems which rely upon the supply of goods to franchisees throughout the EU should review their existing supply agreements and determine the effect on the supply chain arrangements in the event of the loss of the free trade arrangements between the UK and the EU and the imposition of import duties for goods imported from the UK. Franchisors may look to restructure their supply arrangements to avoid any future impact on the current free flow of goods and services between the UK and the EU member states.

IP Protection

The know-how, proprietary system information and trade-marks can be the most valuable elements of a franchise system. Protection of these elements, through copyright and cross-EU property protection is currently aligned throughout the EU. Whether this protection will survive the exit of the UK is uncertain. Accordingly, franchisors should undertake an audit of their IP portfolio as well as existing confidentiality agreements to ensure that they will be protected into the future.

Trademark protection throughout the European Union (including the UK) is available through the European Union Trade Marks Regulation (EUTMR). As a result of Brexit, franchisors will have to separately protect their trade-marks by registering in both the UK and the EU. It is anticipated that there will be transitional provisions to obtain protection for EU-registered trademark portfolios in the UK. For now, franchisors should register new trade-marks in both the UK and the EU.

C. EU Trade Mark Regulation

In late December 2015, the newly named European Union Intellectual Property Office ("EUIPO") (f/k/a/ the "Office for Harmonisation in the Internal Market") issued the European Union Trade Marks Regulation ("EUTMR"), which amended the Community Trade Mark Regulation. The EUTMR was part of the EU trade mark reform legislation that included the replacement of the existing EU Trade Marks Directive. As part of the reform legislation, much of the terminology that had previously been used for trade marks in the European Union was changed. For example, all references to the "Community" were replaced with the "European Union," and the "Community Trade Mark" was renamed the "European Union Trade Mark" ("EUTM").

The EUTMR, which became effective on March 23, 2016, imposed more than terminology changes in the trade mark laws in the EU. The EUTMR changed the number of classes of goods or services an applicant for a trade mark could claim in the same basic application or renewal fee. Before the EUTMR went into effect, an applicant could claim up to three classes of goods or services for a basic application fee of EUR 900, and the fee for each additional class was EUR 150. If an applicant wanted to register the trademark in only one class, it still had to pay the same basic fee. The EUTMR introduced a new application structure. The basic fee for an individual EU trade mark is now EUR 1,000, the fee for the second class of goods and services is an additional EUR 850, and the fee for each class of goods or services exceeding two for an individual EU trade mark has become EUR 150. While there are cost savings of EUR 50 if a franchisor needs to cover only one class, if the franchisor needs to cover three or more classes, the cost will increase by EUR 150 per class as compared to prior costs.

Another significant change was to how applicants now must identify the types of goods or services they are applying for. Prior to passage of the EUTMR, it was common practice for trademark applicants to use class headings of the Nice classification system to designate the goods or services to be included in trade mark protection. If an applicant registered in respect of the Nice Class Heading, all goods and services with that Nice Class Heading were protected even if not expressly identified in the application. However, the decision in the IP Translator case in June 2012[234] eventually led to the legislative

[234] *Chartered Institute of Patent Attorneys* (Case C-307/10), Judgment of the Court (Grand Chamber), 19 June 2012, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-307/10 (last visited March 28, 2017).

change established in the EUTMR. The European Court of Justice ("ECJ") in the IP Translator case posed several questions about whether the various goods and services covered by a trade mark application should be identified with any degree of clarity and precision and whether using the general words of the Nice Class Headings in an application was sufficient to identify the desired goods and services. The ECJ held that the goods and services for which protection is sought must be identified "with sufficient clarity and precision."

As a result, it is no longer sufficient for applicants to list the Nice Class Heading to cover individual goods or services. Instead, goods and services must be classified within the Nice Classification, and all trade mark applications must specify with clarity the goods and services for which protection is sought so trade mark offices are able to determine what is being covered. Also, for all trademarks registered or applied for prior to the IP Translator case, the applicants had until September 24, 2016 to declare that their intention on the date of filing had been to seek protection of goods and services beyond those covered by the literal meaning of the particular Nice Class Heading.

It is not clear what impact Brexit will have on EUTMR, but if and when the UK exits the EU, it is likely that certain EU-based IP rights, including the EUTM, will likely cease to apply in the UK. As a result, while the UK government will need to establish a process for protection for trade mark owners in the UK, it is not clear yet what that will look like.

III. Conclusions

Franchising is increasingly seen as a viable means to expand businesses, spur the development of SMEs, and increase foreign investment. Given these factors, counsel and business executives in the franchise industry should understand the impact and consequences of various franchise structures, the law of the target countries in which the franchise will operate, and the options in drafting key contractual provisions of the international franchise agreement. Moreover, a suitable international franchise arrangement for a particular franchise system in a specific target country must be determined on an individual basis. A franchisor's appetite for international growth, the ability to relinquish control, the desire for capital or debt reduction, and the willingness to share fees must be analyzed. In addition, some thought must be given to certain cultural and business considerations including availability of product, supplies and sites, the receptiveness and adaptability of the franchise concept in the target market, and the sophistication of potential investors. Throughout the expansion process, it is critical that the franchisor obtain experienced legal, accounting, banking, and other professional advice in the target country and that an appropriate selection be made of the franchisee in the target country to launch a successful franchise venture. The issues explored in this article cover a small portion of the issues that must be address, but it's a solid start.

Exhibit A

INTERNATIONAL FRANCHISE SALES LAWS CHART

Countries with Registration and/or Disclosure Laws	Disclosure Required? (Yes/No)	Governmental Filing Required? (FDD; Franchise Agreement) (Yes/No); (Yes/No)
Argentina	Yes	No
Australia	Yes	No
Belgium	Yes	No
Brazil	Yes	No; Yes
Canada (Alberta, Ontario, Prince Edward Island, New Brunswick, Manitoba, and British Columbia)	Yes	No
China	Yes	Yes
France	Yes	No
Germany	Yes	No
Indonesia	Yes	Yes
Italy	Yes	No
Japan	Yes	No
Macau	Yes	No
Malaysia	Yes	Yes
Mexico	Yes	No; Yes
Romania	Yes	No
Russia	Yes	No; Yes
South Africa	Yes	No
South Korea	Yes	Yes
Spain	Yes	No
Sweden	Yes	No
Taiwan	Yes	No
Tunisia	Yes	Yes
United States	Yes	No registration required under federal law, but state laws on registration of the FDD and/or Franchise Agreement vary.
Vietnam	Yes	Yes