



International
Franchise
Handbook

2021



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Partners

Prefaces



Introduction

This is the third edition of the International Franchise Handbook under our watch, and we are honored to present to you contributions from the legal franchise experts of 43 countries around the world. We continue to see the demand for international legal expertise in this field and thus are pleased to give to you an in-depth view of the legal framework in those 44 countries.

Not only have three years passed since the last edition of the International Franchise Handbook, but the unprecedented COVID-19 pandemic and its impact on franchise systems around the world make it even more important to update franchisors on the legal measurements that governments implemented in order to support their economy and its citizens. These newly implemented regulations are in some parts temporary, but in other parts are here to stay and need to be taken into account in the investment decisions of international acting franchise systems.

And though the world has changed so dramatically in the last years, the initial statement made in the first edition of the International Franchise Handbook remains unchanged: International players need a global overview, alongside knowledge of the local nuances. Deloitte Legal, with presence in over 80 countries and closely interlinked with Deloitte's other practice areas such as

consulting, tax, risk advisory, audit and financial services, provides the ideal global view with local expertise, as business partner to these global players.

Each Deloitte legal practice contributing to this edition has in-depth knowledge of franchise law in its home country and works closely with Deloitte Legal practitioners from other countries and professionals from other disciplines in a multi-disciplinary approach to international matters. This international legal franchise group can advise companies from all industrial sectors in every aspect of national and international franchise law when it comes to structuring and evaluating steps to expand into foreign countries.

Finally, we would like to thank the Deloitte Center of Excellence (CoE) for the organization and implementation of the handbook and all Deloitte colleagues, global and domestic, who have supported or contributed to this edition.



Dr. Mathias Reif



Dr. Christine von Hauch

“These newly implemented regulations are in some parts temporary, but in other parts are here to stay and need to be taken into account”

“International Franchising Handbook is a useful tool to stimulate reflection and insight into the current regulatory framework”

We are extremely proud to launch the “International Franchising Handbook”, an initiative of Deloitte Legal’s Global Service Line Commercial to which over 40 jurisdictions from our network have participated.

The International Franchising Handbook is intended to provide a wide-ranging and cross-country view of the main legal issues related to franchising which are illustrated following a multidisciplinary approach and with an eye to the current situation we are facing.

International Franchising Handbook is a useful tool to stimulate reflection and insight into the current regulatory framework and practice of this line of business, also in the light of the evolution of the world of distribution and the challenges and opportunities that will arise in the immediate future.

The result of this cross-country cooperation once again represents the strength, expertise, multidisciplinary and territorial coverage of the Deloitte Legal International Franchising Handbook network. My thanks to the coordinators and contributors for their incredible work.

Massimo Zamorani



2021

Country reports



Argentina



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Legal professionals



Region

AMERICAS



Offices

Buenos Aires

Essentials

about Argentina's franchising law

- 1** The franchisor must be the exclusive owner of all the intellectual rights, trademarks, patents, trade names, copyrights, and other rights included in the franchise system; or, when appropriate, must have the right to its use and transmission to the franchisee under the terms of the contract.
- 2** The franchisor cannot have a direct or indirect controlling shareholding in the franchisee's business.
- 3** Franchises are exclusive for both parties unless otherwise agreed.

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Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

In Argentina, franchises are regulated in the Civil and Commercial Code (the "Code") in which the bases of the franchise agreement are established, such as: definition; obligations of the franchisor and franchisee; types of franchise; term of the agreement; clauses accepted in the agreement and clauses that are not allowed; responsibility of the franchisor and franchisee and forms of termination of the contract.

Legal basis of Franchise Law

"There is a commercial franchise when one party, called franchisor, grants another party, called franchisee, the right to use a proven system, intended to trade certain goods or services under the trade name, emblem or brand of the franchisor, who provides a set of technical knowledge and the continuous provision of technical or commercial assistance, against a direct or indirect provision of the franchisee."

Specifics regarding foreign franchisors

One of the obligations of the franchisor is to defend and protect the use by the franchisee of the rights inherent to the franchise (mentioned in the definition of the franchise). Notwithstanding this, it is established that in international franchises, this right must be exercised by the franchisee without prejudice to the fact that the franchisor must help and collaborate with the franchisee in defense of these rights.

Corporate Law

The Code establishes that a franchisor or franchisee can be a human person or a company. Regarding companies, it does not establish any recommended corporate type.

Notwithstanding this, the most common corporate forms to set up business in Argentina are: (i) Limited Liability Companies and (ii) Corporations. The main characteristics of both corporate types of entities are described in the chart below:

	Corporation	Limited liability company
Shareholders/ partners	Minimum: 2 shareholders (unless single-shareholder corporations). Maximum: unlimited.	Minimum: 2 partners. Maximum: 50 partners.
Corporate capital	The minimum required capital is ARS 100,000 and is represented by shares.	There is no minimum capital required for this type of business company but it should be adequate to the type of activity to be developed by the company. It is represented by quotas.
Shareholders/ Partners' liability	The shareholders' liability is limited, in principle, to the total amount of contributed and paid-in capital. Shares carry voting and economic rights. There may be many different classes of shares, granting different rights among them	The quota holders/partners liability is limited, in principle, to the total amount of capital stock. Capital quotas carry voting and economic rights. There are no different classes or types of capital quotas. The value of each quota shall be ARS 10 each or multiples of ten.

In the case of foreign entities participating in the Argentine company, they must first be registered with the Public Registry.

Consumer Protection Law

Under Argentine law, individuals seeking to become franchisees are not qualified as consumers as they intend to set up a business.

Antitrust/Competition Law

The Code established that the franchise agreement, by itself, should not be considered an agreement that limits, restricts, or distorts competition.

Employment Law

The Code expressly establishes that the parties to the franchise agreement are independent and that there is no labor relationship between them.

The same Code establishes as a general rule that the franchisor is not liable for the franchisee's obligations and that the franchisee's dependents do not have an employment relationship with the franchisor.

However, these characteristics would only apply to the extent that fraud to the law is not corroborated through the execution of this type of contract with the purpose of hiding an employment relationship between the parties or to intermediate in the hiring of personnel to the detriment of the employee, otherwise, the franchisor and franchisee could be jointly and severally liable for the labor obligations.

Law on commercial agents

There are no provisions regarding commercial agents and its relation to franchises in the Code.

IP Law

Franchisors need to protect their IP against third parties' attacks or imitations, especially by registering their trademarks with Argentina's

IP authority (Instituto Nacional de la Propiedad Industrial). It is also recommended to carry out research beforehand in order to prevent the potential loss of the trademark and corresponding claims for disclosure and damages.

Selected aspects

Precontractual disclosure

Prior to signing a franchise agreement, franchisors and, in a sub-franchising structure, master franchisees must provide economic and financial information on the evolution of two years of franchise units/systems similar to the one offered in the franchise agreement, which has operated for a sufficient time, in the country or abroad.

The Code does not establish a statutory list of which information has to be made available and in what form, nor is there a standard compliance procedure. Likewise, the Code does not establish the obligation to continuously update the precontractual information.

This obligation is very important since the franchisee will be able to use the witness cases to project and forecast their own profitability and the convenience of the franchise. This obligation must be fulfilled in good faith; otherwise, the franchisor will be liable for the damages caused to the franchisee by providing false, incomplete, or distorted information in order to induce him to contract.

For reasons of proof, we understand that the precontractual information should be carried out in writing. In addition, franchisors need to anonymize references and examples when disclosing information to comply with the requirements of the Personal Data Protection

Law. The Argentine Association of Brands and Franchises (<http://www.aamf.com.ar>) and the Argentine Chamber of Franchisees (<https://franquiciados.com.ar>) provide advice and guidelines regarding the minimum information to be disclosed and all the doubts that both franchisors and franchisees may have.

Franchise fees

There are no laws in Argentina regulating the payment of franchise fees. Regarding payments to a foreign franchisor in any currency different from Argentine currency, Argentina has several exchange restrictions for sending funds abroad.

Confidentiality

The Code expressly states that the franchisee is obliged to maintain the confidentiality of the reserved information that compose the set of technical knowledge provided by the franchisor. In addition, the franchise must ensure confidentiality with respect to any person, employees or not, to whom such information must be provided for the development of activities. This obligation subsists after the expiration of the contract.

In case the franchisor must provide economic and financial information on the evolution of 2 years of franchise units/systems to the possible franchisee, the references and examples must be anonymized when disclosing information in order to comply with the requirements of the Personal Data Protection Law.

Amendments

In this case, both parties in the contract can agree that in certain specific cases, the franchisor or franchisee can make amendments to the agreement unilaterally and that some amendments



must be made with the agreement of both parties. If the contract does not have any provision regarding amendments, the agreement of both parties will be necessary to make an amendment to the franchise agreement.

Termination

The termination of the franchise agreement is governed by the following rules:

- the agreement is terminated by the death or incapacity of either party;
- the agreement between the parties cannot be terminated without cause within the term of its original validity;
- the agreement with a term of less than 3 years justified by special reasons, are fully terminated at the expiration of the term;
- whatever the term of the agreement may be,

the party that wants to terminate it at the expiration of the original term or of any of its extensions (if applicable), must send to the other party a notice in term of one month in advance for each year of duration, up to a maximum of six months, counted from the beginning until the expiration of the agreement term. In case of such agreements that are agreed for an indefinite period, advance notice must be given so that the termination occurs, at least, at the end of the third year from its conclusion. It is not required the invocation of a just cause in any case.

The clause that prevents the franchisee from competing with the marketing of its own products or services or those of third parties after the agreement has expired for any reason, is valid for a maximum period of one year and within a reasonable territory.



Renewal and transfer

The general rule states that the contract lasts at least 4 years. However, a shorter term may be agreed if it corresponds to special situations such as fairs or congresses, activities carried out within the premises, or undertakings that are scheduled for a shorter duration or similar. Upon expiration of the term, the contract is understood to be tacitly extended for successive terms of one year, except for an express notice by one of the parties before each expiration thirty days in advance. At the second renewal, it becomes a contract for an indefinite period.

Regarding the transfer of the contract, unless there is an agreement of the parties to the opposite, the franchisee cannot assign its contractual position or the rights that emerge from the contract while it is in force, except those of monetary content. This provision does not apply to wholesale franchise contracts intended for the franchisee to grant sub-franchises for these purposes. In such cases, the sub-franchisee must have the prior authorization of the franchisor to grant sub-franchises under the conditions agreed between the franchisor and the main franchisee.

Dispute resolution and applicable law

The justice system of Argentina is composed of the National Judicial Power and the Judicial Power of each of the provinces. The National Judicial Power is composed of the Supreme Court of Justice (higher instance within the Judicial Power), the National Council of Judges (it is in charge of the appointment of the judges and the administration of the Judicial Power in conjunction with the Supreme Court), the Courts of First Instance and the Chambers of Appeals.

Within the National Judicial Power, there are different jurisdictions, which function separately from each other. These jurisdictions are given, in general, by reason of the matter. Therefore, there are civil jurisdiction, commercial jurisdiction, criminal jurisdiction, labor jurisdiction, federal contentious-administrative jurisdiction, etc. The Courts of First Instance and the Chambers of Appeals act within each jurisdiction. These chambers are courts that review the proceedings in First Instance, are divided into "chambers" and are multi-person courts.

The parties may agree that in the event of any conflict arising from the franchise agreement, they are subject to the jurisdiction of the courts of specific jurisdiction and/or jurisdiction or submit to arbitration by an impartial third party.

COVID-19

From early 2020 on, the COVID-19 pandemic has been having a huge impact on the franchise sector, as, under government measures, public life was shut down to contain the pandemic. Therefore, the Argentine government arranged several measures to help the sectors directly affected (including gastronomic franchises) by the COVID-19 pandemic, among which we can highlight: ATP "Assistance program for work and production" (consists of reducing the payment of a percentage of the charges labor and employee salaries and some taxes) and the granting of credits to companies and individuals.

Austria

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Legal professionals



Region

EMEA



Offices

Vienna

Essentials

about Austria's franchising law

- 1 Franchisees may be entitled to indemnity after termination of the franchise agreement in analogous application of the law of commercial agents
- 2 Franchise agreements usually contain vertical restraints and should be reviewed as to their compliance with antitrust law
- 3 In general, franchisees qualify as businesses but can – under certain conditions – also qualify as employee-like

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

In Austria, there is neither a legal definition of “franchise”, nor a codified franchise law. Austrian franchise law is set out by different areas of law, especially civil, commercial and corporate law.

Corporate Law

The most common corporate form to set up business in Austria is the private limited liability company (“GmbH”). A GmbH can be set up by one or more people and requires a minimum capital of – generally – EUR 35,000. Solely, the registered capital is liable to the company’s creditors, not the shareholders personally. The formation costs for a GmbH are moderate. Notwithstanding foreign trade law regulations regarding foreign investments in certain sectors (“Investitionskontrollgesetz”), Austrian corporate law does not impose any general restrictions on foreign operations in Austria, nor on franchise systems in particular.

Consumer Protection Law

In general, franchisees are not qualified as consumers but as traders/entrepreneurs under Austrian law. However, it should be noted that the provisions of the Consumer Protection Act (“Konsumentenschutzgesetz”) apply to the franchisee if the conclusion of the franchise agreement constitutes a founding transaction for the franchisee.

Antitrust/Competition Law

In general, franchise agreements typically have antitrust law implications as they usually contain vertical restraints. The EU-Vertical Block Exemption Regulation (“V-BER”) applies on vertical restraints on the purchase, sale and

resale of goods and services within franchising agreements—such as selective distribution, non-compete or exclusive distribution—if the market share of neither the franchisor nor of the franchisee exceeds a 30% threshold on the relevant market(s). Hardcore restrictions within the meaning of Art. 4 V-BER are not covered by the block exemption and lead to the full agreement being presumed to be anti-competitive. Restraints within the meaning of Art. 5 V-BER are not exempted as well, although only the specific provisions lose exemption. If the market share is higher than 30% on the relevant market(s), a case-by-case analysis must take place. In general, the possible application of the commercial agent privilege on franchise agreements needs to be assessed. If franchisees bear the financial and commercial risks of their undertaking on their own and do not act on behalf and for the account of the franchisor, the commercial agent privilege does not apply (thus, the franchisee must be free to determine resale prices).

Employment Law

In general, due to the legal independence and the entrepreneurial risk bearing, the franchisee cannot be classified as an employee. However, the Austrian Supreme Court has in some cases and under certain conditions qualified a franchisee as employee-like. The decisive criteria is especially the degree of personal dependency of the franchisee. Main consequence of the qualification as employee-like is the establishment of jurisdiction of the labor and social courts. Contrary agreements regarding the place of jurisdiction are invalid. A franchisee is considered an entrepreneur if they can independently and freely determine their working hours, working place and working behavior.

Law on commercial agents

Although the franchisee typically does not qualify as a commercial agent within the meaning of Section 1 of the Commercial Agents Act (“Handelsvertretergesetz”, “HVertrG”), case law of the Austrian courts favors an analogous application of individual provisions of the HVertrG, provided that the franchisee is integrated into the sales organization of the entrepreneur like a commercial agent. For example, franchisees may be entitled to an indemnity of up to an average annual remuneration under very specific conditions always depending on which franchise-type is concerned.

IP Law

Franchisors can protect their IP against third parties’ attacks or imitations, especially by registering their trademarks—either as International Registration (“IR”) with the World Intellectual Property Organisation (“WIPO”), as EU Trademark (“CTM”) with the EU Intellectual Property Office (“EUIPO”) in all 27 EU member countries, or as national trademark in Austria only with the Austrian Patent Office.

Selected aspects

Precontractual disclosure

Prior to signing a franchise agreement, franchisors have the duty to inform each potential franchisee accurately and with reasonable advance about all circumstances recognizably relevant for the conclusion of the franchise agreement. The information provided in each case must be correct and complete. Thus, the franchisor may be liable for sales forecasts if it can be accused of at least gross negligence in preparing these forecasts.

However, there is neither a statutory compliance procedure for making precontractual disclosure in Austria nor a list of which information has to be made available. Furthermore, Austrian franchise law does not know a general obligation to continuously update precontractual information. However, such an obligation may arise during the term of the franchise agreement (or even prior to signing) if certain circumstances occur, or change, being recognizably relevant to the franchisee.

Legal restrictions

Antitrust/Competition Law.

This information is already provided for above.

Franchise Fees

There are no laws explicitly regulating franchise fees in Austria. The consideration to be paid by the franchisee to the franchisor for entering the system or on an ongoing basis is to be determined individually. In many cases, the franchise agreement provides that the franchisee shall pay a one-time entry fee to the franchisor. This entry fee represents the payment for franchise rights as well as the payment for the transfer of know-how. The ongoing franchise fees to be paid periodically by the franchisee are usually based on the net sales generated by the franchisee. Payments to a foreign franchisor may be made in the franchisor’s domestic currency. The interest rate in Austria for default payments in B2B-transactions is currently 9.2 percent above the base interest rate.

Confidentiality

Franchise agreements very often contain enforceable confidentiality clauses in Austria. The franchisor may file an interim injunction against an infringing franchisee, claim damages occurred due to the breach, and possibly terminate the franchise agreement for cause.

Amendments to franchise agreements
In general, amendments to franchise agreements must be agreed unanimously between the franchisor and the franchisee. However, many franchise agreements contain change reservation clauses that give the franchisor the possibility to unilaterally amend the agreed terms, although taking into consideration the franchisee's interests.

Termination

The franchisor and the franchisee are free to agree on the duration of the franchise agreement. In general, the franchise agreement may end by expiry of time, regular termination (if agreed upon), or termination for cause. The franchisor and the franchisee are generally free to agree on the circumstances under which the parties may terminate. Good cause will generally be deemed to exist if circumstances are present which make it unreasonable for one of the contracting parties to continue the contract until the expiry of the agreed contract term or the next regular termination date. Unjustified terminations by a franchisor might entitle the franchisee to claim damages.

Renewal and transfer

In general, franchisors are free to decide whether or not to renew a franchise agreement. It is admissible to contractually restrict a franchisee's ability to transfer its franchise, typically by requiring an explicit prior written approval of the franchisor.

Dispute resolution and applicable law

The Austrian civil court system consists of a four-tiered system with district courts (values < EUR 15.000,-), regional courts (values > EUR 15.000,-), higher regional courts (generally courts of appeal), and the Supreme Court. In principle, it is admissible for the parties to a franchise agreement to agree on a choice of law to be applicable on their contractual relationship, and if the franchisee is a trader/entrepreneur, to agree on a venue clause. Moreover, it is possible for the contracting parties to submit to arbitration.

COVID-19

The COVID-19 pandemic has had a significant impact on the franchise sector. COVID-19 poses several questions in relation to franchising, e.g., questions on existing agreements (rental agreements, employment contracts, supplier and customer agreements and the franchise agreements itself) labor law or financial state aid.

In general, COVID-19 can be considered an unavoidable elementary event and may therefore exclude liability for possible damages. In the context of rental agreements, there has been a controversial discussion as to the obligation of the lessee to continue paying their rent if the business premise was closed by the authorities (or at least to reduce the rent). There are some decisions of (lower) courts in Austria indicating that a suspension of the obligation to pay rent for the period of closure may be justified. However, it remains to be seen whether the Austrian Supreme Court shares that opinion.

Bangladesh



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Legal professionals



Region

APAC



Essentials

about Bangladesh's franchising law

- 1** In Bangladesh, there does not appear to be any specific dedicated legislation that regulates franchising, and, instead English common law derived principles of contract law that have been codified in the Contract Act 1872 ("CA") applies;
- 2** There do not appear to be any laws in Bangladesh which require franchisors to disclose any matters to potential franchisees prior to entering a franchising arrangement; and
- 3** Trademarks should generally be registered with the relevant authority to be enforceable under Bangladesh law.

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Relevant areas of law

Legal basis of Franchise Law

In Bangladesh, there does not appear to be either a legal definition of “franchise” or specific legislation addressing franchising arrangements, which are generally governed by contract law under the CA. The parties to a franchise agreement are generally free to agree on the terms and conditions of franchise arrangements so long as such arrangements do not contravene the CA’s express provisions, such as the illegality of consideration.

Specifics regarding foreign franchisors

There do not appear to be any specific laws in Bangladesh, which require a franchising agreement prepared by a foreign entity or governed by foreign law to be adapted to a certain form in order to be enforceable in Bangladesh.

It is, however, worth noting that payments / remittances made from Bangladesh to any other country are tightly regulated by the Foreign Exchange Regulations Act 1947 and circulars issued by Bangladesh Bank (the central bank of Bangladesh), which may require a franchisee in Bangladesh to obtain approval from the Bangladesh Investment Development Authority (“BIDA”) in respect of the payment of royalties and technical fees to an overseas franchisor.

Corporate Law

The most common business structure in Bangladesh is a private limited company incorporated in accordance with the Companies Act 1994.

To incorporate a company in Bangladesh, we understand that the following requirements (among others) must be met:

- Shareholders/directors: Every company must have a minimum of two (2) directors and two (2) shareholders, none of whom need to be residents in Bangladesh.
- Corporate information: Among others, the names of the proposed directors/shareholders of the company must be provided along with the proposed local address of the company’s office.
- Charter documents: A company constitution must be prepared and submitted (along with the “Corporate information” above) to the Registrar of Joint Stock Companies and Firms, which is the national companies’ registry.

Most required filings with and payments to relevant authorities can be undertaken online, and a company can generally be incorporated within approximately six (6) weeks.

Consumer Protection Law

Franchisees do not appear to be covered by the definition of “consumer” under the Consumers’ Right Protection Act 2009 and are unlikely to be protected by its provisions.

Antitrust/Competition Law

We have noted earlier that while there do not appear to be any specific laws in Bangladesh addressing franchising arrangements, general principles of contract law under the CA would apply. In this regard, the provisions of the Competition Act 2012, which generally places restrictions on, among others, agreements that substantially reduce competition, territorial restrictions and resale price maintenance (e.g., a franchisor pressuring a franchisee not to sell products below a certain price), may also apply to such arrangements.

Employment Law

Franchisees do not appear to be covered by the definition of “worker” under the Labor Act 2006 and are unlikely to be protected by its provisions, which provide a “worker” with, among others, rights to minimum notice periods and severance payments in circumstances where their employment contract is terminated.

To help mitigate the risk of characterization as an employment relationship, a franchise agreement may also stipulate that the franchisee will be acting in their capacity as an independent contractor and nothing in the agreement should be construed as creating an employment relationship between the franchisor and the franchisee.

Law on commercial agents

We understand that a franchisee is generally not regarded as an “agent” under Bangladesh law as they would typically trade in their own name, receive income on their own account and be ultimately and directly responsible for any liability arising in connection with goods or services they supply.

To help mitigate the risk of characterization as an agency relationship, a franchise agreement may also stipulate that nothing in the agreement should be construed as creating an agency relationship between the franchisor and the franchisee. Bangladesh law generally upholds parties’ intentions based on their express agreements.

IP Law

Franchise agreements may allow the licensing and/or transfer of all forms of Intellectual Property Rights (“IPRs”), depending on the nature of the intended activity or business of the franchisee. A franchisor may control,

supervise and impose conditions and limitations on the exploitation and use of their IPRs by a franchisee.

While Bangladesh law does not appear to require trademarks or licenses to be registered in order to engage in franchising activities, undertaking relevant registrations with the Department of Patents, Designs and Trademarks is advisable to help obtain statutory protection of such IPRs.

Selected questions/aspects

Precontractual disclosure

There do not appear to be any laws in Bangladesh which require franchisors to disclose any matters to potential franchisees prior to entering a franchising arrangement.

It would therefore be advisable for potential franchisees to undertake some due diligence on the franchisor and the proposed franchise arrangement before entering any franchising arrangement.

Legal restrictions

As discussed in “Legal Basis of Franchise Law” above, there does not appear to be any specific legislation in Bangladesh that requires particular provisions to appear or prohibits particular provisions from appearing in franchise agreements.

Confidentiality

Confidentiality clauses are generally enforceable under Bangladesh law.

Franchise fees

The parties to a franchise agreement are generally free to agree on any matters in connection with franchise fees subject to the provisions of the CA.

Amendments

Likewise, parties to a franchise agreement are generally free to agree on terms that allow a franchisor to unilaterally amend the terms of the franchise agreement subject to the provisions of the CA.

Termination

The parties to a franchise agreement are also generally free to agree on the length of a fixed-term franchise agreement subject to the provisions of the CA that would then automatically terminate on the expiry of such fixed term.

There do not appear to be any limitations on the right of a franchisor to terminate a franchising agreement under Bangladesh law and parties are generally free to agree on the grounds for termination such as material breach, repudiation, and others – again, subject to the provisions of the CA.

Renewal and transfer

There do not appear to be any laws in Bangladesh which require franchisors to renew or transfer a franchise agreement, and parties are generally free to agree on such terms subject to the provisions of the CA.

Dispute resolution and applicable law

Dispute resolution, court system

Cross-border franchising arrangements may be governed by foreign laws – and the parties can opt for dispute resolution by arbitration in a “neutral” location (rather than a Bangladesh court or local arbitration)¹. In the absence of a binding arbitration agreement expressly

¹ There is also a detailed arbitration regime in Bangladesh under the Bangladesh Arbitration Act 2001

reflected in the agreement or otherwise agreed by the parties, the parties may choose to commence proceedings in a Bangladesh court.

The Judicial system of Bangladesh is broadly classified into two levels (in descending order of superiority):

- Supreme Court, comprising of (i) the Appellate Division (appellate jurisdiction only) and (ii) the High Court Division; and
- Subordinate courts and tribunals.

Applicable law

Bangladesh courts will generally defer to the law that parties have chosen to govern a franchise agreement, subject to exceptions such as where the chosen governing law is contrary to “public policy” in Bangladesh.

COVID-19

Businesses in Bangladesh have been badly hit by the COVID-19 pandemic, and the Bangladesh government has offered financial support for businesses, including tax relief, moratoriums on certain loan repayments, and extending deadlines for tax and other filings. As of 4 August 2021, there does not appear to be any COVID-19 related legislation in Bangladesh that specifically relates to franchising matters.

Belgium

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Legal professionals



Region

EMEA



Offices

Antwerp, Brussels,
Ghent, Kortrijk,
Zaventem

Essentials

about Belgium's franchising law

- 1 Belgian law does not include a "franchise regulation". As such, franchise agreements are mainly subject to the general commercial laws and regulations.
- 2 Articles X.26-X.34 of the Belgian Code of Economic Law (the "CEL") impose specific information obligations on the franchisor in the precontractual phase, prior to closing the franchise agreement. Failure to comply with these mandatory information obligations can result in the annulment of the franchise agreement.
- 3 Franchisees may be entitled to compensation payment upon termination of the franchise agreement, in case the franchise agreement also constitutes an "exclusive distribution agreement" having effect in (part of) Belgium (art. X.35-X.40 CEL).

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Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

Belgian law does not provide for a legal definition of a “franchise” or for a codified franchise regulation. In Belgium, franchise agreements and franchise relationships are governed by general economic law that applies to all kinds of commercial cooperation agreements including civil, commercial, and corporate law.

In addition to the principles of general economic law, all franchise agreements are (in principle) subject to a specific regulation on precontractual information obligations set forth in article X.26-X.34 CEL (cf. infra section “Pre Contractual Disclosure”). Furthermore, termination of a franchise agreement may in some cases be subject to a specific regulation on the termination of exclusive distribution agreements set forth in article X.35-X.40 CEL (cf. infra section “termination”).

Corporate Law

The most common corporate form to set up a franchisee business in Belgium is a private limited company (“BV”/“SRL”). The private limited company is not subject to a minimum starting capital requirement (a BV/SRL can be established with a starting capital of 1.00 EUR). When setting up the company, the founder(s) must file a financial plan for the first 24 months of the company’s lifespan. The liability of the BV/SRL’s founders is limited to the share capital, unless:

- the company goes bankrupt within three (3) years after its establishment, and
- it appears that, taking into account the financial plan, the starting capital was insufficient to survive/bridge the first two (2) years (cumulative conditions).

Consumer Protection Law

Under Belgian law, individuals seeking to become franchisees are not considered consumers as the intention of their conduct is business-oriented. Hence, Belgian Consumer (Protection) Law is not applicable to such franchise agreements or relationships.

Employment Law

The franchisor should verify that the self-employed nature of the franchisor is guaranteed, both contractually as in daily practice for labour courts have already recharacterized the cooperation with the franchisor into an employment contract if the framework (applied) is too strict.

Such recharacterization should be avoided as the social security status of the individual would have to be regularized and the franchisor would be liable to pay (i) arrears of employee social security contributions (13.07% of gross remuneration, uncapped) and employer social security contributions (\pm 28% of gross remuneration, uncapped); (ii) 10% surcharges of unpaid contributions; and (iii) 7% late payment interests. The status of limitations of claims of the NSSO is three (3) years (seven years in case a fraudulent intention can be proven).

Furthermore, the franchisee could claim the payment of arrears of vacation pay, 13th month, indexations, pension schemes, etc., and compensation in lieu of notice in case the franchisor has unilaterally terminated the collaboration.

Mitigating such risk requires formal and factual consistency as the Act of 27 December 2006 on Labour Relations provides specific guidelines to assess the nature of the professional relation: (i) the parties’ intention (chosen character of the contract); (ii) the freedom (or not)

to organize their working time; (iii) the freedom (or not) to organize the way in which the work is done; (iv) the possibility (or not) to exercise any hierarchic control.

The basic principle of the Act of 27 December 2006 is that parties are allowed to freely choose the nature of their professional relation when concluding an agreement on the condition that the chosen character of their relation/contract corresponds to the way in which the contract is executed (substance should support form). If not the case, the contract can be “recharacterized” with the abovementioned financial consequences at risk.

Law on commercial agent

In general, a franchisee purchases and sells the products/services concerned in its own name and for its own account. Hence, a franchisee will in principle not be considered a commercial agent. However, it cannot be excluded that under certain franchise concepts, the franchisee would sell the products/services in the name and for the account of the franchisor. In such case, the Belgian Law on Commercial Agents (set forth in article X.1-X.25 CEL) may apply, provided that the franchisee has “continuing authority to negotiate the sale or the purchase of goods on behalf of the franchisor or to negotiate and conclude such transactions on behalf of and in the name of the franchisor” (cf. legal definition of commercial agent).

The rules set forth in the Belgian Law on Commercial Agents basically correspond to those set forth in Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents.

IP Law

Franchisors need to protect and enforce their Intellectual Property (IP). Since a franchise is mostly built around a strong brand, the most important intellectual property rights to consider are trademarks, although it remains important for the franchisor to protect other IP such as copyrights, design rights or patents.

In Belgium, trademarks can be protected at Benelux level, EU level or international level. It is not possible to register Belgian national trademarks. The Benelux trademark is governed by the Benelux Convention on Intellectual Property (“BCIP”) and offers unified trademark protection in Belgium, the Netherlands and Luxembourg. An EU trademark offers protection in all 27 EU member states. An international trademark consists of a bundle of national trademarks and offers protection in all countries as indicated in the international trademark application, which need to be members of the Madrid Union.

Know-how or confidential information are also an important aspect of a franchise but these cannot always be protected by intellectual property rights. Therefore, it could be important for the franchisor to take the necessary measures in order to protect knowhow and confidential information as trade secrets. The Belgian Law of 30 July 2018 has implemented the EU Trade Secret Directive (Directive (EU) 2016/943) into Belgian law.

Selected questions/aspects

Precontractual disclosure

Articles X.26-X.34 of the CEL impose specific information obligations on the franchisor in the precontractual phase, prior to closing the franchise agreement. In principle, this law on

precontractual information obligations applies to all 'commercial collaboration agreements' (thus including franchise agreements).

The abovementioned law on precontractual information obligations can be summarized as follows:

- At least one month prior to entering into a franchise agreement, the franchisor must provide the candidate franchisee with (i) the draft franchise agreement and (ii) an information memorandum ("Precontractual Information Document"/"PID") containing all essential commercial, corporate, financial and marketing information.
- The information to be included in the PID is set forth in article X.28 CEL and is divided into two groups:
 - 'Contractual clauses that are deemed to be crucial' (if included in the agreement), such as: the question whether or not the contract is concluded *intuitu personae*; the relevant obligations and the consequences of failure to comply with these obligations, the fees (royalties or any other amounts) that will be due by the franchisee as a direct compensation for the granting of the franchise rights (including the calculation method and manner of revision of such fees in case of renewal); the duration and terms of non-competition obligations, the duration of the franchise agreement and the conditions for renewal; the conditions for termination of the agreement as to the charges and investments made; the existence of a right of first refusal or a purchase option in respect of the franchisor to obtain the franchisee's business (and the rules for valuation of such business); and any exclusive rights reserved to the franchisor;

- 'Information that is deemed necessary' in order to enable the franchisee to assess (the consequences of) the franchise agreement, such as: the name and address of the franchisor; the identity and capacity of the natural person representing the franchisor; the nature of the commercial activities of the franchisor; the intellectual property rights in relation to which certain rights will be granted by the franchisor; the annual accounts for the last three financial years of the franchisor; the franchisor's experience relating to commercial collaborations and relating to the exploitation of the commercial formula outside the franchise network; the history, condition and perspectives of the relevant market (both on a general and local level); the history, condition and perspectives of the (franchise) network's market share (both on a general and local level); the number of franchisees (or other distributors) that were part of the network (on a national and international level) during the last three years; the intentions to expand the network; the number of franchise (or commercial collaboration) agreements entered into during the last three years; the number of franchise (or commercial collaboration) agreements terminated during the last three years; the number of franchise (or commercial collaboration) agreements not renewed or extended during the last three years; and the charges and investments which the franchisee will have to pay at the start of the agreement and in the course of the collaboration (including the amounts and their use, the amortization periods, the times at which they will be implemented and their disposal at the end of the contract).

- The one-month period is considered a period of reflection.

- If certain ‘contractual clauses that are deemed crucial’ (cf. above sub a) are changed during the one-month period, the franchisor will have to provide the franchisee with a new draft agreement and a simplified PID (containing at least the changes), after which a new one-month reflection period will start.
- In case a franchise agreement is renewed, in case a new franchise agreement is concluded between the same parties or in case an existing franchise agreement is changed/amended, the franchisor must provide the franchisee at least one month prior to renewal, conclusion or amendment with a simplified PID, containing the crucial clauses (mentioned above sub a) and the crucial information (mentioned above sub b) to the extent such elements of the franchise agreement have changed.
- The franchisee cannot be requested to assume any obligations (except for confidentiality obligations) or to pay any fees before the one-month reflection period has lapsed.

Art X.30 CEL provides for the sanctioning in case of non-fulfilment of one of the precontractual disclosure obligations set out hereabove. In case the draft franchise agreement or the PID is not provided to the franchisee one month prior to the conclusion of the actual contract, the franchisee will be able to demand a court to annul the franchise agreement up to two years after conclusion of the contract.

In case a ‘contractual clause that is deemed crucial’ is not included in the PID, the franchisee will be able to invoke the nullity of that particular provision of the contract. In case the PID contains incorrect or incomplete information (as to a ‘contractual clause that is deemed crucial’ or as to ‘information that is deemed essential’), the franchisee may invoke

absence of consent or quasi-intentional tort. In such case, the franchisee will have to seek nullification of the agreement or request damages and interests.

Legal Restrictions

Antitrust/Competition Law: As is the case for every EU country, franchise agreements may contain restrictions that collide with art. 101 Treaty on the Functioning of the EU (“TFEU”). Exemptions from the prohibition in art. 101 of the Treaty are possible under the EU-Vertical Block Exemption Rule (“V-BER”), provided that the respective parties to a franchise agreement do not have a market share of more than 30% each. The V-BER contains black clauses (“hardcore restrictions”), rendering the entire agreement null and void, as well as grey clauses, rendering solely the specific provision in an agreement null and void. Examples for black clauses are provisions dictating fixed prices or prohibiting passive sale outside a designated territory (including sale via the Internet), whereas provisions prohibiting competition for more than five years or for an unlimited time are grey clauses.

Unfair contract terms in B2B agreements: On 1 December 2020, the “B2B law” prohibiting unfair contract terms in B2B contracts entered into force (incorporated in article VI.91/1-VI.91/10 of the CEL). These new rules only apply to contracts entered into, renewed or amended after 1 December 2020.

The new rules on unfair contract terms provide for two general requirements:

- transparency: written terms must be transparent and intelligible;
- balance: terms that—either on their own or in combination with other clauses—generate

a clear imbalance between the parties' rights and obligations are considered 'unfair'.

The 'balance test' does not apply to (i) terms defining the actual object of the agreement or (ii) the link or equivalence between the price to be paid and services or goods to be supplied. In addition to the above, the new rules provide for a "black list" of terms that are always deemed to be unfair and a "grey list" of terms that are presumed to be unfair (somewhat analogue to the rules on unfair contract terms in consumer protection law).

The black list prohibits clauses:

- that provide for an irrevocable obligation with respect to one party, while the execution of the other party's obligations is subject to a condition where the fulfilment depends exclusively on that party's will;
- granting a party the unilateral right to interpret the (terms of the) agreement;
- resulting in a party a priori waiving any right to seek legal recourse against the other party in case of a dispute;
- stipulating that a party irrefutably acknowledges having read and accepted certain terms (e.g., general terms and conditions) even though it was impossible for said party to have knowledge of these terms.

The grey list of terms that are presumed to be unfair relates to clauses that:

- grant a party the right to unilaterally change the price, characteristics or terms of the agreement without justification or reasonable cause;
- provide for an automatic renewal or extension of a fixed term agreement without mentioning a reasonable notice term (that should be complied with to prevent renewal/extension);



- without compensation, place an economic risk with one party while that risk would normally be borne by the other/another party;
- inappropriately exclude or limit a party's rights in case the other party fails to comply with its contractual obligations;
- bind parties without mentioning a reasonable notice period;
- exonerate a party for its (representatives') deliberate or gross errors in relation to non-compliance with its essential obligations that comprise the actual object of the agreement;
- limit the means of evidence that may be used by the other party in case of a dispute;
- provide for a fixed compensation in case of late or non-execution of a party's obligations, if said fixed compensation is not proportionate to the damage that could be incurred by the other party.

Unfair contract terms can be declared null and void by the courts. If the concerned stipulation relates to the agreement's essence/core, the entire agreement can be annulled. Furthermore, any interested party and the Minister competent for Economy and Middle Class ("ministers bevoegd voor economie en middenstand"/"ministères compétents pour l'économie et les classes moyennes") can seek an injunction against the enterprise using unfair contract terms. The use of unfair contract terms can even be criminally sanctioned, but only in cases of breach in bad faith.

Franchise fees

The franchisor can demand payment of franchise fees; however, the granting of franchise rights is not necessarily subject to payment of franchise fees. The franchise fees (if any) and the amount of such franchise fees are to be

agreed upon up front in the franchise contract (and must be mentioned in the PID).

The franchise fee comes in different forms: entrance fees, royalties, marketing fees, etc. As the franchise fee is not regulated in Belgian law, the franchisor and franchisee are free to agree upon the nature and amount of the franchise fees.

In case of late or non-payment by the franchisee, the amount due will automatically and without prior notice be increased with the statutory annual interest that is referred to in the Act of 2 August 2002 on combating late payment in commercial transactions or with any other late payment interest agreed upon in the franchise agreement.

Confidentiality

Confidentiality clauses in franchise agreements (often in combination with a contractual penalty) are generally common and enforceable in Belgium. Confidentiality clauses are advisable in order to adequately protect existing trade secrets (both in the contractual phase as in the pre-contractual phase). Although the information relating to a franchise relationship that is disclosed during the precontractual phase is by law subject to a confidentiality obligation (article X.31 CEL), it is advisable to sign a written confidentiality and non-disclosure agreement prior to disclosing any information to the potential franchisee.

Amendments

In principle, contracts are binding and thus cannot be unilaterally changed. Article VI.91/5, 1° CEL states that unless counterproof is provided, the company (franchisor) cannot be granted the right to unilaterally change the

price, the characteristics or the terms of the agreement without giving a valid reason. It is thus important to provide specific and detailed reasons (specific market developments that could arise during the performance of the franchise agreement) to make such unilateral amendment contractually admissible and valid. If the amendment of the franchise agreement relates to an essential contract term or essential aspect of the franchise, the franchisor must comply with the one-month reflection period (cf. section “Pre-contractual Disclosure”).

Termination

Franchise agreements can be entered into for a fixed term or for an indefinite term. Fixed term contracts cannot be terminated by any party before lapse of said fixed term, and automatically expire when the fixed term has lapsed (unless parties (tacitly) continue the collaboration). Contracts entered into for an indefinite term can be terminated at any moment and by each party respecting a “reasonable notice period”. The length of the “reasonable notice period” is determined on a case-by-case basis, mainly taking into account the duration of the contract/collaboration and the importance of the contract for the franchisee (the basic idea being that the notice period should be sufficient to enable the franchisee to reorganize itself). In principle, the length of the “reasonable notice period” can also be agreed upon up front in the franchise contract (unless the franchise relationship also qualifies as an “exclusive distribution”).

Belgian law provides for specific rules on the termination of “exclusive distribution agreements” (article X.35-X.40 CEL). Said rules are applicable to: a) distributors that have exclusivity in the Belgian territory, b) distributors that virtually sell all the relevant products in the

Belgian territory (quasi-exclusivity) and c) distribution contracts that impose important obligations on the distributor, as a consequence of which the distributor would suffer a substantial prejudice in case of termination of the agreement. In case the franchisee a) resells the franchisor’s products in its own name and for its own account (thus being a distributor) and b) has (quasi) exclusivity in (part of) Belgium or has important obligations (e.g. as to investments to be made in light of the franchise) under the franchise agreement, the franchise agreement can (also) be considered an “exclusive distribution agreement” and will thus be subject to the specific rules on termination set forth in article X.35-X.40 CEL. The rules on the termination of “exclusive distribution agreements” set forth in article X.35-X.40 CEL are only applicable to distributions having effect in the territory of Belgium or part thereof.

The rules on termination of “exclusive distribution agreements” can be summarized as follows:

- An exclusive distribution agreement of indefinite term can only be terminated respecting a “reasonable notice period” (art. X.36 CEL). The “reasonable notice period” is to be determined on a case-by-case basis. In general, a notice period is considered “reasonable” by Belgian courts if (i) it allows the distributor to comply with its obligations/commitments towards third parties and (ii) it gives the distributor sufficient time to find an alternative and equivalent source of income. The following elements are typically considered when determining the length of the “reasonable notice period”: duration of the agreement, evolution of the turnover, size of the territory, notoriety of the brand and investments made by the distributor.

- The distributor will be entitled to an indemnity in lieu if the exclusive distribution agreement of indefinite term is terminated without respecting a “reasonable notice period”. The indemnity in lieu should be equal to the financial benefits/profits which the distributor could have obtained during the reasonable notice period (if such reasonable notice period would have been granted/respected). The indemnity in lieu will thus, to a great extent, depend on the profitability of the distribution. In general, the calculation of the indemnity in lieu is based on the average “semi-gross margin” of the three (3) years preceding the distribution’s termination.
- In addition to the “reasonable notice period” or “indemnity in lieu”, the distributor will be entitled to a “fair additional compensation” (art. X.37 CEL) if the exclusive distribution of indefinite term is terminated by the franchisor. The franchisee will be unable to claim such “fair additional compensation” if the distribution is terminated for gross negligence in respect of the franchisee or if the franchisee itself terminates the distribution. The “fair additional compensation” is determined based on the following elements: (i) the known added value in terms of clientele created by the franchisee and residing with the franchisor after the termination of the contract; (ii) the costs incurred by the franchisee in light of the exploitation of the sales concession/franchise concept and which may bring benefits to the franchisor after the contract’s end; (iii) the compensation owed by the franchisee to the staff, which they are obliged to dismiss as a result of the termination of the sales concession/franchise agreement.
- If an exclusive distribution agreement is granted for a fixed term, parties are considered to have agreed to a renewal of the agreement for an indefinite term or for the fixed term mentioned in the clause (if existent) regarding tacit extension, unless either party sent a termination notice by registered letter at least three months and not more than six months before the contractual expiration date. An exclusive distribution agreement entered into for a fixed term automatically and by law becomes an agreement of indefinite term as from the third extension or renewal. An exclusive distribution agreement of fixed term that is transferred into an agreement of indefinite term will automatically become subject to the rules of termination set forth.
- The franchisee that is protected under the abovementioned rules can start legal proceedings before a Belgian judge, who will be obliged to apply article X.35-X.40 CEL (if applicable).

The rules on the termination of “exclusive distribution agreements” are considered a “loi de police” and are therefore applicable irrespective of any choice of law provided for in the franchise agreement.

In case the franchisee sells the products in the name and for the account of the franchisor and the franchisee has “continuing authority to negotiate the sale or purchase of goods on behalf of the franchisor or to negotiate and conclude such transactions on behalf of and in the name of the franchisor” (cf. legal definition of commercial agent), the rules set forth in the Belgian Law on Commercial Agents will apply to the termination of the franchise agreement (cf. above section “Law on Commercial Agents”).

Renewal and transfer

Franchisors are generally free to decide whether or not to renew a franchise agreement, as in every commercial contract. It is possible and advisable to explicitly stipulate the (absence of a) right to renewal in the agreement. In certain (exceptional) circumstances, the non-renewal of the franchise agreement could constitute abuse of law, e.g. in case the franchisor recently obliged the franchisee to make significant investments.

It is recalled that the rules on precontractual disclosure set forth in article X.26-X.34 CEL apply to renewals of the franchise agreement (cf. above one-month reflection period, draft agreement and simplified PID).

Although franchise agreements are usually considered to be entered into *intuitu personae*, art. X.28 CEL stipulates that the *intuitu personae* nature of the franchise agreement must be explicitly stipulated in the contract and must be mentioned in the PID. Hence, it is advisable to explicitly stipulate the (absence of a) right to transfer the franchise in the franchise agreement.

Dispute resolution and applicable law

In principle, the commercial courts (“*ondernemingsrechtbanken*”/“*tribunaux de l’entreprise*”) are competent to rule on disputes between the franchisor and franchisee, irrespective of the monetary amount of the claim.

In principle, the franchisor and franchisee can agree upon the competent courts and applicable law in the franchise agreement and thus opt for the laws and courts of the franchisor’s jurisdiction. However, as mentioned above (cf. section “termination”), if the franchise agreement can be considered an “exclusive distribution agreement” (having effect in part of Belgium), termination of the franchise agreement shall in principle be governed by article X.35-X.40 CEL and the franchisee shall be able to start legal proceedings in Belgium (irrespective of any clause regarding forum choice or choice of law) as the Belgian law on the termination of exclusive distribution agreements is considered a “*loi de police*”.

It is also admissible to agree on arbitration as the exclusive way of resolving disputes between the parties, thus waiving the due process of law.



Chile

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Legal professionals



Region

AMERICAS



Offices

Santiago de Chile

Essentials

about Chile's franchising law

- 1 There is no specific regulation for franchises in Chile, being such activities regulated under general business and commercial law.
- 2 In general, the terms of the franchise agreement will govern the relationship between franchisee and franchisor, provided that general good faith and other public policy considerations are observed.
- 3 Foreign companies and investors are given national treatment in Chile under the foreign investment law and numerous bilateral investment treaties.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

There is no specific regulation in Chile for franchises, and Chilean law does not define the term “franchise”. Such activity does not fall under the jurisdiction of any specific authority. The courts have not recognized the relationship between franchisors and franchisees as deserving special regulation.

Consequently, contracts between the franchisor and franchisee are governed by general contract law established in Chile in the Civil Code. The parties will be generally free to set forth the terms of their relationship. There are no special disclosure requirements or protections for franchisees.

However, pursuant to general principles of contract law, parties are required to fulfill their obligations under the franchise contract in good faith. It means that the franchisor must exercise its rights under the contract without discrimination and upon a rational basis.

Specifics regarding foreign franchisors

The Chilean foreign investment law establishes the principle of non-discrimination to foreign investors. It means that they cannot be discriminated and must receive “national treatment”; i.e., they must be treated as Chilean investors. There is no need for prior approval for foreign investment.

The law also provides the right to access the Chilean foreign exchange market to convert Chilean currency into foreign currency and remit the initial investment and any profits abroad.

The law provides that a foreign investor who feels that it is receiving discriminatory treatment may ask Chilean authorities (including courts) to correct any discrimination. This is enforced in practice.

In addition, Chile has entered into a wide network of Bilateral Investment Treaties, including 55 Bilateral Investment Treaties (BIT) and 33 treaties with Investment protection provisions (TIP). These treaties provide protections for foreign investors, including:

- “Most favorable nation” clause
- No expropriation without compensation based upon “real value”
- Right to compensation for losses in case of discrimination or expropriation
- Right to transfer funds abroad (initial investment and profits)
- The right to initiate arbitration against the Republic of Chile before the Centre for the Settlement of Investment Disputes (ICSID) in case of infringement in their rights.

Corporate Law

The most common corporate form to set up business in Chile is the stock company (sociedad por acciones), the limited liability company (sociedad de responsabilidad limitada), or the corporation (sociedad anónima). They are easy to set up, do not require minimum capital, and establish limited liability for their shareholders or members. The formation costs for a company are very moderate and there are no license fees to be paid to maintain the company in good standing.



Chilean corporate law does not impose any general restrictions neither on foreign operations in the country nor on franchise systems. Also, company may appoint foreign individuals as directors and officers without restrictions, although at least one person with domicile in Chile must be appointed to represent the company before tax and labor authorities.

Consumer Protection Law

Under Chilean law, individuals seeking to become franchisees are not qualified as consumers, as the intention of their conduct is business oriented.

Antitrust/Competition Law

In the event of franchisors with many franchisees, or who have a dominant market position, there is a risk that franchisees could argue that the relationship is subject to the scrutiny of competition authorities. This would allow the franchisee to demand that the franchisor not abuse its dominant position when enforcing the terms of the franchise agreement, and demand that certain unconscionable provisions not be enforced.

Employment Law

It is unlikely that a Franchisee will be deemed an employee, although some care should be applied on this matter.

The main criterion to determine if an individual rendering personal services to another may be qualified as an employee will depend on the grade of personal dependency with the employer, based on the instructions and supervision given to the employee. Pursuant to Chilean law, someone is an independent businessperson if they are – contractually as well as factually – free to design their own activities and set

their own working hours, and who assumes an own entrepreneurial risk. Franchisees that are companies cannot be deemed employees.

IP Law

Franchisors need to protect their IP against third parties' attacks or imitations, especially by registering their trademarks. It is recommended to also carry out research beforehand to prevent the potential loss of the trademark and corresponding claims for disclosure and damages.

Selected questions/aspects

Precontractual disclosure

There is no legal precontractual disclosure beyond the normal duty of good faith established under contract law.

Confidentiality

Confidentiality clauses in franchise agreements (often in combination with a contractual penalty) are very common and enforceable in Chile. The franchisor may file an interim injunction against an infringing franchisee, claim damages occurred due to the breach, and possibly terminate the franchise agreement extraordinarily. Nevertheless, it is important to keep in mind that the breach of confidentiality obligations is difficult to prove in court.

Amendments

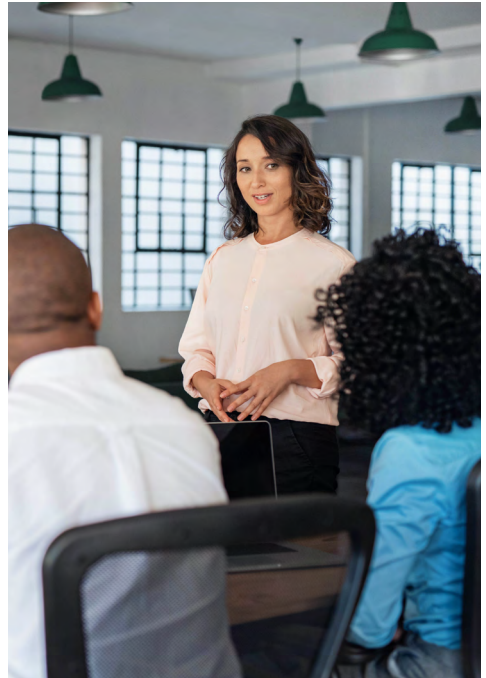
Amendments will need to be agreed upon by all parties unless otherwise regulated. However, even if the contract allows for unilateral changes, such right to unilaterally change the agreement must be exercised in good faith, with a rational basis, and without discrimination, especially if the franchisor is deemed to hold a dominant market position.

Termination

Franchise agreements are entered into for a certain time and terminate with the lapse of that time. A regular termination by one of the parties before that is not admissible unless both parties unanimously agree on it, or in case of a serious uncured breach by the other party. Unjustified terminations by a franchisor might entitle the franchisee to claim damages.

Renewal and transfer

Franchisors are, very generally speaking, free to decide whether or not to renew a franchise agreement; if so, renewals should be done explicitly and in writing. It is admissible to contractually restrict a franchisee's ability to transfer its franchise, typically by requiring an explicit prior written approval of the franchisor.



Colombia



11

Legal professionals



Region

AMERICAS



Offices

Bogotá

Essentials

about Colombia's franchising law

- 1 Franchise agreement is classified as an atypical contract under Colombian law.
- 2 It is an agreement in which the autonomy of the will plays a relevant role.
- 3 The franchise consists of taking advantage of the experience of an already positioned company that has achieved an advantage and great recognition in the market.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

Although the franchise agreement is atypical, it does frame a series of relationships that are widely regulated in Colombian law and that must be taken into account when operating under this agreement.

Therefore, even though in Colombia we do not have a special regulation for the franchise agreement, the legal relationships that arise from this contract are widely regulated. Among other relationships that are displayed in the franchise agreement, are the following:

Trademark license agreement

This kind of agreement is ruled by Decision 486 of 2000 of the Andean Community. Under Colombian regulation, the transfer of the trademark does not constitute a transmission of the property and the rights over it, but it is a license given by the franchisor for the usage and economic exploitation of the trademark in favor of the franchisee. This license agreement must be registered before the Superintendence of Industry and Commerce.

Know-how transference and trade secret

The know-how and the trade secret are widely regulated in Colombia with IP rights contemplated in the Decision 486 of the Andean Community.

The decision protects the information that is not shared by the entrepreneurs and is related to its commercial activity. Therefore, within a contract, unauthorized disclosure of the information is a violation of the secret reserve, and it may constitute an anti-competitive practice as the rights of the owner of the information are violated. That practice may arise criminal,

commercial, administrative, and criminal liability. As per the know-how in Colombia, the Superintendence of Industry and Commerce has established that it is considered information subject to reservation, therefore, is protected with the secret reserve regulations.

IP Law

In order to protect the IP rights within a franchise contract, the franchisor should register the trademarks before the Superintendence of Industry and Commerce, to have the exclusive right over the trademarks. Once it has been registered, it is necessary to include in the contract a clause for the license of the trademarks that states the usage that the franchisee can give to the trademark.

As per the protection of the know-how and the other IP elements that are temporarily transferred by the franchise contract, the best way to protect them is with the clauses of the agreement. It means that the parties must establish fines and a strict liability regime to ensure that the franchisee respects the IP rights of the franchisor.

Supply contract

This contract is widely regulated in articles 968 and followings of the Colombian Commercial Code. By this contract, one of the parties is compelled to supply products periodically or services in exchange for a payment.

The Commercial Code also has the rules to establish the quantity of the product or services that must be supplied within the frame of the contract, the payment, and the way of payment if the parties have not agreed on those aspects. Besides, the Code also contemplates some of the conditions under which it is understood that the parties have breached the contract.



Technical assistance and technical services contract

In order to develop the object of the franchise business the parties may celebrate between them technical assistance and technical services contracts. These kinds of contracts are not specifically regulated in any law, however, under the interpretation of the Colombia Tax Authority, technical assistance services constitute the advice given through a contract for the provision of intangible services, for the use of technological knowledge applied through the exercise of an art or technique, without implying the transfer of knowledge. Regarding the above, some elements of this contract apply to the franchise contract therefore, it is important to conclude that the legal relation that derives from the contract is commercial as it is a service provision.

Labor Law

Labor regulation plays a fundamental role in the franchise agreement. The above taking into account that the employees of the franchisee are not the employees of the franchisor as the legal relation that bonds the franchisee and the franchisor is commercial. However, it is important to establish in the franchise contract that the agreement itself does not constitute a labor contract between the parties or between the employees of one party related to the other.

However, it is important to mention that in Colombia a de facto labor relationship can be declared by the labor judge if the following items are met in a commercial relationship: (i) personal service from a natural person, (ii) subordination expressed as the continued dependence and following of orders and instructions to perform the service (the how, when and where), (iii) remuneration for the services.

Therefore, to avoid any labor risks in this type of agreement, the franchise contract must (i) establish clear conditions regarding the independency of the franchisee to develop the business, and (ii) avoid the configuration in the practice of the three (03) aforementioned elements to avoid the declaration of a de facto labor relationship.

Data protection

In Colombia, the data protection regime is very strict, in that order, in the franchise agreements, it is applicable the rules stated in Law 1581 of 2012. In particular, the parties should bear in mind that the franchisee could not share the data collected from costumers to the franchisor without the authorization of the information holder. As well, if the franchisee or the franchisor wants to collect data from costumers they must request authorization from the holders and establish a privacy policy that complies with the rules of the mentioned law and its regulatory decrees.

Commercial lease agreement

This contract is regulated in Colombia in the Commercial Code. The most important aspects of this contract are related to the preference and renovation rights that the lessee has.

In order to perform the contract, the agreement must be in a private or a public deed document, and it has to be registered before the local chamber of commerce.

Commercial agency agreement

In some cases, the franchise contract may be considered as a de facto agency contract. In those cases, the franchisor must pay to the franchisee an economic provision at the end of the agreement and the parties are not allowed to stipulate something different.

Under some kind of franchise contracts and special occasions, for example, in the merchandising franchise, it can be possible that a de facto agency will be set up. Therefore, upon the termination of the contract, the franchisor will have to recognize an economic provision to the franchisee equivalent to one-twelfth of the average commission, royalty or profit received in the last three years; for each one of the terms of the contract, or the average of all the profits received, if the contract time is less.

In order to avoid this payment it may be useful to:

- Celebrate a franchise contract in markets where already exists a consumer group for the brand and products that are going to be franchised.
- Avoid the activities of promotion done by the franchisee.
- State the franchisee is the one in charge of providing services to the final consumer, instead of the franchisor.
- Avoid transferring financial risks that arise from the final customer to the franchisee.

Consumer Protection Law

According to Consumer regulation, Law 1480 of 2011, the producer and the supplier of the products are jointly responsible before the consumer. It means that both have to offer the guarantee of the products to the consumers and are jointly liable if any damages are caused to the consumers when they are related to the usage of the product. Regarding the franchise contract, as it is not a widely regulated, when the franchisor provides goods or products to the franchisee in order to develop the business and the latter sell those products to consumers in Colombia, the consumer rules above mentioned apply to both parties.

Antitrust/Competition Law

Under Colombian competition law, it is not allowed to enter any agreements or coordinate actions or strategies between a supplier and its provider. However, the Colombian Superintendence of Industry and Commerce, which is the authority that regulates the anti-trust regime in Colombia, states that regarding the franchise contract, there are some exceptions to the rule.



In that order, there may be a coordination between the franchisee and the franchisor and it will be considered legal only when it can be demonstrated that (i) its purpose is to protect the investment that the franchisor has made for the development of the system franchise and the franchisee's ability to distribute the respective good or service; (ii) the parties of the contract do not have a dominant position or significant participation in the relevant market, so none of them are in a position to determine supply or demand conditions regardless of the reaction of their competitors and (iii) it is an agreement which, individually considered, does not distort the market conditions.

Exclusivity

Additionally, principles such as exclusivity are widely developed in Colombian law and have a transcendental impact on the franchise agreement.

In particular, Law 256 of 1996 states that is an anti-competitive practice, the inclusion of exclusivity clauses in supply contracts, when the clauses intend or as an effect, restrict the access for competitors to the market or monopolizes the distribution of products or services.

Contracts Law

The franchise contract as all contracts, must comply with general principles of Civil Law. It means that even though there are no specific requirements to celebrate a franchise agreement, the contract must include:

- Clear identification of the parties.
- Determination of the purpose of the agreement.
- The object of the contract must be legal.
- The contract must include a clause that stipulates the duration of the agreement.

- Identification of the goods and assets that are involved in the transaction.
- Determination of the price/fees.

However, recently in Colombia, in December of 2020, Law 2069 was issued. In the terms of article 11 of this Law, it was stated that the Government has the faculty to regulate the following aspects of the franchise:

- The technical conditions that define the figure of the franchise in Colombia.
- The obligations of the parties.
- Liability regime of the franchisor and the franchisee.

Therefore, it is expected for the government to regulate these aspects of the franchise contract soon.

Selected questions/aspects

Franchise fees

Franchisor and franchisee are free to determine the fees and the way that they are paid.

Nevertheless, attending to Colombian strong foreign exchange regulation is important to consider that between two Colombian residents there cannot be payments in foreign currency, in order to extinct obligation.

As well, bear in mind that despite the payment of the fees derives from a provision of services, and those operations belong to the free market, in order to comply with the foreign exchange regulation the payments in foreign currency can only be performed or collected throughout a settlement account or a commercial bank.

Termination

Franchise agreements may include specifically the grounds for termination of the contract according to the will of the contractors. Despite, if it is not regulated between the parties, the contract may be terminated because the time of the agreement is completed; when one of the parties breaches its obligations in the terms of the contract; or by mutual agreement.

Renewal and transfer

As the franchise contract is not regulated, the contractors can decide if they want to renew or not the franchise agreement.

Dispute resolution and applicable law

As this contract is not regulated under Colombian legislation, if controversies arise between the franchisee and the franchisor, regarding the compliance of the obligations of each party, or because of the interpretation of the contract and its clauses, as general principle the parties may try to solve directly their differences.


In case it is not possible to solve the controversies directly, the parties must follow the guideline established in the contract to deem the dispute. It means that if the parties agreed on a compromising clause, they must present their differences before an arbitration tribunal.

However, if the parties did not state a path in the contract in order to solve the disputes the local judges may have the competence to determine the applicable law to the contract and based on that they will deem the controversy.

Czech Republic

80+
Legal professionals

 **Region**
EMEA

 **Offices**
Brno, Hradec Kralove,
Ostrava, Plzen, Prague,

Essentials

about Czech Republic's franchising law

- 1** There is no legal definition of "franchise agreement" in the Czech Republic. The franchise agreement, as an innominate contract, may include elements from various types of contracts. For example, the provisions of the purchase contract, commercial agency resp. commission contract or license agreement can be partially used.
- 2** The provisions of the Czech Civil Code may apply.
- 3** The franchisee acts as a separate business entity in its own name and on its own account and has complete legal and partial business autonomy.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

Since there is no legal definition of “franchise agreement” in the Czech Republic, nor a definition of the word “franchise” itself, the terms have been formed by court rulings and authority’s decisions, namely by the Czech Office for the Protection of Competition. When concluding contracts between a franchisor and franchisees, it is necessary to proceed only from the general legal regulation, covered particularly in the Civil Code. The Czech private law is generally based on the relatively wide contractual freedom of the parties, and therefore it is possible to adjust mutual rights and obligations to reflect individual needs (taking into account, in particular, the restrictions arising from the competition law). However, the general statutory regulation does not consider the specifics of franchising, and thus creates room for legal uncertainty.

The Czech Office for the Protection of Competition described a franchise agreement as an agreement, by which one entrepreneur - the franchisor - grants the other entrepreneur - the franchisee - the right to use the franchise - a body of knowledge, experience, know-how, and established trade name or trademark - for the purpose of sales of certain types of goods or services. A franchisee acts as a separate business entity in its own name and on its own account and has complete legal and partial business autonomy.

Specifics regarding foreign franchisors

Czech law does not contain any differences regarding foreign franchisors. The same conditions as for domestic franchisors shall apply.

Corporate Law

According to the principle of private autonomy, there are no specific restrictions regarding the corporate form and, therefore, various types of legal entities are sustainable for both a franchisor and a franchisee. The most common corporate form to set up a business in the Czech Republic is the private limited liability company. A Private Limited Liability Company can be easily set up by one or more persons and requires a minimum capital of CZK 1. However, there are several other options. A sole trader represents the simplest business form available in the Czech Republic, which might be a suitable option for smaller businesses. Other than that, joint-stock company, general partnership, limited partnership or European joint-stock company present different possibilities, which can be chosen. Czech law also recognises other forms of legal entities, such as trust and associations, which can also perform business activity, but this should not be the main purpose of their existence.

Consumer Protection Law

Under Czech law, franchisees are not qualified as consumers and, thus, consumer protection regulations should not apply. In order to be qualified as a consumer, one must fit into the definition obtained in the Civil Code, which describes a consumer as any person who, outside the scope of their business activity or outside the scope of independent performance of their profession, enters into a contract with an entrepreneur or otherwise deals with him. The relationship between a franchisor and a franchisee is rather business-oriented and, therefore, the franchisee cannot be seen as a consumer. However, the franchisee could be considered a weaker contracting party. This might have a significant impact on the

franchise relationship. An example might be the inability to agree on a different from statutory limitation period to the detriment of a weaker party or to agree on a provision, which precludes or restricts the weaker party's right to compensation for damage in advance.

Antitrust/Competition Law

The joint interest in the unification of the franchise network forces the franchisor and the franchisee to cooperate very closely, which may have the potential to distort competition. As a result, franchise agreements are highly affected by competition law. This area of law is fully harmonized with EU regulations. The core provisions of EU competition law on franchising can be found in art. 101 and art. 103 of Treaty on the Functioning of the EU ("TFUE"). The purpose is to avoid distortions of competition in the internal market. Exceptionally, franchise agreements may also be affected by art. 102 TFUE, which prohibits abuse of a dominant position. In the Czech Republic, therefore, the same rules, as in other EU countries, governing exclusivity, protection of contractual territory, resale price maintenance, and competitive restrictions, apply.

Employment Law

The leading role of the franchisor in the franchise network may raise the question of whether franchising does not show elements of employment relations. In accordance with Czech employment law, franchisees are not generally qualified as employees of the franchisor. Under Czech law, an employee is a natural person who commits to perform dependent work in a basic employment relationship. Dependent work is work that is performed in a relationship between the employer's superiority and

the employee's subordination, on behalf of the employer, according to the employer's instructions, and the employee performs it for the employer in person. The only possibility the franchisees could be treated as employees would be if they were sole traders and the characteristics of an employment relationship were met. More likely, the franchisees are qualified as entrepreneurs since an entrepreneur is a person who independently carries out gainful activity on his own account and responsibility under a trade license or similar manner with the intention of doing so systematically in order to make a profit.

Law on commercial agents

A franchise agreement and a commercial agency contract have several identical features, namely the independence of the parties between which it is concluded, the long-term duration of the legal relationship, and the objective of ensuring the sale of goods or services of the represented person. However, the commercial agency contract differs from the franchise agreement in its basic feature - the agent under the commercial agency contract acts in the name and on behalf of the represented person. On the other hand, franchisees enter legal negotiations on their own behalf and on their account, although this may not always be apparent to the customer. For this reason, the franchisee is not paid commission and, conversely, the franchisee usually pays the franchisor a franchise fee.

IP Law

An essential part of franchise agreements is the franchisor's obligation to grant the franchisee a license to use the franchisor's intellectual property. The franchise agreements thus contain

a number of provisions typical for the license agreements. Franchisors should protect their intellectual property rights from third parties' attacks, abuse, or imitation by registering their IPR as trademarks, designs, utility models or patents. Concerning the IPR's protection, franchisors have several options. Apart from international protection by WIPO or EUIPO, IPR also might be protected on a national level.

Selected questions/aspects

Precontractual disclosure

The regulation of the precontractual information/disclosure obligation, which in some countries is subject to detailed legislation even if the franchise agreement itself is not regulated as a special type of contract, remains neglected in the Czech Republic. However, the Czech Civil Code covers general precontractual obligations. It stipulates that when negotiating a contract, the parties shall communicate to each other the factual and legal circumstances, which they are aware of or must know, so that the parties are not affected by misleading information or by a failure to provide sufficient information.

Moreover, the Czech Franchise Association emphasizes the Code of Ethics, which stipulates that the prospective franchisor must provide truthful and honest information about his experience, financial possibilities, training, education and other communications regarding the franchise relationship. However, as a non-binding regulation, the non-compliance can be sanctioned only at the level of the association.

For the reasons of proof, it is highly recommended to carry out the precontractual information in writing. In the case of a breach, the franchisee has the right to claim damages, generally in the form of pecuniary damages.

Legal restrictions

Apart from the regulations governing IPR aspects of a franchise agreement and restrictions arising from competition law, it is also data protection law, which has to be taken into account.

Franchise fees

There is no regulation affecting franchise fees specifically. However, the Act on the Restriction of Cash Payments prohibits making cash payments in excess of CZK 270,000. This amount is a daily limit that must not be exceeded by either a natural or a legal entity in a business transaction. Other than that, there are no laws regarding the nature, amount or payment of franchise fees, nor are there any restrictions on a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency in the Czech Republic.

Confidentiality

Confidentiality clauses in franchise agreements are not only very common and enforceable under Czech law, but they are also highly recommended. In the case of a breach, the franchisor may bring legal action against an infringing franchisee, claim damages occurred due to the breach, and possibly terminate the franchise agreement extraordinarily.

The Civil Code lays down that if a party violates the contract substantially, the other party may withdraw from the contract without undue delay. Since it may not always be easy to assess the damages caused by a breach of confidentiality clause, setting a contractual penalty for clearly defined breaches of confidentiality is highly recommended. The contractual penalty should however be proportionate. Besides, a confidentiality clause is recommendable as a way to protect existing trade secrets. According

to the Civil Code, a trade secret is only protected if the owner of the secret has taken appropriate measures to maintain its secrecy.

Amendments

The contracting parties are free to agree to change their rights and obligations. However, the commitment may also be changed unilaterally if certain requirements are met. If the franchise agreement contains a precise and reasonable change reservation clause, which considers the franchisee's interest, the franchisor may be entitled to change a franchise agreement unilaterally in order to meet their obligation to continuously develop their franchise system according to changing marketing conditions. When such a reservation clause is missing, amendments of the franchise agreement may only be agreed unanimously between the franchisor and the franchisee. Therefore, it is advisable to at least consider the application of such change reservation clause in the franchise agreement.

Termination

Franchise agreements are either entered into for a certain period and terminate with the lapse of that time or are concluded for an indefinite period and can be terminated by the end of the calendar quarter with a three-month notice period. The duration of a franchise contract usually varies from 2 years to 20 years; the most common contracts are medium-term contracts of 5 years, generally concluded with the possibility of their renewal or option. It is highly recommended to expressly agree on the terminating reasons, conditions, and manner of terminating an agreement so that both parties are certain about the possible termination of their contractual relationship.

Renewal and transfer

Simply put, it is at the franchisor's discretion whether they renew a franchise agreement or not. If they decide to do so, renewals should be done explicitly and in writing. The transfer may consist in the transfer of contractual rights and obligations or assignment of the entire franchise agreement. It is also possible to transfer a business shares to a new shareholder or to transfer a business enterprise or a part thereof to which the franchise agreement belongs. However, the franchisor may contractually restrict the franchisee's right to such transfers, typically by requiring an explicit prior written approval of the franchisor.

Dispute resolution and applicable law

Dispute resolution, court system

If a conflict between a franchisor and a franchisee arises, there are various types of possible dispute resolutions in the Czech Republic, namely civil procedure, arbitration, or mediation. The judicial system in the Czech Republic consists of the Constitutional Court of the Czech Republic and the "ordinary" court system. The "ordinary" court system consists of district courts at the lowest level, regional courts, high courts, and the Supreme Court and the Supreme Administrative Court at the highest level. In the Czech Republic, there is a two-instance system, which is a determining factor in the hierarchical organization of the system of remedies.

Arbitration presents an alternative to civil procedure, which is often used in commercial matters. The parties trying to find a solution may choose either a permanent arbitration court or an ad hoc arbitrator or panel of arbitrators. An advantage of arbitration is that such procedures enable

disputes to be settled promptly and cost-effectively. Moreover, arbitration proceedings are, unlike proceeding before ordinary courts, not held in public. Another option of dispute resolution is mediation. Mediation is a way of peacefully resolving disputes and conflicts, the aim of which is an agreement. However, there is no enforceable judgement as a result of mediation.

Applicable law

Under Czech law, the parties to the contract are free to choose foreign law to govern the contract. Generally, it is recommended to choose the law closest to the contractual relationship. Making such a choice of applicable law is, however, advisable if, at the same time, the jurisdiction of the courts of the same foreign country or an arbitration court, arbitrator(s) or mediator(s) is agreed on.

COVID-19

Since COVID-19 entered the Czech Republic in early spring 2020, the impact on the franchise sector has been enormous, significantly due to the strict government measures in order to contain the pandemic. Public life has been shut down to the bare minimum and almost everything, except for groceries, pharmacies, and drugstores, had to be closed pretty much for almost an entire year – except for summer months and pre-Christmas shopping. Restaurants, bars, and stores could only have takeout.

The government has taken a number of measures to support particular sectors of the economy, entrepreneurs and business owners, as well as workers who have been affected by the consequences of COVID-19 in combination with the relevant anti-epidemic measures, and launched a number of subsidy schemes under the auspices of the relevant departments.

If a substantial change in circumstances resulting from the COVID-19 pandemic would create a gross disparity in the rights and obligations of the contractual parties, the affected party may request the resumption of negotiations on an already concluded agreement. In the event that the parties do not agree on new conditions, the contract may even be terminated by a court at the request of one of the parties. However, it will depend on the specific contractual relationship and its conditions, which may exclude respective provision of the Civil Code regarding a substantial change in circumstances.


The so-called Lex Covid newly introduced the institution of extraordinary moratorium into the Czech legal system implementing measures, including, for instance, the impossibility to declare insolvency, suspension of enforcement proceedings, or reversal of the sale of secured assets. The protection provided by virtue of the extraordinary moratorium should be effective until 30 June 2021 (if not prolonged).

Denmark



10
Legal professionals

 **Region**
EMEA

 **Offices**
Aarhus, Copenhagen

Essentials

about Denmark's franchising law

- 1** No specific form or procedure prescribed by law regarding Franchisor's precontractual disclosure obligation.
- 2** Specific laws concerning agents and employment law are not relevant when traditional franchise.
- 3** Irrespective of an agreement to the contrary, the lessor of a business lease may only terminate a lease in certain cases.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

In Denmark, there is no legal definition of “franchise”, nor a codified general franchise law. A franchise agreement is regulated through the general rules of law, except the Petrol Dealers Act, which has very limited scope of regulating the relationship between petrol wholesalers and petrol retailers.

An overarching principle of Danish contract law is the principle of freedom of contract. This means that, as a general rule, with only minor, although important, exceptions, the parties to a contract are free to draw up their agreement so that it reflects their particular needs and preferences. Over time, a number of restrictions and exceptions in this starting point have found their way into Danish law. The rules setting out restrictions of particular importance to franchise agreements are contained in the Competition Act, the Marketing Act, the Business Lease Act, and others.

Corporate Law

In Denmark, the most common businesses are the sole tradership, the partnership, and the subject in this section, the public limited liability companies (in Danish “Aktieselskaber”) and private limited liability companies (in Danish “Anpartsselskaber”). Public limited liability companies and private limited liability companies are governed by the Companies Act.

The rules that govern public limited liability and private limited liability companies are somewhat similar, even though some of the rules differ. One of the most commonly known differences is that a public limited liability company must have a minimum share capital of DKK 400,000 (approximately EUR 53,793), whereas

a private limited liability company must have a minimum share capital of DKK 40,000 (approximately EUR 5,379.30).

A public limited liability company

A public limited liability company must have a two-level management structure, consisting of either a board of directors or a supervisory board (both must have at least three members), and at least one managing director. In both situations, the management is appointed by the board of directors or the supervisory board.

A private limited liability company

Contrary to public limited liability companies, the management of private limited liability companies may consist of i) a sole managing director and no board of directors or supervisory board, ii) a board of directors and a managing director, or iii) a supervisory board and a managing director. Hence, the Companies Act does not require two-level management, as is required for public limited liability companies.

The main difference between the public limited liability company and the private limited liability company (despite the difference in required share capital) is that private limited liability companies to a wide extent are more flexible and not subject to all mandatory regulations imposed on public limited liability companies.

Consumer Protection Law

Under Danish law, individuals seeking to become franchisees are not qualified as consumers, as the intention of their conduct is business-oriented.

Employment Law

Even though the traditional franchisee is characterized as being independent of the franchisor and acting in their own names and for

their own accounts, some franchise arrangements may be considered an employment relationship rather than a collaboration between two independent parties.

Whether the franchise relationship is to be considered a camouflaged employment relationship depends on an overall assessment of the circumstances of the case, hereunder the wording of the franchise agreement and the parties' execution thereof. Among the factors to be considered is the extent to which the franchisee may manage its own hours, the extent to which the franchisee is taking on a financial risk by paying for the business premises and any employees, whether the remuneration to the franchisee is determined by the franchisee's performance or the time spent, etc.

If the collaboration is viewed as an employment relationship, it will be subject to a number of unintended rules, including employment law principles, collective agreements, and mandatory legislation such as tax legislation and the Salaried Employees Act.

Law on commercial agents

The main regulations in Denmark regarding agents are the Commercial Agents Act and the Commissions Act.

According to the Commercial Agents Act, a commercial agent is defined as a person acting in the name of and for the account of the principal.

In the Commissions Act, a commission agent is defined as being independent of the principal and by the fact that it acts in its own name, but for the account of the principal.

Franchisees are normally characterized as being independent of the franchisor and by the

franchisees' actions in their own names and for their own accounts. Therefore, neither the Commercial Agents Act nor the Commissions Act is applicable to the traditional franchisees.

IP Law

Typically, the franchisor will provide the franchisee with a trademark license and with any other licenses for intellectual property rights that are used for the franchise concept in question. The granting of such rights is an essential element of a franchise project and therefore such rights should be considered when drafting the franchise agreement. The franchise agreement should therefore contain detailed and sanctioned provisions regarding intellectual property, not only when the agreement is in force, but also to secure the intellectual property after the termination of the agreement.

Trademarks

Franchisors need to protect their IP against third parties' infringements or imitations by registering their trademarks – either as International Registration (“IR”) with the World Intellectual Property Organization (“WIPO”), as EU Trademark (“CTM”) with the EU Intellectual Property Office, (“EUIPO”) in all EU member countries, or as a national trademark in Denmark only with Patent and Trade Mark Office.

Domains

The right to a certain domain name is obtained through the Danish company DK Hostmaster A/S that administers the rules regarding the top-level domain. The right to a domain name is acquired on a first-come, first-served basis and only through a written application via a registrar. The domain holder can be any individual or legal entity.



Know-how

Know-how is not defined but can be protected by the provisions of the Marketing Act and the Trade Secrets Act. When drafting a franchise agreement, the franchisor's know-how is usually protected by detailed provisions of confidentiality, both during the term of the agreement and after the expiration of the agreement.

Real Estate/Tenancy Law

Depending on the specific design of the franchise system, legal implications may arise from real estate and tenancy law.

The main principle in Danish legislation is that the right to acquire real estate in Denmark is limited. However, exceptions apply if the buyer is not resident in Denmark and if the buyer has not previously been a resident of Denmark for a total period of 5 years.

A business lease agreement entered into between a franchisor, a franchisee, and/or a third party is regulated by the Business Lease Act. Irrespective of an agreement to the contrary,

the lessor may only terminate a lease in certain cases, such as when the lessor wishes to make use of the rental property, in which case a one-year notice period applies.

The freedom of contract leads to the effect that the rent and subsequent adjustments are to be agreed upon between the lessor and the lessee. Further, payment of a deposit is normal. If the amount is substantial, an extract of the lease agreement ought to be registered in the Land Register.

Certain possibilities exist to demand the rent adjusted to market rate, unless otherwise agreed, or to agree, as part of the lease agreement, that the lessor may demand a change of terms for the lease to the effect that the lessor can terminate the lease agreement if the parties, after negotiations, fail to reach a settlement regarding lease agreement on new terms.

Further, the Business Lease Act contains special provisions regarding termination of a lease agreement when the location of the premises is significant for the lessee. When terminating

such lease agreements, the lessor may also be liable for damages and compensation.

Finally, lease agreements normally regulate the right to subletting and assignment.

Selected questions/aspects

Precontractual disclosure

In Denmark, there is no specific form or procedure prescribed by law regarding the franchisor's precontractual disclosure obligation. However, the former Danish Franchise Association issued a set of ethical rules comprising provisions on disclosure.

Further, in general, commercial standards of fair dealing require that particular circumstances should be disclosed when entering into an agreement. The franchisor's misrepresentation or mis-selling of the franchise concept prior to entering into the franchise agreement may therefore give rise to an action for breach of the agreement allowing the franchisee the ordinary remedies for breach.

Legal restrictions

Antitrust/ Competition Law

The Danish competition rules are found in the Competition Act and are to be interpreted in accordance with the EC Treaty.

In franchise agreements, the franchisor most often wants to restrict the franchisee's freedom of operation. Although such restrictions do not necessarily imply a restriction to competition, this may be the case.

The Danish rules differ from the EU provisions on a few points, such as the *de minimis* regulations. Pursuant to the Competition Act, the Danish prohibition does not apply if the individual participating companies' market shares do

not exceed 15% on any relevant market that is affected by the agreement. However, this does not apply to certain hard-core restrictions, e.g., fixed retail prices.

Further, the European Commission's Block Exemption Regulation for vertical agreements has been incorporated into Danish law.

If there is no provision in the franchise agreement about exclusivity, the franchisor is free to appoint other franchisees in the same territory and to sell the products or services in competition with the franchisee. The franchisor, must however, observe the contractual duty of loyalty meaning that the franchisor also has to look after the franchisee's interests and may not act contrary to the prerequisite of the franchise relationship.

Law on general Terms and Conditions ("T&Cs")

Franchise agreements can be pre-formulated agreements with limited contractual freedom for the franchisee.

The general clause of the Contracts Act states that agreements may be changed or set aside if they are either unfair or contrary to honest conduct. This clause is to be interpreted by the courts, and it is for the courts to set out the contents of the legal standards "unfair" and "contrary to honest conduct". In addition, it is ultimately for the courts to decide what the consequences of an infringement of the legal standards are to be, in terms of setting aside the agreement, either entirely or in part, or even changing the agreement.

Even though the general clause is rarely applied between business partners, the possibility of such an application cannot be ruled out.



Franchise fees

No specific restrictions apply. However, charging royalties pursuant to the franchise agreement must in general be fair and within the scope of the general clause in the Contracts Act.

The interest rate in Denmark for default payments in b2b-transactions is currently 8.05% per annum unless otherwise agreed. In addition, franchisors may claim a lump sum of DKK 100 per reminder (total of 3 reminders with 10 days apart).

Confidentiality

Confidentiality clauses in franchise agreements (normally in combination with a contractual penalty) are very common and enforceable in Denmark. The franchisor may file an injunction against an infringing franchisee, claim damages occurred due to the breach, and possibly terminate the franchise agreement extraordinarily.

Amendments

If the franchise agreement contains a precise and reasonable change reservation clause, considering the franchisees' interests, unilateral amendments of the agreed terms by the franchisor are admissible. Without such a provision, amendments to the franchise agreement may only be agreed unanimously between the parties.

Termination

Danish law does not require a minimum notice period for the parties to terminate a franchise agreement and the parties are therefore free to agree on a notice period with respect to the general clause. If the agreement does not include provisions on termination, either party is entitled to terminate the agreement without cause. Such termination may be done with the ordinary notice, which will typically be three months.



Renewal and transfer

The franchisor has no duty to renew the franchise agreement upon expiration of the initial term unless such extension right has been agreed between the parties. The franchisee may request a renewal upon expiration of the initial term; however, the franchisor is entitled to refuse such a request from the franchisee.

If nothing is agreed in the franchise agreement, Danish law predicts that neither party may transfer any obligations under the agreement. However, if either the franchisor or a franchisee is a limited liability company, the owner of the shares can transfer the shares to a third party, thereby effectively transferring the franchise. Both situations are, however, subject to the agreement between the parties and, hence, it is possible to either allow one or both of the parties to transfer their obligations to a third party, or to introduce a provision for change of control that prevents the owner of a limited liability company from transferring the shares to a third party without prior approval of the other party to the franchise agreement.

Dispute resolution and applicable law

The parties are free to agree on the choice of forum when entering into the agreement. Many franchise agreements prefer disputes to be settled by arbitration and not by the ordinary courts. The advantages of agreeing on arbitration include more freedom for the parties to structure the process with regard to seat, place, and number of judges and qualification of judges (including knowledge about the law

governing the agreement). Further, the process is subject to confidentiality, and in some cases, the dispute will be settled faster.

Further, the parties are free to agree on the law that shall govern their agreement, whether it is the law of the country in which the franchisor is established, the country in which the franchisee is established, or a third country. To the extent that no valid choice of law has been made by the parties, the matter is determined by either the Rome Convention or the Hague Convention.

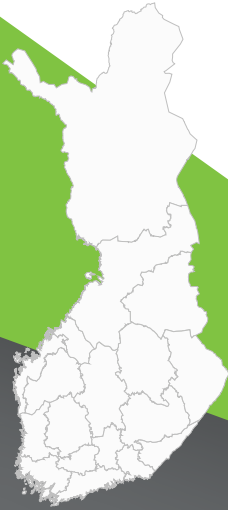
Covid-19

Many franchisors have realized that they have not expended the energy necessary to ensure that their contracts offer sufficient protection when a crisis like COVID-19 strikes.

Some important clauses to consider as part of a review of the franchisors' contract portfolio include:

- Termination; is the termination notice reasonable and can it be shortened if the basis for the conclusion of the contract has disappeared in whole or in part?;
- Force majeure; does the force majeure clause list relevant and an adequate number of specific events to be considered as "force majeure"? Has the franchisor ensured that the franchisee cannot claim force majeure due to general liquidity shortage or failure to pay?;
- Liability; is the liability sufficiently regulated in the contract in cases where the situation is not considered force majeure?.

Finland



12

Legal professionals



Region

EMEA



Offices

Helsinki,
Turku,
Tampere

Essentials

about Finland's franchising law

- 1** No specific form or procedure prescribed by law regarding franchisor's precontractual disclosure obligation.
- 2** The right to assign or transfer lease agreements or to allow subleases is not prescribed by law and can be restricted in the lease agreement.
- 3** The franchisor may unilaterally change franchise terms if they are forced to do so because of circumstances beyond the franchisor's control.

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Deloitte Oy



Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

In Finland, there is no statutory definition for a franchise nor a codified franchise law. Franchising is not easily defined, however, the Finnish Franchising Association (FFA), defines a franchise arrangement as a right conveyed by one undertaking to another.

In Finland, the material content of franchise agreements is regulated by various laws. The most important statutory regulations regarding franchise law are the Contracts Act, the Unfair Business Practices Act, the Trademarks Act, and the Competition Restrictions Act. Further, the FFA, an organization that encourages good franchising behavior and fair and ethical business practices in the franchise business, has concluded a Code of Ethics that provides a good framework for franchise agreements. The Code of Ethics has been considered as trade custom with regards to franchising in Finland.

Specifics regarding foreign franchisors

There are no specific regulations related to foreign franchisors in Finland. The foreign franchisors are not obliged to obtain any special approvals or licenses unless their operating business requires such specific approvals or licenses. These regulated lines of businesses include the security, medical or financial sectors as well as the food and alcoholic beverages industry.

Corporate Law

The most common business entity in Finland and the most preferable form for franchisors is a limited liability company (private or public). Other corporation forms used by franchisors include a partnership subject to it being owned

by a limited liability company and a foundation. Most franchisors will however decide on the private limited liability company due to its simple way of incorporation, well-regulated administration, low capital requirements, and easily transferable shares. A limited liability company is a legal person separate from its shareholders; the shareholders have no personal liability for the obligations of the company. There is no requirement for a private limited liability company to have share capital and there is no minimum share capital requirement to set up a private limited liability company in Finland. In case the company has specified an amount of share capital in its Articles of Association, the said share amount shall be paid to the limited liability company's bank account prior to the filing of the formation documents. The required documents when establishing a limited liability company include the Memorandum of Association, the Articles of Association, and the Start-Up Notification provided by the registration authority.

Finland adheres to the principle of free movement of capital, goods, services, and labor and is committed to non-discrimination. Thus, facilities and incentives that are made available to local businesses shall also be available to foreign entrepreneurs on equal terms. There are no restrictions imposed on foreign ownership except for an acquisition that may put at risk an important national security interest. In such cases, formal approval is required in accordance with the Monitoring Act.

Consumer Protection Law

Under Finnish law, franchisees are not considered as consumers. However, in connection with a legal dispute, the franchisee may refer to the principle that an unclear and ambiguous

agreement can be interpreted against the author of the agreement. According to section 36 of the Contracts Act, unreasonable clauses can be adjusted.

Employment Law

Special care should be taken into consideration regarding the risk that a franchisee might be deemed as an employee of the franchisor. The franchising agreement shall clearly state that the franchisee constitutes an independent party that bears its own financial risk and is responsible for its employees. Even though an explicit provision is included in the franchising agreement, stating that the franchisee is not an employee of the franchisor does not alone exclude the possibility that the actual relationship can be considered as an employment relationship. It is recommended, that the franchisee is a registered company such as a limited liability company. If the franchisee has its own employees, makes payments to the franchisor and for premises and equipment, the franchisee will not be considered as an employee of the franchisor.

Additionally, an employment relationship requires the direction and supervision of the employer, which normally is not the case in the relationship between the franchisor and the franchisee.

IP Law

In order to ensure that the franchisor's trademarks and know-how are protected against infringements from third parties, the Franchisors shall register their trademarks. The trademark can be registered with the World Intellectual Property Organization (WIPO), with the EU Intellectual Property Office (EUIPO) as an EU trademark, or with the Finnish Patent and

Registry's office as a national trademark in Finland. If the Franchisor's IP is registered accordingly, the trademarks can be protected by surveillance and immediate action against possible infringements.

Real Estate/Tenancy Law

Customarily, when the franchisor is the owner of the premises where the franchisee resides its business, a provision is included in the lease agreement stating that the lease will terminate at the time of termination of the franchising agreement. The right to assign or transfer lease agreements or to allow subleases is not prescribed by law and can be restricted in the lease agreement. Thus, in order for the lease agreement to be transferred to the franchisor or a party appointed by the franchisor, a precondition may be invoked.

Selected questions/aspects

Precontractual disclosure

In Finland, there are no legal requirements regarding general or formal precontractual disclosure. However, according to the FFA's Code of Ethics article 3.3, the Franchisor has a precontractual information duty. Prior to signing the franchising agreement, the Franchisor is obliged to disclose complete and accurate information that is relevant for the franchise relationship and provide the franchisee with a copy of the Code of Ethics in due time, in order to ensure that the franchisee has all the necessary data before concluding the franchise agreement. The requirement to disclose complete and accurate information regarding the franchise relationship is based on the principle of good faith and fair dealing. The principle includes a continuous obligation to disclose updated information if circumstances change.

The franchisee shall, on the other hand, with careful consideration, analyze the received information. Also, the franchisee is obliged to be truthful and transparent regarding their experience, financial capacities, and other information that might be relevant for the franchising agreement.

Further, according to the Unfair Trade Practices Act, a party may not use false or misleading expressions regarding their business operations that could affect the supply or demand for a certain commodity. The franchisor is obliged to provide accurate information on its operations. If a franchisor provides the franchisee with information that is untrue or too favorable it might provide the franchisee with grounds for termination of the franchising agreement. Thus, the franchisor shall ensure to provide accurate information regarding its operations.

As there is no official authority liable for enforcing the aforementioned disclosure requirements, the franchisee is responsible for ensuring that their rights are not violated. If a violation regarding the obligation to provide true and sufficient information is made an action based on a charge of unfair business practice may be brought before the Market Court.

Legal restrictions

Antitrust/Competition Law

According to Finnish competition law and the EU competition rules, the vertical restraints block exemption applies to franchising. According to the Vertical Restraints Block Exemption rules, companies may carry out vertical agreements according to the following market share limits; the franchisee at least 10% and both parties up to 30%. The following provisions according to the Vertical Restraints Block Exemption rules might result in complete nullity of a franchise

agreement; prohibitions on cross-deliveries within the dealer network, vertical resale price maintenance agreements, except those setting a maximum price or giving non-binding recommendations and prohibitions on passive distribution beyond the contract territory. There are also certain online and e-commerce restrictions that are applicable for franchisors. The franchisee may have its own website and the franchisor cannot prevent the franchisee from having a website. The franchisor may, however, set binding instructions on the website, and how the intellectual property of the franchisor may be used online. The franchisee can promote and sell products online, as this is a form of passive selling the franchisor cannot prohibit the franchisee from such activities.

Contract Law

According to section 38 of the Contracts Act, non-competition clauses are binding in franchising agreements as long as the clause does not unreasonably restrict the party's freedom or action.

Franchise fees

Normally, the franchisee may be obliged to pay two kinds of fees; a non-refundable initial fee that covers the access to intellectual property rights, training of the franchisee and its employees as well as the franchisor's transaction costs. In addition to the initial fee, the franchisee is charged a continuous fee – called a franchising fee or co-operation fee. The fee normally composes of a percentage of the franchisee's turnover. The franchisee may also be obliged to pay an advertising or marketing fee or an additional IT fee. According to the Finnish Interest Act, interest can be charged on overdue payments.

Confidentiality

Generally, confidentiality clauses are enforceable in Finland. The information and material that is subject to confidentiality shall accurately and in detail be defined in the franchise agreement. It is recommended to agree upon the material content of confidentiality obligations in the case of a potential dispute as the Finnish legislation does not define the concepts of trade and business secrets. As the damages resulting from breaches of confidentiality might be hard to prove, the parties normally agree upon a contractual penalty. If a breach is made, the party will automatically be obliged to pay the contractual penalty.



Amendments

The franchise agreement may be changed unilaterally by the franchisor and the franchisee. Thus, the franchisor may not unilaterally change the terms of the agreements, such as operational terms or standards. The franchisor may, however, change such terms if they are forced to do so because of circumstances beyond the franchisor's control as an example where legislation has resulted in the need for change in provisions. It is important that the franchisor's right to unilaterally change the terms of the franchise agreement and to what extent is drafted in detail in the franchise agreement.

Termination

The franchise agreements are usually entered into for a fixed-term period and it is not admissible to terminate the agreement before the fixed-term period has ended. However, such fixed-term agreements may be terminated by both the franchisor and franchisee under certain preconditions. The franchisor may terminate the franchise agreement if a good cause exists, such as if the franchisee proves not to be loyal to the network. The franchisor may also terminate the franchise agreement if the franchisee at the signing of the agreement has provided untrue information on essential issues such as their skills, education, and financial resources. Other grounds that entitle the franchisor to terminate the agreement are if the franchisee has breached material provisions of the contract, have continuously or severely violated the franchisor's interests, or if the franchisee becomes unable to perform expected duties. The bankruptcy of the franchisee also constitutes a ground for termination of the franchise agreement. The franchisee may also terminate the franchise agreement if

a good cause exists, such as the franchisor has neglected core duties like guidance or training. If the franchisor has neglected such duties the agreement may be terminated with notice. The franchisee may terminate the agreement if the franchisor has deceived the franchisee regarding essential issues, has breached material provisions of the agreement, or has severely violated the interests of the franchisee which has resulted in justified loss or trust.

Renewal and transfer

The franchisor is entitled to refuse the renewal of the franchising agreement if it has been entered into for a fixed term and no provision stating the right of renewal of the franchisee. Usually, if such an option clause regarding the renewal is included in the agreement, there are certain conditions that must be met for the renewal to take effect. If the said conditions are not met, the franchisor is entitled to refuse renewal of the franchise agreement. The Franchisor may also restrict the franchisee's ability to transfer its franchise to a third party. Generally, the restriction is enforceable.

Dispute resolution and applicable law

The Finnish court system constitutes one federal system. The Finnish court system consists of general courts that include district courts, courts of appeal, and the Supreme Court as the final instance. Further, Administrative courts are the Administrative Courts and the Supreme Administrative Court as the final instance in administrative judicial procedural matters. Special courts in Finland include the Market Court, the Labor Court, and the Insurance Court. All courts are independent in

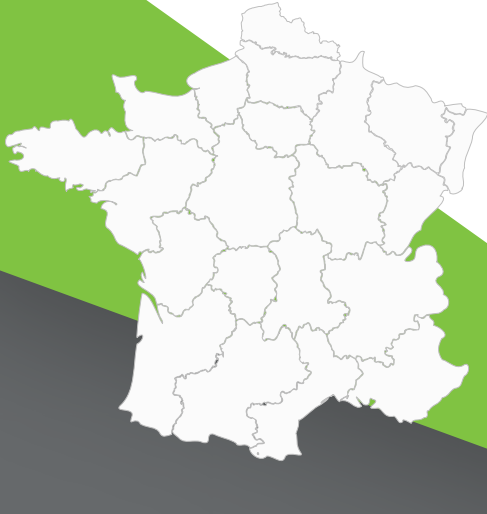
exercising their jurisdiction. There are several types of dispute resolution methods available to the parties of a franchise agreement in Finland. However, the most commonly used and also the most favorable dispute resolution method regarding franchise agreements is arbitration. Even though arbitration is the preferable means of settling a dispute, other alternative dispute resolution methods such as mediation have become more common.

Agreements on applicable law and jurisdiction are admissible in Finland. The parties may choose to have certain or all disputes resolved under a specific law or in some other jurisdiction or by a certain court, in Finland or abroad. According to the Finnish Procedural Code, the court applies the law *ex officio*. A party may also submit to the court a written statement on how the law should be applied. Mandatory laws in Finland must, however, be applied.

COVID-19

The COVID-19 pandemic has had a considerable financial impact on businesses in Finland, including the franchising business due to lockdown measures and limitations implemented by the government to contain the pandemic. However, the government has through various measures tried to ensure that businesses will be able to continue operating on a viable basis after the coronavirus crisis is over. Amendments to the Act on Support for Business Costs have been made to make granting aid to sole entrepreneurs and small companies more flexible and have created a new form of aid closure compensation closed due to the coronavirus epidemic.

France



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Legal professionals



Region

EMEA



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Essentials

about France's franchising law

- 1 According to Article L.330-3 of the French Commercial Code, in case of a franchise agreement with a commitment of exclusivity or quasi-exclusivity from the franchisee, specific precontractual information must be given by the franchisor to the franchisee (including notable information about the franchisor, the market, the network, and the upcoming franchise contract);
- 2 The franchisor undertakes to make available to the franchisee its distinctive signs and original, tested and constantly improved know-how, in return for remuneration and the commitment of the franchisee to use them according to a uniform commercial technique, with the assistance of the franchisor and under his control.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

The notion of “franchise” has not been codified in French law. However, such notion has been specified by European and French court decisions as an agreement under which “an undertaking that has established itself as a distributor on a given market, and thus, developed certain business methods grants independent traders, for a fee, the right to establish themselves in other markets using its business name and the business methods that have made it successful. Rather than a method of distribution, it is a way for an undertaking to derive financial benefit from its expertise without investing its own capital”. CJEC, Pronuptia, 28 January 1986, n°161/84).

Different law areas affect the regulation of the franchise agreements, notably the French Civil Code (contract law) and the French Commercial Code (commercial law, competition law, etc.).

Specifics regarding foreign franchisors

French law does not provide any specific restriction on foreign companies contemplating the creation of a franchise in France. However, foreign franchisors must comply with the applicable French regulations if considered as public order rules

Corporate Law

Under French Corporate law, no specific corporate form is required to operate as a franchisee. In France, the majority of the franchisees are registered as commercial companies in the Trade and Company Register. A foreign entity may also create a branch or a subsidiary in France. However, in sectors considered as “sensitive” under French law, foreign investments are subject to prior approval of the French administration.

Consumer Protection Law

Under French law, franchisees are not qualified as consumers under the French Consumer Code. Indeed, the introductory Article of the French Consumer Code defines:

- consumers as “natural persons who act for purposes that are not part of their commercial, industrial, craft, liberal or agricultural activity”, or to non-professional persons defined as any legal person who is not acting for its business“(introductory article of the French Consumer Code).
- professionals as “any natural or legal person, public or private, acting for purposes within the scope of its commercial, industrial, artisanal, liberal or agricultural activity, including when it acts in the name or on behalf of another professional”.

If it acts within the scope of its professional activity, a franchisee is on the contrary considered as a professional.

In addition, the French Commercial Code specifies that the franchisee acts as an “independent enterprise” (Article A441-1 of the French Commercial Code).

Antitrust/Competition Law

The European and French Competition laws apply to the franchise contract. It shall respect European regulations on anti-competitive practices such as the provisions of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) and the French regulations, that also prohibit anti-competitive practices such as concerted actions, agreements, and abuse of dominant position (Articles L. 420-1 et seq. of the Commercial Code) and restrictive competition practices (Articles L. 442-1 et seq. of the Commercial Code).

They may be considered as exempted contracts under Commission Regulation (EU) n°330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices if they meet the conditions of such exemptions.

Employment Law

The franchise agreement can be requalified as an employment contract if the franchisee can demonstrate the existence of a subordination link with the franchisor. The French judge applies the method of the bundle of evidence to make his decision.

For example, may constitute evidence of the existence of a subordination link in the franchise agreements the following elements:

- the absence of freedom in fixing prices by the franchisee (Cass. soc., 8 June 2010, n°08-44.965);
- the absence of autonomy in the follow up of the client relationship for the franchisee (Cass. soc., 18 January. 2012, n°10-16.341);
- Imposing working conditions on the franchisee, including working hours (Cass. soc., 22 March 2007, n°05-45.434).

To reduce the risk of requalification of the franchise agreement as an employment contract, the independence of the franchisee with respect to the franchisor must be preserved.

Law on commercial agents

Under French law, franchisees are not considered as commercial agents. Therefore, the specific regulations applicable to commercial agents do not apply to franchisees.

IP Law

The franchisor needs to protect its IP rights to protect and maintain the singularity and the success of its business model. Depending on the protection needed, its IP rights and especially its trademarks can be registered by the World Intellectual Property Organization (the "WIPO") as international trademarks, by the European Union Intellectual Property Office (the "EUIPO") as European trademarks, and/or by the French registration office named the Institut National de la Propriété Industrielle (the "INPI") as national trademarks.

In addition, the trademark of the franchisor may be also protected by the possibility to exercise legal actions against third parties (e.g., action for trademark infringement "action en contrefaçon", action for unfair competition "action en concurrence déloyale », etc.).

Selected questions/aspects

Precontractual disclosure

In the relationship master-franchise-franchise, the master franchisee is obliged to provide to the franchisee the precontractual information. He must communicate the relevant information communicated by the franchisor to the franchisee.

Articles L.330-3 and R.L330-3 of the French Commercial Code provide a statutory list of the information that has to be made available to the franchisee before signing a franchise agreement with a commitment of exclusivity or quasi-exclusivity from the franchisee.

This precontractual information document ("DIP") must contain the following:

- Information about the company:
 - registered office, nature of the activities, legal form, share capital, Trade and Companies Register number;
 - the identity of the person leading the company of the franchisor;
 - trademark registration number, date of the registration, date and number registration if the license has been transferred;
 - bank domiciliation;
 - annual accounts of the last 2 financial years;
 - date of incorporation of the company, its main steps of development and the indications to determine the professional experience of the franchisor.
- information about the distribution network:
 - the list of the companies included in the network with the indication of the mode of distribution chosen;
 - a general and local presentation of the market and the perspective of the development of the market;
 - the addresses of the companies established in France linked to the franchisor by similar contracts as the one proposed and the date of conclusion or renewal of these contracts;
 - the number of companies that ceased to be part of the network the year preceding the issuance of the precontractual information and indication related to the way the contract ended (expiry, termination, cancellation);
 - the presence in the area of the proposed location of the activity of any establishment that offers the products or services (if any).

- Other information:
 - the duration of the proposed contract, the conditions of renewal, of termination and transfer, and the scope of exclusivity;
 - the nature and amount of the expenses and specific investments to be undertaken by the franchisee to use the brand before beginning the exploitation;
 - if the payment of a sum is required, the services to be achieved in return shall be written down.

The above -mentioned documents/information must be provided to the franchisee in a language the latter is able to understand.

In addition, Article L.330-3 of the French Commercial Code provides a standard compliance procedure that requires the Franchisor to submit the DIP at least 20 days before the signing of the franchise agreement or before the payment of a sum required prior to the signing of the agreement to obtain the reservation option.

The delivery of the precontractual disclosure is required “prior to the signature of any contract” so that it must also be delivered on the occasion of the renewal of the distribution contract that has been the subject of a precontractual disclosure, even if it is implied (Cass. Com. 9 October 2007, n°05-14.118). If the precontractual information is not provided, several legal actions are possible. The franchisee may, notably, sue the franchisor for damages or the nullity of the franchise agreement for defect of consent (more specifically for fraud (“dol”) provided in Article 1137 of the French Civil Code, if the franchisor intentionally concealed information that he knew was relevant to the



franchisee). In addition, failure to comply with this obligation is subject to a criminal fine of up to 1,500 euros and up to 3,000 euros in the event of a repeated offense (Article. R. 330-2 of the French Commercial Code and Article 131-13, 5° of the French Criminal Code). The damages awarded are calculated on the tort liability (Article 1240 of the French Civil Code). For this purpose, the franchisee must demonstrate the existence of (i) a fault of the franchisor (in this case the lack of precontractual information provided by Article L.330-3 of the French Commercial Code), (ii) a reparable prejudice (i.e. a direct, certain and legitimate prejudice) and (iii) a causal link between the fault and the prejudice. In a sub-franchise, the franchisor is liable towards the master franchisee and the latter is liable towards the franchisees. However, if the damage arises out of a Franchisor's fault, the master franchisee may involve the liability of the Franchisor.

In general, in the event of misconduct committed by the managers in the context of their professional activities, French courts subordinate their personal liability with respect to third parties to the existence of a "separable fault": "the personal liability of a director with respect to third parties can only be retained if he has committed a fault separable from his functions" and "this is the case when the director intentionally commits a fault of particular gravity, incompatible with the normal exercise of the company's functions" (Cass. com., May 20, 2003, n°99-17.092). For example, the franchised manager is personally liable based on a detachable fault when he creates a company competing with the franchised company (CA Paris, Pôle 5 - chamber 4, November 13, 2019, n°19/00499).

In addition, the employer (franchisor or franchisee) is liable for its employees when the latter commits a fault within the limits of the mission assigned by their employer. When employees have acted within the limits of their mission, employees may not be held liable (Plenary assembly, February 25, 2000, Costedoat).

Legal restrictions

Please find below a non-exhaustive list of specific laws that may apply to franchise agreements:

French Civil Code

The general law of contracts remains applicable to franchise agreements (conditions of validity of consent, good faith in the precontractual and contractual phases, theory of unforeseen events ("théorie de l'imprévision"), etc.).

French Commercial Code

A franchise agreement may contain clauses that may be sanctioned or that may result in the franchisor being held liable under Article L.442-1 of the French Commercial Code, as such contracts can be unbalanced or might provide benefits without consideration.

A postcontractual non-competition clause provided by a franchise agreement may be deemed as null and void by French courts if after the term or termination of the franchise agreement, it limits the freedom of the franchisee to operate its commercial activity (Article L.341-2 of the French Commercial Code).

Franchise fees

In practice, in return for the advantages provided by the contract the franchisee is generally required to pay an entrance fee to the franchisor. Entrance fees cannot be requested before the signature of the franchise agreement because

the franchisee must be aware of the pre-contractual information provided by the franchisor before committing. Fees are negotiated between the franchisor and the franchisee. French courts require these fees to be balanced.

According to Article L.441-10 II of the French Commercial Code, “unless otherwise provided, the Parties may not set a rate lower than three times the legal interest rate, this rate is equal to the interest rate applied by the European Central Bank to its most recent refinancing operation plus 10 percentage points [...]”

Furthermore, Article L.441-10 II of the French Commercial Code provides that a fixed compensation of €40 is due to the creditor for collection costs, upon any delay in payment.

Regarding the currency of the transactions, Article 1343-3 of the French Civil Code specifies that: « The payment, in France, of a monetary obligation, is made in euros. However, payment may be made in another currency if the obligation thus denominated arises out of an international transaction or a foreign judgment. The parties may agree that the payment will be made in a foreign currency if it is made between professionals, when the use of a foreign currency is commonly accepted for the transaction concerned ».

Confidentiality

Confidentiality clauses in franchise agreements are likely to help protecting the franchisor's know-how made available to the franchisee. They are very commonly used in franchise contracts and their breach can lead to the termination of the contract.

Such clauses may be enforceable, notably in case of breach by the way of:

- a penalty clause or;
- damages/termination of the agreement.

Amendments

The principle of the binding nature of the contracts also applies to franchise agreements (Article 1103 of the French Civil Code). Thus, the parties may modify the franchise agreement by mutual agreement.

Termination

Distinction between fixed-term agreements/open-ended agreements

A distinction must be made between fixed-term and open-ended franchise agreements.

The parties to an open-ended franchise agreement have the right to unilaterally terminate the agreement by giving the prior notice provided in the agreement or a reasonable prior notice if there is no notice specified in the agreement (Articles 1210 and 1211 of the French Civil Code).

The parties to a fixed-term franchise agreement must perform it until the end of its term (Article 1212 of the French Civil Code). For example, under a fixed-term franchise agreement, the terminating party will be liable to compensate the other party for the damage caused. For the franchisor, this prejudice generally consists of the gross margin of which he was deprived while he had to find a replacement solution (CA Paris, March 27, 2019, no. 17/05107), except if the franchise agreement provides a fixed amount (penalty clause) as compensation.

Cases of unilateral termination provided by the French Civil Code

According to Article 1224 of the French Civil Code, the termination of an agreement “results either from the application of a termination clause or, in the event of sufficiently substantial non-performance, from a notification by the creditor to the debtor or from a court decision”.

- Termination by applying a termination clause
Agreements usually include termination clauses notably in case of non-payment of the fee by the franchisee or breach by the franchisor of its supply exclusivity. The terminating party

will comply with the modalities described in the termination clause of the agreement (events of termination, prior notice required, etc.).

In addition, the termination of the agreement is subject to an unsuccessful notice of breach, if it has not been agreed that this is due to the sole fact of non-performance. (e.g., in case of breach by the franchisor of its supply exclusivity, no payment of the fee by the franchisee to the franchisor, etc.). The notice of breach is only effective if it expressly mentions the termination clause (Article 1225 of the French Civil Code).



- Termination by notification (without applying a termination clause)

Without applying a termination clause, in the event of a substantial breach, the parties may also terminate the agreement at their own risks ("à leurs risques et périls") by sending a formal notice to the other party (except in case of emergency). If the substantial breach persists, the terminating party may notify the other party of the termination of the agreement and the reasons. The other party may go to court to challenge the termination, and the terminating party will have to prove the significance of the alleged non-performance (Article 1226 of the French Civil Code).

- Termination by a court decision

The parties may request the judge to terminate the agreement. Furthermore, it should be noted that Article L. 442-1, II of the French Commercial Code sanctions the abrupt termination of established commercial relationships. The determined or indetermined nature of the duration of the franchise agreement has no impact on the risk of the qualification

of abrupt termination. A reasonable notice is required. Therefore, professionals take these requirements into account, by stipulating variable notice periods, indexed to the duration of their established commercial relationships.

Renewal and transfer

Renewal

There is no right of renewal of a franchise agreement in favor of the franchisee (Cass. Com., 4 September 2018, n°17-17891). The franchise agreement is usually a fixed-term contract.

Thus, it expires on the date agreed upon by the parties. If provided in the agreement, it can be tacitly renewed. A contrario, if the parties wish to renew the agreement, a new franchise agreement will have to be signed by both parties.

According to Article L.442-6-I-5° of the French Commercial Code, any merchant may be liable if he abruptly terminates, even partially, an established commercial relationship without a prior written notice considering the duration of the commercial relationship. Therefore, in



franchise agreements, the terminating party must inform the other party of the termination sufficiently in advance to avoid any liability.

Transfer

Concerning the transfer of the franchise agreement, generally, a change of control clause or an assignment clause is provided in the contract to govern these kinds of situations. If not, French courts usually consider that the franchise contract is an *intuitu personae* contract that may not be automatically transferred to the new structure and that the validity of such transfer requires the consent of the other party.

Dispute resolution and applicable law

Dispute resolution, court system

In case of litigation relating to a franchise agreement governed by French law and including a franchisee who is a merchant, the dispute will be brought before the French commercial courts (a jurisdiction clause may be provided to determine a specific commercial court). In case of appeal, it will be brought before the French Court of Appeals and in case of appeal to the Supreme Court, the case will be brought before the French Supreme Court.

The Fédération Française de la Franchise proposes to settle disputes through arbitration before the *Chambre Arbitrale Internationale de Paris*. Arbitration is a confidential procedure but may be very expensive. The parties may also use an alternative dispute resolution, notably the “*médiation*” (contractual or judicial), the “*conciliation*” (contractual or judicial). At the request of the parties, the judge may approve the agreement resulting from the conciliation or mediation.

Applicable law

The applicable law may be freely chosen by the parties to the franchise agreement in the case of an international agreement.

If there is no applicable law clause and in case of conflict of laws with French law, the franchise contract must be governed by the law of the country where the franchisee has his habitual residence (Article 4 e) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations).

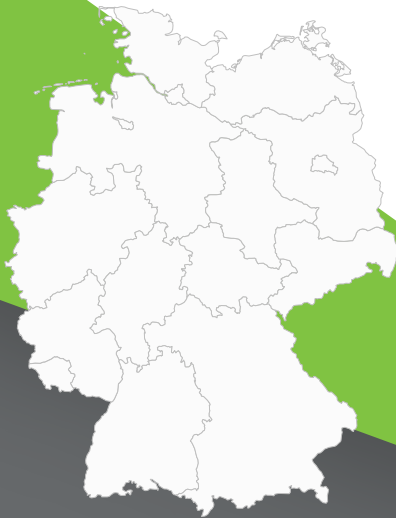
In any case, in the event of a connection with France (e.g., a French franchisee), although companies may choose the law applicable to their international contracts, they must be scrupulous in ensuring that this choice does not conflict with internal and international public order rules and public policy laws.

COVID-19

In France, there was no specific text for franchise contracts but general measures applicable to all contracts.

Due to the Covid-19 crisis, many public facilities, which may include franchises, have been forced to curtail operations and close their premises due to a health emergency. However, the French Government has put in place subventions (e.g., a solidarity fund, freezing of penalty clauses for a certain period, etc.) to support businesses under certain conditions. In addition, some small companies (with less than 10 employees) have been able to benefit from a temporary deferral of commercial rents under certain conditions provided in Order n° 2020-316 of 25 March 2020.

Germany



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Law professionals



Region

EMEA



Offices

Berlin, Cologne,
Dusseldorf, Frankfurt,
Hamburg, Hanover,
Munich, Stuttgart

Essentials

about Germany's franchising law

- 1 No specific form or procedure is prescribed by law regarding franchisor's pre-contractual disclosure obligation
- 2 As a "business founder", a franchisee may be entitled to revoke the franchise agreement.
- 3 Franchisees may be entitled to compensation payment upon termination of the franchise agreement.

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 Find and reach out to local contacts in the **Contacts** section on page 288.

Relevant areas of law

Legal basis of Franchise Law

In Germany, there is neither a legal definition of “franchise” nor a codified franchise law. German franchise law has been developed by court decisions; its implications result from many different areas of law, especially civil, commercial, and corporate law.

Corporate Law

The most common corporate form to set up business in Germany is the private limited liability company (as a “GmbH”, or as a “UG”). It is easy to set up by one or more persons and requires a minimum capital of EUR 25,000 (GmbH) or less (UG). Solely the registered capital is liable to the company’s creditors, not the shareholders personally. The formation costs for a GmbH/UG are very moderate. Notwithstanding foreign trade law regulations regarding foreign investments in certain sectors, German corporate law does not impose any general restrictions on foreign operations in Germany, nor on franchise systems in particular.

Consumer Protection Law

Under German law, individuals seeking to become franchisees are not qualified as consumers, as the intention of their conduct is business oriented. However, at the stage of setting-up business, a franchisee may be qualified as “business founder”, and as such may be entitled to revoke the franchise agreement within 14 days following the signing, provided that the franchisee has been informed accordingly by the franchisor – otherwise, the right of revocation does not expire until 12 months and 14 days following the signing. If the franchisee is an entity such as a GmbH or a UG, there is no right of revocation.

Law on commercial agents

Only single provisions of the statutory law on commercial agents are analogously applicable to franchising. Like a commercial agent, the franchisee may be entitled to a compensation payment of up to an average annual remuneration upon the termination of the franchise agreement if (i) the franchisee is incorporated into the franchisor’s sales organization like a commercial agent and (ii) is obliged to transfer its customer base so that the franchisor can immediately and easily take advantage of it at the end of the agreement. Accordingly, the franchisor’s risk of a possible compensation payment can be mitigated by not imposing on the franchisee an obligation to transfer its customer base. However, according to a landmark ruling by the German Federal Supreme Court, there is no such entitlement in franchises mainly comprising anonymous mass business.

Employment Law

Care needs to be taken that a franchisee is not qualified as an employee of the franchisor according to German employment law and German social law. To that end, the decisive criterion is the degree of personal dependency of the franchisee. Pursuant to German jurisdiction, someone is an independent businessperson who is – contractually as well as factually – free to design his activities and set his working hours, and who assumes an own entrepreneurial risk. In case the franchisee is an entity such as a GmbH, however, it cannot be an employee.

IP Law

Franchisors need to protect their IP against third parties’ attacks or imitations, especially by registering their trademarks – either as International

Registration (“IR”) with the World Intellectual Property Organisation (“WIPO”), as EU Trademark (“CTM”) with the EU Intellectual Property Office (“EUIPO”) in all 27 EU member countries, or as a national trademark in Germany only with the German Patent and Trademark Office (“DPMA”). It is recommended to also carry out research beforehand in order to prevent the potential later loss of the trademark and corresponding claims for disclosure and damages.

Real Estate/Tenancy Law

Depending on the specific design of the franchise system, legal implications may arise from real estate and tenancy law. In a structure where the franchisor (sub-) leases the locations to the franchisees, harmonizing the termination rights of the (sub-) leasing and the franchise is of the essence. In contrast to that, some franchisors use “investor models”, in which third parties own the locations and directly lease them to the franchisees. While this model eliminates the risk of lost rent for the franchisor, it prevents the franchisor from imposing on the franchisee a non-compete obligation for more than five years according to EU antitrust law. Further, in order to secure locations of strategic interest for the franchise systems, in an “investor model” the franchisor must ensure to reach an agreement with the lessor according to which the franchisor automatically enters into the lease agreement in lieu of the franchisee in the event of termination of the franchise agreement.

Selected questions/aspects

Precontractual disclosure

Prior to signing a franchise agreement, franchisors and, in a sub-franchising structure, master franchisees have the duty to inform

each potential franchisee accurately and with reasonable advance about all circumstances recognizably relevant for the conclusion of the franchise agreement.

Having said that, there is neither a statutory list of which information must be made available and in what form, nor is there a standard compliance procedure. Likewise, German franchise law does not know a general obligation to continuously update the precontractual information. However, such an obligation may arise during the term of the franchise agreement (or even prior to signing) if certain circumstances occur, or change, being recognizably relevant to the franchisee.

The German Franchise Association (Deutscher Franchiseverband e.V.) provides – next to a Code of Ethics – guidelines regarding the minimum information to be disclosed (www.franchiseverband.com). The obligation affects all data available (only) to the franchisor and is necessary to enable the potential franchisee to generate own calculations of profitability and to draw own conclusions about the prospects of success regarding the franchise. Furthermore, it also comprises general information about the franchise system as well as the basic content of the (master-, sub-, or) franchise agreement. Notwithstanding the foregoing, the franchisor is not obliged to disclose trade secrets.

For reasons of proof, precontractual information should be carried out in writing. In addition, franchisors need to anonymize references and examples when disclosing information to comply with the requirements of the General Data Protection Regulation (“GDPR”).

A violation of the pre-contractual duty to inform may entitle the franchisee to terminate

the franchise agreement for good cause as well as lead to damage claims by the franchisee. To that end, the franchisee may choose to rescind the franchise agreement and claim back all paid franchise fees (earned income deducted) and all expenses incurred in connection with the franchise business.

Legal restrictions

Antitrust/Competition Law

Franchise agreements may contain restrictions that collide with art. 101 Treaty on the Functioning of the EU (“TFEU”). Exemptions from the prohibition in art. 101 TFEU are possible under the EU-Vertical Block Exemption Rule (“V-BER”), provided that the respective parties to a franchise agreement do not have a market share of more than 30 % each. The V-BER contains so-called black clauses (“core restrictions”), rendering the entire agreement null and void. It also contains so-called grey clauses, rendering solely the specific provision in an agreement null and void. Examples for black clauses are provisions dictating fix prices or prohibiting passive sale outside a designated territory (including sale via the internet), whereas provisions prohibiting competition for more than five years or for unlimited time are grey clauses.

Law on general Terms and Conditions (“T&Cs”)

Franchise agreements as pre-formulated agreements significantly limit the other party’s contractual freedom, which is why their T&Cs are subject to judicial effectiveness control. This is lessened in b2b-only agreements such as franchisor-franchisee-relationships. However, still such T&C-clauses are ineffective that unreasonably disadvantage the other party.



Franchise fees

Besides the prohibition of usury, there are no laws in Germany regulating the payment of franchise fees. However, case law sets requirements for fee adjustment clauses, which – in a nutshell – must be transparent and verifiable for the franchisee. Payments to a foreign franchisor may be made in the franchisor’s domestic currency. The interest rate in Germany for default payments in b2b-transactions is nine percent above the base interest rate (currently: $- 0.88 \% = 8.12 \%$). In addition, franchisors may claim a lump sum of EUR 40 if a franchisee is in default with payments.

Confidentiality

Confidentiality clauses in franchise agreements (often in combination with a contractual penalty) are very common and enforceable in Germany. The franchisor may file an interim injunction against an infringing franchisee, claim damages occurred due to the breach, and possibly terminate the franchise agreement extraordinarily. Furthermore, a confidentiality clause is advisable to adequately protect existing trade secrets: According to the German Trade Secrets Act, a trade secret is only protected if the (alleged) owner of the secret has taken appropriate measures to maintain secrecy.

Amendments

Simply put, if the franchise agreement contains a precise and reasonable change reservation clause, taking into account the franchisees’ interests, unilateral amendments of the agreed terms by the franchisor are admissible as an expression of the franchisor’s obligation to continuously develop its franchise system according to changing market conditions. Without a respective provision, amendments of the

franchise agreement may only be agreed unilaterally between franchisor and franchisee – an almost impossible task in terms of uniform regulations once a franchise system has reached a size with a large number of franchisees.

Termination

Franchise agreements are entered into for a certain time and terminate with the lapse of that time. A regular termination by one of the parties before that is not admissible unless both parties unanimously agree on it. However, franchise agreements may be terminated by each party without notice if it is unreasonable for the terminating party to continue the contractual relationship until the agreed time of termination (good cause). If the cause for the termination is a breach of a contractual obligation by the other party, e.g., non-payment of franchise fees, the termination for good cause is only admissible after having issued a fruitless warning (advisably in writing), and within a reasonable period after learning about the circumstances for the termination. Unjustified terminations by a franchisor might entitle the franchisee to claim damages.

Renewal and transfer

Generally, franchisors are free to decide whether or not to renew a franchise agreement; if so, renewals should be done explicitly and in writing. It is admissible to contractually restrict a franchisee’s ability to transfer its franchise, typically by requiring an explicit prior written approval of the franchisor.

Dispute resolution and applicable law

Germany provides one (federal) court system, consisting of the local courts (values < EUR 5,000.-), the district courts (values > EUR

5,000.-), the higher regional courts (generally courts of appeal), and the Federal Supreme Court. In principle, it is admissible for the parties to a franchise agreement to agree on a choice of law to apply to their contractual relationship, and, if the franchisee is a merchant, to agree on a venue clause.

It is also admissible to agree on arbitration as the exclusive way of resolving disputes between the parties, thus waiving the due process of law. This may be favorable, as the parties may choose the language of the proceedings and have an influence on the arbitrators selected. Also, arbitration proceedings are, unlike proceedings before ordinary courts, not held in public. However, if the value in dispute is rather low, arbitration may often be too cost-intensive.

COVID-19

From early 2020 on, the COVID-19 pandemic has been having a huge impact especially on the franchise sector due to the government measures, especially shutting down public life to contain the pandemic. Therefore, legislation was passed in Germany to mitigate this impact, e.g., temporary payment moratoria (until June 30, 2020). Franchise fees, however, were not covered by these and, therefore, had to be paid continuously.

One of the more recent COVID-19 related legislation is a provision in German civil law referring to the principles of frustration of contract with respect to commercial lease agreements in general, intending unanimous solutions between

lessor and lessee about adjustments of the rent amount. This provision is accompanied by a new statutory requirement to prioritize and accelerate court actions about such adjustments.

Within the past months, various courts have had to deal with the question of whether the lessee remains obliged to pay the (full) rent if, due to government measures, the store must not be opened. The courts came up with different results and reasoning: While some courts affirmed full payment obligation, denying that the government measures are a defect of the premise entitling the lessee to a reduction of the rent, other courts argued that the lessee may claim a reduction due to frustration of contract, as it is unreasonable to continue the unchanged agreement given the circumstances. In that regard, the extent to which a reduction may be claimed is dependent on the necessary balancing of interests, taking into account all circumstances of the respective individual case, such as possible advantages of the lessee due to increased online trade, short-time work, and state aid, the economic situation of both parties, the duration of the lease to date, and the lessee's possibly being a member to a group.

With a uniform case law as well as a Federal Supreme Court decision not in sight to date, the question of whether or not a (franchisee) lessee is entitled to an adjustment of the rent amount in COVID-19 cases still is a matter of all circumstances of the individual case; the judicial development should be observed.

Greece

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Legal professionals



Region

EMEA



Offices

Athens

Essentials

about Greece's franchising law

- 1 No specific form or procedure prescribed by law regarding franchisor's precontractual disclosure obligation.
- 2 As a "business founder", a franchisee may be entitled to revoke the franchise agreement.
- 3 Franchisees may be entitled to compensation payment upon termination of the franchise agreement.

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Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

Greek law neither defines “franchise” nor a codified legal framework regulating franchising. Greek franchise law has been developed by court decisions. Its implications result from many different areas of law, especially civil, commercial and corporate law and the voluntary Code of Ethics, written by Franchise Association of Greece, which is in line with that of the European Code of Ethics for franchising and only a few additions have been made to reflect business practices in Greece.

Corporate Law

The most common corporate form to set up business in Greece is the *société anonyme* (as a “SA”) and the private limited liability company (as an “EPE” or as an “IKE”). It is easy to set up a *société anonyme* by one or more persons and requires a minimum capital of EUR 25,000. Furthermore, only EUR 1 is required to set up an EPE/IKE. In both company formats, solely the registered capital is liable to the company’s creditors, not the shareholders personally. Greek corporate law does not impose any general restrictions on foreign operations in Greece, nor on franchise systems in particular.

Consumer Protection Law

Under Greek Consumer Protection law (Law 2251/1994), franchisees are not qualified as consumers, because ‘consumer’ means any natural person who is acting for purposes that are outside his trade, business or profession.

Law on commercial agents

According to Law 3557/2007 (art. 14), provisions of the Presidential Decree 219/1991, that implements Directive 86/653/EEC on

commercial agents, are analogously applicable to exclusive distribution agreements. If the franchise agreement has the same essential characteristics as an exclusive distribution agreement, provisions regarding compensation and notice period for termination of the Presidential Decree 219/1991 on commercial agents are analogously applicable on franchising. In that view, the franchisee may be entitled to a compensation payment upon termination of the franchise agreement, and the notice period is one month during the first year of the agreement, two months during the second year and so on, up to six months for the sixth and following years.

IP Law

Franchisors need to protect their IP against third parties’ attacks or imitations, especially by registering their trademarks – either as International Registration (“IR”) with the World Intellectual Property Organization (“WIPO”), as EU Trademark (“CTM”) with the EU Intellectual Property Office (“EUIPO”) in all 27 EU member countries, or as a national trademark in Greece only with the Hellenic Industrial Property Organisation (“HIPO”). Under the franchise agreement, the franchisee usually has the right to use the franchising system’s IPs during the term only for the franchising, while the franchisor remains the owner of the IPs.

Real Estate/Tenancy Law

Depending on the specific design of the franchise system, legal implications may arise from real estate and tenancy law. In a usual structure, where the franchisor (sub-) leases the locations to the franchisees, both the franchise and the lease agreement are concluded for the same term and obligations. The franchisor

can charge its franchisee tenant a fixed rent or a rent calculated as a percentage of its sales. There is also the structure where a franchisee is the owner of the property. After the termination of the franchise agreement, the franchisor can take over and operate the franchisee's business by either acquiring the property owned by the franchisee or leasing it.

Precontractual disclosure

Greek law does not provide specific disclosure obligations regarding the franchise. There is only a general provision of articles 197 and 198 of the Greek Civil Code setting out obligations arising from negotiations. Prior to signing a franchise agreement, franchisors should inform each potential franchisee accurately and with reasonable advance about major circumstances recognizably relevant for the conclusion of the franchise agreement.

The Greek Code of Ethics provides guidelines regarding the minimum information to be disclosed (<https://www.franchise.org.gr/en/codes-of-ethics/>). In particular, the franchisor should disclose to the potential franchisee necessary information on the franchise system, namely the corporate status of the franchisor and the description of its business and relevant data on total costs associated with establishing a franchised business, in order franchisee to generate own calculations of profitability and to draw own conclusions about the prospects of success regarding the franchise. Moreover, the franchisor should disclose information relating to all licenses required by law for the operation of the franchise system and the basic content of the franchise agreement, i.e., rights and obligations of both parties, duration, etc. Notwithstanding the foregoing, the franchisor is not obliged to disclose trade secrets. The provisions of the Code

of Ethics are voluntary and therefore, there are no specific consequences for failure to observe disclosure requirements.

For reasons of proof, precontractual information should be carried out in writing. In addition, franchisors need to anonymize references and examples when disclosing information in order to comply with the requirements of the General Data Protection Regulation ("GDPR").

A violation of the precontractual duty to inform may entitle the franchisee to claim damages in the course of negotiations and torts (articles 140-149, 197-198, 914, 919 of the Greek Civil Code).

Selected questions/aspects

Legal restrictions

Antitrust/Competition Law

Franchise agreements may contain restrictions that infringe art. 1 of Greek Competition Act (Law 3959/2011) and art. 101 Treaty on the Functioning of the EU ("TFEU"). In particular, franchise agreements may contain non-compete clauses during the term of the franchising agreement and post-term. Post-term non-compete clauses are examined ad hoc in alignment with the general provisions of the Greek Civil Code. Exemptions from the prohibition in art. 101 TFEU and art. 1 Law 3959/2011 are possible under the Regulation (EU) 330/2010 on vertical restraints and art. 101(3) of the TFEU on an individual exemption. However, according to Hellenic Competition Authority case law (Decisions No. 395/2008 and 495/2010), non-compete clauses and exclusive supply obligations imposed in franchise agreements infringe art. 4 (d) Regulation (EU) 330/2010, by prohibiting cross sales between authorized franchisees within the franchise system. Moreover, exclusive supply obligations



under a selective distribution agreement must be limited to a reasonable period, generally not exceeding 5 years.

Greek Civil Code. Franchise agreements are subject to general provisions of the Greek Civil Code. In that view, both parties have the obligation to behave fairly, reasonably, in good faith, loyally, in fairness and with goodwill not only precontractual (negotiations phase), during the term of the franchise agreement and post-term.

Franchise fees

There are no laws in Greece regulating the payment of franchise fees except the rule for abuse of rights of the Greek Civil Code. Usually, there is an initial fixed fee the franchisee pays to enter the franchising system. During the term of the franchise agreement, the franchisee usually pays continuing fees and an advertising contribution. The interest rate for default payments cannot exceed the rate set by the Bank of Greece (currently 5.25%).

Confidentiality

Confidentiality clauses in franchise agreements (often in combination with a contractual penalty) are very common and enforceable in Greece. The franchisor may file an interim injunction against an infringing franchisee, claim damages occurred due to the breach, and possibly terminate the franchise agreement extraordinarily. Furthermore, a confidentiality clause is advisable in order to adequately protect existing business secrets.

Amendments

Amendments of the franchise agreement may only be agreed unanimously between franchisor and franchisee and should be done explicitly and in writing.

Termination

Franchise agreements are entered into either for a fixed time and terminate with the lapse of that time either for an indefinite time which can be terminated at any time. A regular termination for a fixed time franchise agreement by one of the parties before the agreed term expires is not admissible unless either party has good cause for early termination. In an indefinite time franchise agreement, the terminating party must provide notice to the other party before termination subject to restrictions imposed by the contractual obligations. Unjustified terminations by the terminating party might entitle the other party to claim damages for lost profits and unnecessary expenses.

Renewal and transfer

Any renewal of the franchise agreement should be done explicitly and in writing. Tacit renewal is also permitted by law, except it is forbidden by a clause in the franchise agreement. There are no legal restrictions for a franchisee to transfer its business. However, it is admissible to contractually restrict a franchisee's ability to transfer its franchise, typically by requiring an explicit prior written consent of the franchisor. But this is not very common in Greece.

Dispute resolution and applicable law

Greece provides a court system, consisting of Magistrates' Court (claims valued up to EUR 20,000), Single-Member Court of First Instance (claims valued between EUR 20,001 and EUR 250,000) Multi-Member Court of First Instance (claims valued more than EUR 250,000). Decisions of Courts of First Instance can be appealed to the Courts of Appeal. Decisions of Courts of Appeal are subject to cassation application before the Supreme Court. In principle, it

is admissible for the parties to a franchise agreement to agree on a choice of applicable law on their contractual relationship, subject to mandatory domestic rules. Greek courts will also recognize the choice of a foreign jurisdiction.

It is also admissible to agree on arbitration as the exclusive way of resolving disputes between the parties, but this is not very common in Greece. The parties can also use the simple mediation procedure for the settlement of disputes arising in relation to franchise agreements, which is introduced by the Franchise Association of Greece.

COVID-19

COVID-19 pandemic has a huge impact on the franchise sector, which faces significant levels of uncertainty and instability due to financial weakening, disruption of operations at workplaces, and the number of consumers plummeted. In particular, franchising and distribution represented a large part of the market share impacted by COVID-19 due to the government measures, which shut down public life and suspended business activities to contain the pandemic.

Although, the Greek government took relevant measures to mitigate the impact of COVID -19, these measures, such as temporary payment moratoria, did not cover franchise agreements fees. Among the measures which helped the franchising systems to mitigate the impact of COVID-19 were credit lines and loans for micro, small and medium-sized companies, flexibility in the rules for obtaining loans, a moratorium on debt repayments, and credit lines for small and medium-sized companies to pay salaries.

Moreover, more recent COVID-19 related legislation granted temporary payment moratoria

of the rent amount with respect to commercial lease agreements provided that lessee's business was implicated by COVID-19 measures and its store was closed due to lockdown. Notwithstanding the above mentioned, a statutory moratorium applied which stopped creditors from exercising rights against a business's assets.

Despite the above, some franchises faced a positive impact during the COVID-19 pandemic. These franchises either sell products tailored to this new environment or have adapted to a new business model during the crisis. Many franchises, whether small businesses or large corporations, are finding ways to keep customers coming back for more, such as food deliveries, clothing and footwear, and cosmetic products sold via online stores.



Guatemala



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Legal professionals



Region

AMERICAS



Offices

Guatemala City

Essentials

about Guatemala's franchising law

- 1 There is no franchise law.
- 2 The only law that mentions franchises is the Industrial Property Law, Decree 57-2000 of the Congress of the Republic of Guatemala. This law regulates the registration in the Intellectual Property Registry of the license to use the trademark contained in a franchise agreement.
- 3 Since 2007, a group of more than 20 local entrepreneurs and franchisors have joined forces to establish the Guatemalan Franchise Association (AGF).

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Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise law

In Guatemala, there is neither a legal definition of a “franchise” nor a franchise law. Franchises in Guatemala have been developed according to established business models of other countries and replicated in the country. Furthermore, entrepreneurs and franchisors have created the Guatemalan Franchise Association with a purpose of representing the interests of the industry, both locally and internationally.

Corporate Law

The most common corporate form of a business organization in Guatemala is locally known as a Sociedad Anónima (“S.A.”), or an incorporated company (“Inc.”). It is easily set up by two or more people and requires a minimum capital of GTQ200.00, approximately US\$30.00. In this type of commercial company, the capital is divided and represented by shares. The liability of each shareholder is limited to the payment of shares subscribed by them. The Commercial Code of Guatemala does not regulate or impose any type of restrictions on franchises.

Consumer Protection Law

The Consumer and User Protection Law, Decree 06-2003 of the Congress of the Republic of Guatemala, regulates the rights of consumers and users, contractual protection and the entity in charge of ensuring the protection of consumers and users. However, it does not mention or regulate any matter related to franchises. It is important to note that this law applies to all legal acts carried out between suppliers and consumers and/or users be they individuals or legal entities, national or foreign, and thus, it is applicable to any franchise model.

Antitrust/Competition Law

Since 1997, Guatemala has been developing a preliminary draft of the Competition Law through the Ministry of Economy. However, to date, Guatemala does not have a Competition Law. The Guatemalan Commercial Code has a section regarding the protection of free competition and acts of unfair competition. Likewise, the Industrial Property Law includes a section titled “On the Suppression of Unfair Competition”.

These general regulations apply to any commercial or business activity, and are therefore applicable to franchises. Any contract or franchise agreement has to adhere to and respect these provisions.

Employment Law

It is important for the franchisee to maintain its status as an independent entrepreneur or merchant. This removes the doubt that the franchisee is not an employee of the franchisor.

If an employment relationship evidence is found between the franchisee and the franchisor, the franchisee could make a claim for the payment of legal benefits in accordance with the Labor Code, including severance for time worked.

The key to reducing this risk is the franchise agreement, which must clarify the independence of the parties, and not mention terms that are specific to an employment relationship. These include: salary, schedule, vacations, dependence on an immediate supervisor, etc. In addition, these situations cannot occur in practice either.

Law on Commercial Agents

Guatemala does not have a specific law on Commercial Agents. However, the Commercial Code regulates the definition of commercial agents as those persons who act permanently, in relation to one or more principals, promoting commercial contracts or entering into them on behalf of their name. Commercial agents can be: 1) dependent, if they act on behalf of the principal, form part of their company and are bound to the principal through an employment relationship; 2) independent, if they act through their own company and are bound to the principal through a commercial contract, also known as an agency contract. Independent commercial agents may also enter into commercial contracts on their own account—to sell, distribute, promote or place goods or services in the national territory, when it has been agreed with the principal. Individuals or legal entities acting as agents under this law, must register as such in the Registry of Agents, Distributors and Representatives in the Mercantile Registry.

Based on the above, the provisions for commercial agents are not applicable to franchises, in addition to the fact that the relationship of commercial agents is protected by a specific contract called an “Agency Contract”.

IP Law

The Industrial Property Law, Decree 57-2000 of the Congress of the Republic of Guatemala, states that in franchise agreements—specifically for the issuance of trademark use licenses—the provisions of this law must be applied. For registering the license to use the trademark indicated in a franchise agreement, the applicant has to present the section of agreement that refers to the license or a summary of it, following

the formal process before the Intellectual Property Registry. The same law stipulates that it is not required to register the licenses of a trademark in order to establish its validity, to affirm the rights on a trademark or for other purposes. If you choose to register the license of use, the application may be submitted by the owner of the trademark or by the licensee.

To protect the IP of franchisors, it is necessary to use the available legal mechanisms to avoid any copy or imitations by third parties.

Real Estate/Tenancy Law

If it is necessary to lease a location that complies with the instructions of the franchisor, within the franchise or business model, it will be important to consider the terms for termination of the agreement. For example: 1) if the franchise agreement is terminated, will the lease be terminated too?; or 2) if the franchisor unilaterally terminates the franchise agreement, will it be subrogated in the place of the franchisee in the lease agreement?

Selected questions/aspects

Precontractual disclosure

Prior to signing a franchise agreement, franchisors, and in a sub-franchising structure, master franchisees have to inform each potential franchisee about all circumstances relevant for closing the franchise agreement accurately and with advance notice. This is not a formal obligation for the franchisor.

There is neither a statutory list of which information has to be made available and in what form, nor is there a standard compliance procedure. The pre-contractual disclosure is subject to how the interested parties wish to handle it.



Pre-contractual information should be in written format and a Non-disclosure Agreement (NDA) should be signed for the protection of the franchisor. However, the franchisor does not have the obligation to continue making or updating the disclosure. This will depend on their criteria of what information is essential for the franchisees prior to formalizing the franchise agreement.

The franchisees cannot demand the disclosure of information in any way, but if an NDA is signed and the franchisee violates the terms, the franchisor can claim damages in accordance with what has been stipulated in the agreement.

As there is no obligation to register such documents, the disclosure documents and franchise agreements can be issued in the language of each party.

Legal restrictions

Due to the lack of regulation in franchises and franchise agreements, there are also no legal restrictions on them. In general terms, any object or activity can be franchised, as long as they can be legally and commercially traded.

Franchise fees

Besides the prohibition of usury, there are no laws in Guatemala regulating the nature, amount or payment of franchise fees. The parties will have to exclusively agree to this in the franchise agreement.

There are no restrictions on a franchisee's ability to make payments to a foreign franchisor in the latter's domestic currency. This shall depend on what is agreed to by the parties in the franchise agreement.



Confidentiality

Confidentiality clauses in franchise agreements (often in combination with a contractual penalty) are quite common and enforceable in Guatemala. The franchisor can claim the payment of damages for confidentiality violation, and it may also be a cause (if stipulated) for termination of the agreement without any liability on their part.

Amendments

The rule should be that all the amendments to the franchise agreement should be expressively accepted by the two parties. The franchisee should not be entitled to amend the agreements unilaterally, for e.g., to adapt it to market developments, unless the franchise agreement itself has an express authorization that frees the franchisee to do so without their consent.

However, in case if the franchise agreement does not allow unilateral amendments, but still the franchisee creates them for the betterment of the franchise and it is successful in the country, the franchisor may choose to accept these changes that it was unaware of previously.

Termination

The conditions for terminating a franchise agreement should be agreed to by the parties within the same agreement.

For example: After the fulfillment of a term stipulated in the contract and by agreement of both parties, one of the parties may choose to no longer continue with the franchise agreement (upon previous notification and compliance with the pending obligations) should they wish to, due to a violation of any of the parties' obligation, etc.

Renewal and Transfer

Franchisors are free to decide whether or not to renew a franchise agreement. If they choose to, renewals should be made explicitly and in writing. It is admissible to contractually restrict a franchisee's ability to transfer its franchise, typically by requiring explicit prior written approval from the franchisor.

Dispute resolution and applicable law

The parties can indicate the applicable law and form of dispute resolution.

The judicial procedure to be followed will depend on what matters are sought to be resolved in court. Usually, the agreement only stipulates that disputes will be resolved according to the regulations of the Republic of Guatemala and in the courts of Guatemala City.

Arbitration is the most recommended means of dispute resolution for the parties in a franchise agreement. Therefore, the franchise agreement must incorporate an arbitration clause, providing for the specific center that is designated for the arbitration. In Guatemala, there are two centers for arbitration: 1) The Arbitration and Conciliation Center of the Guatemalan Chamber of Commerce (CENAC) and 2) The Conflict Resolution Commission of the Guatemalan Chamber of Industry (CRECIG).

COVID-19

There are no changes regarding franchises as a result of the COVID-19 pandemic, since to date there is still no law or court provision regarding franchises in Guatemala.

India



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Legal professionals



Region

APAC



Essentials

about India's franchising law

- 1 There does not appear to be any specific legislation that regulates franchising in India. Rather, franchising arrangements are generally governed by contract law.
- 2 Franchisees must withhold certain amounts (as income tax) when paying royalties and technical fees to overseas franchisors.
- 3 There does not appear to be a requirement for franchisors to make any pre-contractual disclosures.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

In India, there does not appear to be a legal definition of “franchise” or specific legislation addressing franchising arrangements. However, many franchisors and franchisees are members of franchise associations, like the Franchising Association of India, which has formulated a code of conduct that their members are expected to follow (although this is not binding).

Franchising arrangements are generally governed by contract law as codified in the Contract Act 1872 (“CA”) and supplemented by general principles of contract law (e.g., an implied obligation on contracting parties to deal with each other in good faith). The parties in a franchise agreement are generally free to agree on the terms and conditions of franchise arrangements, as long as such arrangements do not contravene the CA’s express provisions (e.g., illegality of consideration).

Specifics regarding foreign franchisors

There do not appear to be any laws in India which require a franchising agreement prepared by a foreign entity or governed by a foreign law to be adapted to a certain form in order to be enforceable in India. However, certain provisions may be contrary to Indian law and should be modified or removed accordingly—for e.g., under the Foreign Exchange Management Act 1999 (“FEMA”), an Indian franchisee cannot issue a bank guarantee in favour of a foreign franchisor except under very limited circumstances.

Also, certain Indian laws which govern contractual relations with foreign entities may be relevant depending on the franchise agreement.

For example, the FEMA governs payments made and guarantees issued by Indian franchisees to foreign franchisors, and the Foreign Direct Investment Policy (“FDI Policy”), as issued and enforced by the Department of Industrial Policy and Promotion, regulates any proposed foreign direct investment into India and lists the sectors in which such investment is permitted.

Furthermore, a franchisee in India must withhold tax at a certain rate (usually 20%) on the payment of royalties and technical fees to the overseas franchisor. However, if the franchisor is located in a jurisdiction that has a double taxation avoidance treaty with India, the provisions of that treaty will prevail over Indian tax law (so long as the treaty provisions, when applied, produce a more beneficial outcome for the franchisor).

Corporate Law

The most common business structure in India is a company (either public or private) incorporated in accordance with the Companies Act 2013.

To incorporate a company in India, the following requirements (among others) must be met:

- Shareholders/directors:
 - public companies must have a minimum of three (3) directors and seven (7) shareholders;
 - private companies must have a minimum of two (2) directors and two (2) shareholders.
- Corporate information: The names of the proposed directors/shareholders of the company and the proposed address of the company’s office must be provided.
- Charter documents: A memorandum and articles of association must be prepared and submitted (along with the “Corporate information” above) to the Ministry of Corporate Affairs.

All required filings with and payments to relevant authorities can be undertaken online, and a company can generally be incorporated within one (1) month.

As discussed under the “Specifics Regarding Foreign Franchisors” section above, the FDI Policy regulates the formation of foreign business entities and imposes sector-specific regulations on foreign investment.

Consumer Protection Law

Franchisees are not covered by the definition of “consumer” under the Consumer Protection Act 1986 and will not be protected by its provisions.

Antitrust/Competition Law

Franchising arrangements are regulated by the Competition Act 2002, which places restrictions on, among others, exclusive distribution agreements, territorial and customer restrictions and resale price maintenance. However, franchisors can impose certain reasonable restrictions, like those in connection with the protection of Intellectual Property Rights (“IPRs”). In the context of franchise agreements, franchisors can impose restraints on a franchisee to prevent them from carrying on a competing business during the term of the franchise agreement. Generally, a franchisor can legally restrict a franchisee from having its own website presence, promoting its business on the internet and engaging in e-commerce activities, insofar as these activities are undertaken in connection with the franchisee offering products or services which compete with the franchisor’s own offerings.

Further, the Competition Commission of India must approve any acquisition of shares/voting rights/control in an Indian company when certain thresholds (e.g., net assets of a company/corporate group being acquired) are exceeded.

Employment Law

A franchisee will not be regarded as an employee of a franchisor and their relationship will be treated as between two principals. However, if a franchisee is deemed to be an “employee”, the protections they will enjoy under Indian labour laws depend on the type of employee which they will be classified as (e.g., “workman” under the Industrial Disputes Act 1947 and Factories Act 1948) and the Federal and/or State legislation that will apply to them based on that classification and their location of employment.

To mitigate the risk of establishing an employment relationship, a franchise agreement may stipulate that a franchisee will be acting as an independent contractor in its capacity and nothing in the agreement should be construed as creating an employment relationship between the franchisor and the franchisee.

Law on commercial agents

An “agent” is defined under Indian law as a person who is employed to act on behalf of another, or to represent another in dealing with third parties. For example, if a franchisee is given the authority to enter into contracts with third parties on behalf of the franchisor, the franchisee would be an “agent” of the franchisor and would have the authority to bind the franchisor to such contracts.

To mitigate the risk of a franchisee being deemed an “agent”, franchise agreements should be drafted to expressly exclude any employment and/or agency relationship.

IP Law

Franchise agreements may allow the licencing and/or transfer of all forms of IPRs, depending on the nature of the intended activity or



business of the franchisee. Franchisors may control, supervise and impose conditions and limitations on the exploitation and use of their IPRs by a franchisee.

While Indian law does not appear to require IPRs (e.g., licences, patents and trademarks) to be registered in order to be legally recognised, undertaking relevant registrations (e.g., with the Indian Trade Mark Registry) is advisable in order to obtain statutory protection of such IPRs under Indian law.

Selected questions/aspects

Precontractual disclosure

There are no laws in India which require franchisors to disclose any matters to potential franchisees prior to entering into a franchising arrangement. Accordingly, potential franchisees should perform their due diligence and evaluate any proposed franchise arrangement and the franchisor before entering an franchising arrangement.

Legal Restrictions

As discussed in “Legal Basis of Franchise Law” above, there does not appear to be any specific legislation in India that imposes particular restrictions on provisions in franchise agreements.

Confidentiality

Confidentiality clauses are generally enforceable subject to the provisions of the CA and general principles of contract law.

Franchise fees

As discussed in the “Legal basis of franchise law” section above, the parties to a franchise agreement are free to agree on any matters in connection with franchise fees. However, the FEMA

provides that payments made by an Indian franchisee to a foreign franchisor must be made through an authorised payment institution (i.e., banks and other organisations which have been approved by the Reserve Bank of India as “authorised payment institutions”).

Amendments

The parties to a franchise agreement are free to agree on terms which allow a franchisor to unilaterally amend the terms of the franchise agreement, subject to the provisions of the CA and general principles of contract law.

Termination

Fixed-term franchise agreements will automatically terminate on the expiry of the fixed term—the length of which the parties to a franchise agreement are free to agree on, subject to the provisions of the CA and general principles of contract law.

There does not appear to be any limitations on the right of a franchisor to terminate a franchising agreement under Indian law. The parties to a franchising agreement are free to agree on the grounds for terminating such an agreement (e.g., material breach of contract, repudiation), subject to the provisions of the CA and general principles of contract law.

Renewal and transfer

There are no laws in India which require franchisors to renew a franchise agreement. The parties to a franchise agreement are free to agree on provisions in connection with the renewal and transfer of franchise agreements, subject to the provisions of the CA and general principles of contract law.

Dispute resolution and applicable law

Dispute resolution, court system

Cross-border franchising arrangements may be governed by foreign laws. Accordingly, parties who wish to resolve disputes in connection with such arrangements may resort to arbitration to avoid jurisdictional issues which may arise if a claim were brought in an Indian court. Of course, in the absence of a mandatory arbitration or mediation provision in the franchising agreement or mutual consent by the parties to such dispute resolution options, the parties may commence proceedings in an Indian court. The Judicial system of India is broadly classified into three levels (in descending order of superiority):

- Supreme Court of India;
- High Courts of each state in India; and
- District/Subordinate Courts for one or more districts in India.

Applicable Law

Indian courts will generally defer to the law that parties have chosen to govern a franchise agreement, subject to exceptions such as where the chosen governing law is contrary to public policy in India.

COVID-19

Businesses in India have been badly hit by the COVID-19 pandemic and the Indian government has introduced relief measures in connection with, among others, tax filings, corporate compliance, goods and service tax, customs and central excise, insolvency and bankruptcy, fisheries and banking matters. As of 15 July 2021, there does not appear to be any COVID-19 related legislation in India that directly relates to franchising matters.



Indonesia

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Legal professionals



Region

APAC



Offices

Jakarta

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about Indonesia's franchising law

- 1** There is an obligation for a franchisor to have a Franchise Offer Prospectus prepared, pursuant to the Indonesian Franchise Law.
- 2** Franchisors are required to obtain Surat Tanda Pendaftaran Waralaba/STPW to enable their franchise business activity.
- 3** The Indonesian Antitrust/Competition Law expressly states that a franchise agreement is not subject to the Indonesian Antitrust/Competition Law. However, in practice, we understand that parties to a franchise agreement usually consider the Indonesian Antitrust/Competition Law when preparing the franchise agreement, to avoid scrutiny from the authority.

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Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of Law

Legal basis of Franchise Law

Under Article 1 of Government Regulation Number 42 of 2007 concerning Franchise (“GR 42/2007”) and Article 1 of Regulation of Trade Minister Number 71 of 2019 concerning Franchise Implementation (“TMR 71/2019”), the definition of “franchise” is a special right given to an individual or a business entity with regard to their successful business system for marketing goods and/or services, so that the system can be utilized and used by other parties based on a franchise agreement.

There are certain regulations that specifically deal with the franchise issues, namely Law Number 7 of 2014 concerning Trade, GR 42/2007, and TMR 71/2019 (“Indonesian Franchise Laws”).

To carry out franchise business activity, a franchisor, including a foreign franchisor, is required to obtain a Franchise Registration Certificate (Surat Tanda Pendaftaran Waralaba or “STPW”) from the Ministry of Trade. The Certificate is valid till five years and is extendable for another five years. To obtain this Certificate, certain documents are required as stated in TMR 71/2019. One of these documents is a prospectus that sets out the offered franchise business from the franchisor. In terms of foreign franchisors, they must legalize their Franchise Offer Prospectus to a public notary by attaching a statement letter issued by the Trade Attaché of the Republic of Indonesia or the Representative Office of the Republic of Indonesia in the franchisor’s country of origin.

Corporate Law

The most common corporate form to set up business in Indonesia is the limited liability company (Perseroan Terbatas or “PT”). It can be easily set up by two or more people with the

amount of capital based on the agreements of shareholders in domestic investment (PMDN Company), and a minimum of issued and paid-up capital of IDR 10,000,000,000 for a Foreign Direct Investment (PMA Company). The establishment costs for PT (PMDN/PMA) are very moderate. In addition, pursuant to Law Number 11 of 2020 concerning Job Creation and Government Regulation Number 8 of 2021 concerning Company’s Authorized Capital and Incorporation, Amendment, and Dissolution of Companies Qualifying as Micro and Small Enterprises, Indonesia has granted an opportunity for every individual to establish a micro and small enterprise with a sole proprietorship of one person.

There are restrictions for foreign investors when conducting certain businesses in Indonesia, which refer to the Positive List of Investment (Daftar Positif Indonesia or “DPI”) regulated under Presidential Regulation Number 10 of 2021, as amended by Presidential Regulation Number 49 of 2021, concerning Investment Business Lines. Generally, business sectors that are not identified under the DPI are considered open for foreign investment without restriction, unless other specific law and regulation provide otherwise. Also, for several identified sectors, there may be maximum foreign ownership thresholds applicable (in addition to other requirements), pursuant to the Indonesian Standard Industrial Classifications (Klasifikasi Baku Lapangan Usaha Indonesia or “KBLI”). In principle, if the franchisor’s business activity is not identified under the DPI, it is open for a foreign investment. However, the legal feasibility of the proposed foreign investment should be assessed with reference to both the DPI and applicable sectoral regulations.

Consumer Protection Law

Under the Indonesian Franchise Laws, a franchisee is not defined as a consumer but as an individual or a legal entity that is given the rights by a franchisor to use the franchise, based on a franchise agreement and protected by the specific regulations on franchise in Indonesia. However, in general, when the franchisee orders some supplies from the franchisor to carry out their business under a sale and purchase agreement, the franchisee will be treated as a consumer and protected under the Indonesian Consumer Protection Law.

Antitrust/Competition Law

Article 50 (b) of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (“Law 5/1999”) expressly states that agreements related to franchise are excluded from the implementation of this law. However, in practice, there are legal practitioners and academics that advise a franchise agreement to comply with the requirements under Law Number 5 of 1999 to avoid scrutiny from the authority.

Employment Law

A franchise agreement shall not constitute any employment relationship of employee and employer between the franchisee and the franchisor. The franchisee shall remain independent as an individual or a legal entity and have free will to conduct its business activity.

Law on Commercial Agents

Under the Indonesian laws, a franchisee is not treated as a commercial agent due to the differences in legal definition and characteristics between commercial agents and franchisees in Indonesia. Therefore, regulations on commercial agents are not applicable to franchisees.

IP Law

Under TMR 71/2019, a franchise business must have its IP right registered. Hence, a franchisor must register its franchise business trademark pursuant to Law Number 20 of 2016 concerning Brands and Geographical Indications. It must be taken into account that IP protection for trademarks in Indonesia shall apply in terms of territorial basis. Therefore, the franchisor needs to register its franchise business trademark with the Director General of Intellectual Property Rights of Indonesia to protect its brand from infringement. Please note that a registered trademark with the International Registration of the World Intellectual Property Organization is not protected under the Indonesian IP Law.

Selected questions/aspects

Precontractual disclosure

Under TMR 71/2019, a franchisor or sub-franchisor must submit the Franchise Offer Prospectus to the prospective franchisee or prospective sub-franchisee in no later than two weeks prior to the signing of the franchise agreement.

The Franchise Offer Prospectus must be written in Indonesian language and contain the following:

- Identity of franchisor or sub-franchisor;
- Business legality of the franchise;
- History of business activity;
- Organization structure of franchisor or sub-franchisor;
- Financial statements of the last two years;
- Number of existing business locations;
- List of franchisee or sub-franchisee;
- Rights and obligations of franchisor or sub-franchisor and franchisee or sub-franchisee; and
- Information on the Intellectual Property rights of the franchise.



A franchisor or sub-franchisor has to register the Franchise Offer Prospectus by filing a request for the STPW in accordance with the prevailing laws and regulations. For a foreign franchisor, the Franchise Offer Prospectus must be legalized by a public notary by attaching a statement letter from the Trade Attaché of the Republic of Indonesia or the Representative Office of the Republic of Indonesia in the country of origin.

If a franchisor or sub-franchisor does not register the Franchise Offer Prospectus, the Minister, Governor, or Regent/Mayor—based on their respective authority, can impose administrative sanctions in the form of written warning letters, fines, and/or revocation of STPW.

Administrative sanctions in the form of fines are imposed on the franchisors that do not register the Franchise Offer Prospectus after receiving the third written warning letter. The maximum amount of such fines is IDR 100,000,000.

Franchise agreement

A franchise agreement must be written in Indonesian language and contain the following:

- Name and address of the parties;
- Type of the Intellectual Property right;
- Business activity;
- Rights and obligations of franchisor and franchisee;
- Assistance, facility, operational guidance, training, and marketing provided by franchisor;
- Business area;
- Franchise period;

- Procedure for royalty payment;
- Ownership, change of ownership, and rights of heir;
- Dispute resolution;
- Procedure to extend and terminate franchise agreement;
- Warranty from franchisor; and
- Number of existing business locations.

Legal restrictions

There are restrictions under the provisions of Indonesian laws concerning franchise agreements, namely: (i) selling prices of franchises are prohibited from being fixed as it will eliminate price competition between franchisees, and (ii) franchisors may not prohibit franchisees from buying supplies from other parties, as long as they meet quality standards.

Franchise fees

There are no requirements for franchise fees or royalties in a franchise agreement. The determination of franchise fees or royalties shall be made based on the agreement by both parties, including the amount of interest that may be charged on overdue payments. In addition, payments to a foreign franchisor may be made in the franchisor's domestic currency.

Confidentiality

The confidentiality clause in a franchise agreement is very common and enforceable in Indonesia to protect the Intellectual Property right, the know-how, and the characteristics of the franchise against any duplication or imitation. Furthermore, a confidentiality clause is advisable to be included in a franchise agreement, to provide adequate protection for existing trade secrets.

Amendments to Franchise Agreement

Considering that a franchise agreement is entered into between a franchisor and a franchisee, the franchisor is unable to unilaterally amend the agreement without the consent of the franchisee.

Termination

A franchise agreement is entered into for a certain period of time and will be terminated with the lapse of that period. A unilateral termination by one of the parties before the franchise period ends is not admissible, unless both parties agree on such termination with the procedures set by both parties in the franchise agreement.

Renewal and transfer

There is no obligation for a franchisor to renew a franchise agreement and the franchisor can refuse the renewal of the agreement. Usually, renewals should be done accurately, in writing, and should be agreed by both parties. The franchisor may restrict the franchisee to transfer its franchise to sub-franchisees. In addition to transfer, Indonesian laws require a franchise agreement to contain a provision on ownership, change of ownership, and rights of heir—in the event of a franchise ownership transfer or upon the death of the franchisor.

Dispute Resolution and Applicable Law

Dispute resolution, court system

Indonesia adheres to the district court system, consisting district courts for the first court level, high courts for the appeal level, and the

Supreme Court. The district court system accommodates every individual or party with a dispute to submit a file to a district court based on the domicile of the defendant, if there is a default in contract/agreement or unlawful act. It is also recommendable for both parties to agree on arbitration as an alternative dispute resolution forum to settle the dispute between both parties. It is admissible for both parties to select one choice of jurisdiction between the district court system and the arbitration in a franchise agreement.

Applicable Law

It is expressly required under the Indonesian Franchise Laws that a franchise agreement must be made, pursuant to the laws of the Republic of Indonesia.

COVID-19

Since early 2020, the Covid-19 pandemic has had a huge impact on various sectors, especially on the economic condition of Indonesia. This also includes the franchise sector as the government has issued policies to temporarily prohibit all non-essential and critical workers from working from the office and cease the operations of shopping centers. Earlier this month, Indonesia's president announced a new restriction policy for parts of Java and Bali islands, in an effort to contain the rapidly spreading Delta variant of Covid-19, including closing mosques, schools, shopping malls, and sport facilities, which affects the sustainability of franchise businesses in Indonesia.

Italy



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Region

EMEA



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about Italy's franchising law

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Under law 129/2004 ("Franchising Law"), contracts must be in writing, with minimum duration of three (3) years and expressly include the following information:

- Value of expenses for franchisee;
- Calculation, payment method of royal and minimum revenue for franchisee;
- Potential territorial exclusivity;
- Know-how provided;
- Assistance, training services of franchisor;
- Renewal, resolution, transfer conditions.

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Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of franchise law

Franchising agreement is defined as “the contract between two legal entities, which are economically and judicially independent, under which a party grants a set of industrial or intellectual property rights relating to trademarks, trade names, signs, utility models, designs, copyrights, know-how, patents, technical and commercial assistance or consultancy, by including the franchisee in a system consisting of a plurality of franchisees distributed throughout the territory, in order to market certain goods or services”. Furthermore, the general principles set forth by the Italian Civil Code regarding contracts and obligations apply to franchising agreements.

Corporate Law

Regarding the legal form of the parties involved in the franchise agreement, there are no limitations under the subjective profile. The contractual parties can be physical people or legal entities, as long as they qualify as entrepreneurs pursuant to articles 2082 and 2195 of the Italian Civil Code.

Consumer Protection Law

Potential franchisees are considered entrepreneurs and not consumers. With reference to the initial stage in which the franchisor turns their commercial communication to the potential franchisee to insert in their network, Legislative Decree No. 145/2007 on misleading advertising between companies (B2B) applies.

Employment Law

A natural assumption for the existence of franchising agreements is the reciprocal judicial and economic autonomy of the contractual

parties. In this regard, the subsistence of a subordinate employment relationship is incompatible in such cases.

Law on Commercial Agents

An “agent” distinguishes itself from a franchisee because the former is considered as a “para-subordinate”, while the latter is an independent entrepreneur. Due to this, the franchisee takes on and bears the business risk, unlike the agent. In addition, the agent’s fee is always constituted by a commission on deals carried out successfully, while the franchisee realizes its gain by recharging the price of goods or services offered, which the franchisee purchases from the franchisor and re-sells it in the name and on its own behalf.

IP Law

Protection and regulation of intellectual property rights represents the core of the franchising agreements. In fact, through such agreements, the franchisor will usually grant the franchisee a license to use and exploit their intellectual property, particularly their trademarks and know-how, for the purpose of carrying out the franchising business. In this regard, the definition of franchising under the Franchising Law specifies that the franchisor must grant the availability of “a set of industrial or intellectual property rights relating to trademarks, trade names, signs, utility models, designs, copyrights, know-how, patents, technical and commercial assistance or consultancy” to the franchisee.

Several interests come into play, and have to be protected and regulated within the framework of such contracts. On one hand, the franchisor has an interest in ensuring that the franchisee uses the licensed rights in an

appropriate manner, consistent with the image and quality standards of the franchise network. On the other hand, the franchisee has an interest in the licensed rights being regularly registered and free from constraints or oppositions from third parties. These aspects are normally regulated through specific clauses in contracts, which may also provide for penalties or express termination clauses in the event of non-compliance.

Once the franchising agreement has been terminated, the relative license contained therein will also be terminated and the franchisee will no longer be authorized to use the franchisor's distinctive signs. Following the contract termination, any abusive use of the intellectual property rights by the franchisee may be prevented by the franchisor by filing a precautionary injunction.

With regards to the protection of licensed trademarks, Article 122-bis of Legislative Decree n.30/2005 (Italian Industrial Property Code) provides that the licensee may also be entitled to bring a legal action against the infringement of licensed trademark, provided they have obtained the consent of the trademark owner (i.e., the licensor). Nonetheless, if the licensee holds an exclusive license and the trademark owner has failed to act promptly to protect their intellectual property rights, then the law grants the right to the licensee to bring a legal action against the infringer, regardless of the trademark owner's consent. Moreover, under a procedural perspective, the licensee may also intervene in an infringement action brought by the trademark owner in order to obtain compensation for the damage suffered.

For the purpose of carrying out the franchising activity, the franchisor will also grant the franchisee a license to use their company

know-how. Under Franchising Law, "know-how" is defined as "a patrimony of unpatented practical knowledge derived from experience and tests carried out by the franchisor, which is secret, substantial and identified".

To this end, in accordance with the Italian Industrial Property Code know-how is granted protection only when:

- it is secret;
- it has gained economic value due to it being a secret;
- adequate measures to maintain it a secret are implemented by the owner.

Often, in order to protect the know-how granted to the franchisee from possible unauthorised uses or disclosures, franchisors will include certain clauses in the contracts. These clauses are aimed at providing an obligation to the franchisee and its collaborators to use the know-how only for purposes strictly related to the contractual performance and for strict confidentiality clauses. Moreover, the franchising contract can also state that breach of said clause may result in a penalty for the franchisee.

Selected questions/aspects

Precontractual disclosure

Article 4 of the Franchising Law provides that at least 30 days prior to the execution of a franchise agreement, the franchisor must deliver to the franchisee a complete copy of the contract to be signed together with the following annexes, with the exception of those documents for which there are objective confidentiality requirements:

- main corporate data relating to the franchisor;
- details concerning the trademarks owned or otherwise used by the franchisor;

- description of the business activity which is the subject of the franchise agreement;
- list of franchisees operating in the system;
- indication of the annual change in the number of franchisees and their location;
- description of any proceedings in which the franchisor is involved.

The above-mentioned disclosure obligations aim at ensuring the protection and the informed decision of the prospective franchisee. If the franchisor omits to provide such information at all or provide false information, the franchisee can claim an annulment of the contract and may be entitled to obtain damages, pursuant to Article 8 of the Franchising Law.

With regards to the master franchise, two distinct relationships must be considered: (i) between franchisor and master franchisee, and (ii) between master franchisee and sub-franchisees (where the master franchisee acts as a kind of 'franchisor' vis-à-vis the sub-franchisees), as follows:

- Considering the relationship between franchisor and master franchisee, the latter is the 'weaker' party and the disclosure obligations fall upon franchisor;
- With respect to the relationship between the master franchisee and the sub-franchisees, the disclosure obligations fall upon the master franchisee.

Legal restrictions

Antitrust/Competition Law

Franchise agreements may contain restrictions in contrast with Article 101 of Treaty on the Functioning of the EU ("TFEU") and/or Article 2 of the Italian Antitrust Law (Law No. 287/1990). Exemptions from the prohibition in Article

101 TFEU and Article 2 of the Italian Antitrust Law are possible under the EU-Vertical Block Exemption Rule ("V-BER"). This can be possible, provided that the respective parties to a franchise agreement do not have a market share of more than 30% each and the franchise agreement does not contain "black clauses" (such as provisions dictating fixed prices or prohibiting passive sales outside a designated territory, etc.), which would render the whole agreement void. "Grey clauses", such as a non-compete obligation exceeding five (5) years, may only cause a specific provision (but not the whole agreement) null and void.

In case of breach of Article 101 TFEU and/or Article 2 of the Italian Antitrust Law, fines up to 10% of the parties' total turnover may be imposed.

Furthermore, a great imbalance in the contractual rights and obligations between the parties may be qualified as an abuse of economic dependence pursuant to Law No 192/1998. Consequences of abuse of economic dependence infringement include nullity of the agreement, possible actions for damages, and fines up to 10% of the infringer total turnover.

Franchise Fees

Pursuant to Article 3, paragraph 4, b) of the Franchising Law, the agreement must indicate the expenses of the investments and potential entrance fees, as well as the method of calculating the royalties. In case of overdue payments, the discipline of default interest applies (Article 1244 of the Italian Civil Code and Legislative Decree 9 October 2002, No 231). The parties can decide to apply a legal rate or a conventional rate. If the conventional rate is higher than the legal rate, such fee must be determined in writing and not exceed the threshold of luxuriousness.

Confidentiality

Pursuant to Article 5, paragraph 2, of the Franchising Law, the franchisee undertakes to keep the maximum discretion regarding the company's activities, even after the termination of the contract. In practice, the franchisor normally requires the franchisee to sign a specific confidentiality agreement. Confidentiality obligations apply to both the franchisee and its personnel.

Amendments

Clauses specifying the goods/services which are the subject matter of the franchise relationship and the possible power of the franchisor to change the range of products, to eliminate some of them or to introduce new ones, are normally provided within the franchise agreement. In the absence of a written reservation of this right, the franchisee may object to the ineffectiveness of the change unilaterally imposed by the franchisor.

Termination

There is no specific provision on withdrawal right provided by Franchising Law. Pursuant to Article 1373 of the Italian Civil Code, a party may withdraw from a contract without any specific reason only if such a contract specifically provides for a right of withdrawal. However, in the absence of such a clause, withdrawal right cannot be exercised, unless the agreement is of indefinite duration.

Lacking a specific right of withdrawal provided by the contract, pursuant to Article 1372 of the Italian Civil Code a contract may be terminated upon mutual consent by the parties.

In this case, lacking a specific clause in the agreement granting the franchisee such a withdrawal

right, it is not possible for the franchisee to exercise a unilateral right of withdrawal before the natural expiry of the agreement.

Pursuant to Article 3 of the Franchising Law, franchising contracts must last at least three (3) years, but can always be terminated early for material breach of one of the parties. This is in line with general principles provided for by Article 1453 et seq. of the Italian Civil Code.

Renewal and transfer

The Franchise Act does not provide for a "right to renewal"; Article 3, by requiring the contract to define the conditions of renewal, has de facto denied that renewal must necessarily be automatic.

It is very common in practice to include clauses providing for a deadline by which the franchisee must express its willingness to renew the contract; once the deadline has expired, the contract will be terminated.

With regard to the possibility of assigning the Agreement and/or the obligations arising therefrom, franchising agreements are generally considered to be *intuitu personae* agreements, meaning that personal qualities of the contracting parties are considered to be of particular importance.

Dispute resolution and applicable law

Dispute resolution, court system

Pursuant to Article 7 of the Franchising Law, for disputes relating to franchising agreements, the parties may agree that, before going to court or resorting to arbitration, an attempt at conciliation must be made at the Chamber of Commerce, in whose territory the franchisee is established.



COVID-19

With the recent and prolonged closure of non-essential shops, the franchising world has been significantly impacted. The main effect of the pandemic is the concept of frustration and force majeure, and the impossibility of completing certain contractual obligations due to the sanitary crisis. In such a situation, the measures adopted for the Coronavirus constitute a cause for liability exemption from contractual breach. This is regardless of the specific contractual provisions, for both the franchisors and the franchisees, pursuant to and for the purposes of art. 1256 of the Italian Civil Code. Such exemption was confirmed by the "Decreto Cura Italia" (DL 18/2020) which, as Art.91 specifically explains, provides that "compliance with the containment measures is always assessed for the purpose of excluding, pursuant to and for the purposes of articles 1218 and 1223 of the Civil Code, the liability of the debtor, also in relation to the application of any forfeiture or penalties related to delayed

or omitted fulfillments". Article 1467 of the Civil Code further dictates that in long-term contracts, if the performance of one of the parties has become excessively burdensome due to unpredictable and extraordinary events, then such party can ask for the rescission from the contract, with the effects established by Article 1458. However, the code is very clear in that the rescission cannot be asked for if the burden is included in the normal contractual circumstances. In particular, because franchisees classify as entrepreneurs, they have to bear a high degree of business risk. That said, therefore, although the Covid-19 global disruption has the potential of being a reason why a contract would be rescinded, a case-to-case analysis is most suitable. This is because when coming to a judgment, one may have to look at different factors such as governmental subsidies and eventual dispositions that have ordered the closure of certain economic activities in specific sectors.

Japan

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Legal professionals



Region

APAC



Offices

Osaka, Tokyo

Essentials

about Japan's franchising law

- 1 There is no general statute that regulates franchises, and a franchisor and a franchisee can freely agree on the terms of a franchise agreement under the principle of freedom of contract.
- 2 However, there are several laws affecting franchises that one should pay attention to, including the Antimonopoly Act.
- 3 One should also keep an eye on the developments and updates of the relevant laws as some have been revised recently.

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Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

There is no general statute which defines a “franchise”. However, the Guidelines Concerning the Franchise System under the Antimonopoly Act (“Guidelines”) published by the Fair Trade Commission (“FTC”) describe franchises as follows: The franchise system is generally considered to be a form of business in which the head office provides the member with the rights to use a specific trademark and trade name, and also provides coordinated control, guidance, and support for the selling of goods, the provision of services, and other business and its management of the member. In return, the member pays consideration to the head office.

The Small and Medium-sized Retail Business Promotion Act (“SMRBPA”) defines a “chain business” as a “business that continuously sells goods or acts as an intermediary for sales of goods, and provides management-related guidance for primarily small and medium-sized retailers, based on contracts with uniform terms and conditions” and a “specified chain business” as “any chain business with terms and conditions that include a provision that permits its members to use certain trademarks, trade names, or any other signs, and a provision that collects membership fees, deposits or any other money from the member when joining the business.”

Specifics regarding foreign franchisors No restriction is imposed on foreign franchisors conducting franchise business, just on the basis of it being a franchise. However, an advance notification under the Foreign Exchange and Foreign Trade Act (“FEFTA”), and industry-specific permits and licenses may be required.

Corporate Law

A branch office and a subsidiary are available for foreign franchisors to carry on business in Japan. The adoption out of these two options is decided primarily from a taxation perspective. There are mainly two forms of entity for a subsidiary: the Kabushiki Kaisha (Corporation) and the Godo Kaisha (LLC). The latter is increasingly being selected because the establishment fees can be saved and there is no obligation to publish financial statements. It is necessary to check whether or not an advance notification under the FEFTA is required, as it will be required for foreign investors to set up a branch office or a subsidiary to carry out certain categories of business in Japan. The FEFTA is of importance to note because it has been revised frequently in the past few years.

Consumer Protection Law

The Consumer Contract Act, which is the primary consumer protection law in Japan, regulates “consumer contracts” that are contracts between a consumer and a business operator and therefore, in principle, does not apply to franchise agreements between business operators.

Antitrust/Competition Law

When negotiating a franchise agreement, it is necessary to ensure one’s conduct does not fall. For example, within the following “unfair trade practices” under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (“Antimonopoly Act”): “luring customers by deception”, “abuse of dominant bargaining position”, or “restrictive trading”.

The Guidelines and other guidelines for relevant areas published by the FTC provide the factors considered for enforcement by the FTC and it is common practice to take note of and abide by



them. The Guidelines were revised in April 2021, following the publication of the report, “Fact-Finding Survey about Transactions between Head Offices of Convenience Stores and Members” (November 2020). The descriptions of (1) explanations when soliciting, (2) compelling purchases of certain quantities, (3) 24/7 business, (4) dominant strategy, and (5) sales of closeout items were newly added in the Guidelines. The FTC may issue cease and desist orders or impose surcharges for violations of the Antimonopoly Act.

Employment Law

In practice, the determination of whether someone is a “worker” differs depending on whether one is dealing with the Labor Standards Act and the Labor Contracts Act, which regulate individual labor relationships, or dealing with the Labor Union Act, which regulates collective labor relationships and it tends to be interpreted broader in the latter case.

If franchisees are deemed to be “workers” under the Labor Standards Act and the Labor Contracts Act, there arises the risk that regulations on wages and working hours, prohibitions of the abuse of dismissal rights, and obligations to protect workers’ safety will be imposed on franchisors. However, a court recently decided that a franchisee does not constitute a worker because it manages the store as an independent business operator. Also, franchisors need to react to collective bargaining if a union that is organized by franchisees falls within a “labor union” under the Labor Union Act. This topic is controversial. Recently, the Tokyo Labor Relations Commission ruled that the franchisees in a cram school case were workers, while the Central Labor Relations Commission ruled that franchisees in a convenience store case were not workers. Courts have yet to decide on the matter.

Law on Commercial Agents

No special restrictions will be imposed if franchisees are deemed to be commercial agents. Here, something called “name-lending liability” is worth mentioning. This is where a franchisor will bear the same responsibility as the franchisee against a counterparty in a case where the following requirements are met: (1) there is an appearance that the franchisor operates the store, (2) there is attributability to the franchisor, and (3) the counterparty misconceives the situation. As such, it is advisable to make sure that a third party can recognize that franchisees are members of the franchisor, and to patrol and monitor the operation of franchisees regularly.

IP Law

Trademarks once registered will be protected against infringement by the Trademark Act, under which injunctive relief is available, and in certain cases, an infringer will be subject to criminal punishment. Unregistered trademarks can also be protected by the Unfair Competition Prevention Act (“UCPA”) against certain infringing activities. Know-how, if it falls within the definition of “trade secrets” under the UCPA, will be protected against infringing activities by the UCPA, under which injunctive relief is available, and in certain cases, an infringer will be subject to criminal punishment.

Selected questions/aspects

Precontractual disclosure

The obligation of a franchisor to explain under the principle of good faith has been recognized by courts and pre-contractual disclosure is required by the SMRBPA and the Antimonopoly Act.

When conducting a specified chain business under the SMRBPA, a franchisor must deliver a document that states the following items and explain it in advance: (1) franchise fee and deposit, (2) terms and conditions about sales of goods, (3) guidance about management, (4) trademarks and trade names, (5) duration, renewal, and termination of contract and so on. Note that the cabinet ordinance was revised and an item will be added to the above from 1 April 2022. From that period onwards, it must also state matters regarding income and expenditure of the past three business years of franchisees that are similar in terms of population, traffic, and other location conditions of the surrounding area. Although the language is not specifically designated, it should be in Japanese because the counterparties should be able to understand the content. Against non-compliance with the above duties, the authorities may make recommendations for compliance and if the recommendations are not followed, they may make a public announcement of that fact.

In addition, even in cases where the franchisor does not engage in specified chain business, disclosure of sufficient information when soliciting is required under the Antimonopoly Act, as the Guidelines explain. If disclosure is not sufficient, one could fall within “luring customers by deception”. As stated above, the FTC may issue cease and desist orders or impose surcharges for violations of the Antimonopoly Act.

In any of these events, franchisees may seek termination (fraud or mistake) or invalidity (violation of public order and morals) of the contract and claim damages (tort or contractual liability) against the franchisor.

Legal restrictions

In principle, a franchisor and a franchisee may freely agree on the franchise agreement terms (the principle of freedom of contract), except for the restrictions in compulsory provisions under the Antimonopoly Act and the Civil Code. However, if it were to (although it is unlikely) fall within “standard terms of contract”, which were newly introduced by the amendment of the Civil Code (effective from 1 April 2020), the franchisee is deemed to not have agreed to provisions (1) that restrict the rights or expand the duties of the franchisee and (2) that are found, in light of the manner and circumstances of the standard transaction as well as the common sense in the transaction, to unilaterally prejudice the interests of the franchisee in violation of the principle of good faith.

Franchise fees

As long as it is not against public order and morals, a franchisor and a franchisee may freely agree on the nature, amount, and payment of franchise fees and late payment penalties.

Confidentiality

Confidentiality clauses are enforceable, assuming they are part of the contractual content and thus, parties may claim injunctive relief and damages.

Amendments

A franchisor cannot amend a franchise agreement unilaterally unless otherwise provided in the franchise agreement. However, in the case of standard terms of contract, the franchisor may amend agreements unilaterally (1) if the amendment conforms to the general interest of the counterparties, or (2) if the amendment is not contrary to the purpose of the contract, and it is reasonable given the circumstances

concerning the amendment. These can include necessity of the amendment, the appropriateness of the details of amended conditions, whether or not it is provided in the contract that the standard terms may be subject to an amendment pursuant to the provisions of the Civil Code, and the details of such provisions.

Termination

The parties may, after demand, terminate the agreement if the counterparty does not perform its obligations and may terminate immediately in certain cases. These circumstances could be around where the performance of the obligation becomes impossible under the Civil Code. Other than that, the parties are free to agree on situations in which parties can terminate the agreement. However, some courts require circumstances that destroy the relationship of trust or compelling reasons to be unable to continue a contract in order to terminate the agreement.

Renewal and transfer

A franchise agreement will terminate upon the term’s expiry. In practice, a renewal clause is usually included which provides that the agreement automatically renews unless one of the parties expresses a refusal of renewal by a certain point in time before the expiration. However, as with the cases of termination, some courts require compelling reasons to be unable to continue a contract in case of refusal to renew.

Further, although it is considered to be an assignment of contractual status or an assignment of claims and obligations, under the Civil Code, a franchisee may not assign its franchise without the franchisor’s consent and it is common to include an assignment restriction clause in a franchise agreement.



Dispute Resolution and Applicable Law

Dispute resolution, court system

Litigation and arbitration (if agreed to) are available as means of dispute resolution. The court system of Japan is a threeter system. There is no jury system or discovery. Generally speaking, arbitration is recommended for foreign franchisors in terms of language, confidentiality, and the professional knowledge of arbitrators.

Applicable Law

In principle, a franchisor and a franchisee may freely agree on the applicable law of their franchise agreement.

COVID-19

It is not specific to franchises, but during the pandemic, the Japanese government requested restaurants and commercial facilities, including many franchises, to close shops and shorten business hours under the declaration

of a state of emergency, while at the same time taking measures to provide compensation for business operators who cooperate with the requests. The issues here are, for example, whether franchisees may terminate their franchise agreements or whether franchisees may ask for exemptions from the payment of royalties (in cases where there is a minimum royalty clause). The applicability of the principle of *clausula rebus sic stantibus* to the fact that franchisees are compelled to close their stores and whether Covid-19 pandemic constitutes a force majeure need to be considered. The Supreme Court of Japan recognizes *clausula rebus sic stantibus* but is reluctant to apply it to cases. On the other hand, whether the Covid-19 global disruption constitutes a force majeure will be a case-by-case decision, considering whether parties can possibly foresee the situation. In any event, parties will be required to, and in fact do, negotiate in good faith, which is the principle under the Civil Code.

Latvia

10

Legal professionals



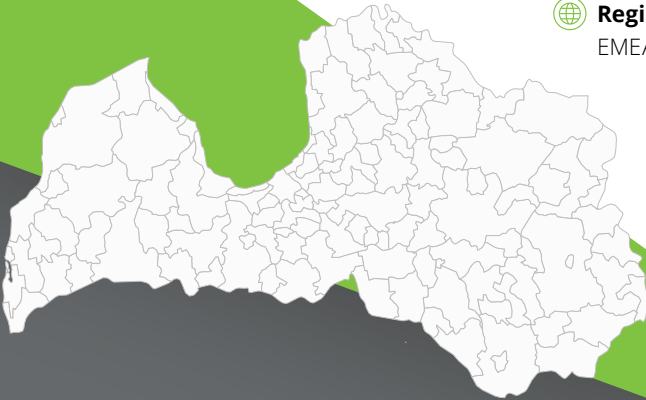
Region

EMEA



Offices

Riga



Essentials

about Latvia's franchising law

- 1 Pre-disclosure obligations apply irrespective of the provisions of the franchise agreement
- 2 The commercial secret protection mechanism is available according to the Commercial Secret Protection law
- 3 No specific provisions on franchise fees except for payments related to the non-competition obligation of the franchisee

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

The legal framework of franchise agreements is provided by the Commercial law of Latvia, which contains a separate section regarding franchise agreements (Articles 474 to 480). Commercial law defines the franchise agreement. A franchise agreement is an agreement by which a merchant (franchisor) grants the other party (franchisee) the right to use a trademark, other intellectual property rights, know-how in the sale, distribution, or provision of services, under a system developed and tested by the franchisor (franchise). But the franchisee pays the agreed fees (Article 474). As the franchise relationship is private law, the relationship between merchants, the legal framework of the franchise agreement provided in the Commercial law is applicable, if the parties have not agreed otherwise. There are only a few exceptions when Commercial law provisions are mandatory (for example, definition of a franchise agreement, pre-contractual obligations). Also, the mandatory rules of the public law overrule the provisions of the franchise agreement (for example, mandatory licensing regulations for particular types of commercial activity, competition law).

Specifics regarding foreign franchisors

There are no restrictions regarding foreign franchisors. Any person can become a franchisor and enter into the franchise agreement.

Corporate Law

Latvian corporate law does not impose any restrictions on operations of foreign merchants in Latvia, nor on franchise systems in particular.

The most common corporate form for business operations in Latvia is the limited liability company (as a "Sabiedrība ar ierobežotu atbildību" or "SIA"). SIA requires a minimum share capital of EUR 2800. Another option is to establish a joint-stock company ("Akciju sabiedrība" or "AS"). The minimum share capital requirement for AS is EUR 35000, and AS can place its shares in a public offering. For both types of companies, only the registered share capital is liable to the company's creditors, not the shareholders personally. In order to establish SIA or AS, the founders need to sign an agreement or decision on the establishment and other documents, appoint a board (for AS also a supervisory board), and register the company in the Commercial register.

Foreign companies often choose to operate in Latvia through the branch. The branch is not a legal entity but a part of the company operating separately on behalf of the company. To establish a branch, a branch manager shall be appointed, and the branch needs to be registered with the Commercial register.

Consumer Protection Law

According to the Consumer Rights Protection Law, a consumer is an individual who buys goods or receives services for a purpose not related to his/her commercial or professional activity. For this reason, the franchisee does not qualify as the consumer, and laws and regulations determining consumer rights are not applicable.

Antitrust/Competition Law

According to the Latvian legislation, the mandatory rules of the public law overrule the provisions of the franchise agreement. Such kind of public law is the Competition law. The

rules on prohibited agreements overrule the agreement provisions, which distort competition within the territory of Latvia (Art 11 of the Competition law). The provisions of the franchise agreement, which distort competition, are deemed to be invalid retrospectively, i.e., as of the moment when the franchise agreement was concluded.

Employment Law

There is no specific labor regulation related to franchise and employment relationships is governed by the Labor Law. A franchise agreement is a type of agreement governing a particular business activity. The employment agreement is a different type of agreement according to which an individual undertakes to perform certain tasks and is entitled to receive a salary. Due to significant differences in definitions of the substance of these agreements, the franchisee should not be considered to be an employee of the franchisor. To avoid any risk that a franchise agreement could be considered to constitute an employment relationship, the franchise agreement should clearly state the type of relationship between the parties.

Law on commercial agents

According to Commercial law, a commercial agent activity is a separate type of business activity. The commercial agent is a merchant, who is permanently authorized on behalf of and for the benefit of the other person (principal). The agent prepares the conclusion of contracts or to conclude contracts with the third parties (Article 45 of the Commercial law). There are no limitations for the franchisor to authorize the franchisee to perform such types of activity as part of the franchise agreement. If the franchisee acts as a commercial agent, then

the mandatory provisions of law regarding the commercial agent apply: (1) the commercial agent is entitled to receive remuneration every month, the period for the calculation of remuneration can be prolonged only up to 3 months, (2) the minimum termination period for a commercial agent's contract by any party is 1 month – if termination is made in the 1st year of the contract, 2 months – if termination is made in the 2nd year of the contract, 3 months – if termination is made in the 2nd year of the contract, and 4 months – if termination is made on fourth or subsequent years of contract, (3) any party can terminate the contract immediately on the grounds of important reason, and other. These mandatory provisions of law prevail over any agreements.

IP Law

The trademarks are protected by Trademark Law as there are no specific provisions about the trademarks used for the franchise. Owners of trademarks can acquire the right to prohibit the other persons to use their trademarks by registering their trademarks – either as International Registration with the World Intellectual Property Organization (WIPO), as EU Trademark with the EU Intellectual Property Office (EUIPO) in all 27 EU member countries, or as a national trademark in Latvia only with the Patent Office of the Republic of Latvia. If the trademark is not registered, the owner using a non-registered trademark can only dispute the registration of the trademark by another person and needs to prove the rights of the owner of the well-known non-registered trademark.

Know-how is protected as a commercial secret. The protection is provided by the Commercial law and Commercial Secret Protection Law.

The Commercial Secret Protection Law defines what type of action is deemed to be lawful and what is considered to be unlawful in relation to the acquisition, use, and disclosure of the commercial secret, and commercial secret protection mechanism available to the injured party.

Selected questions/aspects

Precontractual disclosure

The Commercial law determined that prior to entry into the contract the franchisor must provide the following information to the potential franchisee: (1) general description of the franchise compliant with the actual circumstances, (2) evidence on the existence of rights included in the franchise and general description of know-how, (3) franchise term and extension options, (4) franchise fee and payment terms, (5) other information the franchisor considers necessary for entry into franchise contract. The franchisee has a general obligation to disclose significant circumstances to the franchisor relevant for entry into the franchise agreement. The law provides the right to the party of the franchise agreement, which has suffered from non-disclosure or provision of misleading information by the other party, to terminate the franchise agreement unilaterally.

Franchise fees

The franchise fees shall be determined in the franchise agreement and are a mandatory part of the agreement. The franchise fees are not regulated by law. Specific payment obligations are provided by law regarding a non-competition of the franchisee. If the non-competition clause is included in the agreement limiting the business activity of the franchisee after the expiry of the franchise

agreement, the franchisee is entitled to remuneration for the whole period of this limitation. The remuneration shall be determined in the franchise agreement. However, if the franchisor terminates the agreement due to potential harm to his reputation or due to an important reason, which was caused by the fault of a franchisee, the franchisee loses his right to receive remuneration.

Confidentiality

The franchisor has a legal obligation not to disclose to the third party the commercial secret, which has become known to the franchisee as a result of using the franchise. This obligation remains effective five years after the expiry of the franchise agreement. Although the Commercial law section on franchise agreements does not provide a specific definition of the commercial secret for the franchise, the general rules section of the Commercial law and the Commercial Secret Protection Law defines the information. It is considered a commercial secret, and these definitions also apply to the franchise. Even if the franchise agreement does not contain the provisions for the protection of commercial secrets, these provisions of law apply.

The Commercial Secret Protection Law provides a commercial secret protection mechanism, which is made available to the parties to protect the information. The injured party may ask the court to prohibit the other person or to impose an obligation to the other person to perform certain actions to protect commercial secrets and terminate unlawful actions with the commercial secret. The injured party may also ask the court to order compensation of loss or non-pecuniary harm.

Amendments/ Termination

The provisions regarding the franchise agreement amendments and termination shall be included in the agreement. The Commercial law states that any of the parties have a right to terminate the franchise agreement according to the provisions of law or agreement. If the agreement does not determine otherwise, the provisions of the law are applicable.

According to the law, any of the parties may withdraw from the agreement, if the performance on the franchise agreement has become too burdensome due to objective change of circumstances or misleading information regarding the significant circumstances was provided by the other party before entering into the contract.

The law provides that in case if the performance on the franchise agreement has become too burdensome due to objective change of circumstances, the parties have to perform negotiations to amend or terminate the contract. The party may refer to the objective changes of circumstances if: (1) changes have occurred after the entry into the agreement, (2) the party could not foresee the change of circumstances at the moment of entry into the franchise agreement, and (3) the party has not undertaken the risk of change of circumstances.

In addition, if as a result of the negotiations agreement between the parties to amend or terminate the agreement has not been reached, any of the parties may ask the court either to decide on the termination of the agreement or amendments of the contract, determining fair distribution between the parties of the loss and gains resulting of changed circumstances.

Renewal and transfer

The Commercial law does not provide any provisions on transfer or renewal of the franchise agreement. The specific provisions on transfer and renewal should be stated in the franchise agreement. In the agreement, the franchisor may prohibit the franchisee from transferring the franchise agreement or any claims arising from it to another person.

If the agreement does not provide specific provisions regarding renewal and transfer, the general provisions of the law are applicable. In such a case, the renewal of the agreement after its expiry is possible only by agreement of both parties. The franchisee can transfer his rights and liabilities arising from the franchise agreement to another person as part of the business transfer. It is possible under the provisions of transfer of merchant's undertaking provided in Article 20 of the Commercial law. According to the definition given in the law, the merchant's undertaking is an organizational unit of merchant consisting of pool tangible and intangible assets and other valuable items used for commercial activity. If the franchisee transfers its undertaking (for example, shop, manufacturing plant) to another person, all rights and obligations related to it, including the relevant franchise agreement, are deemed to be transferred to the acquirer of the undertaking. However, in case of such transfer, the franchisee and the acquirer shall maintain joint liability for the transferred obligations, which existed before the transfer, or it will become due within 5 years after the transfer. This liability provision is mandatory and prevails over any provisions of agreement. The same provisions apply in the case of transfer of an undertaking by the franchisor in case, if part of it is a franchise agreement.

Dispute resolution and applicable law

Dispute resolution, court system

The parties to a franchise agreement can agree on the venue of the disputes. The parties of the franchise agreement may choose that the disputes are reviewed by an arbitration court instead of the state court. In such case, the arbitration clause shall be included in the franchise agreement.

If agreement on venue or jurisdiction of arbitration court is not made, the claims against any party can be brought to the Latvian state courts if the defendant is registered in Latvia or the claim relates to losses that have occurred in Latvia.

Latvia has a three-tier court system. The first instance court is region (city) court, which reviews the case in merits. The judgment of the first instance court is appealable to the district court, which has the competence to review disputes on merits repeatedly. After the appellate court has issued its judgment, the cassation complaint regarding the appellate judgment can be submitted to the Supreme Court. However, the Supreme Court does not have the competence to review the case on merits. The Supreme Court can only verify whether there was a breach of substantive or procedural law during the review of the case on merits. If the Supreme Court finds that there was such breach, it can cancel the judgment in full or part and return the case to a new review in merits by the first instance or appellate instance court.

Applicable Law

The parties of the franchise agreement can agree on a choice of law to apply to their contractual relationship. In order to avoid disputes on applicable law, the governing law shall be determined in the franchise agreement. If the agreement on applicable law does not exist, then it is determined according to the provisions of the Latvian Civil law. The Civil law states that in relation to the contractual obligations. The applicable law is the law of the country where the obligations have to be performed. If this country cannot be determined, then the applicable law is the law of the country where the agreement was concluded.

COVID-19

No specific legislative provisions have been adopted in relation to the franchise agreements. There are only general provisions adopted influencing all types of contractual relationships. Until 1 September 2021, there is a temporary moratorium for compulsory collection of different types of payments – the debtor shall be given 60 days time for voluntary payment before commencement of the compulsory collection process. Also, the application for commencement of the debtor's insolvency process cannot be submitted to the court earlier than 1 September 2021.

Malaysia

6

Legal professionals



Region

APAC



Essentials

about Malaysia's franchising law

- 1** In Malaysia, franchising arrangements are governed by the Franchise Act 1998 ("FA") and its subsidiary legislation, which prescribe strict requirements in connection with franchise agreements. It also includes mandatory terms that must appear in such agreements and the language that such agreements must be drafted in;
- 2** The FA generally treats master franchisees as franchisors, such that master franchisees are subject to similar obligations as franchisors; and
- 3** Franchisors do not need to be registered with professional bodies, but they must register their franchise with certain Government bodies.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

We understand that franchising arrangements in Malaysia are governed by the FA and the Franchise Regulations 1999 (“FR”), which are enforced by the Franchise Development Division of the Ministry of Domestic Trade and Consumer Affairs (“FDD”), and that the FA applies to the operation of any franchise in Malaysia and the sale of such a franchise.

Under the FA, we understand that a “franchise” is generally an agreement under which a franchisor grants certain rights to the franchisee, such as the right to operate a business or use the franchisor’s intellectual property rights (“IPRs”), in exchange for the franchisee providing monetary or other consideration.

Generally, in order to undertake franchising operations in Malaysia, foreign franchisors must register their franchise with, among others, the FDD.

In addition, many franchisors and franchisees are members of the Malaysian Franchise Association, which has formulated a code of conduct that their members are expected to follow (although this is not binding on its members).

Specifics regarding foreign franchisors

As noted in “Legal Basis of Franchise Law” above, foreign franchisors are generally required to register their franchise with the FDD. For such registration, we understand that local authorities typically require the provision of, among others, three (3) years of notarised and audited accounts.

Corporate Law

The most common business structure in Malaysia is a private limited company incorporated in accordance with the Companies Act 2016.

- Shareholders/officers: Every company must have a minimum of:
 - one (1) director who is ordinarily resident in Malaysia;
 - one (1) company secretary who is (i) a Malaysian citizen or permanent resident and (ii) ordinarily resident in Malaysia; and
 - one (1) shareholder.
- Corporate information: The names of the proposed directors/company secretary/shareholders of the company and the proposed local address of the company’s office must be provided.
- Charter documents: A company constitution must be prepared and submitted (along with the “Corporate information” above) to the Companies Commission of Malaysia.

Most required filings with and payments to relevant authorities can be undertaken online, and a company can generally be incorporated within a few – usually two (2) – weeks.

There do not appear to be any unusual restrictions on foreign ownership of businesses under Malaysian law, save for (i) acquiring an interest in companies carrying on business in connection with, among others, financial services, education, public utilities, petroleum production, and shipping and (ii) requirements for members of certain indigenous groups to hold a certain level of shareholding (usually 30%) in certain companies (e.g., companies acquiring real property in Malaysia valued at above RMB20 million).

Consumer Protection Law

Franchisees do not appear to be covered by the definition of “consumer” under the Consumer Protection Act 1999 and will not be protected by its provisions.

Antitrust/Competition Law

Franchising arrangements do, however, appear to be covered by the Competition Act 2010, which generally prohibits, among others, agreements that are targeted at having and/or in fact have a significant adverse effect on competition in any market for goods or services.

Employment Law

The question of whether a franchisee is an “employee” of a franchisor under common law principles is a question of fact, which will be determined based on a variety of factors such as the degree of control exercised by the franchisor over the franchisee, how the franchisee is remunerated and whether the franchisee is obliged to work solely for the franchisor– and other factors. Notwithstanding the above, given that a franchisee must typically pay a franchisor for, among others, the use/exploitation of the franchisor’s intellectual property rights (“IPRs”) and a franchisor would not usually exercise a degree of control over a franchisee to the same extent as an employer would have over their employees, we understand that franchising arrangements are generally unlikely to give rise to an employment relationship under Malaysian law.

To help mitigate the risk of characterization as an employment relationship, a franchise agreement may also stipulate that the franchisee will

be acting in their capacity as an independent contractor, and nothing in the agreement, should be construed as creating an employment relationship between the franchisor and the franchisee.

Law on commercial agents

Generally, the FA provides that a franchising arrangement will not give rise to any agency relationship between a franchisor and franchisee.

IP Law

Franchise agreements may allow the licensing and/or transfer of all forms of IPRs, depending on the nature of the intended activity or business of the franchisee. A franchisor may control, supervise and impose conditions and limitations on the exploitation and use of their IPRs by a franchisee.

While Malaysian law does not appear to require trademarks or licenses to be registered to engage in franchising activities, undertaking relevant registrations with the Intellectual Property Corporation of Malaysia is advisable in order to obtain statutory protection of such IPRs under Malaysian law.

We understand that the FA specifically protects a franchisor’s confidential information by requiring a franchisee to give the franchisor a written guarantee that the franchisee and specific related parties (e.g., directors) will not disclose certain confidential information (e.g., information in the franchise operations manual) to any other person. This obligation continues throughout the term of the franchise agreement, and for two (2) years, after its expiry or termination, whichever is earlier.



Selected questions/aspects

Precontractual disclosure

Under the FA, a franchisor/master franchisee must provide any potential franchisee/sub franchisee respectively with (i) a copy of the franchise agreement and (ii) certain documents prescribed by the FR (e.g., the background of the franchisor and details of the franchisor's directors) at least 10 days before signing the franchise agreement. Franchisors/master franchisees who fail to comply will commit an offense and may therefore be liable for penalties (e.g., fines).

The FA requires franchise agreements to be in writing but the language to be used varies based on the parties as follows:

- the agreement may be in English where it is between a foreign franchisor and a direct local franchisee; and
- the agreement must be in both Bahasa Malaysia and English, where it is between (i) a local master franchisee and its local sub-franchisee and (ii) a local franchisor and a local franchisee.

Legal restrictions

The FA requires certain compulsory provisions to be present in all franchise agreements (e.g., obligations of the franchisor and franchisee and details of the territorial rights granted to a franchisee), which cannot be contracted out of – generally, provisions purporting to do so will be void.

Confidentiality

Confidentiality clauses are generally enforceable under Malaysian law to the extent that they are not inconsistent with the mandatory confidentiality obligations imposed by the FA as noted in "IP Law" above.

Franchise fees

The FA requires franchise agreements to stipulate the franchise/promotion fees or royalties, which may be payable by a franchisee. Save for this requirement, the parties to a franchise agreement are generally free to agree on any matters in connection with franchise fees.

Amendments

The parties to a franchise agreement are generally free to agree on terms that allow for a franchisor to unilaterally amend the terms of the franchise agreement subject to principles of contract law set out in the Contracts Act 1950 ("CA").

Termination

Generally, the FA requires franchise agreements to have a minimum term of five (5) years. Subject to this requirement, fixed-term franchise agreements will automatically terminate on the expiry of the fixed term, the length of which the parties to a franchise agreement are generally free to agree on the subject to principles of contract law set out in the CA.

The FA provides that a franchisor or franchisee can generally only terminate a franchise agreement before the expiration date for a "good cause", including a failure to comply with the terms of the franchise agreement, the bankruptcy of either party, or abandonment of the franchise business.

Renewal and transfer

Generally, a franchisor may refuse to extend a franchise agreement if the franchisee:

- has breached the terms of a previous franchise agreement; or
- fails to provide written notice to the franchisor to renew the term of the franchise agreement.

Unless a franchisor can establish either one of the above, it would seem that the FA requires a franchisor to extend the term of a franchise agreement on terms that are no less favorable than that of the existing franchise agreement if the franchisee has applied for such extension in accordance with the FA.

The parties to a franchise agreement are generally free to agree on provisions in connection with the transfer of franchise agreements.

Dispute resolution and applicable law

Dispute resolution, court system

Cross-border franchising arrangements may be governed by foreign laws. The parties can opt for dispute resolution by arbitration in a “neutral” location (rather than a Malaysian court). In the absence of a mandatory arbitration or mediation provision in the franchising agreement or mutual consent by the parties to such dispute resolution options, the parties may commence proceedings in a Malaysian court.

The judicial system of Malaysia is broadly classified into four levels (in descending order of superiority):

- Federal Court (appellate jurisdiction and only by special leave);
- Court of Appeal (appellate jurisdiction only)
- High Courts of Malaysia in (i) Malaya and (ii) Sabah and Sarawak; and
- Subordinate Courts, consisting of the (i) Sessions Courts and (ii) Magistrates’ Courts.

Applicable Law

Malaysian courts will generally defer to the law that the parties have chosen to govern a franchise agreement (and indeed other agreements), subject to exceptions such as where contrary to public policy.

COVID-19


Businesses in Malaysia have been badly hit by the COVID-19 pandemic, and the Malaysian government has offered financial support for businesses, including providing wage subsidies and extending deadlines for tax and other filings. As of July 24, 2021, there does not appear to be any COVID-19 related legislation in Malaysia that specifically relates to franchising matters.



Mexico

150
Legal professionals

 **Region**
AMERICAS

 **Offices**
Guadalajara,
Mexico City,
Monterrey,
Tijuana

Essentials

about Mexico's franchising law

- 1** The franchise agreement is regulated in Mexican legislation.
- 2** The franchise has minimum content for its celebration, and the franchisor must share information with the franchisee prior to the execution of the agreement.
- 3** The franchisor may have interference in the organization and operation of the franchisee solely to ensure compliance with the standards of administration and image of the franchise.

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Relevant areas of law

Legal basis of Franchise Law

In Mexico, the franchise agreement is regulated in the Federal Law for the Protection of Industrial Property («Ley Federal de Protección a la Propiedad Industrial»).

In this sense, there will be a franchise with the license to use a brand, granted in writing, technical knowledge is transmitted, or technical assistance is provided so that the person to whom it is granted can produce or sell goods or provide services in a uniform manner and with the methods operational, commercial and administrative established by the trademark owner, aimed at maintaining the quality, prestige, and image of the products or services that it distinguishes.

According to Mexican law, the franchise agreement must be in writing, containing, at least:

- The geographical area in which the franchisee will carry out the activities that are the object of the agreement;
- The location, minimum size, and characteristics of investments in infrastructure, with respect to the establishment in which the franchisee will carry out the activities derived from the subject of the agreement;
- The inventory, marketing, and advertising policies, as well as the provisions relating to the supply of goods and contracting with suppliers, if applicable;
- The policies, procedures, and terms related to reimbursements, financing, and other compensation payable by the parties under the terms agreed in the agreement;
- The criteria and methods applicable to the determination of profit margins or commissions of the franchisees;

- The characteristics of the technical and operational training of the franchisee's staff, as well as the method or form in which the franchisor will provide technical assistance;
- The criteria, methods, and procedures of supervision, information, evaluation, and qualification of the performance, as well as the quality of the services provided by the franchisor and the franchisee;
- The terms and conditions to sub-franchise, in the event that the parties so agree;
- The causes for the termination of the franchise,
- The assumptions under which the terms or conditions related to the franchise agreement.

It is worth mentioning that, there will be no obligation of the franchisee to alienate their assets to the franchisor or to whom he designates at the end of the agreement unless otherwise agreed and there will also be no obligation for the franchisee to dispose of or transfer to the franchisor in any moment, the shares of his company or make him a partner unless otherwise agreed.

Intervention of the franchisor: The franchisor may have interference in the organization and operation of the franchisee, solely to ensure compliance with the standards of administration and image of the franchise in accordance with the provisions of the corresponding agreement.

The franchisor will not be considered to have interference in cases of merger, split, transformation, amend of bylaws, transfer of social shares, equity, or shares of the franchisee when this modifies the personal characteristics of the franchisee that have been foreseen in the respective agreement as a determinant of the will of the franchisor for the celebration of such agreement with the said franchisee.

Specifics regarding foreign franchisors

Currently, there is no restriction in Mexican law to establish a foreign franchise in Mexico. However, it is essential to consider that, in the Foreign Investment Law, certain restrictions are stipulated in activities that are exclusively reserved for Mexican nationals or in which foreign investment is limited to a certain percentage.

Additionally, in the case of opening branches in Mexico, it is necessary to submit to the Ministry of Economy the corresponding notice or authorization request, according to the country of nationality of the company.

Corporate Law

The most common corporate regimes in Mexico are the Limited Liability Company («Sociedad de Responsabilidad Limitada») and the Stock Company («Sociedad Anónima»). In both corporate regimes, it is essential to have a minimum of 2 partners or shareholders, with a minimum capital of MXN\$1.00.

In both cases, the procedure implies the authorization for the use of the corporate name, as well as going before a notary public for the formalization of the bylaws and transitory clauses in which the amount of capital, administrators, proxies, among others, is defined, as well as its registration before the Public Registry of Commerce, for publicity purposes before third parties.

Consumer Protection Law

In Mexico, consumer protection legislation does not specifically regulate the nature of the franchise or qualifies the franchisee as a consumer since the franchise is understood as a voluntary agreement between the parties involved.

However, said the legislation does stipulate the regulations that must be observed in the franchise since, by its nature, it protects the final consumer of goods and services.

In addition, those products that are marketed under a franchise must observe certain minimum requirements regarding the registered trademark. It is required to register it before the competent IP Mexican authority.

Antitrust/Competition Law

Although the applicable law in antitrust does not regulate franchises per se, it is essential to consider that, even if there are minimum clauses that must be stipulated in the agreement, the content in terms of the competition is left to the discretion of the parties, as is the case of setting prices of products, restriction in terms of contracting suppliers, among others –since franchisor and franchisee are two entities/individuals that are not competitors with each other–.

Additionally, the competent authority, if deemed pertinent, could carry out investigations to corroborate whether or not there are monopolistic practices or that there is substantial power in the relevant market derived from the franchise, and, if it is determined that it does exist, the authority may request the correction or suspension of the franchise.

Employment Law

Under Mexican labor law, the franchisor and franchisee do not have a relationship of an employment/social security nature.

In this case, the provisions contemplated in the Federal Labor Law and the Social Security Law will be applicable to regulate the relationship between the franchisee and its employees and the franchisor and its employees, as the case may be.

By exception and under specific assumptions, the franchisor could be liable before the franchisee's workers, according to what is stipulated in the franchise agreement, but in this case, it must be proven that there is an employment relationship between said workers and the franchisee.

Law on commercial agents

In the Commercial Code, various figures are regulated in this regard: i) factors are considered to be those people who have the address of a company or manufacture or commercial establishment, or are authorized to contract with respect to all businesses concerning said establishments or companies, on behalf of and in the name of their owners; ii) on the other hand, those who constantly carry out one or some procedures of the traffic, in the name and on behalf of the owner of this, will be considered dependent; iii) the commercial commission agent, who will be the person who performs a mandate applied to acts of trade.

IP Law

To protect a brand against third parties in national territory, the franchisor must register its brand with the Mexican Institute of Industrial Property («Instituto Mexicano de la Propiedad Industrial» "IMPI"). For such purposes, it is always advisable to search for the trademark in the categories in which the registration is sought prior to the start of the registration procedure. Nevertheless, in some cases, an international treaty on the matter may be applicable, by virtue of which, if the trademark is registered in a Contracting State, the local process may be simplified.



Selected questions/aspects

Precontractual disclosure

It is to be considered that, whoever grants a franchise (owner of the trademark), must provide the interested party in obtaining the franchise (franchisee), the technical, economic and financial information on the status of its company, with at least thirty days prior to the execution of the agreement.

This information must cover, as a minimum:

- Name or company name, domicile and nationality of the franchisor;
- Description of the franchise;
- Age of the original franchisor company and, where appropriate, master franchisor in the business object of the franchise;
- Intellectual property rights involved in the franchise;
- Amounts and concepts of the payments that the franchisee must cover the franchisor;
- Types of technical assistance and services that the franchisor must provide to the franchisee;
- Definition of the territorial area of operation of the negotiation exploited by the franchise;
- Right of the franchisee to grant or not sub-franchises to third parties and, where appropriate, the requirements what he/she/it must cover to do it;
- Obligations of the franchisee regarding the confidential information provided by the franchisor, and
- In general, the obligations and rights of the franchisee that derive from the termination of the franchise agreement.

In the event that the information provided by the franchisor is not true, the franchisee, in addition to claiming the nullity of the agreement, may claim the payment of damages that have been caused by the breach. This right may be exercised by the franchisee during one year from the conclusion of the agreement. After this period has elapsed, he/she will only have the right to demand the nullity of the agreement.

Franchise fees

As it is a private contract, the fees applicable to the franchise will be agreed upon between the parties.

The Mexican Franchise Association («Asociación Mexicana de Franquicias» "AMF") indicates that, by virtue of the fact that franchises are currently a common business model, the cost of each will depend on the size and line of business chosen, as well as the return on investment that such franchise offers.

Confidentiality

The franchisee must save during the term of the agreement and, once terminated, the confidentiality of the information that has said character or of which it has had knowledge and property of the franchisor, as well as the operations and activities concluded under the agreement.

Amendments

As it is a private agreement, the Mexican authority does not intervene in its granting. Except for its registration, all those modifications or amendments to the franchise agreement must be commonly agreed between the intervening parties, always observing the required formalities –granted in writing– and the minimum content established by law.



Termination

The franchisor and the franchisee may not terminate or terminate unilaterally the franchise agreement unless it has been agreed for an indefinite period or there is a just cause for it.

The franchisee or franchisor can terminate the agreement in advance, whether this happens by mutual agreement or by termination, they must comply with the causes and procedures agreed in the corresponding agreement.

In the event of violations of such provisions, the early termination made by the franchisor or franchisee will result in the payment of the conventional penalties that the parties agreed in the franchise agreement, or instead to compensation for damages caused.

Renewal and transfer

For the renewal or transfer of the franchise, unless otherwise stipulated in the franchise agreement, it will be necessary for the parties to agree again on the applicable term, as well as the terms and conditions thereof or the provisions for its transfer observing, at all times, the minimum content of the franchise agreement stipulated by law.

Dispute resolution and applicable law

Dispute resolution, court system

As it is a commercial agreement, any controversy raised by virtue of a franchise will be resolved through an ordinary commercial lawsuit unless, in the same franchise agreement, it is agreed that arbitration or some alternative dispute resolution mechanism will be applicable.

COVID-19

Derived from the pandemic called covid-19, various franchises in Mexico had to close due to mobility restrictions and the economic repercussions that this pandemic had.

Although there is no record of a franchise that has disappeared in its entirety, it is not uncommon to hear that, in order to maintain the franchise, many merchants have chosen to “optimize” their resources.

To date, financial entities in Mexico have granted various benefits in terms of loan payment terms, but there has not been a specific measure for the franchise sector.

The Netherlands



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Legal professionals



Region

EMEA



Offices

Amsterdam,
Eindhoven,
Rotterdam

Essentials

about The Netherlands' franchising law

- 1** The Dutch Franchise Act entered into force on January 1st, 2021.
- 2** The Franchise Act applies to all franchisees established in the Netherlands, even if parties have chosen foreign applicable law to govern the franchise agreement.
- 3** A 'stand-still period' of four weeks is introduced between the moment on which the franchisee receives all required information and the moment of signing the franchise agreement. During this period, no amendments are allowed to be made to the franchise agreement; the franchisor is not allowed to conclude the actual franchise agreement or related agreements. They are also not allowed to request the franchisee to make investments and payments.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

In the Netherlands, the Franchise Act entered into force on the 1st of January 2021. Article 7:911 under f of the Dutch Civil Code (“DCC”) defines a franchise agreement as: ‘the agreement whereby the franchisor grants to a franchisee, in exchange for financial consideration, the right and obligation to exploit a franchise formula in the manner designated by the franchisor for the manufacture or sale of goods or the provision of services.’ The provisions of the Franchise Act are of mandatory law as far as franchise agreements are concluded with franchisees established in the Netherlands, regardless of a foreign applicable law clause in the agreement.

Specifics regarding foreign franchisors

The Franchise Act applies to all franchisees established in the Netherlands, also if the franchisor is established in a foreign country. There are no specific regulations applicable to foreign franchisors in the Netherlands.

Corporate Law

In practice, an option would be to establish a private limited company (“B.V.”). There are no restrictions regarding the formation of foreign business entities in the Netherlands, however, registration in the trade register of the Dutch Chamber of Commerce (“KvK”) is mandatory for all companies. Companies incorporated under foreign law that are not located in an EEA country, operate entirely in the Netherlands and do not have a connection with the country of incorporation can be subject to the Companies Formally Registered Abroad Act (“Wet op de formeel buitenlandse vennootschappen”).

Consumer Protection Law

Article 6:230 under g DCC defines a consumer as an individual acting for purposes outside of his business or profession, whereas a franchisor would normally act within the scope of its professional activities to exploit the franchise formula. Therefore, a franchisor would in principle not be qualified as a consumer, but rather as a trader based on Article 6:230 under g DCC: ‘a natural person or legal entity acting in the course of trade, his business or profession’.

Antitrust/Competition Law

It is inherent to a franchise formula that a franchisor protects the accumulated knowledge and safeguards a uniform appearance of the formula. This protection may go too far, thus violating the Antitrust Law, more specifically Article 6 of the Dutch Competition Act and Article 101 of the Treaty of the Functioning of the European Union. These Articles prohibit agreements and practices which prevent or restrict the competition (e.g., price agreements between franchisor and franchisee). Certain activities carried out by cooperative ventures – which includes the franchise relationship – are exempted from the cartel prohibition in the Decree providing exemptions for cooperation agreements in the retail trade sector (“het Besluit vrijstellingen samenwerkingsovereenkomsten detailhandel”). At a European level, the Block Exemption Regulation on Vertical Agreements and the accompanying guidelines are particularly important for franchise relationships.

Employment Law

For an agreement to qualify as an employment agreement, the parties must have agreed on the following 4 essential elements: (i) the employee works for the employer, (ii) the work is

carried out personally (the employee cannot be replaced), (iii) the employee receives a wage, and (iv) the employee performs his work under the supervision of the employer. If an agreement qualifies as an employment agreement, Dutch Employment Law will be applicable, including amongst others dismissal laws, continued payment of wages, or sick pay. The protection of an employee can be far-reaching under Dutch Employment Law. To mitigate the risk of the franchise agreement qualifying as an employment agreement, the franchisor and franchisee should ensure that the agreement is in line with the definition and scope of the franchise agreement as provided by Article 7:911 under f DCC (as described further on page 143).

Law on commercial agents

The agency agreement is codified in Book 7 DCC and contains mandatory provisions. Before the Franchise Act entered into force, the statutory rules on the agency agreement would analogously apply when the franchise agreement would correspond in substance to an agency agreement. Since the Franchise Act has entered into force, the rules governing the agency agreement do not apply to a franchise agreement anymore. Attention should be paid to the following aspects to make a distinction between franchise and commercial agency. Firstly, franchisees pay a fee for the use of the franchise formula, whereas the commercial agent is entitled to a commission under Section 7:431(1) DCC. Secondly, franchisors supervise the way in which franchisees carry out their business, while the principles of an agent mainly focus on the results. Thirdly, franchisees act in their name and at their own risk, whereas agents act in the name and at the risk of the principal (Article 7:428 DCC).

IP Law

Arrangements regarding the protection, enforcement, and use (i.e., exploitation) of IP are an important part of the franchise formula. In the franchise agreement, parties can agree that the franchisee is entitled to use the IP (e.g., trademarks) by means of a license. The IP provision within the franchise agreement may contain contractual arrangements regarding the material and territorial scope of the right to make use of the IP, the future development of IP, enforcement of IP, and use of the IP rights after termination. It deserves a recommendation to also include a clear definition of the know-how shared by the franchisor with the franchisee and to determine the scope of the use of know-how by the franchisee in the franchise agreement.

Selected questions/aspects

Precontractual disclosure

The franchisor must provide the franchisee the following (non-exhaustive list of) information, at least 4 weeks prior to concluding the franchise agreement, which is labeled the 'stand-still period' (as described further on page 142):

- The definitive draft of the franchise agreement, including annexes;
- All relevant details for the conclusion of the franchise agreement and necessary financial information, including the financial numbers regarding investments that the franchisor demands from the franchisee;
- The extent to and the manner in which the franchisor can develop initiatives through which the franchisor de facto competes with the franchisee (e.g., setting up a derived formula which may include a webshop with the same brand name, house style, and products).

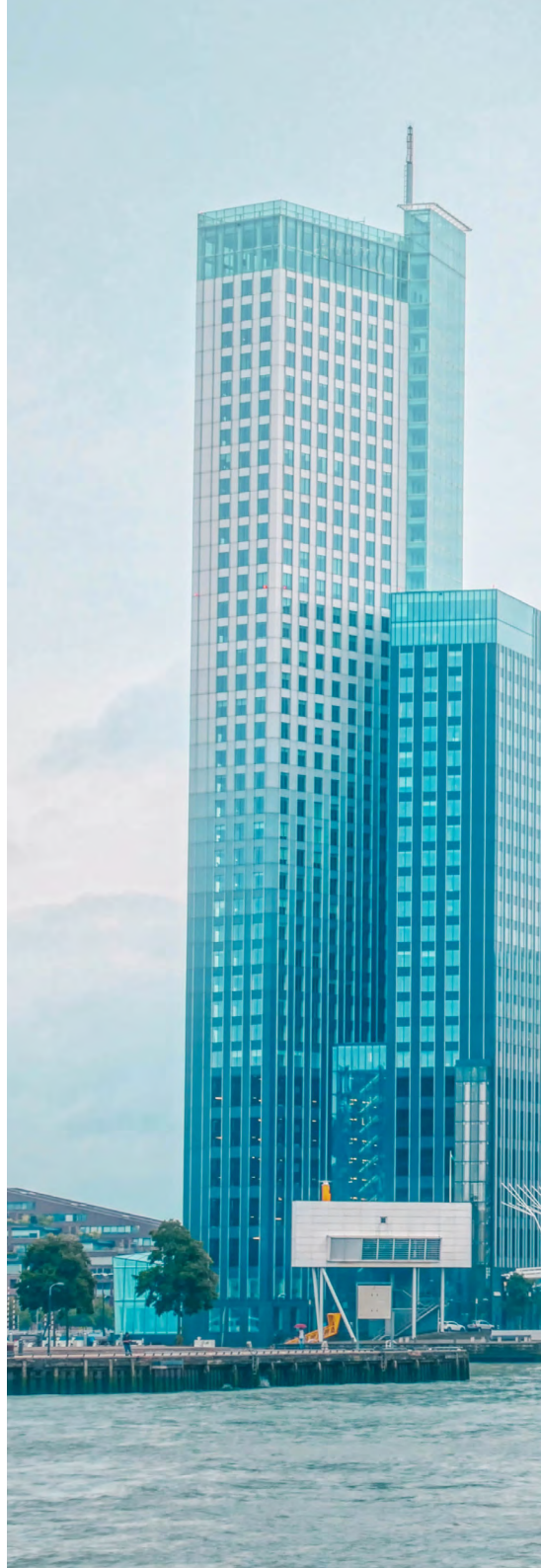
Agreements between the franchisor and franchisee regarding non-disclosure of confidential information to ensure that confidential information provided for (deliberating on) the conclusion of the franchise agreement will not be disclosed, are exempt from the 'stand-still period'. For both franchisors and franchisees, there is an obligation to keep each other updated with relevant information during the term of the franchise agreement. Disputes in case of violations of the disclosure obligation by the franchisor will often be settled through actions based on breach of contract or tort, which may lead to compensation for damages if the franchisor is held liable for disclosure of confidential information.

Legal restrictions

The substantive requirements and limitations on provisions in the franchise agreement are limited due to the basic principle of freedom of contract in Dutch civil law. The franchise agreement must, however, specifically include a goodwill provision in case of an acquisition of the business of the franchisee by the franchisor. The goodwill provision should be clear regarding how the franchisor and franchisee will determine whether goodwill exists. If this is the case, it should also be determined to what extent it is attributable to the franchisee. The Franchise Act also contains a framework for permissible agreements regarding non-competition clauses.

Franchise fees

There are no provisions in the Franchise Act regulating the payment of franchise fees. In the event of overdue payments, Article 6:119 under a DCC states that a statutory interest of 8% may be charged on the unpaid part of the sum. In principle, there are no restrictions on a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency.





Confidentiality

In general, confidentiality clauses to prevent unauthorized use or disclosure of confidential information are enforceable under Dutch Civil Law. The EU Trade Secrets Directive, which is implemented in the Dutch Trade Secrets Act, protects certain confidential business information. A franchisor may only rely upon the protection of the Trade Secrets Act if the following conditions are met: (i) the information must not be generally known, (ii) the information must have commercial value because it is secret, and (iii) legal, technical and organizational measures must have already been taken to keep the information a secret (e.g., a confidentiality clause in a contract, encryption of the information and merely disclosing the confidential business information on a 'need to know' basis). In order to protect confidential business information that must be provided as part of the precontractual disclosure process, the franchisor and franchisee should enter into a non-disclosure agreement.

Amendments

Franchisors will often reserve the right to make unilateral amendments to the franchise agreement with respect to various subjects. The Franchise Act has, however, introduced a right of consent for a franchisee with respect to changes – set out in Article 7:921 DCC – that have (substantial) financial implications for the franchisee. The consent must be obtained from either a majority of the franchisees with whom the franchisor has concluded a franchise agreement or from all individual franchisees affected by the financial implications.

Termination

Article 7:920 DCC states that parties must agree to compensate for accrued goodwill that may be granted to the franchisee, as far as the goodwill can be reasonably attributed to the franchisee. This arrangement is limited to the situation where the franchisor takes over the franchise for himself or transfers it to a new franchisee. Furthermore, the term of the postcontractual non-competition clause may not last longer than 1 year and is limited to: (i)

the geographical area where the franchisee exploited the franchise, (ii) what is necessary to protect the franchisor's know-how, and (iii) the business activities that compete with the franchisor's products and services.

Renewal and transfer

The Franchise Act does not provide a statutory requirement for franchisors to renew the franchise agreement. Based on the general principle of freedom of contract in Dutch civil law, parties may, however, agree on an obligation to renew. In addition, the principles of reasonableness and fairness may limit the franchisor's freedom to refuse renewal (e.g., when the franchisor has promised an extension). Based on the general principle of freedom of contract the franchisor may also restrict a franchisee's ability to transfer its franchise. The franchise agreement will often require the franchisee to offer its business to the franchisor or other franchisees.

Dispute resolution and applicable law

Dispute resolution, court system

The judicial system in the Netherlands is divided into 11 district courts, 4 courts of appeal and 1 Supreme Court. Disputes can be taken to court, but there are also forms of alternative dispute resolution available such as mediation and arbitration. The Dutch Franchise Association ("the NFV") has established dispute settlement rules for mediation. The Dutch Franchise Association and the Netherlands Arbitration Institute have also established a list of 'franchise arbitrators' from which parties can select an arbitrator to settle a franchise dispute. Arbitration can be a good option for disputes involving international franchise contracts where one of the parties resides in a country that is not bound to international

treaties concerning the execution of foreign judgments, cases where specialized knowledge is required, and cases where confidentiality is key. Arbitration can, however, be relatively expensive compared to the Dutch court system, because in principle, the administration fee for the ICC International Court of Arbitration is higher than the fixed court fees.

Applicable Law

The provisions of the Franchise Act are of mandatory law, which means that no derogation from the Franchise Act may be made to the detriment of franchisees established in the Netherlands, not even when parties have chosen foreign applicable law to govern the agreement. Solely when franchisees are established outside of the Netherlands, the franchisors are not bound by the provisions of mandatory law.

COVID-19

The lockdown measures for COVID-19 have had a major impact on the franchise sector. Various courts have addressed the question of whether tenants are obliged to pay rent if, due to governmental measures, the property cannot be exploited for the purpose for which it is intended. The main argument (however depending on all circumstances of the case) is that for rental agreements concluded before the start of the COVID-19 crisis, COVID-19 and the subsequent measures must be considered unforeseen circumstances that are not attributable to the tenant. In short, some courts have ruled that the consequences of these unforeseen circumstances have to be shared equally between the parties. This allowed tenants to suspend the payment of rent up to 50%, or they were granted a reduction of up to 50% on the contractual rental fees.

New Zealand



6

Legal professionals



Region

APAC



Essentials

about New Zealand's franchising law

- 1 There does not appear to be any specific dedicated legislation that regulates franchising in New Zealand, and instead, general principles of contract law would apply;
- 2 There do not appear to be any laws in New Zealand that require franchisors to disclose any matters to potential franchisees prior to entering into a franchising arrangement;
- 3 Trademarks should generally be registered with the relevant authority to be enforceable under New Zealand law.

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Relevant areas of law

Legal basis of Franchise Law

There does not appear to be either a legal definition of “franchise” under New Zealand law or specific legislation addressing franchising arrangements, which are generally governed by contract law and legislation of general application, such as the Commerce Act 1986 and Fair Trading Act 1986 (“FTA”) which relate to, among others, trade practices and consumer fair trading matters (e.g., misrepresentations) respectively.

However, many franchisors and franchisees are members of the Franchise Association of New Zealand, a private association that promotes best-practice franchising in New Zealand and has formulated its own rules that are binding upon its members, which generally comprise franchisors, franchisees, and master franchisees alike. These internal rules contain provisions relating to, among others, disclosure requirements, rights of termination, and dispute resolution.

Specifics regarding foreign franchisors

There do not appear to be any specific laws in New Zealand that require a franchising agreement prepared by foreign entity or governed by a foreign law to be adapted to a certain form to be enforceable in New Zealand.

Generally, a franchisee in New Zealand must withhold tax at a certain rate (which we understand to be usually 28%) on the payment of royalties and technical fees to the overseas franchisor. However, if the franchisor is located in a jurisdiction that has a double taxation treaty with New Zealand, the provisions of that treaty will generally prevail over New Zealand tax law.

Corporate Law

The most common business structure in New Zealand is a limited liability company incorporated in accordance with the Companies Act 1993 (“CA”).

To incorporate a company in New Zealand, the following requirements (among others) must be met:

- **Shareholders/directors:** Every company must have a minimum of one (1) director who is (i) ordinarily resident in New Zealand or (ii) ordinarily resident in Australia and also a director of a company incorporated in Australia, and one (1) shareholder.
- **Corporate information:** Among others, the names of the proposed directors/shareholders of the company and the proposed local address of the company’s office must be provided.
- **Charter documents:** A company constitution must be prepared and submitted (along with the “Corporate information” above) to the New Zealand Companies Office, which is the national companies registry.

Most required filings with and payments to relevant authorities can be undertaken online, and a company can generally be incorporated within approximately 20 working days.

Consumer Protection Law

Franchisees do not appear to be covered by the definition of “consumer” under the Consumer Guarantees Act 1993 and the FTA and will not be protected by the provisions of those statutes.



Antitrust/Competition Law

As noted in “Legal Basis of Franchise Law” above, although there do not appear to be any specific laws in New Zealand addressing franchising arrangements, the Commerce Act 1986, which generally places restrictions on, among others, agreements that substantially reduce competition, territorial restrictions and resale price maintenance (e.g., a franchisor pressuring a franchisee not to sell products below a certain price), may apply to such arrangements.

Employment Law

The Employment Relations Act 2000 is relevant to the question of whether a franchisee is an “employee” of a franchisor and which is a question of fact based on a variety of factors such as the degree of control exercised by the franchisor over the franchisee, how the franchisee is remunerated and whether the franchisee is obliged to work solely for the franchisor—among other factors.

Notwithstanding the above, given that a franchisee must typically pay a franchisor for, among others, the use/exploitation of the franchisor’s intellectual property rights (“IPRs”) and a franchisor would not usually exercise a degree of control over a franchisee to the same extent as an employer would have over their employees, we understand that franchising arrangements are generally unlikely to give rise to an employment relationship under New Zealand law.

To help mitigate the risk of characterization as an employment relationship, a franchise agreement may also stipulate that the franchisee will be acting in their capacity as an independent contractor, and nothing in the agreement

should be construed as creating an employment relationship between the franchisor and the franchisee.

Law on commercial agents

We understand that a franchisee is generally not regarded as an “agent” under New Zealand law as they would typically trade in their own name, receive income on their own account and be ultimately and directly responsible for any liability arising in connection with goods or services they supply.

To help mitigate the risk of characterization as an agency relationship, a franchise agreement may also stipulate that nothing in the agreement should be construed as creating an agency relationship between the franchisor and the franchisee.

IP Law

Franchise agreements may allow the licensing and/or transfer of all forms of IPRs, depending on the nature of the intended activity or business of the franchisee. A franchisor may control, supervise and impose conditions and limitations on the exploitation and use of their IPRs by a franchisee.

While New Zealand law does not appear to require trademarks or licenses to be registered to engage in franchising activities, undertaking relevant registrations with the Intellectual Property Office of New Zealand is advisable to help obtain statutory protection of such IPRs.



Selected questions/aspects

Precontractual disclosure

There do not appear to be any laws in New Zealand that require franchisors to disclose any matters to potential franchisees prior to entering into a franchising arrangement. It would, therefore, be advisable for potential franchisees to undertake some due diligence on the franchisor and the proposed franchise arrangement before entering into any franchising arrangement.

Legal restrictions

While there does not appear to be any specific legislation in New Zealand that requires particular provisions to appear or prohibits particular provisions from appearing in franchise agreements, the Contract and Commercial Law Act 2017 ("CCA") may protect franchisees by giving them, among others, the right to

cancel contracts entered into based on misrepresentations (under certain circumstances).

Confidentiality

Confidentiality clauses are generally enforceable under New Zealand law.

Franchise fees

The parties to a franchise agreement are generally free to agree on any matters in connection with franchise fees subject to the provisions of the CCA and general principles of contract law.

Amendments

The parties to a franchise agreement are generally free to agree on terms that allow a franchisor to unilaterally amend the terms of the franchise agreement, subject to the provisions of the CCA and general principles of contract law.

Termination

The parties to a franchise agreement are generally free to agree on the length of a fixed-term franchise agreement subject to the provisions of the CCA and general principles of contract law. Such agreements will automatically terminate on the expiry of the fixed term.

Under New Zealand law, there do not appear to be any limitations on the right of a franchisor to terminate a franchising agreement. The parties to a franchising agreement are generally free to agree on the grounds for terminating such an agreement (e.g., material breach of contract, repudiation) subject to the provisions of the CCA and general principles of contract law.

Renewal and transfer

There do not appear to be any laws in New Zealand that require franchisors to renew or transfer a franchise agreement. The parties to a franchise agreement are generally free to agree on terms in connection with its renewal and transfer subject to the provisions of the CCA and general principles of contract law.

Dispute resolution and applicable law

Dispute resolution, court system

Cross-border franchising arrangements may be governed by foreign laws – and the parties can opt for dispute resolution by arbitration in a “neutral” location (rather than a New Zealand court). In the absence of a binding arbitration agreement expressly reflected in the agreement or otherwise agreed by the parties, the parties may choose to commence proceedings in a New Zealand court.

The Judicial system of New Zealand is broadly classified into four levels (in descending order of superiority):

- Supreme Court (appellate jurisdiction and only by special leave);
- Court of Appeal (appellate jurisdiction only);
- High Court; and
- District Court.

Applicable Law

New Zealand courts will generally defer to the law that the parties have chosen to govern a franchise agreement (and indeed other agreements), subject to exceptions such as where contrary to public policy.

COVID-19

Businesses in New Zealand have been badly hit by the COVID-19 pandemic. The New Zealand government has offered financial support for businesses and introduced the COVID-19 Response (further management measures) Legislation Act 2020, which, among others, modifies the application of the CA to help businesses cope with the effects of the pandemic. Some of these changes include giving companies the option to freeze existing debts, allowing more extensive use of electronic signatures, extending statutory deadlines in connection with general meetings and annual returns, and providing safe harbor protections for company directors in connection with insolvency matters. As of July 24, 2021, there does not appear to be any COVID-19 related legislation in New Zealand that specifically relates to franchising matters.

Norway



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Legal professionals



Region

EMEA



Offices

Bergen Vest,
Drammen,
Kristiansand,
Oslo, Rogaland,
Tondheim,
Tonsberg

Essentials

about Norway's franchising law

- 1 In Norway, there is no statutory definition of a "franchise" nor is there a specific act exclusively concerning franchise businesses.
- 2 The regulation in franchise agreements restricting competition between franchisor and franchisee, between different franchisees and/or in relation to third parties must be compliant with the Norwegian Competition Act of 2008.
- 3 While contractual freedom is a basic principle in Norway, the courts have the competence to amend or set aside severely unbalanced franchise agreements.

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Relevant areas of law

Legal basis of Franchise Law

In Norway, there is no statutory definition of the word “franchise” and no specific act which exclusively regulates franchise businesses. Instead, a variety of laws and regulations apply whereof the most relevant are described briefly below.

Corporate Law

Both partnerships and limited liability companies can be relevant company structures for a franchisee. However, private or public limited liability companies (in Norwegian “AS” or “ASA”) are generally preferred, with private limited liability companies being more commonly chosen, as compliance requirements are less extensive.

In Norway, establishing a private limited liability company is done by completing a form with the signatures of all board members. However, the process may vary depending on the nationalities of board members and/or individuals with significant roles in the company. Where board members do not hold a Norwegian identification number, a D-number which allows the foreigner to work or run a business, open a bank account or be a board member in an enterprise can be obtained upon application.

In other situations, forms consisting a memorandum of association and articles of association may be used. However, the concrete procedures and necessary forms depend on specific circumstances. Citizens from outside the EU/EEA area need a residence permit, allowing for work to be performed in Norway to run a business.

Regardless of the nationality of the founding parties, establishment of a private limited liability company requires a minimum starting

capital of NOK 30,000 (approximately EUR 3000). Furthermore, a Norwegian business address (note that postbox addresses are not accepted) and a registration with the Register of Business Enterprises is required. The establishment costs are moderate, but please note that the Register must receive a registration notification of the company within three months after the company is established. Generally, the company cannot undertake obligations before the registration completion and the company is given an organization number.

The process of establishing a general partnership company is similar to the process described above—however, no stating capital is required. In a partnership business, the owners (at least two founding parties) share the risk of liability, either as a “DA business” with shared liability for the agreed upon share of debt, or an “ANS business” with joint unlimited liability.

Consumer Protection Law

Where there is a legal distinction between “professionals” and “consumers”, Norwegian regulation treats franchisees as professionals. This is based on an assumption that the franchisee has the capacity and capability to take on responsibilities of a professional party in an agreement.

However, when a franchisee is doing business with consumers, the franchisee must comply with relevant consumer protection laws which provides consumers significant rights and protection.

Antitrust/Competition Law

The Norwegian Competition Act of 2008 prohibits agreements whose purpose or effect is to restrict competition in a market. This prohibition may apply to franchise agreements as they usually contain a combination

of limitations related to products that are distributed. These include non-compete clauses and territorial division clauses providing exclusive distribution within a defined geographical area. Such vertical restraints may contain regulations that restrict competition between franchisor and franchisee in some cases, between different franchisees and or in relation to third parties to an extent prohibited by the Competition Act, resulting in sanctions.

Employment Law

Generally, Norwegian labor laws do not consider the franchisee an employer of the franchisor, even though the franchisor does exercise power and influence over the franchisee. Furthermore, it is the franchisee who will be considered an employer of the employees in a business.

However, if the franchisor controls, instructs and handles a large part of the franchisee's business, i.e., controls the franchisee's opening hours or the terms in individual agreements with the employees employed by the franchisee, or where the franchisor holds a financial risk of the franchisee, then the franchisee may be assessed as an employee of the franchisor.

IP Law and Trademark

If a trademark is unregistered, the trademark can be registered with the Norwegian Industrial Property Office or with the European Union Intellectual Property Office for a trademark, which will have effect in both Norway and the EU member states. If a trademark is registered in a nation taking part in the WIPO trademark registration system, an application of protection in Norway can be sent through WIPO. Note that a Norwegian registration is not valid in other countries.

Provided that the owner has the right to a trademark and that consumers view the said trademark as well known—then a trademark can also be obtained through consistent use. However, registration is a considerably practical option. The Norwegian Trademark Act protects the trademark for 10 years at a time and protection can be renewed. If the trademark is obtained through consistent use, it remains until the trademark owner seizes the use of the trademark.

The business “know-how” can constitute a trade secret by the Marketing Control Act of 2009 which provides businesses with some protection. Also, the Trade Secrets Act of 2020 provides protection of undisclosed trade secrets against their unlawful acquisition, use and or disclosure. When assessing which information constitutes a trade secret, the implications on the business' competition strength and the protective measures taken to protect the information becomes relevant.

Selected questions/aspects

Precontractual disclosure

There is no regulation clearly stipulating that the franchisor has a duty to inform each potential franchisee accurately and with reasonable advance about all circumstances recognizably relevant for the franchise agreement's conclusion. However, a Norwegian district court has declared a contract void based on article 36 in the Contracts Act, because the franchisee was not given sufficient information about the concept or the financial details. This casemade it impossible for them to make a reasonable decision regarding the business risk theywere taking on. The contract also made it difficultfor the franchisee to profit, while the franchisor would earn profit even when the franchisee suffered financial losses.



Legal restrictions

The primary source of regulation is the franchising agreement. The already existing regulations on contractual relationships are used to interpret the franchise agreement. Other than the regulations specifically concerning a business entity's establishment, it is important to consider other regulations that may affect the business entity. This includes the Contracts Act, the Personal Data Act, labour law acts and regulations, as well as other acts relevant to the specific field of business.

As stated, the primary legal source of regulation between parties is the franchising agreement itself. Thus, it is crucial to ensure that both the franchisor's and franchisee's interests are considered and that all aspects of the contractual relationship are regulated.

Contractual freedom is a basic principle in Norway. However, it is important to be aware of its limitations. Due to the naturally unbalanced relationship between the parties, article 36 in the Contracts Act is especially relevant for the limitation of content in franchising contracts. The purpose of article 36 is to limit contracts that already were or have become very unfair for one of the parties. If deemed unfair by the courts, the agreement may be partially or wholly changed or set aside. The judge must evaluate the situation in its entirety, and will consider the agreement's content, position of the parties and circumstances at the time of the signing the agreement, in addition to subsequent circumstances and events that may make the agreement unreasonable to invoke. The Norwegian Supreme Court does not use this article widely but it may be used in cases where it would be "unreasonable or in conflict with general accepted business practice" to

invoke the agreement. It is quite seldom that agreements are deemed void, and one could say that it requires the parties to be significantly uneven in terms of power, combined with a very uneven distribution of duties. Therefore, it is important to enter into agreements that are not, or will not become, unreasonable or go against the general accepted practice.

The European Franchise Federation (EFF) and the International Franchise Association (IFA) both have a set of ethical rules called "code of ethics". The European national franchise associations must include the EFF code of ethics in their bylaws. These are not legally binding but serve as guidelines for the different European franchise associations and their members. Norway does not have a national franchise association and are therefore, not directly bound by the EFF ethical guidelines. Nevertheless, the rules are followed by Norwegian franchisors and franchisees to a great extent.

Franchise fees

Besides the startup costs of establishing a limited liability company or a general partnership company and other incurred costs as a result of owning said company, there are no laws in Norway regulating the payment of franchise fees.

Confidentiality

Confidentiality clauses in franchise agreements are common and enforceable in Norway.

Depending on the exact confidentiality clause's wording, the franchisor may file an injunction against an infringing franchisee, claim damages occurred due to the breach, and possibly terminate the franchise agreement extraordinarily. Furthermore, a confidentiality clause is advisable to adequately protect existing trade

secrets. According to the Business Secrets Act of 2020, a trade secret is only protected if the owner of the secret has taken appropriate measures to maintain secrecy.

Amendments

The terms for the franchisor's and franchisee's right to amend the franchise relationship will normally be included in the agreement between the parties. There is no regulation stating the right to amend the content or nature of the franchising agreement in Norwegian law.

Termination

The terms for a franchisor's and franchisee's right to end the franchise relationship, either with or without cause, will normally be included in the agreement. The agreement will also include whether there is a right to immediate termination or if it requires notice preceding the termination.

Renewal and transfer

There is no Norwegian law regulating the transfer of franchise agreements. However, it is possible to incorporate a clause in the franchise agreement that gives the franchisor the right to approve or disapprove a transfer from the old franchisee to a new franchisee.

Dispute Resolution and Applicable Law

Most Norwegian franchising agreements have an arbitration clause, therefore making the solution of disputes confidential. There are no

restrictions on the possibility to arrange arbitration instead of a process through the traditional court system. The parties can also choose/negotiate desired applicable law. However, the access to arbitration must be included in the franchising agreement and must be agreed upon for consideration. If the parties do not explicitly agree upon arbitration, the legal proceedings will proceed through the traditional court system with the applicable law being decided by the Act on Civil Proceedings. The advantages of arbitration are the same for foreign and domestic franchisors. The cost might be higher than court proceedings in the traditional court system. Norway is a party to the UN convention on the recognition and enforcement of foreign arbitrary decisions, and the Norwegian Arbitration Act opens for the possibility to enforce foreign arbitration decisions.

COVID-19

From early 2020 onwards, the COVID-19 pandemic has had a huge impact especially on the franchise sector due to the government shutting down public life to contain the spread of the coronavirus. The government has issued several compensation packages to limit the negative effects of the shutdown on businesses. We will not go into detail on what these packages entail, but several businesses have been compensated for necessary and inevitable costs in some way, either completely or partially.

Paraguay

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Legal professionals



Region

AMERICAS



Offices

Asuncion

Essentials

about Paraguay's franchising law

- 1** No specific form or procedure prescribed by law regarding Franchisor's precontractual disclosure obligation.
- 2** Franchisees may be entitled to compensation payment upon termination of the franchise agreement.
- 3** Franchisees may adopt any type of company when operations begin.

Authors

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

In Paraguay, there neither is neither a legal definition of “franchise”, nor a codified franchise law.

Corporate Law

The most common corporate form to set up business in Paraguay is the Corporation. Those are companies where the capital contributed by partners is represented by shares. Partners are liable towards third parties only until the concurrence of their respective contributions. This is because the corporation only responds to social obligations with its assets.

The corporation must be constituted by public deed, and in the constituent act, identifying the following aspects is essential—the partners, denomination, duration, object, the amount subscribed and paid-in capital, number and nominal value of the shares, method of administration and control, rules under which they will share the profits and losses, and other clauses related to corporate transactions.

There is another type of corporate form that is widely used, which is the Limited Liability Company. This must be constituted by two or more people who could be “individuals” or a “legal person”. This type of form is characterized by the fact that liability is limited to the amount of contributions, by having a small number of members (not more than 25), for the total subscription of capital when the company is formed, by the division of capital in quotas, by the difficulty of transmitting the membership quotas, for not having a minimum capital limit, and for its simplicity of setting up and operation.

Consumer Protection Law

Under Paraguayan consumer protection law, the rights recognized by the law to the consumer may not be objects of resignation, transaction or conventional limitation and will prevail over any legal norm, use, practice, or stipulation to the contrary.

Employment Law

Care needs to be taken that a franchisee is not qualified as an employee of the franchisor according to Paraguayan employment law and Paraguayan social law. In this case, the decisive criteria is the grade of the franchisee’s personal dependency. Pursuant to Paraguayan jurisdiction, someone is an independent businessperson who is—contractually as well as factually—free to design their activities and set their working hours, and who understands a selfentrepreneurial risk.

Law on Commercial Agents

There are no considerations on the law related to commercial agents on the franchise agreements.

IP Law

Franchisors need to protect their IP against third parties’ attacks or imitations, especially by registering their trademarks. Locally, there is a Public Office called Dirección Nacional de Propiedad Intelectual (DINAPI), who is in charge of the IP register.

Real Estate/Tenancy Law

There are no specific regulation on the franchise system. The real estate tax is paid by the person who owns the land, and it is managed/collected by the municipality of their location. Regarding the tenancy, it is subject to VAT and CIT.



Selected questions/aspects

Precontractual Disclosure

According to the Paraguayan law, there are no obligation prior to signing a franchise agreement, where the franchisors and in a sub-franchising structure, master franchisees have the duty to inform each potential franchisee accurately and with reasonable advance about all circumstances recognizably relevant for the-franchise agreement's conclusion. These are agreements between parties.

Legal restrictions

Antitrust/Competition Law

There is a law that is called "Defensa de la Competencia" (Competition defense). This law's purpose is to defend and promote free competition in the markets. It is applicable to all acts, practices or agreements carried out by natural or legal persons, national or foreign, with legal domicile in the country or abroad. This is also applicable whether it is under public or private law, or any entities that carry out economic activities with non-profits and that produce an effect on competition in all or part of the national territory,

Law on general terms and conditions ("T&Cs")

In franchise agreements, it is considered as an agreement between parties and according to that, the law is regulated by the agreement itself.

Franchise fees

Besides the prohibition of usury, there are no laws in Paraguay regulating the payment of franchise fees.

Confidentiality

Confidentiality clauses in franchise agreements (often in combination with a contractual penalty) are very common and enforceable in Paraguay. The franchisor may file an interim injunction against an infringing franchisee, claim damages that might have occurred due to the breach, and possibly terminate the franchise agreement extraordinarily. Furthermore, a confidentiality clause is advisable in order to adequately protect existing trade secrets.

Amendments

Simply put, if the franchise agreement contains a precise and reasonable change reservation clause, taking into account the franchisees' interests, unilateral amendments of the agreed terms by the franchisor are admissible as an expression of the franchisor's obligation to continuously develop its franchise system according to changing market conditions. As the franchise agreement is an agreement between parties, those amendments would have to be agreed again.

Termination

Franchise agreements are entered into for a certain time and terminate after the lapse of that time. A regular termination by one of the parties before that is not admissible, unless both parties unanimously agree on the same. However, franchise agreements may be terminated by each party without notice if it is unreasonable for the terminating party to continue the contractual relationship until the agreed time of termination (good cause). If the termination's cause is a breach of contractual obligation by the other party, e.g., non-payment of franchise fees, the termination for good cause is only admissible

after having issued a fruitless warning (advisably in writing), and within a reasonable period of time after learning about the circumstances for the termination. Unjustified terminations by a franchisor might entitle the franchisee to claim damages.

Renewal and transfer

Franchisors are free to decide whether or not to renew a franchise agreement. If they do so, renewals should be done explicitly and in writing. It is admissible to contractually restrict a franchisee's ability to transfer its franchise, typically by requiring an explicit prior written approval of the franchisor.

Dispute Resolution and Applicable Law

In principle, it is admissible for the parties of a franchise agreement to agree on a choice of law and jurisdiction to be applicable on their contractual relationship, and if the franchisee is a merchant, to agree on a venue clause.

It is also admissible to agree on arbitration as the exclusive way of resolving disputes between the parties, thus waiving the due process of law. This may be favorable as the parties may choose the language of proceedings and have influence on the arbitrators selected. Also, arbitration proceedings are (unlike proceedings before ordinary courts) not held in public.

COVID-19

From early 2020 onwards, the COVID-19 pandemic has been having a huge impact on all the sectors due to the government measures, especially shutting down public life to contain the pandemic. Nevertheless, there were no laws, regulations or measures that the government has implemented so far, specifically related to franchise.

Peru



7
Legal professionals

 **Region**
AMERICAS

 **Offices**
Lima

Essentials

about Peru's franchising law

- 1** It is not regulated by Law.
- 2** It is flexible.
- 3** There are no limitations to celebrate this agreement. Nevertheless, it is important to entirely cover the franchise's aspects in the contract.

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Relevant areas of law

In Peru, there is neither a legal definition of “franchise”, nor a codified franchise law.

Corporate Law

The most common corporate forms to set up business in Peru are the Limited Liability Company (S.R.L.) or a Corporation in any of its three forms: Closed Corporation, Ordinary Corporation or Open Stock Corporation. The creation of a company in Peru requires a minimum of two (2) people and the Peruvian Law does not require a minimum amount of share capital. However, the banks require a minimum of PEN 500 to open a bank account.

Additionally, Peruvian corporate law does not impose any restriction on franchise systems in particular.

Consumer Protection Law

Under Peruvian law, individuals seeking to become franchisees and franchisors are not qualified as consumers, as the intention of their conduct is business-oriented. Nevertheless, they will be considered as consumers when they act outside their business activity.

Antitrust/Competition Law

Every company interested to celebrate a franchise agreement will have to comply with the general Antitrust and Competition Law. There are no special regulations for franchise agreements.

Employment Law

Every company interested to celebrate a franchise agreement will have to comply with the general Employment Law. There are no special regulations for franchise agreements.

IP Law

Franchisors are able to protect their IP against third parties’ attacks or imitations, especially by registering their trademarks before the Peruvian authority, Indecopi. It is recommended to also carry out research beforehand to prevent the potential loss of the trademark later and corresponding claims for disclosure and damages.

Law on commercial agents

There is no law on commercial agents in Peru.

Selected questions/aspects

Precontractual disclosure

There are no precontractual disclosure obligations in Peru. However, it is advisable to request the franchisors to inform about all circumstances recognizably relevant for the franchise agreement’s conclusion.

Legal restrictions

There are no restrictions applicable for franchise agreements.

Franchise fees

There are no laws in Peru regulating the payment of franchise fees.

Confidentiality

It can be agreed by the parties with the signature of an NDA and inclusion of confidentiality clauses in franchise agreements (often in combination with a contractual penalty). The franchisor may file a claim against an infringing franchisee, claim damages occurred due to the breach, and possibly terminate the franchise agreement extraordinarily.



Amendments

If the franchise agreement contains a precise and reasonable change reservation clause—taking into account the franchisee's interests—, unilateral amendments of the agreed terms by the franchisor are admissible as an expression of their obligation to continuously develop its franchise system according to changing market conditions. Without a respective provision, amendments to the franchise agreement may only be agreed upon unanimously between the franchisor and franchisee.

Termination

Franchise agreements are entered into for a certain time and terminate with lapse of that time. A regular termination by one of the parties before is not admissible, unless both parties unanimously agree upon the same. However, the parties are allowed to agree on termination clauses in case of a contractual obligation breach by the other party, within a reasonable period of time after learning about the circumstances for the termination. Unjustified terminations by a franchisor might entitle the franchisee to claim damages.

Renewal and transfer

The renewal and transfer of the franchise agreement can be freely agreed on by the parties. This must be done with the same agreed formalities in the first agreement.

Dispute Resolution and Applicable Law

Dispute resolution

The parties have two options: submit their dispute to the court or agree to an arbitration clause.

Depending on the amount of the claim, complexity of the dispute or the economic, social and/or judicial relevance, the dispute will be resolved in a different kind of track: proceso sumarísimo, proceso abreviado, and proceso de conocimiento, the last one being the most complex.

Finally, arbitration is the fastest and a more secure way to resolve disputes in Peru due to its flexibility.

Applicable law

The parties are free to agree the applicable law.

COVID-19

From early 2020 onwards, the COVID-19 pandemic has been having a huge impact in every economic activity due to the government measures, especially shutting down public life to contain the pandemic. There are no COVID-related legislation affecting the franchising process directly. Nevertheless, every ministry has established protocols in order to open business to public.

Poland

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Legal professionals



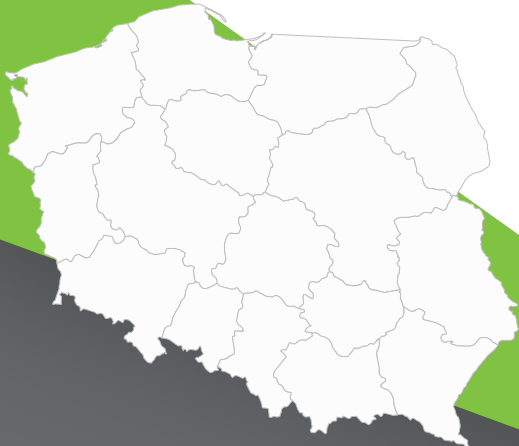
Region

EMEA



Offices

Cracow, Katowice,
Poznań, Szczecin,
Warsaw, Wrocław



Essentials

about Poland's franchising law

- 1 No legal definition of the franchise and no legal provisions dedicated to the franchise agreement.
- 2 Conclusion and content of the franchise agreement (including, for example, confidentiality and IP clauses) is generally based on the freedom of contract rule stipulated by the Polish civil code.
- 3 Pursuant to the jurisprudence, the franchisor and the franchisee are deemed entrepreneurs.

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Relevant areas of Law

Legal basis of Franchise Law

There is no definition of franchise in the Polish legal system. Neither the Polish civil code nor other legal acts contain rules governing the running of a franchise business.

The franchise agreement can be concluded on the basis of freedom of contract rule, resulting from the Polish civil code. Pursuant to this rule, parties have the freedom to choose a type of contract and can shape its content.

However, the primary features of a franchise agreement have been developed through the practice of trading. Also, the jurisprudence attempts to define the franchise. Generally, it is indicated that the franchise agreement is a contract between entrepreneurs, pursuant to which the franchisor grants the franchisee the right to use the so-called franchise package when selling goods or services to final customers. In addition, the franchisor undertakes to provide assistance to the franchisee on a permanent basis.

The franchisee carries out business in his own name and on his own account in the manner specified in the franchise agreement. The franchisor is entitled to control the franchisee in this respect and to collect the agreed remuneration.

Specifics regarding Foreign Franchisors

Foreign entities wishing to conduct the franchise business in Poland can be both the franchisor and the franchisee. In general, these entities are subject to the same regulations as Polish entities and are therefore, subject to similar restrictions under the Polish civil code and other legal acts.

Corporate Law

There are several forms of doing franchise business in Poland: sole proprietorship, civil law partnership, capital companies (i.e., Limited Liability Company and joint-stock company) and partnerships (i.e., registered partnership, limited partnership, limited joint-stock partnership).

The most popular form of a business activity are capital companies, i.e., limited liability companies and joint-stock companies. The establishment of a capital company requires conclusion of the Articles of Association (in the case of a joint-stock company—a statute), covering of the share capital and entry of the company in the Polish commercial register. A foreign franchisor may hold shares in a Polish capital company and may also be a partner in a Polish partnership.

Foreign entities from EU Member States may also set up a branch of a foreign entrepreneur in Poland, if they operate a business in one of the EU Member States. In case of foreign entities from countries outside the EU, it is possible to establish the branch of a foreign entrepreneur in Poland, provided that this possibility is allowed by ratified international agreements.

Consumer Protection Law

Consumer is a natural person who carries out a juridical act with an entrepreneur, which is not directly related to their economic or professional activity. Since, in accordance with the established practice of trade and the views of legal doctrine and judicature, it is considered that the parties to the franchise agreement are economic operators (traders), the franchisee does not have the status of the consumer. Consequently, the franchisee is not entitled to protection resulting from consumer protection rules.



Antitrust/Competition Law

The provisions of antitrust law in the field of public law impact the franchise agreement's content. As Poland is a member of the European Union, both EU law and national law will apply. When considering the possibility of concluding the franchise agreement with its individual clauses, it is necessary to analyze provisions of antitrust law, in particular those relating to prohibited restrictive agreements. Article 101 of the Treaty on the Functioning of the European Union will be of the greatest importance in EU law, while Polish law will be about the Law of 16 February 2007 on the protection of competition and consumers, and the Regulation of the Council of Ministers of 30 March 2011 on the exclusion of certain types of vertical agreements from the prohibition of restrictive agreements.

The first of these Polish Acts indicates a catalogue of prohibited agreements which could disrupt or distort the functioning of the free market. The Regulation eases some of the prohibitions on so-called vertical agreements.

Employment Law

Polish labour courts have the power to determine whether a legal relationship can be regarded as an employment contract and consequently, be subjected to labour law. In general, the risk of the franchisee being deemed an employee of the franchisor seems rather small. Pursuant to the definition of employment relationship, by entering into an employment relationship, the employee assumes the obligation to perform specific work for the employer and under the employer's direction at a place and time specified by the employer. The employer assumes an obligation to employ the employee against payment of remuneration. On the basis

of the legal doctrine and jurisprudence views, a cooperation within the franchise generally does not fulfil the employment relationship elements indicated above. According to the jurisprudence, the franchisee is an independent trader engaged in an economic activity in their own name and on their own account in the manner specified in the franchise agreement.

Law on commercial agents

Under Polish law, a franchise agreement and an agency agreement are not the same concepts. Unlike the franchise contract, the agency contract is a named agreement and is regulated by the Polish civil code. The most important difference between the franchise and the agency contract is that the agent concludes contracts for or on behalf of the contract provider, while the franchisee concludes the contract on their own behalf and acts on their own account. In addition, the agent receives remuneration for their actions in the form of commissions, while in accordance with the trade practice, the franchisee pays remuneration to the franchisor for support received from them. Therefore, as a general rule, restrictions on the agency contract do not apply to the franchise agreement.

IP Law

The franchise agreement may include elements specific to intellectual property rights agreements such as patent licenses, trademark licenses and the know-how agreements.

The most important Polish Acts governing the licensing agreements are the Industrial Property Law and the Act on Copyright and Related Rights. A franchise agreement may contain elements of the licensing agreement and the know-how agreement.

The most important piece of legislation to protect know-how is the Act on Fair Trading. It indicates unlawful acts which threaten the interests of another trader or customer. One of the acts of unfair competition is a breach of business secrecy. It covers the transmission, disclosure or use of someone else's trade secret information or its acquisition from an unauthorized person if it threatens or prejudices the interests of the trader. In the event when the act of unfair competition occurs, the trader whose interest has been infringed may claim, inter alia, cessation of violations and compensation for the damage caused. Know-how may also be subject to copyright protection.

Selected questions/aspects

Precontractual Disclosure

In light of lack of regulations on the franchise agreement in Polish law, there are no guidelines on what data and information the parties to the contract are obliged to disclose at the negotiation stage. Therefore, the scope and procedure for transferring data to each other depends on a given agreement.

In case when a counterparty has not been provided with all relevant information or when the information provided is untrue or incomplete, then the infringer will be liable under the general principles of the Polish civil code. It is also possible to include contractual penalties in the franchise agreement to be paid in case when the violations described above occur.

Legal restrictions

The franchise agreement is an unnamed contract and is therefore not directly governed by Polish civil code. There are also no provisions containing restrictions or limitations

specifically related to the franchise agreement. The parties to the agreement may shape its content considering the principle of freedom of contract as set out in the Polish civil code and other rules related to conducting business activity in Poland.

Franchise fees

There are no regulations specifying the nature, amount and method of payment of franchise fees. There are also no statutory restrictions preventing payments in any currency. These issues depend on arrangements of the parties to the agreement, however the fees should be at market value.

The parties may determine amount of interest in the contract. The civil code indicates the maximum amount of interest for late payments. Currently, the maximum percentage for delay is 5.6% per annum. The above limitation cannot be excluded in contractual terms, even if jurisdiction of foreign law is selected.

Confidentiality

The parties have the option to include confidentiality clauses in the franchise agreement. Those provisions should specify precisely what information is confidential and what actions are not permissible with respect to confidential information. The parties may also indicate a demand for payment of the contractual penalty in the event of a confidentiality obligation breach.

It is possible that the parties will also be able to claim compensation for the indicated infringements on a general basis. In such a situation, a plaintiff will have to prove the fact and the amount of the damage caused by the infringement and the causal link between the damage and the infringement.

Amendments

Amendments to the franchise agreement require consent of all parties to the agreement. In the event of an extraordinary change of relations, the court may, at the request of the party, amend the content of the contract or even terminate it, using the *rebus sic stantibus* clause. This clause will be applicable once three conditions are met. Firstly, the change in relations between the parties to the agreement must be extraordinary. Secondly, this change must entail excessive difficulty in performance or risk a gross loss to one of the parties. Thirdly, the parties at the stage of the agreement conclusion might not anticipate the impact of an extraordinary change of relations on the obligation. This clause is used exceptionally in the case of truly extraordinary events.

Termination

The franchise agreement may be concluded for a definite period or for an indefinite period. Due to the nature of the cooperation, it is a long-term agreement. Therefore, it is most often concluded for an indefinite period or for a definite period covering a longer period, e.g., several years. The franchise agreement may be terminated by any party. The parties may specify the termination period and reasons for terminating the agreement with immediate effect. The franchise contract may also be terminated by a concerted agreement between the parties.

Renewal and transfer

The parties to the franchise agreement may specify whether the rights and obligations arising from the contract are transferable. The parties may also determine whether the transfer of contractual rights and obligations to another entity requires a consent of the counterparty.

Dispute Resolution and Applicable Law

Dispute resolution, court system

Civil law disputes are resolved by common courts. They are divided into district courts, regional courts and courts of appeal. However, the legal proceedings consist of two instances.

In principle, where the subject matter of the dispute is pecuniary claim, the district courts are entitled to hear cases in which the value of the dispute does not exceed PLN 75,000.00. If the value of the disputes's subject matter exceeds PLN 75,000.00, the case will be heard by the regional courts.

It is possible to resolve a dispute amicably in mediation proceedings. Mediation can be applied in all cases where the outcome depends on the will of the parties, for example, in the case of payment claims. Mediation is carried out before or during legal proceedings. The

basis for mediation is the mediation agreement or a court decision directing the case to mediation proceedings.

The parties have the opportunity to take advantage of arbitration proceedings conducted by an arbitral court. In Poland, the most famous arbitration institution is the Court of Arbitration at the National Chamber of Commerce in Warsaw.

Applicable Law

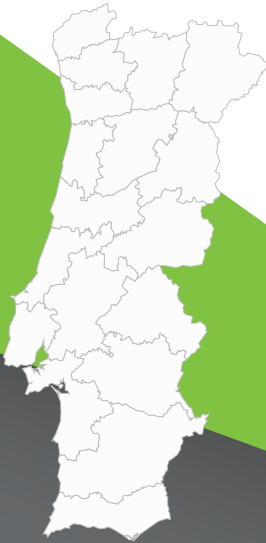
Generally, the parties are free to choose Polish or foreign law being applicable to the franchise agreement.

COVID-19

There are no Polish legal provisions on COVID-19 directly related to the franchise. Both franchisors and franchisees were able to benefit from support offered to entrepreneurs by the Polish authorities.



Portugal



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Legal professionals



Region

EMEA



Offices

Lisboa, Porto

Essentials

about Portugal's franchising law

- 1** Commonly executed in Portugal but lack of specific law; governed by general law and provisions from legal regime of similar contracts. Detailed clauses in agreements and court decisions have been relevant to govern franchise contracts.
- 2** Franchisor's Intellectual Property (IP)/know-how need to be registered and protected to avoid misuse or be unlawfully disclosed by franchisees.
- 3** Unless otherwise foreseen in the agreement, franchisees are not entitled to clientele indemnity upon its termination. Despite this, Agency Law may be applicable by analogy since most courts reject franchisee's right to clientele indemnity, as franchisee benefits from franchisor's customer base.

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Relevant areas of Law

There is no specific legal regime that is expressly applicable to “franchise agreements”. There is also no legal definition of “franchise” in Portuguese legislation. However, scholars and courts commonly define franchise as a contractual relationship entered into between the franchisor who authorizes the franchisee to carry on a business activity, under the franchisor registered and owned mark, insignia or similar. Whereby the franchisor provides and undertakes to maintain a certain business interest in the activity carried on by the franchisee on a continuing basis, providing the required know-how and training, whilst the franchisee uses the trademark or insignia, the know-how and methods owned or controlled by the franchisor, promoting capital investment in the business on their own and undertaking entirely at their own risk. The guarantee of legal independence of the franchisee is relevant to define the franchise contractual relationship, despite in some cases where the franchisor freely decides to become a shareholder of the franchisee.

The absence of a legal definition and a specific legal regime often leads to doubts and confusion with other similar distribution agreements, in particular with “concession agreements” and “agency agreements”. It occurs namely whenever the agreements that rule the franchise do not include detailed, clear, and consistent clauses. Therefore, drafting a franchise agreement accurately becomes significantly relevant. The clauses and structure of the franchise agreement should be complete, detailed, and clear as possible to prevent and avoid any misunderstanding or confusion with other similar contractual situations and to prevent potential disputes later. In addition

to the complete identification of the parties, the trademark, insignia or similar right that is licensed, as well as its national or international registration number, the franchisor and franchisee respective obligations, exclusivity, territory, as well as reference to the professional training, stock, advertising materials, order requests, confirmation and delivery deadlines, term of the agreement, conditions for renewal and termination, are the primary standard clauses of the franchise agreement.

The franchisor shall register the trademark, insignia or similar right at local level in advance, unless if it already benefits from international registration.

In Portugal, it is common practice to conclude franchise agreements based upon the existing regulations from other jurisdiction and from the European Code of Ethics for Franchising, and furthermore based upon Portuguese court decisions.

Corporate Law

The most usual corporate forms adopted and incorporated to set up business in Portugal are private limited liability companies by quotas (“sociedade por quotas/Lda.”) and private limited liability companies by shares (“sociedade anónima/S.A.”).

A private limited liability company by quotas may also be incorporated by one sole quota holder who shall be the registered owner of the quota representative of the entire share capital. In this case, it shall be a sole quota holder limited liability company by quotas, also called “Unipessoal, Lda.” The quota holder(s) may freely decide over the share capital amount intended to be paid up for the incorporation of a “sociedade por quotas” subject to the legally required minimum amount of one euro. This

shall be paid up on the signature date, unless the quota holder(s) expressly represents and undertakes to pay the share capital until the end of the first financial year. Quota holders are jointly liable for all the share capital entry contributions, up to the amount of the contributions. In general, only the Company's assets are liable for the Company's debts, unless it is foreseen in the by-laws that one or more quota holders shall be liable towards the Company but also before its creditors, up to a defined cap amount. In case a quota holder settles the Company's debt, they shall have the right to demand those amounts against the Company, but not against other quota holders. The companies incorporated as "sociedades por quotas" shall be managed and represented by one or more appointed directors, who may be a third-party to the company. The appointment shall be understood as being without any defined office term unless it is otherwise expressly foreseen under the by-laws.

In case of companies incorporated as "sociedade anónima/S.A." and unless the relevant share capital is 100% directly held by a company, establishing the relationship of a group structure, a minimum of five shareholders for its incorporation is required. The minimum share capital amount in this case is fifty thousand (50,000) euros, whose payment may be deferred in 70%. Each shareholder is liable up to the amount of the respective shareholding in the Company's share capital. The companies incorporated as "sociedades anónimas" have to be managed by a board of directors, composed by the number of directors foreseen in the Company's by-laws. A legal person may be appointed as director, provided that they appoint an individual to exercise the office in their own name. In this case, the legal person shall

be liable with the person they have appointed. Directors shall be appointed for the term foreseen in the by-laws, which shall not exceed four calendar years. A Statutory Auditor is also required to be appointed along with an Alternate Statutory Auditor.

In both scenarios, some corporate decisions are mandatorily subject to the resolution of the quota holder(s)/shareholders, by the majority of the votes unless whenever the applicable law and by-laws demand a higher percentage majority for the approval of specific issues. The quota holder(s)/shareholders decisions shall be taken in a general meeting or in writing, but in the latter case it will imply to be unanimously approved.

Consumer Protection Law

Pursuant to the Portuguese Consumer Protection Law, a franchisee does not fall within the definition of a consumer, as goods or services delivered or provided by the franchisor to it are meant for professional use.

Antitrust/Competition Law

Special attention shall be given to certain clauses, namely market sharing, pre-pricing, exclusivity and non-compete provisions, as they may collide with the provisions set forth in the Treaty on the Functioning of the European Union and in the Portuguese Legal framework for competition. A prior assessment of the abovementioned clauses should be carefully executed while drafting the franchise agreement as well as during its effectiveness, based upon the particularities of each concrete case.

Employment Law

Pursuant to the Portuguese Labor Law, an employee is someone who is deemed to render their intellectual or manual activity to other

person/entity—under its authority, control, and management, against the payment of a specific remuneration and fulfilling with a specific labor schedule. Considering that, on the one hand, neither the franchisee renders any activity to the franchisor nor the franchisor pays to the franchisee a specific remuneration as under an employment agreement, and on the other hand, the franchisor does not exercise a management or disciplinary authority over the franchisee. There should be no association between the employment agreement and the franchise agreement, and the franchisee cannot be qualified as an employee of the franchisor, regardless of the franchisee being an individual or a company.

Law on commercial agents

Franchise agreements, although very common in Portugal, are atypical and therefore, not specifically regulated under Portuguese law, contrary to agency contracts.

Nevertheless, Portuguese courts and scholars do not exclude the application thereto of certain rules of the Portuguese agency law ("Agency Law"), so far as the relevant provisions may be applicable by analogy to a franchise agreement. In fact, under the Agency Law, an "agent" is defined as a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods or services on behalf of the principal—thus excluding franchisees from being qualified as such. Portuguese courts have already ruled out in favor of the application by analogy of the rules on termination of the agency agreement. Such application is not undisputed and shall always depend on the court's assessment of the particular circumstances (such as, *inter alia*, the level of the franchisee's integration in the

franchisor's network, the existence of training programs, the use of marketing materials provided by the principal, franchisee's exclusivity undertakings and level of economic dependency of the franchisor, whether the franchisor shall benefit from the customers developed by the franchisee in a certain territory).

IP Law

Intellectual Property ("IP") rights are core in a franchise system to the extent that franchising usually encompasses the granting of a license to the franchisee to use franchisor's trademarks, insignias or similar rights, in connection with the marketing and sale of goods or services pursuant to the franchise agreement.

Safeguarding the IP, particularly by advance registration of trademarks and insignias (either at local level, e.g., Portuguese trademarks, internationally or within the European Union), is therefore of critical importance to the franchisor. For that purpose, it is generally up to the franchisor to defend its IP against third parties' attacks (directly or through a master franchisee) as well as to make sure that the franchisees are clearly informed as to how they may or may not use the IP in order to prevent any potential misuse. The protection of IP further requires clear identification of what needs to be protected (e.g., databases, software, know-how) and how (copyrights, trademarks, industrial designs, etc.), consistent registration and enforcement practices, and systematic monetarization of the franchisees' use of the IP.

Additionally, franchise also entails transfer of know-how from the franchisor to the franchisee as a central element of the agreement, as otherwise the franchisee will be unable to implement the franchise concept. Although

know-how is effectively transferred through training sessions or the delivery of handbooks and manuals, it may still be protected by the franchisor, as a trade secret, provided the information in hand (i) is not generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question, (ii) have commercial value because it is secret, and (iii) has been subject to reasonable steps under the circumstances, by the person lawfully in control of it, to keep it secret. Where information meets the criteria to be qualified as know-how, the protection must be sought by way of clear confidentiality policies and practices by the franchisor, the imposition of confidentiality undertakings upon franchisees, and legal defense against any illegal acquisition, use or disclosure of know-how either by franchisees or third parties.

In any case, the franchise contract is a key element for proper protection of IP and know-how, to the extent that it imposes on the franchisee clear and comprehensive contractual obligations, including in respect of confidentiality and the use of know how licensed by the franchisor only for purposes of exploitation of the franchise. Additional safeguards may also be implemented through imposition on the franchisee of other specific obligations, such as: an obligation not to engage, directly or indirectly, in any similar business, or to acquire financial interests in the capital of a competing undertaking; an obligation to communicate to the franchisor any experience gained in exploiting the franchise and to grant it, or other franchisees, a non-exclusive license for the know-how resulting from that experience; an obligation to inform the franchisor of infringements of any IP, to take legal action against

infringers or to assist the franchisor in any legal actions against infringers; an obligation on the franchisee not to assign the rights and obligations under the franchise agreement without the franchisor's consent, etc.

Selected questions/aspects

Precontractual disclosure

As mentioned before, franchise agreements are not specifically regulated in Portugal, but being subject to the general principles of contract law and the relevant sectorial legislation that may be applicable to specific matters.

Franchisors or master franchisees usually provide potential new franchisees with reasonable advance to the execution of a franchise or sub-franchise agreement, with information on the circumstances that franchisees need to consider prior to entering the agreement. However, although the provisions of Civil Code establish a general duty of good faith—both in the negotiation and performance of an agreement, the Portuguese law does not impose any specific obligations on franchisors in respect of the information that needs to be disclosed to franchisees, prior to the execution of the agreement. This includes any statutory procedure and minimum notice period to be followed in respect or in connection with subsequent modification or update thereof. Nevertheless, the Portuguese Association of Franchising as well as most local franchisors or master franchisees follow the European Code of Ethics for Franchising's guiding principles and rules, including on the franchisors' precontractual disclosure obligations.

Additionally, failure to provide a potential franchisee with all relevant information they need to receive and consider prior to entering the

franchise contract, in a timely and accurate matter, may render the franchisor liable for breach of precontractual, negotiation and good faith duties. In such cases, the franchisee may be entitled to terminate the contract and seek compensation for damages.

Franchise fees

There is no Portuguese Law that foresees the nature, amount, or payment of franchise fees. If the franchisee does not fulfill its obligation to timely pay the agreed franchise fees, the franchisor will be entitled to a compensation corresponding to default interest, which is legally defined depending on whether the franchisee is an individual or legal person. Respectively, this does not withstand the interest that may be foreseen under the agreement's clauses. There are no restrictions to the payment of the franchise fees in a foreign currency.

Confidentiality

As mentioned above, the passing of valuable information on the franchise business and operational procedures is a typical element of the franchise. Without such information, the franchisee will be unable to implement the franchise concept. However, such information may be qualified as trade secrets to the extent that (i) it is not generally known among, or readily accessible to, people within the circles that normally deal with the kind of information in question, (ii) have commercial value because it is a secret, and (iii) has been subject to reasonable steps under the circumstances, by the person lawfully in control of it, to keep it a secret. Where information meets the criteria to be qualified as know-how, the protection may be sought by way of clear confidentiality policies and practices by the franchisor, the imposition

of confidentiality undertakings upon franchisees, and legal defense against any illegal acquisition, use or disclosure of know-how either by franchisees or third parties.

Confidentiality undertakings and notices are therefore common in both the franchise contract and documents, manuals and presentations passed on or shown to franchisees. This is done not only to ensure that franchisees have proper and full understanding of the nature, value and purpose of the information to which they have access to, but also to evidence that the franchisor takes reasonable steps to keep the information secret. Infringers of trade secrets may be rendered liable on the grounds of the contract and tort law, both for damages or administrative penalties (which may go up EUR 100,000), as well as be subjected to preliminary injunctions or protective measures sought or requested by the franchisor.

Amendments

Unless otherwise expressly foreseen between the parties, amendments to a franchise agreement may be agreed between the franchisor and the franchisee. Any amendments should clearly and expressly state to which clause it refers to, either deleted or amended, and the new revised wording added therein.

Termination

As noted above, although very common in Portugal, franchise agreements are not specifically regulated under Portuguese law. Therefore, like any ongoing contract, a franchise agreement normally terminates in accordance to what is set out in the agreement and additionally, civil law provisions, given that an agreement terminates (i) on expiration term or upon verification of a condition of termination, (ii) by

just cause, (iii) by agreement of the parties or (iv) when either party's notice of termination, with reasonable term of notice where no specific term has been agreed upon previously.

Portuguese courts' decisions have held, in specific situations, that certain provisions of the Agency Law on termination (which regulate, e.g., the conditions for termination, prior notices and clientele indemnity) may be applicable by analogy to franchise agreements. Under the Agency Law, in order to terminate an agency agreement without a fixed term, the principal is required to give notice to the agent with a minimum prior notice period of one month for contracts in force for less than one year; two months for agreements in force for more than one year and less than two years; and three months for agreements in force for more than two years. However, the Portuguese Supreme Court of Justice ruled out that the prior notice periods established in Agency Law are not directly applicable to a franchise agreement but should be viewed as a reference. The Supreme Court also considered that a case-by-case assessment of the prior notice's adequacy needs to be carried

out and that termination notices longer than the periods established under the Agency Law, given the higher level of cooperation between the parties as compared to the one achieved in most of the agency agreements.

The Agency Law further determines that in case of an agency agreement's termination, the agent may be entitled to receive a clientele indemnity provided that certain cumulative conditions are met. Such conditions include, e.g., that the agreement is not terminated due to a circumstance caused by or attributable to the agent (for instance, there is no clientele indemnity if the agreement is terminated due to a serious breach of the agent's obligations); that the agent has developed and increased the business of the principal; that after the termination of the agreement the principal shall continue to profit significantly from the agent's activity (i.e., in case the principal shall have a relevant access to the clients after termination); and that the agent ceases to receive any remuneration for contracts negotiated or entered into after the termination, with clients arranged by them. This is a mandatory rule that



cannot be derogated by the parties.

The application of clientele indemnity's provisions to franchise agreements is generally rejected by most courts in Portugal, on the basis that it is the franchisee—not the franchisor—who typically benefits from the franchisor's customer base and established business. However, a decision from the Lisbon Appeal Court confirmed this indemnity can be claimed by a franchisee under a franchise agreement in accordance with the provisions of the Agency Law (though in a specific case, it rejected to award the indemnity because the agreement's cessation had been caused by the franchisee). The Supreme Court of Justice decided that this indemnity can be claimed only when the franchisee evidences that they had an important role in bringing new clients to the franchisor or for the increase of its business (in a specific case, the indemnity claimed by the franchisee was not awarded since the Court understood that no evidence had been provided in relation to such role of the franchisee).

Renewal and transfer

The parties may foresee an automatic renewal of the agreement once the initial term expires for an additional period as they see fit. Otherwise, franchisors may propose an extension of the franchise agreement to the franchisees, in which case the parties shall conclude an amendment to the initial agreement. An assignment of the franchise by the franchisee is subject to prior written consent of the franchisor, unless otherwise agreed by the parties.

Dispute Resolution and Applicable Law

Dispute resolution, court system

For purposes of dispute resolution, the parties may resort to the court system or to arbitration. In the latter option, it requires to be foreseen in the provisions of the franchise agreement.

The Portuguese court system is divided into three hierarchy levels (i) court of first instance, which is divided as well into local courts (for lawsuits with value up to EUR 50,000) and central courts (for lawsuits with value higher than EUR 50,000); (ii) courts of appeal and (iii) supreme court of appeal.

In the agreement, the parties may choose the courts which shall have territorial jurisdiction to settle any dispute arising from the franchise agreement.

Applicable law

The parties may freely agree on the applicable law which shall govern the franchise agreement. The governing law clause should be foreseen in the franchise agreement. However, it should be noted that Agency Law—whose provisions may, in certain circumstances, be also applicable by analogy to termination of franchise agreements—determines that an agent running its business exclusively or mainly in Portugal shall benefit from the rules on cessation of the agreement, insofar as they are more favorable to it than the ones established in the law chosen by the parties to govern the substance of the agency agreement. Therefore, where Agency Law rules are deemed applicable, the parties' choice in respect of the applicable law may be overridden.

Romania

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Legal professionals



Region

EMEA



Offices

Bucharest, Cluj

Essentials

about Romania's franchising law

- 1** All franchising agreements should be registered within the National Franchise Registry;
- 2** The precontractual information that the franchisor is required to provide to the franchisee is expressly regulated. However, there is no restriction regarding the language in which such precontractual information is provided;
- 3** The Franchising Law does not regulate specific provisions regarding foreign franchisors.

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Relevant areas of law

Legal basis of Franchise Law

The legal basis governing franchise is Government Ordinance no. 52/1997 ("Franchise Law" or "GO 52/1997"). The Franchise Law defines franchising as "a trading system of products and/or services and/or technologies, based on a continuous collaboration between natural persons or legal persons, each of them legally and financially independent from one another. Whereby a person named franchisor grants to another person named franchisee the right and imposes the obligation to operate a business, in compliance with the franchisor's concept." A key aspect of the franchise system is the franchise network, meaning the contractual relations established between the franchisor and one or more franchisees, meant to promote a technology, product or service, as well as to streamline the development of their production and distribution. For the purpose of implementing the franchise network, the Franchise Law provides that the franchisor "authorizes and obliges the franchisee, in exchange for direct or indirect contributions, to use products and/or services trademarks, other protected intellectual or industrial property rights, know-how, copyrights, and signs of traders, benefiting from a continuous contribution of commercial and/or technical assistance from the franchisor, within and during the franchise agreement concluded between the parties for this purpose." Based on Law no. 179/2019, the National Franchise Registry was established in consideration of the European Parliament Resolution of 12 September 2017, on the functioning of franchising in the retail sector. The main purpose of the registry is to ensure opposability and publicity of franchising structures to interested

third parties, transparency of the market and to cover the following main topics: registration, amendment/completion and termination.

Corporate Law

The most common corporate form to set up business in Romania is the limited liability company (known as "S.R.L.") compared to joint stock companies "S.A.", which may be either private or public, but are less common. Setting-up an S.R.L. is a rather straightforward process without involving significant fees. One or more persons (individuals or legal entities) may set up a S.R.L., without any required minimum share capital. In the case of an S.A., it is required by law to have at least two shareholders and a minimum share capital of approximately EUR 25.000. Notwithstanding foreign trade law or regulatory requirements regarding foreign investments in certain sectors, Romanian corporate law does not impose any general restrictions on foreign operations in Romania, nor on franchise systems in particular.

Consumer Protection Law

Although it is possible for both legal and natural persons to act as franchisees, the law explicitly states that they act as professionals. This means that they are automatically excluded from consumer protection legislation since their intention to enter the franchise is recognized by the law as business-related. Therefore, provisions concerning commercial agents will apply to both parties.

Antitrust/Competition Law

In Romania, the franchise agreement is regulated by GO 52/1997. GO 52/1997 offers general guidance, with only limited references to competition law, on matters such as: non-compete

or exclusivity clauses. That being said, franchise agreements may contain restrictions that collide with art. 5 of Law no. 21/1996 on the Competition Law (the “Romanian Competition Law”) which is, in fact a carbon copy of art. 101 Treaty on the Functioning of the EU (the “TFEU”). Therefore, before implementing any franchise agreement, one should always consider the framework put in place by the European Commission through the EU-Vertical Block Exemption Regulation (“V-BER”) and its accompanying guidelines (Commission Notice-Guidelines on Vertical Restrictions)¹. Under V-BER, some restrictions put in place in the franchise agreements can be exempted from the prohibitions mentioned in art. 5 of the Romanian Competition Law or art. 101 TFEU provided that the respective parties to a franchise agreement do not have a market share of more than 30% each and no other hardcore restrictions exist which will render the entire agreement null and void. Examples for hardcore restrictions are provisions dictating fixed prices/rebates or prohibiting passive sales outside

1 Please note that the V-BER and its accompanying guidelines apply to “vertical agreements” as agreements or concerted practices entered into between two or more undertakings, each of which operates at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. The V-BER includes vertical agreements containing certain provisions relating to the assignment of intellectual property rights (IPRs) to or use of IPRs by the buyer in its application, and thereby excludes all other vertical agreements containing IPR provisions. The V-BER applies to vertical agreements containing IPR only when certain conditions are met.

a designated territory (including online sales). In the recent years, the Romanian Competition Authority focused its investigations primarily on vertical relationships², therefore we recommend bespoke competition law advice before the implementation of any major vertical commercial relationship. Finally, please note that a franchise agreement that complies with the local legislation concerning such agreements (i.e., GO 52/1997) is not automatically complying with Romanian/European competition law. Therefore, a qualitative analysis of the agreement must be performed, in order to assess whether a franchise agreement is in line with its specific provisions and other relevant provisions such as competition law. The analysis will be based around V-BER and its accompanying guidelines.

Employment Law

A deemed employment risk could arise under Romanian labour legislation and needs to be considered regarding franchisees. If the franchisee’s activity mirrors an employment relationship, Romanian labour authorities/courts of law could reclassify the franchise relationship into an employment relationship. As such, they could impose the conclusion of an employment contract with the franchisee and apply fines for

2 Competition Council’s Decision no. 65 dated 31 October 2012 regarding the commitments assumed by Fornetti Romania S.R.L. – price fixing agreement – the franchisor imposed a minimum price to be followed by the franchisee.

Competition Council’s Decision no. 39 dated 14 September 2015 regarding the sanctioning of Secuiana SA and its distributors/franchisors - price fixing agreement - the franchisor imposed the margins for the franchisee, among many others vertical restrictions.



undeclared work. Personal tax liabilities might also arise. A potential requalification to employment would consider how the relationship is established in the franchise contract (particularly, the parties' rights and obligations), what are the concrete circumstances and elements characterizing the franchisee's activity and if they indicate the existence of a relation which has characteristics belonging to employment relationship. Therefore, it is important to ensure that in substance, the franchisee's activity is an independent activity.

IP Law

In principle, based on a franchise agreement, the franchisee is granted with the right to use protected trademarks, patents, know-how, copyright and other protected intellectual or industrial property rights of the franchisor. These rights may be granted for a period which is at least the equal to the duration of the franchise

agreement. However, the law states that the franchisee must not disclose the know-how provided by the franchisor to third parties, neither throughout the duration of the franchise agreement nor thereafter. The franchisor may impose a non-compete and confidentiality clause as well, to prevent the know-how being disclosed without prior authorization during the execution of the exclusivity clause. Before implementing non-compete or confidentiality clauses, especially post-term clauses, we strongly advice performing a competition law review of such provisions.³ However, although these rules are provided by law to govern the franchise agreements, the franchisors still need to ensure the proper IP protection, for instance by registering their trademarks, patents etc.

³ Please refer to Antitrust/Competition Law section.



Selected questions/aspects

Precontractual disclosure

The local franchise law explicitly governs this phase. Precisely, the franchisor must provide the future franchisee with information enabling them to participate in the performance of the franchise agreement, after being fully aware of the facts.

The franchisor must provide the franchisee with an information disclosure document, which should contain specific data relating to: a) the franchisor's history and experience; b) details of the franchise management; c) identity; c) the dispute history of the franchisor and their management; d) the initial amount to be invested by the franchisee; e) the mutual obligations of the parties; f) copies of the financial results of the franchisor in the last year; g) information on the pilot unit (until the start of its franchise network, the franchisor shall effectively operate a business concept for a period of at least one year, in at least one pilot unit). Documents regarding the information disclosure should be registered by the franchisor/master franchisee with the NFR. Moreover, advertising for the selection of franchisees must be unambiguous and contain no erroneous information, while advertising documents, which present a franchisee's expected financial results, will need to be objective and verifiable.

With regards to language, in which the disclosure documents and franchise agreements must be drafted, the Franchise Law does not regulate any rule on this matter, giving a possibility for the parties to choose the language of drafting their contractual framework. However, the Franchise Law states that the franchise contract must clearly and with no ambiguity

define each party's rights and obligations and liabilities, as well as any other clauses regarding the collaboration between the parties.

Throughout the agreement's execution, the franchisee must provide the franchisor with any information that facilitates knowledge and analysis of actual financial performance and situation, to ensure effective management in relation to the franchise. That being said, all the information provided must be in line with rules and regulations regarding the exchange of sensitive information as to avoid any competition law-related risks.

Romanian Franchise Law does not provide any special rules in this respect. Thus, the contractual provisions and general legislation, i.e., Civil Code, will apply. This is also applicable in terms of contractual liability/claims for any damages and personal liability involving individual officers, directors and employees of the franchisor. There is a possibility where the franchisee can cancel or rescind the franchise agreement due to franchisor's violation of the obligation to disclose. In this case, the Franchise Law expressly stipulates that any case of rescission or early termination of the agreement should be clearly stipulated under the agreement.

The Franchise Law clearly stipulates that the franchise agreement should expressly regulate the matter of sub-franchising and assignment. In this regard, the contractual provisions would be supplemented by the general legal provisions of the Civil Code and by specific provisions, where applicable, such as trademark law. Also, in the case of a sub-franchise, the obligation to provide precontractual information is applicable to contracts concluded with the sub-franchisee. The Master Franchisee is required to provide the related disclosure document to the

sub-franchisees. The Master Franchisee may use the information provided by the franchisor, emphasising its own contractual obligations.

The Franchise Law clearly stipulates that the franchise agreement should expressly regulate the matter of sub-franchising and assignment. In this regard, the contractual provisions would be supplemented by the general legal provisions of the Civil Code and by specific provisions, where applicable, such as trademark law. Also, in the case of a sub-franchise, the obligation to provide precontractual information is applicable to contracts concluded with the sub-franchisee. The Master Franchisee is required to provide the related disclosure document to the sub-franchisees. The Master Franchisee may use the information provided by the franchisor emphasising its own contractual obligations.

Legal restrictions

There are no such restrictions imposed under Romanian law. However, if the franchise business entails the acquisition of land, it should be noted that persons/entities from countries outside of the EU/EES may obtain ownership over land in Romania only based on a mutual agreement between Romania and their country of origin. They may obtain other real rights over land should the franchise business require them.

Confidentially

The franchisor may impose a non-compete and confidentiality clause, to prevent the know-how being disclosed without prior authorization during the exclusivity clause's execution. The confidentiality clause may be extended to other aspects as well. A breach of the confidentiality clause may be sanctioned similar to other contract defaults and depending on the situation, a party may seek interim measures to prevent

any unlawful use of any information, either in opposition to the other party and if the case arises, to other third parties. Before implementing confidentiality clauses (especially post term confidentiality clauses), it is strongly advised to perform a competition law review of such provisions. Under certain conditions, confidentiality clauses could be regarded as non-compete clauses and must be analyzed in the context of V-BER and its accompanying guidelines.

Amendments

If the franchise agreement contains a precise and reasonable clause regarding amendments, considering the franchisees interests, unilateral amendments of the agreed terms by the franchisor are admissible as an expression of the franchisor's obligation to continuously develop its franchise system according to changing market conditions. Without a respective provision, amendments of the franchise agreement may only be agreed between franchisor and franchisee—an almost impossible task in terms of uniform regulations once a franchise system has reached a size with a large number of franchisees. Special care must be taken in case of a dominant franchisor (i.e., where the franchisor holds a market share of more than 40% on its relevant market) as to not discriminate, impose unfair trading conditions or any other practice that falls inside the scope of dominance abuse.

Termination

As the law requires parties to provide the contract's duration, it should be noted that unless otherwise agreed, the contract cannot be unilaterally terminated. Furthermore, in case of a contract breach, a prior warning should be provided before issuing a termination notice, unless otherwise agreed. The reasons for

termination should be substantial and the law also states that termination for breach of contract may be enforced without a prior warning, only if it was provided in the contract. Special care must be taken in case of a dominant franchisor (i.e., where the franchisor holds a market share of more than 40% on its relevant market) as to not unlawfully refuse to deal by way of termination of an existing agreement. Refusal to deal is considered a practice that falls inside the scope of dominance abuse.

Renewal and Transfer

Franchisors are free to decide whether or not to renew a franchise agreement. Parties may also provide a clause for an automatic extension of the agreement, if preferable, otherwise renewals should be done explicitly. It is admissible to contractually restrict a franchisee's ability to transfer its franchise, typically by requiring an explicit prior written approval of the franchisor.

Dispute Resolution and Applicable Law

COVID-19

GEO 29/2020, regulating certain moratoria measures related to COVID-19 pandemic only marginally, is concerned about the situation of professionals carrying out their economic activities in shopping centers (malls etc.) that were closed during the state of emergency. Thus, probably the most consistent measures in favor of these small and medium-sized enterprises was the deferred payment for utility services—electricity, natural gas, water, telephone and internet services, as well as deferred payment of rent for the building destined for registered office and secondary offices. However, no legal provision was regulated in relation to the franchising fees or other related contractual fees.



Russia

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Legal professionals



Region

EMEA



Offices

Moscow,
Saint Petersburg

Essentials

about Russia's franchising law

- 1 Franchise shall always contain a trademark, otherwise the agreement is not recognized as franchising. Transfer of the franchise shall be duly registered, otherwise it is deemed as not having taken place.
- 2 Franchisee is entitled to revoke an open-ended franchise agreement with a six-month' notice. Either party is entitled to revoke the agreement with 30-days' notice, with payment of a termination compensation.
- 3 Franchisor bears subsidiary or joint liability for claims arising from franchisee's non-compliance with quality requirements.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of Law

Legal basis of Franchise Law

Franchising (commercial concession) is defined in the Article 1027 of the Russian Civil Code as a contract, under which one party (the right holder, the franchisor) undertakes to provide the other party (the user, the franchisee) with the right to use in the user's business activities the complex of exclusive rights belonging to the right holder, inter alia, the right to a trademark, service mark, know-how, in exchange of a fee for a period or without specifying a term.

Usually the franchisor also obliges to provide the franchisee with ongoing technical and advisory assistance, including assistance with employee training and development, and to control the quality of goods (works, services) produced by the franchisee.

Franchising is governed with Articles 1027 – 1040 (Chapter 54) of the Russian Civil Code, while rights to relevant intellectual property are subject to rules of the Part IV of the Russian Civil Code. There is also a noticeable corpus of case law related to franchising disputes.

Registration of franchising agreements lies within authority of the Federal Service for Intellectual Property (Rospatent, <https://rospatent.gov.ru/ru/about>).

Specifics regarding Foreign Franchisors

Russian law does not contain any restrictions nor specific requirements regarding foreign franchisors. Any intellectual property, recognized and protected in Russia, may be franchised by a Russian or foreign Franchisor.

Corporate Law

As the franchising agreement is dedicated to use of intellectual property in business (commercial) activities, only eligible subject of such activities may become users (franchisees) under the franchising agreement. Those eligible subjects are:

- a) commercial legal entities (the most common is a limited liability company, LLC (OOO in Russian);
- b) sole entrepreneurs, duly registered with the tax inspection in that status.

Consumer Protection Law

Under Russian law, individuals seeking to become franchisees are not qualified as consumers, as the intention of their conduct is business-oriented. In the course of the franchisee's business the franchisee is liable before consumers, if any.

However, the franchisor bears subsidiary liability for claims against the franchisee for non-compliance with the quality requirements. For claims against the franchisee as the manufacturer of the franchisor's products (goods), the franchisor shall be jointly and severally liable with the franchisee.

Antitrust/Competition Law

Russian law expressly permits to include the following provisions into the franchising agreement:

- obligation of the franchisor not to provide others with similar franchises for their use in the territory assigned to the franchisee or to refrain from their own similar operations in this territory;
- obligation of the franchisee not to compete with the franchisor in certain territory;

- the franchisee's obligation not to obtain the similar rights from the franchisor's competitors (potential competitors) and/or not to sell similar goods, perform similar work or render similar services with the use of trademarks or commercial designations of other right holders;
- the franchisee's obligation to stick to franchisor's defined prices;
- obligation of the franchisee to sell goods, perform work or render services only within a certain territory;

The Federal Antimonopoly Service may challenge the franchising agreement or its separate provisions if they breach the antitrust law, considering the state of the relevant market and the economic situation of the parties.

Employment Law

Since a franchisee may only be a commercial company or a sole entrepreneur, no risk of recognition of a franchising agreement into an employment contract arises. In the course of the franchisee's business the franchisee, not the franchisor, is liable before franchisee's employees, if any.

Law on commercial agents

Franchising and commercial agency are recognized as different, independent legal constructs in Russian law. While an agent acts on behalf of the principal or on the agent's own behalf, but always at the expense of the principal, a franchisee operates at its own risk, on its own behalf and at its own expense. The agent is entitled to receive a fee from the principal, the franchisee is bound to pay a fee to the franchisor. A mixed agreement may be concluded but does not create any specific consequences for rights and obligations of a franchisee.

Intellectual Property

Franchisors are obliged to carry out registration of transfer of the franchise to franchisees. Franchisors are expected to keep validity and legal protection (in case of trademarks – registration) of the transferred intellectual property and shall protect their IP against third parties' claims, misuse or imitations. Trademarks require registration as a national trademark in Russia.

Selected questions/aspects

Precontractual disclosure

Franchisor's obligation to disclose recognizably relevant information related to the franchise to a potential franchisee is not expressly established in the legislation, but is derived from the good faith principle and precontractual liability (*culpa in contrahendo*). There is no statutory list of which information has to be made available, and in what form, nor is there a standard compliance procedure. Likewise, there is no franchisor's obligation to continuously update the precontractual information, unless specified in the franchise agreement.

For the sake of evidencing, precontractual information exchange should be documented. Applicable national and international personal data protection regulations shall be obliged.

Failure to disclose essential information may give ground for a franchisee's claim(s) for compensation of incurred losses and/or termination of the franchising agreement.

Legal restrictions

Antitrust/Competition Law

Although franchising agreement may contain territorial, pricing and other requirements and limitation, those are bound to a general prohibition not to prevent, limit, eliminate

competition. Franchising agreements may be evaluated for that purpose by the Federal Antimonopoly Service on a case by case basis (it should be noted that such cases are scarce).

Preformulated agreements

Franchise agreements are often concluded with use of preformulated templates drafted by franchisors. Using templates may significantly limit franchisees in their contractual freedom, which grants them a potential claim for challenging certain provisions as ineffective due to unreasonably disadvantaging the franchisee or unfairly advantaging the franchisor.

Franchise fees

Russian law does not provide for any specific rules regarding franchise fees. Any fee mechanics may be used as long as there is a fee established by the agreement or definable, based on its terms and conditions.

A franchisor may charge a statutory interest on overdue payments (equal to the key rate of the Bank of Russia, currently 6.5% https://www.cbr.ru/hd_base/KeyRate/?utm_source=w&utm_content=page, unless other interest rate or a fine is specified in the agreement).

Franchising agreement may provide for paying the fees in a foreign currency (other than Russian Ruble). If the franchisor is a foreign entity, such payment terms are eligible—however, the agreement and payments under it will be subject to currency control (the franchisee will have to register the agreement with the authorized bank and carry out payments through that bank). If both the franchisor and franchisee are Russian entities or individuals, the fees may be nominated in any currency, but payments may only be made in Russian Ruble.



Confidentiality

Maintaining confidentiality is a statutory obligation of a franchisee. The franchisor is commonly also obliged to keep confidentiality, especially in terms of maintaining the secrecy regime of know-how, if transferred as a part of the franchise.

A party in breach may be liable for losses and fines (if provided for in the agreement). A breach of confidentiality may also serve as grounds for early termination of the agreement (via litigation or outside the court, if expressly stated in the agreement).

Amendments

As a general rule, a franchising agreement may only be altered, amended and/or added to on the basis of mutually executed written supplementary agreement. Written form is a statutory requirement. However, the agreement itself may establish a different procedure for amending (e.g., unilateral amendments by a party) with observation of the due written form. It would be recommended to avoid establishing unilateral procedure for amending the material conditions of the agreement, because there is inconsistent and contradictory case law on the matter.

Termination

Franchise agreements may be concluded for a certain time or without specified time (open-term agreement). In the former case the agreement expires as the time comes. In the latter, the agreement lasts until the parties terminate it. In any case, the parties may terminate the franchising agreement unanimously in writing.

Under the open-ended agreement, the franchisee is entitled to terminate it unilaterally by giving the franchisor a termination notice at

least six months prior to the termination date. Under any franchising agreement, both parties may unilaterally terminate it by giving the other party a termination notice at least 30 days prior to termination and paying the termination compensation, defined by the agreement.

The franchisor is entitled to unilaterally terminate the agreement in case of material breaches committed by the franchisee (non-compliance with quality requirements, gross non-observance of franchisor's instructions, failure to pay), if the breach was not remedied within reasonable time after the franchisor's demand.

If the franchisor fails to maintain legal effectiveness of the transferred franchise in full or in part (e.g., trademark protection is revoked) and fails to replace it, the agreement is terminated and the franchisee may claim for compensation of losses and/or reduction of the fees (if the agreement survives). Franchising agreements terminate on the day a court recognizes either party insolvent. Return of the franchise subsequent to termination of the agreement shall be registered with Rospatent.

Renewal and transfer

Parties are free to renew the agreement in writing. The agreement survives any transfer of exclusive rights to another right holder and remains unchanged for the franchisee, except for the person of the franchisor. Transfer of the intellectual property under transactions, inheritance, M&As etc., does not entitle the new franchisor to review and change the agreement.

The franchisee may transfer their rights and obligations under the agreement only subject to consent of the franchisor, who may demand payment or establish additional conditions for such transfer.

The franchisee may, under the consent of the franchisor, or if provided for in the agreement, is obliged to conclude franchising sub-agreements, and becomes subsidiary liable for sub-franchisees before the franchisor.

Dispute Resolution and Applicable Law

State commercial courts are entitled to solve disputes arising from franchising agreements regardless of the subject and/or the claim amount.

Franchisor and franchisee may also agree on arbitration as the exclusive way of resolving disputes between the parties. This may be favorable, as the parties may choose the language of the proceedings and have influence on the arbitrators selected. Also, arbitration proceedings are, unlike proceedings before ordinary courts, not held in public. However, if the value in dispute is rather low, arbitration may often be too cost-intensive. Arbitration awards are often challenged in Russian state courts by the dissatisfied party in a separate procedure (if the award is not final and conclusive) or during the enforcement (if the award is final and conclusive but is alleged

to contradict public order or basic principles of Russian law). If the parties are both Russian entities, they may not choose the governing law. If a party to the franchising agreement is a foreign entity, any law may be chosen as the governing one.

COVID-19

The COVID-19 pandemic has had a huge economic impact on all businesses, including those operating on the franchise basis. There are no special measures nor regulations related to franchising agreements, including fees.

As healthcare restrictions prevented many places from operating in 2020 (shops, sport clubs etc.), many negotiations and disputes arose on basis of frustration of contract, force majeure and material change in circumstances doctrines. While the legislation provided for special lease regulations, no such regulations were introduced for other purposes, including franchising. Franchisees are left to negotiate with franchisors and if unsatisfied, to sue for alteration or termination of the agreement. At the moment, there is no established case law.



Saudi Arabia

6

Legal professionals



Region

EMEA



Essentials

about Saudi Arabia's franchising law

- 1 In Saudi Arabia, franchising arrangements are governed by the Commercial Franchise Law ("CFL") and its implementing regulations, which prescribe strict requirements in connection with franchise agreements, including mandatory terms that must appear in such agreements and the language that such agreements must be drafted in;
- 2 Certain disclosure documents (which must be in Arabic) must be registered with the Saudi Arabian Ministry of Commerce and Investment ("MOCI") and be given to the franchisee prior to entering into a franchise agreement; and
- 3 Franchise agreements must have a minimum term of five (5) years.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

We understand that franchising arrangements in Saudi Arabia are governed by the CFL and its implementing regulations, which are enforced by the MOCI. However, as the CFL is still very new and further implementing regulations may be required, its implementation and enforcement in practice is likely to be an ongoing and developing process.

Under the CFL, we understand that a “franchise” is generally an agreement under which a franchisor grants certain rights to the franchisee, such as the right to operate a business or use the franchisor’s intellectual property rights (“IPRs”), usually in exchange for the franchisee providing monetary or other consideration.

Generally, in order to undertake franchising operations in Saudi Arabia, foreign franchisors must register their franchise with, among others, the MOCI.

In addition, many franchisors and franchisees are members of the Middle East and North Africa Franchise Association (“MENAF”), a private association which promotes best-practice franchising in Saudi Arabia and has formulated a code of ethics that its members are expected to follow (although this is not binding). MENAF’s members generally comprise franchisors, franchisees and master franchisees.

Specifics regarding Foreign Franchisors As noted in “Legal Basis of Franchise Law” above, foreign franchisors are generally required to register their franchise with the MOCI. For such registration, we understand that the MOCI typically requires the provision of two (2) years of notarized and audited accounts.

Under the Foreign Investment Law (“FIL”), any foreign investor looking to do business in Saudi Arabia must obtain a foreign investment licence (“FI Licence”) from the Ministry of Investment of Saudi Arabia (“MISA”). The FIL imposes stringent requirements which must be complied with, for such a licence to be granted, such as requiring minimum shareholding thresholds to be held by Saudi nationals (usually 25% for companies engaging in trading activities) and prohibiting undertaking business in certain ‘protected’ sectors such as defence and fisheries. The CFL imposes further requirements on foreign franchisors—for example, if a foreign franchisor does not carry on business in Saudi Arabia on its own account but does so through a master franchisee operating in Saudi Arabia, the master franchisee cannot enter into any sub-franchising arrangements until it has operated in Saudi Arabia for at least one (1) year.

Corporate Law

The most common business structure in Saudi Arabia is a limited liability company (“LLC”) incorporated in accordance with the Companies Law of 1965. To incorporate an LLC in Saudi Arabia, the following requirements must be met:

- Shareholders/directors: Generally, every company must have a minimum of two (2) shareholders (subject to the minimum share-holding requirements noted in “Specifics Regarding Foreign Franchisors” above) and one (1) director. The director is not required to be a Saudi national or resident although the general manager does.
- Corporate information: The names of the proposed directors/shareholders of the company and the proposed local address of the company’s office must be provided.

- Charter documents: The articles of association of the proposed company must be prepared and submitted (along with the “Corporate information” above) to the MOCI.

In addition, any proposed foreign shareholder must obtain an FI Licence from MISA in order to hold shares in a Saudi Arabian LLC.

Many required filings with and payments to relevant authorities can be undertaken online, and a company can generally be incorporated within four (4) to six (6) weeks assuming an FI Licence (if required) has already been obtained.

Consumer Protection Law

Although there does not appear to be specific consumer protection legislation in Saudi Arabia there are Government related bodies (such as SIMAH and SAMAD under the auspices of the Central Bank) that have been set up to deal with consumer complaints in certain areas.

Antitrust/Competition Law

Franchising arrangements appear to be covered by the Competition Law of 2019, which generally places restrictions on agreements that are targeted at having and/or in fact have a significant adverse effect on competition in any market for goods or services, abuse of a dominant market position and resale price maintenance, such as a franchisor pressuring a franchisee not to sell products below a certain price.

Employment Law

The question of whether a franchisee is an “employee” of a franchisor under the Labour Law of 2005 appears to be principally a question of fact, which is determined based on a variety of factors such as the degree of control exercised by the franchisor over the franchisee, how the franchisee is remunerated

and whether the franchisee is obliged to work solely for the franchisor. Notwithstanding the above, given that a franchisee must typically pay a franchisor for, among others, the use / exploitation of the franchisor’s IPRs and a franchisor would not usually exercise a degree of control over a franchisee to the same extent as an employer would have over their employees, we understand that franchising arrangements are generally unlikely to give rise to an employment relationship under Saudi Arabian law.

To help mitigate the risk of characterization as an employment relationship, a franchise agreement may also stipulate that the franchisee will be acting in their capacity as an independent contractor and nothing in the agreement should be construed as creating an employment relationship between the franchisor and the franchisee.

Law on commercial agents

Generally, the CFL states that a franchising arrangement will not give rise to any agency relationship between a franchisor and franchisee.

IP Law

Franchise agreements may allow the licensing and/or transfer of all forms of IPRs, depending on the nature of the intended activity or business of the franchisee. A franchisor may control, supervise and impose conditions and limitations on the exploitation and use of their IPRs by a franchisee.

While Saudi Arabian law does not appear to require trademarks or licences to be registered in order to engage in franchising activities, undertaking relevant registrations with the Saudi Arabian Trade Mark Office is necessary in order to obtain statutory protection of such IPRs under Saudi Arabian law.



Selected questions/aspects

Precontractual Disclosure

Under the CFL, a franchisor/master franchisee must provide any potential franchisee/sub-franchisee respectively, with certain documents prescribed by the CFL's implementing regulations (e.g., background of the franchisor, details of the franchisor's directors and the franchisor's audited financial statements for the past two (2) years) ("Disclosure Documents") at least fourteen (14) days before signing the franchise agreement. Any franchisor/master franchisee who fails to comply will commit an offence and may be liable to monetary penalties (i.e. fines).

The CFL requires franchise agreements and the Disclosure Documents to be drafted either (i) in Arabic, or (ii) in a language other than Arabic but with a certified Arabic translation.

Legal restrictions

The CFL requires certain compulsory provisions to be reflected in all franchise agreements - such as certain prescribed obligations of the franchisor and franchisee and details of the territorial rights granted to a franchisee - which cannot be contracted out of. Provisions purporting to do so will generally be deemed void.

Confidentiality

Confidentiality clauses are generally enforceable under Saudi law.

Franchise fees

The CFL requires franchise agreements to stipulate the franchise/technical fees which may be payable by a franchisee. Save for this requirement, the parties to a franchise agreement are generally free to agree on any matters in connection with franchise fees.



Amendments

The parties to a franchise agreement are generally free to agree on terms which allow for a franchisor to unilaterally amend the terms of the franchise agreement.

Termination

Generally, the CFL requires franchise agreements to have a minimum term of five (5) years. Subject to this requirement, the parties to a franchise agreement are generally free to agree on the length of a fixed-term franchise agreement. Such agreements will automatically terminate on the expiry of the fixed term.

The CFL generally allows parties to a franchising agreement to agree on the grounds for terminating such an agreement, such as material breach of contract and repudiation.

Renewal and transfer

The CFL generally allows parties to a franchising agreement to agree on provisions in connection with the renewal and transfer of franchise agreements. However, if parties do not expressly include provisions relating to such renewal, the CFL generally requires a franchisor to renew the franchise agreement where the franchisee gives at least six (6) months' written notice of their intention to renew to the franchisor.

Dispute Resolution and Applicable Law

Dispute resolution, court system

Cross-border franchising arrangements may be governed by foreign laws, and the parties can opt for dispute resolution by arbitration in a "neutral" location (rather than a Saudi Arabian

court or local arbitration regime). In the absence of a binding arbitration agreement expressly reflected in the agreement or otherwise agreed by the parties, the parties may choose to commence proceedings in a Saudi Arabian court.

Since Saudi Arabia is an Islamic state, its judicial system is partly based on Islamic law principles (Shariah law) for both criminal and civil cases, and is broadly classified into three levels (in descending order of superiority):

- Supreme Judicial Council (appellate jurisdiction only);
- Courts of Cassation; and
- First Instance Courts.

Applicable Law

Saudi Arabian courts will generally defer to the law that parties have chosen to govern a franchise agreement, and if the chosen governing law is foreign, a Saudi Arabian court will generally refer the case back to the courts of the relevant jurisdiction/parties agreed arbitration regime without looking into whether the parties' choice of governing law should be upheld subject to certain 'public policy' nature exceptions.

COVID-19

Businesses in Saudi Arabia have been badly impacted by the COVID-19 pandemic and the Saudi Arabian Government has introduced relief measures in connection with tax payments, corporate compliance, value-added tax, customs and excise, and deferral of loan payments. As of 4 August 2021, there does not appear to be any COVID-19 related legislation in Saudi Arabia that specifically relates to franchising matters.

Serbia



15

Legal professionals



Region

EMEA



Offices

Belgrade

Essentials

about Serbia's franchising law

- 1 No specific regulation targeting franchising arrangements;
- 2 Poor court practice due to which the subjects entering in franchising arrangements should consider some amount of legal uncertainty;
- 3 Various examples of franchising arrangements in practice result in lack of adjusted and unified approach in resolving similar matters.

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Relevant areas of law

Legal basis of Franchise Law

In Serbia, there is neither a legal definition of “franchise”, nor a codified franchise law. Serbian “franchise law” is currently developing mostly through the commercial practice and in rare court decisions; its implications result from many different areas of law, especially civil, commercial and corporate law.

Corporate Law

The most common corporate form to set up business in Serbia is a limited liability company (“DOO” in Serbian). It is easy to set up by one or more people and requires a minimum capital of approximately EUR 1. The company is liable to the creditors with its property that is separate from the shareholders’ property as a rule. The formation costs for a limited liability company are not high. Notwithstanding specifics of some industries, Serbian corporate law does not impose any general restrictions on foreign operations in Serbia, nor on franchise systems in particular.

Consumer Protection Law

Under Serbian consumer protection law, individuals seeking to become franchisees would not qualify as consumers, as they would be operating a business venture. If the franchisee is an entity such as a limited liability company or entrepreneur, consumer protection rules are not applicable.

Employment Law

In case where an entrepreneur (natural person registered with the commercial registry) is performing franchise services for the legal entity and fulfils five (5) out of nine (9) criteria defined by the local law (so called “independence test”), this income which they receive as

an entrepreneur will have a treatment of “other income” and would be subject to 20% tax and 25.5% social security contributions for pension and disability. This is paid in addition to the tax for independent activities and social security contributions for independent activities.

Law on commercial agents

There is no separate law on commercial agents in Serbia. However, similar concept of “commercial representation” exists in local law on contracts and torts, which is not often used in practice but may be confused for franchising arrangement due to unclear concept of the latter. Commercial representation contract is a type of contract by which the commercial agent undertakes to find third parties who would conclude a contract with their principal. Commercial agent may also be authorized to conclude a contract on behalf of their principal, provided that the principal undertakes to pay them a certain fee for each concluded contract. In one resolution of the Commercial Appellation Court from 2014, the court stated that if a contract that is named as “commercial representation contract” does not contain provision on mandatory commission but contains work instructions, information on training for presentation and sales, it should be considered as a complex contract such as franchising contract. Current court practice is not sufficiently developed in order to assess the relation between commercial representations as regulated concept and franchising as unregulated concept.

IP Law

Franchisors need to protect their IP against third parties’ attacks or imitations, especially by registering their trademarks—either as International Registration (“IR”) with the World



Intellectual Property Organization (“WIPO”) or as national trademark in Serbia only with the Serbian Intellectual Property Office (“SIPO”). It is recommended to also carry out research beforehand in order to prevent the potential later loss of the trademark and corresponding claims for disclosure and damages.

Real Estate/Tenancy Law

Depending on the specific design of the franchise arrangement, legal implications may arise from real estate and tenancy law. In a structure where the franchisor (sub-) leases the locations to the franchisees, harmonizing the termination rights of the (sub-) leasing and the franchise is of essence.

Selected questions/aspects

Precontractual disclosure

Prior to signing a franchise agreement, franchisors and in a sub-franchising structure, master franchisees should inform each potential franchisee accurately and with reasonable advance about all circumstances recognizably relevant for the conclusion of the franchise agreement.

However, since the franchising relations are not recognized as a separate and independent legal institute in Serbia, there are no specific precontractual disclosure rules that would target franchising in particular. General rules regarding negotiations to conclude a contract, business secret, personal data and other applicable institutes need to be taken into consideration.

Legal restrictions

Antitrust/Competition Law

Franchise agreements may contain restrictions that collide with local Competition Law and accompanying bylaws. Exemptions from the

prohibition are possible under the local Vertical Block Exemption Rule (“V-BER”), provided that the respective parties to a franchise agreement do not have a market share of more than 25% each. The V-BER contains black clauses (“core restrictions”), rendering the entire agreement null and void, as well as grey clauses, rendering solely the specific provision in an agreement null and void. As a rule prescribed in the V-BER, exemption is possible for the franchising agreements. However, special attention should be paid to the black and grey clauses.

Franchise fees

Since there are no separate laws regulating franchising fees, general rules would apply. Among others, there is a statutory prescribed payment deadline of 60 calendar days that cannot be contractually changed in a way to be longer than 60 days between franchisor and franchisee. In addition, special note should be paid to the foreign exchange rules in Serbia since official currency in Serbia is Serbian Dinar (RSD) if the franchisor is a foreign entity.

Confidentiality

Confidentiality clauses in franchise agreements (often in combination with a contractual penalty) are enforceable as in other agreements i.e., there are no special rules for franchising agreements. The franchisor may file an interim injunction against an infringing franchisee, claim damages occurred due to the breach, and possibly terminate the franchise agreement extraordinarily.

Amendments

According to general rules from the law on contracts and torts, if the (franchise) agreement contains a precise and reasonable change

reservation clause, considering the franchisees interests, unilateral amendments of the agreed terms by the franchisor may be admissible as an expression of the franchisor's obligation to continuously develop its franchise system according to changing market conditions. Without a respective provision, amendments of the franchise agreement may only be agreed unanimously between franchisor and franchisee.

Termination

Franchise agreements are usually entered into for a certain time and terminate with lapse of that time. A regular termination by one of the parties before that is not admissible, unless both parties unanimously agree upon the same. However, franchise agreements may be terminated by each party without notice if it is unreasonable for the terminating party to



continue the contractual relationship until the agreed time of termination (good cause). If the cause for termination is a breach of a contractual obligation by the other party, e.g., non-payment of franchise fees, the termination is only admissible after having issued a warning to the franchisee to remedy the breach. Unjustified terminations by a franchisor might entitle the franchisee to claim damages. Neither party to the franchising agreement cannot terminate it because of the breach/non fulfillment of a small portion of the contractual obligation. In one old (second instance) commercial court decision, the court assessed that the franchise agreement was (dully) terminated, because the conditions for termination were met, since the franchisee did not perform the contract in the agreed manner. In this particular case, the “economic interest” was not satisfying as defined in the franchise agreement.

Renewal and transfer

Franchisors are free to decide whether or not to renew a franchise agreement. If they do so, renewals should be done explicitly and in writing. It is admissible to contractually restrict a franchisee’s ability to transfer its franchise, typically by requiring an explicit prior written approval of the franchisor.

Dispute Resolution and Applicable Law

Serbia has 1) basic court system for general disputes (basic court in first instance, high courts for high value cases, special subject cases and second instance in some cases, appellation court as second instance and supreme court as the highest court in the country), 2) commercial court system for disputes between commercial entities (commercial court as first instance, commercial appellation

court as second instance and supreme court as the highest court in the country) and administrative court system for proceedings with the public entities such as ministries, agencies and similar public institutions depending on the specific subject matter (administrative proceeding with a specific administrative body as first instance, special body or ministry for the subject matter as second instance, administrative court and supreme court).

In principle, it is admissible for the parties to a franchise agreement to agree on a choice of law to be applicable on their contractual relationship. In commercial relations i.e., excluding consumers, the parties may agree on the specific venue.

It is also admissible to agree on arbitration as the exclusive way of resolving disputes between the parties, thus waiving the due process of law. This may be favorable, as the parties may choose the language of the proceedings and have influence on the arbitrators selected. Also, arbitration proceedings are, unlike proceedings before ordinary courts, not held in public. However, if the value in dispute is rather low, arbitration may often be too cost-intensive.

COVID-19

The COVID-19 pandemic has been having a huge impact especially on some sectors such as tourism and catering, including franchising in those sectors due to the government measures, especially shutting down public life to contain the pandemic. Some of the measures provided by the government aimed at mitigating the situation in the affected sectors did help but only up to a limited extent.

Singapore

6
Legal professionals

 **Region**
APAC

 **Offices**
Singapore



Essentials

about Singapore's franchising law

- 1** In Singapore, there is no specific legislation that regulates franchising. Rather, franchising arrangements are generally governed by contract law;
- 2** Also, there is no requirement for franchisors to make any precontractual disclosures; and
- 3** Singapore has a strong Intellectual Property legislative framework which allows for effective enforcement of trademarks.

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Relevant areas of law

Legal basis of Franchise Law

There is no legal definition of “franchise” under Singapore law or a specific legislation addressing franchising arrangements, which are generally governed by general principles of contract law.

However, many franchisors and franchisees are members of the Franchising and Licensing Association of Singapore, which has formulated a code of ethics that is binding upon its members. This code contains provisions relating to disclosure requirements, selection of franchisees, provision of proper training and business guidance, standards of conduct, notice of breaches, rights of termination and dispute resolution.

Specifics regarding Foreign Franchisors There are no laws in Singapore which require a franchising agreement prepared by a foreign entity or governed by a foreign law to be adapted to a certain form in order to be enforceable in Singapore.

Generally, a franchisee in Singapore must withhold tax at a certain rate (usually 10%) on the payment of royalties and technical fees to the overseas franchisor. However, if the franchisor is located in a jurisdiction that has a double taxation avoidance treaty with Singapore, the provisions of that treaty will prevail over Singapore tax law (so long as the treaty provisions, when applied, produce a more beneficial outcome for the franchisor).

Corporate Law

The most common business structure in Singapore is a private limited company incorporated in accordance with the Companies Act

(Cap. 50). To incorporate a company in Singapore, the following requirements must be met:

- **Shareholders/directors:** Every company must have a minimum of one (1) director who is a resident in Singapore and one (1) shareholder.
- **Corporate information:** The names of the proposed directors/shareholders of the company and the proposed local address of the company's office must be provided.
- **Charter documents:** A company constitution must be prepared and submitted (along with the “Corporate information” above) to the Accounting and Corporate Regulatory Authority of Singapore.

Most required filings with and payments to relevant authorities can be undertaken online, and a company can generally be incorporated within one (1) week.

There do not appear to be any restrictions on foreign ownership of businesses under Singapore law, save for acquiring an interest in companies carrying on business in connection with national defence, air transportation, public utilities, newspaper publishing and shipping. Also, strict regulatory and licensing requirements are imposed on any market entrants in certain sectors such as banking and telecommunications.

Consumer Protection Law

Franchisees are not covered by the definition of “consumer” under the Consumer Protection (Fair Trading) Act (Cap. 52A) or Unfair Contract Terms Act (Cap. 396) (“UCTA”) and will not be protected by the consumer protection provisions of those statutes.



Antitrust/Competition Law

Franchising arrangements are covered by the Competition Act (Cap. 50B), which generally places restrictions on agreements that have a significant adverse effect on competition, abuse of a dominant market position and mergers that substantially reduce competition. However, franchise agreements are generally deemed to be “vertical agreements” under the Competition Act and may therefore be exempt from some of these provisions.

Employment Law

The question of whether a franchisee is an “employee” of a franchisor under the Employment Act (Cap. 91) is a question of fact, which will be determined based on a variety of factors such as the degree of control exercised by the franchisor over the franchisee, how the franchisee is remunerated and whether the franchisee is obliged to work solely for the franchisor. Notwithstanding the above, given that a franchisee typically must pay a franchisor for the use/exploitation of the franchisor’s intellectual property rights (“IPRs”) and a franchisor does not typically have a degree of control over a franchisee to the extent that an employer would have over their employees, we understand that franchising arrangements are generally unlikely to give rise to an employment relationship under Singapore law.

To mitigate the risk of an employment relationship being established, a franchise agreement may stipulate that the franchisee will be acting in their capacity as an independent contractor and nothing in the agreement should be construed as creating an employment relationship between the franchisor and the franchisee.

Law on commercial agents

We understand that a franchisee is generally not regarded as an “agent” under Singapore law as they would typically trade in their own name, receive income on their own account, and be ultimately and directly responsible for any liability arising in connection with goods or services they supply.

To mitigate the risk of a franchisee being deemed an “agent”, franchise agreements should be drafted to expressly exclude any employment and/or agency relationship.

IP Law

Franchise agreements may allow the licensing and/or transfer of all forms of IPRs, depending on the nature of the intended activity or business of the franchisee. A franchisor may control, supervise and impose conditions and limitations on the exploitation and use of their IPRs by a franchisee.

While Singapore law does not appear to require trademarks or licences to be registered in order to engage in franchising activities, undertaking relevant registrations with the Intellectual Property Office of Singapore is advisable in order to obtain statutory protection of such IPRs under Singapore law.

Selected questions/aspects

Precontractual disclosure

There are no laws in Singapore which require franchisors to disclose any matters to potential franchisees prior to entering into a franchising arrangement. Accordingly, potential franchisees should undertake due diligence on and evaluate any proposed franchise arrangement as well as the franchisor before entering into any franchising arrangement.



Legal restrictions

While there are no specific legislation in Singapore that imposes particular restrictions on provisions in franchise agreements, franchisees may be protected under provisions of the UCTA that limit the effectiveness of limitation of liability clauses in connection with breach of contract and negligence. For example, if a franchisee enters into a franchising agreement with a franchisor based on the franchisor's standard form terms and conditions, the UCTA may deem such limitation of liability clauses to be void unless they satisfy certain reasonableness requirements based on the circumstances of the case.

Confidentiality

Confidentiality clauses are generally enforceable under Singapore law.

Franchise Fees

As discussed in "Legal Basis of Franchise Law" above, the parties to a franchise agreement are generally free to agree on any matters in connection with franchise fees subject to the provisions of the UCTA and general principles of contract law.

Amendments

The parties to a franchise agreement are generally free to agree on terms which allow for a franchisor to unilaterally amend the terms of the franchise agreement, subject to the provisions of the UCTA and general principles of contract law.

Termination

Fixed-term franchise agreements will automatically terminate on the expiry of fixed term, the length of which the parties to a franchise agreement are generally free to agree on, subject to

the provisions of the UCTA and general principles of contract law. There are no limitations on the right of a franchisor to terminate a franchising agreement under Singapore law. The parties to a franchising agreement are generally free to agree on the grounds for terminating such an agreement (e.g., material breach of contract, re-udiation), subject to the provisions of the UCTA and general principles of contract law.

Renewal and transfer

There are no laws in Singapore which require franchisors to renew a franchise agreement. The parties to a franchise agreement are generally free to agree on provisions in connection with the renewal and transfer of franchise agreements, subject to the provisions of the UCTA and general principles of contract law.

Dispute Resolution and Applicable Law

Dispute resolution, court system

Cross-border franchising arrangements may be governed by foreign laws. Accordingly, parties who wish to resolve disputes in connection with such arrangements may resort to arbitration to avoid jurisdictional issues which may arise if a claim were brought in a Singapore court. Of course, in the absence of a mandatory arbitration or mediation provision in the franchising agreement or mutual consent by the parties to such dispute resolution options, the parties may commence proceedings in a Singapore court.

The Judicial system of Singapore is broadly classified into two levels (in descending order of superiority):

- Supreme Court of Singapore, comprising of (i) the Court of Appeal (appellate jurisdiction only) and (ii) the High Court; and
- State Courts of Singapore.

Applicable law

Singapore courts will generally defer to the law that parties have chosen to govern a franchise agreement, subject to exceptions such as where the chosen governing law is contrary to public policy in Singapore.

COVID-19

Businesses in Singapore have been severely impacted by the COVID-19 pandemic, and the Singapore government has introduced the COVID-19 (Temporary Measures) Act 2020 ("C19 Act") which seeks to offer temporary relief to businesses and individuals who are unable to fulfil their contractual obligations because of COVID-19, with provisions in connection to leases /licenses for non-residential immovable property, construction, provision of and contracts for the sale of goods and services, and loan agreements. The C19 Act also provides temporary relief for businesses in financial distress by increasing the monetary threshold (of debt) required for creditors to commence proceedings against a company and lengthening the statutory period allowed for debtors to respond to demands from creditors. As of 16 July 2021, there does not appear to be any COVID-19 related legislation in Singapore that directly relates to franchising matters.

Slovenia

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Legal professionals



Region
EMEA



Offices
Ljubljana



Essentials

about Slovenia's franchising law

- 1 No legal codification and special regulation of franchise agreements;
- 2 Parties to the franchising agreement may regulate their contractual relationship freely, as long as it does not contravene the Slovenian Constitution, mandatory legal provisions, and moral principles;
- 3 Case law on franchise agreements is scarce. However, courts regularly uphold provisions of franchise agreements (also those made in favour of the franchisor);
- 4 Confidentiality clauses are essential as this area is regulated by the mandatory provisions of the 2019 Slovenian Trade Secrets Act.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of Law

Legal basis of Franchise Law

Franchise agreements are not codified in Slovenian law, and there is no official legal definition of “franchise”. In Slovenian legal theory, franchise agreements are considered as “agreements sui generis”, which may contain elements of various codified agreements (e.g., license, agency, sale and purchase, or lease agreements). Franchise law in Slovenia is primarily developed by Slovenian courts, which inter alia, decide in accordance with the principles of civil, commercial, and corporate law. However, jurisprudence regarding franchise agreements up till now is very scarce. Until now, the Slovenian courts upheld the content of franchise agreements, and have not found a respective clause to be null and void just because it was in favour of the franchisor.

In 1998, the franchisors in Slovenia have established a Slovenian Franchise Association, which is a member of the European Franchise Federation and the World Franchise Council since 2001.

Corporate Law

Slovenian legislation does not prescribe a specific legal form of incorporation for franchisees. However, in practice, franchisees most commonly operate under the formation of a limited liability company (“LLC”; *družba z omejeno odgovornostjo* (d.o.o.)). The formation of an LLC is quick and simple; an LLC can have one or multiple founders (which are not liable for the obligations of the company), the minimum amount of share capital is EUR 7,500, whereas the costs of incorporation are also reasonably low. Each shareholder must fulfil several conditions under Slovenian Companies Act (absence of criminal

records for certain felonies, absence of records of unpaid tax obligations etc.), in order to be able to be registered as a shareholder.

As of 2020, the incorporation of LLCs by foreign natural persons or legal entities is also subject to a special interim legislation which regulates Foreign Direct Investments (“FDI”). The legislation represents a transposition of the EU FDI Regulation (2019/452). However, as opposed to the EU regulation, Slovenian legislation considers foreign investors as also investors from EU countries. Accordingly, an establishment of a subsidiary in Slovenia by an EU or third country person, as well as an acquiring of at least 10% share or voting rights in a Slovenian company, shall require notification of such investment to the Ministry of Economic Development and Technology, if such a foreign investment can have an impact on critical infrastructure in Slovenia. The Ministry then considers whether such an investment represents a threat to security and public order in Slovenia, and issues a decision on allowing or rejecting the foreign direct investment, or else (if the FDI does not affect Slovenian critical infrastructure) issues an opinion that a special decision is not necessary.

Consumer Protection Law

The relationship between a franchisor and franchisee is not considered as a consumer relationship, as the franchisees’ activity with respect to the franchise agreement is business-oriented. This stands true even if the franchisee is organized as an “independent contractor” (*samostojni podjetnik*), i.e., a natural person performing business activity. The rules of consumer protection law shall thus apply only in respect of the franchisee’s marketing and selling of products or services to consumers.

Employment Law

To enter into the franchise agreement, the franchisee shall be organized as a company or an independent contractor (samostojni podjetnik; natural person, registered for performance of business activities). Such set up means that the franchisee shall not be considered as an employee of the franchisor, nor shall the employees of the franchisee be considered as employees of the franchisor. Potential exception could exist only if the franchisee would not be organized as a company (e.g., LLC) but as an independent contractor, and who would act as an employee of the franchisor (they would be economically dependent from the franchisor, the franchisor would organize its business process, give mandatory instructions to the franchisee etc.).

Law on commercial agents

It is generally accepted in Slovenian legal theory that franchising agreements also contain some elements of agency agreements. However, there is no uniform position that provisions for agency agreements (which would include provisions of compensation upon termination of the franchise agreement, legally prescribed notice period for termination of agreement etc.) should be applied *mutatis mutandis* also for franchising agreements. This is also reflected in the currently existing Slovenian jurisprudence, which does not apply agency agreement provisions in the Code of Obligations to franchising agreements. In this respect, the Higher Court of Ljubljana has in the Judgement case no. I Cpg 119/2014 stated that the provisions on non-compete clauses, which are otherwise used for agency agreements, are not to be used for franchise agreements, but that general provision on contractual penalty shall apply instead.

IP Law

As a rule, the holder of the IP rights will be the franchisor, and the franchisee shall acquire a license to use such IP for the duration of the franchise agreement. In order for the franchisor's IP to enjoy protection in Slovenia, the IP shall be registered with the Slovenian Intellectual Property Office (SIPO), or EUIPO or WIPO (with designation for Slovenia). The IP/license relationship between the franchisor and the franchisee shall entirely be regulated by the franchise agreement, whereas under the Slovenian law the license agreements must be concluded in written form.

Selected questions/aspects

Precontractual disclosure

There is no legal regulation on exactly which information need to be disclosed to the franchisee prior to signing the agreement. There are also no special guidelines by the Slovenian Franchise Association on the minimum information that need to be disclosed. Therefore, general provisions of the Code of Obligations shall apply.

In this respect, the following provisions of the Code of Obligations are particularly relevant: (i) in order for an agreement to be concluded, the parties must agree on all important elements of the agreement; (ii) if parties believe that they have reached an agreement, but in reality there exists a misunderstanding on the nature, basis or subject of the agreement, it shall be deemed that the agreement was never concluded; (iii) participants in contractual relationships must obey principles of fair treatment and must avoid causing harm to one another; and (iv) if one party misleads the other party into concluding an agreement, the other party may demand rescission of the agreement.

It stems from the above listed provisions, that both parties have a duty to disclose all information which they can expect the other party will consider relevant for the conclusion of the franchise agreement. In case this obligation is violated, the other party could demand the rescission of the agreement and reimbursement of incurred damages.

Legal restrictions

Parties to a franchise agreement may generally regulate their contractual relationship freely, as most of the provisions of the Slovenian Code of Obligations are dispositive (and can therefore be cordially amended). However, the parties to the franchise agreement are prohibited to act in contravention of the Slovenian Constitution,

mandatory legal provisions, and moral principles. Failure to comply with any of the preceding, may render the agreement, or a respective contractual clause, null and void.

Antitrust/Competition Law

Slovene national legislation does not provide any direct antitrust/competition law restrictions in respect of franchise agreements. However, it should be noted that franchise agreements may contain certain provisions which would contravene Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), which sets forth competition-law rules applying to undertakings and certain restriction in that respect. However, those restrictions may be declared inapplicable by specific "safe harbour rules"



(e.g., Commission Regulation (EU) No 330/2010) which stipulates that Article 101 of the TFEU does not apply to vertical agreements, provided that both parties of the franchise agreement do not exceed 30% of the relevant market share, respectively (subject to additional conditions).

Law on general terms and conditions (“T&Cs”)

Most commonly, franchise agreements are concluded as preformulated agreements, so that all franchisees in different countries are bound by the same contractual obligations. However, pursuant to Slovenian Code of Obligations, any unclear provisions in such pre-prepared franchise agreements would be interpreted for the benefit of the franchisee, whereas any clauses which could be considered as significantly too harsh for the franchisee, could ultimately be declared null and void in judicial proceedings. Since franchise agreements are B2B agreements, the chance of a court declaring a contractual provision as being null and void based on it being too harsh on the other party, are significantly lessened. Generally, courts in Slovenia tend to uphold the content of franchise agreements, including those which are made for the benefit of the franchisor (e.g., the High Court of Ljubljana in the Judgement case no. I Cpg 119/2014 upheld the contractually agreed penalty of EUR 20,000 for respective violations of non-compete clause by the franchisee, for violations made after the termination of the franchise agreement).

Confidentiality

Confidentiality clause is one of the most important part of the franchising agreement. The courts will uphold the confidentiality clauses in the franchising agreements, whereas during judicial review, courts also apply provisions of Slovene Trade Secrets Act, which are mostly

mandatory (*ius cogens*). It shall be noted that, pursuant to the Slovenian Trade Secrets Act, trade secrets are information which (i) are not generally known to the relevant public; (ii) have a market value and (iii) the holder of a trade secret has taken appropriate measures to keep it a secret. The latter condition shall be fulfilled if the holder of the trade secret has designated the information as a trade secret in writing and has informed thereof all persons who come into contact with respective information (business partners, employees, etc.). To protect the confidentiality of the franchisor’s trade secrets, it is advisable that franchisors specifically determine which information is considered as trade secrets (e.g., in internally adopted Trade Secret Rules) and have all relevant persons sign a non-disclosure agreement. Such diligence offers franchisors remedies under the Trade Secrets Act, including requesting a cessation of violation, prohibition of distribution of goods which are subject of violation (both claims may also be accompanied by a claim for temporary injunction, to be issued before the final ruling), as well as claim contractual penalties and damages resulting from the breach.

Amendments

As a general rule, any amendments to franchise agreements must be agreed upon by both parties to the agreement. The franchisor is entitled to amend the franchise agreement unilaterally only if the franchise agreement contains a clause to that effect. Should the franchisor use this clause to impose upon the franchisee disproportionately onerous obligations, such a clause could be found null and void in case of dispute (for more on this, see the section on General Terms and Conditions).



Termination

The parties to the agreement may always bilaterally agree on premature termination of a franchise agreement concluded for a definite or indefinite term. However, unilateral premature termination of agreement without cause is possible only if the franchise agreement contains a clause to that effect. Conversely, premature termination of agreement for cause (i.e., due to breach of contract) is possible also without a contractual clause, based on mandatory provisions of the Slovenian Code of Obligations. In this case, the terminating party must first issue a notice to the other party, in which it explains the breach and awards the other party a reasonable time to remedy the breach. If the breach is not remedied within the set time, the party may terminate the agreement with immediate effect. Premature unilateral termination of agreement results in both parties having to return what they have received, whereas in the case of a breach of

contract, the terminating party may also claim damages from the wrongdoing party for the damage it sustained as a result of a breach.

Renewal and transfer

The parties to the franchise agreement may always bilaterally agree to renew an agreement. Since the franchise agreement usually contains elements of a license agreement, for which the Slovenian law requires a written form, also the renewal of the franchise agreement must be concluded in writing. With respect to transfer of the franchise agreement by one party to a third person, a general rule of the Code of Obligations is that a party may transfer an agreement to a third person only with consent by the other contractual party. Without a special clause to that effect, neither party shall be able to transfer (assign) the agreement to another person without the consent of the other party. The parties may, however, always agree differently in the franchise agreement itself.



Dispute Resolution and Applicable Law

Dispute resolution, court system

In Slovenia, the court system consists of Local Courts (for cases in which the value of the dispute does not exceed EUR 20,000, and some special types of cases), District Courts (for cases in which the value of the dispute exceeds EUR 20,000, and some special types of cases, including all commercial disputes), Higher Courts (generally courts of appeal against decisions of local and district courts), and the Supreme Court (which can in some cases also review decisions of Higher Courts). The parties may agree upon the venue for dispute resolution (Slovenian courts or courts of another country). The parties may also opt for arbitration, which is in principle a much more flexible and timely manner of dispute resolution than proceedings before Slovenian courts. Arbitration proceedings in Slovenia are governed by the Arbitration Act, which sets out several ground rules for arbitration proceedings, and which also states that rulings in arbitration proceedings bear the same validity as final judicial decisions. In practice, more and more companies thus opt for an arbitration clause instead of a judicial clause, in their commercial agreements. The most common arbitration venue in Slovenia is the Permanent Arbitration before the Slovenian Chamber of Commerce.

Applicable law

Parties to the franchising agreement are, in principle, allowed to freely determine the law which will govern their contractual relationship. In case of judicial dispute, Slovenian courts or arbitral bodies would be obliged to apply provisions of said law. The only exception are rules which would contravene certain fundamental

principles of Slovenian law and Slovenian legal system (the so called *ordre public* exception), as the courts and arbitration bodies can disregard such foreign-law rules.

COVID-19

In order to mitigate the impact of COVID-19 pandemic on commerce, Slovenia adopted several interim COVID-19 acts. The measures included, *inter alia*, state aids in the form of direct grants, tax and payment benefits, loan guarantees, wage subsidies (e.g., reimbursement of wage compensation to employees on temporary lay-off; reimbursement of paid salary compensation due to part-time work) etc. Some of the measures also included moratoriums on bank loans, and (in certain cases) moratoriums on lease payments.

Namely, to help companies which were renting commercial real estate, and which could not use said real estate due to COVID-19 government measures, interim legislation provided for new rules with respect to such leases. The lessees were granted the possibility to unilaterally terminate the lease agreement, or else to request a deferral of payment of obligations under the lease agreement, as well as to demand the extension of a fixed-term lease.

No special moratoriums were imposed on payment of franchise fees. In general, it was up to contractual parties to negotiate potential amendments to commercial agreements in the event that one party was harmed by the COVID-19 pandemic. Legal remedies, prescribed in the Slovenian Code of Obligations (such as demanding the rescission of contract based on changed circumstances etc.) proved to be very limited.

South Africa



6
Legal professionals

 **Region**
EMEA

 **Offices**
Cape Town,
Johannesburg

Essentials

about South Africa's franchising law

- 1** Franchise agreements between franchisors and franchisees in South Africa are highly regulated in terms of the Consumer Protection Act, 68 of 2008 ("CPA").
- 2** The CPA sets out specific requirements for franchise agreements and any provision which is in conflict with these requirements will be void.
- 3** Franchisees are afforded certain protections as they are treated as consumers in terms of the CPA.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of Law

Legal basis of franchise law

In South Africa, franchise relationships are governed in terms of common law and statute, most notably the CPA. The law of contract, the Competition Act, 89 of 1998 (“Competition Act”) and the Protection of Personal Information Act, 4 of 2013 should also be noted.

The term “franchise” is not specifically defined in our law. However, the CPA defines a “franchise agreement” as an agreement between two parties, being the franchisor and the franchisee, in terms of which:

- the franchisor grants the franchisee the right to carry on business in all or a specific part of South Africa, under a “system or marketing plan substantially determined or controlled by the franchisor”, for which consideration is paid by the franchisee to the franchisor (or an associate of the franchisor);
- the operation of the franchisee’s business will be “associated with advertising schemes/programmes, or one or more trade marks/commercial symbols/logos/or any similar marketing, branding, labelling or devices that are conducted, owned, used or licensed by the franchisor” (or an associate of the franchisor); and
- the business relationship between the franchisor and the franchisee is governed, including the “relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor” (or an associate of the franchisor).¹

Specifics regarding Foreign Franchisors

There are no material additional laws which regulate the implementation, offer and/or granting/

¹ Section 1 of the CPA

sale of foreign franchise systems in South Africa. The CPA will be applicable to a franchise agreement entered into between a foreign franchisor and a local franchisee. South Africa does, however, have exchange control restrictions which would be relevant in relation to a foreign franchisor (see the corporate law section below).

Corporate Law

The most common form of business entity in South Africa is the private limited liability company (“(Pty) Ltd.”).

Incorporating a private company with a standard form memorandum of incorporation (“MOI”) with the Companies and Intellectual Property Commission (“CIPC”) is relatively quick and easy, and is done through an electronic application. A company can also be incorporated with a customized or non-standard MOI, but this process generally takes longer than incorporating a company with a standard form MOI.

There are no minimum share capital requirements in South Africa for a private company. Foreign companies may opt to register as an external company (i.e., branch) with the CIPC (as opposed to incorporating a private company subsidiary).

South African resident companies (which includes external companies or branches) are subject to exchange controls administered by the Financial Surveillance Department of the South African Reserve Bank (“SARB”) and authorized dealers (commercial banks) in terms of the Exchange Control Regulations of 1961 (“Exchange Control Regulations”).

Transactions between a local subsidiary and its holding company outside of South Africa are regarded as being between a resident and

a non-resident, and certain transactions are subject to the approval of the SARB. If a local subsidiary has a foreign holding company, the share certificate(s) issued to such foreign holding company must be endorsed “non-resident” by an authorized dealer for exchange control purposes.

Consumer Protection Law

The CPA provides that, inter alia, the following arrangements must be regarded as a transaction between a supplier and consumer:

- a solicitation of offers to enter into a franchise agreement;
- an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
- a franchise agreement or an agreement supplementary to a franchise agreement; and
- the supply of any goods or services to a franchisee in terms of a franchise agreement.²

The CPA also defines the term “consumer” as including a franchisee in terms of a franchise agreement, to the extent set out above.³

The effect of a franchisee being regarded as a consumer is that the CPA applies to all transactions between a franchisor and franchisee. The franchisee is entitled to rely on a wide range of consumer rights in the CPA, for example, the right to information in plain and understandable language⁴, the right not to be furnished with unsolicited goods or services by the franchisor⁵ and the right to choose suppliers⁶.

² Section 5(6)(b) to (e) of the CPA

³ Section 1 of the CPA

⁴ Section 22 of the CPA

⁵ Section 21 of the CPA

⁶ Section 13 of the CPA

Antitrust/Competition Law

Franchise agreements are regarded by the South African Competition Authorities (the “Competition Authorities”) as one of the most effective vehicles to facilitate the entry of new firms and/or products (which have efficiency enhancing benefits) into the South African market. Franchising is seen as being good for economic development and as a potential means to ensure that historically disadvantaged individuals and small and medium-sized enterprises are able to participate in the economy.

The Competition Act applies to all economic activity within, or having an effect within, South Africa. It will therefore apply to franchising activities within (or having an effect within) South Africa.

The structure of franchising, however, has potential for collusion among competitors (franchisees) in respect of price and market allocation, which could substantially lessen competition. To comply with the Competition Act and to avoid any anti-competitive conduct, extreme care must be taken in relation to the following areas as there are potential competition implications:

- resale price maintenance;
- exclusive territories for the franchise business;
- exclusive dealing;
- tying of products; and
- intellectual property rights.

property rights and the need to maintain quality and consistency) and the interest of franchisees and the public in ensuring adequate competition is maintained. As all franchising agreements involve a degree of cooperation amongst franchisees, if not outright restraints in relation to certain conduct, there is an inherent potential for anti-competitive conduct to occur.

The extent to which competition concerns may arise in franchising would depend largely on market definition. This is done by the Competition Authorities on a case-by-case basis, considering both geographic and product dimensions. The Competition Authorities pay special attention to the restraint provisions in franchising agreements.

Employment Law

It is not likely that a franchisee would be regarded as an employee of the franchisor, due to the inherent nature and structure of a franchising arrangement.

To mitigate any risk of deemed employment, the franchise agreement should be drafted to ensure sufficient independence of the franchisee from the franchisor, such as control over working hours, management and direction of work, obtainment of tools of trade and economic independence. In doing so, the framework of the franchise model should be separated from the level of control which may be exerted on the individual franchisee by the franchisor in the day-to-day running of the business (e.g., the franchisor may dictate the structure of the franchise business model, but should not supervise or manage the franchisee in their running). In the event of deemed employment, the franchisor would be liable for employment dues owed to the franchisee, including basic conditions of employment (such as various forms of leave, minimum wage etc.,) and employment rights (such as fair reason and procedure for termination).

IP law

Franchisors usually register their trade marks in terms of the Trade Marks Act, 1994 of 1993 ("Trade Marks Act") and protection is therefore

provided in terms of statute. Unregistered trade marks and know-how are offered some protection in terms of the common law.

In terms of the Regulations to the CPA (published in Government Notice No. 293 in Government Gazette No. 34180 of 1 April 2011) (the "CPA Regulations"), a franchise agreement must include, inter alia, a description of the trademark or any other intellectual property owned by, or otherwise licensed to, the franchisor which is or will be used in the franchise, and the conditions under which they may be used⁷.

Selected questions/aspects

Precontractual disclosure

A franchisor must provide a prospective franchisee with a disclosure document at least 14 days prior to the signing of a franchise agreement. The disclosure document must contain, as a minimum:

- the number of individual outlets franchised by the franchisor;
- the growth of the franchisor's turnover, net profit and the number of individual outlets franchised by the franchisor for the financial year prior to the date on which the prospective franchisee receives a copy of the disclosure document;
- a statement confirming that there have been no significant or material changes in the company's or franchisor's financial position since the date of the last accounting officer or auditor's certificate and that the company or franchisor has reasonable grounds to believe that it will be able to pay its debts as and when they fall due; and
- written projections in respect of levels of

⁷ Regulation 2(3)(i) of the CPA Regulations

potential sales, income, gross or net profits or other financial projections for the franchised business or franchises of a similar nature with particulars of the assumptions upon which these representations were made⁸.

The disclosure document must be accompanied by additional prescribed documentation including an auditor's certificate, a list of current franchisees and outlets owned by the franchisor and an organogram setting out the support system in place for franchisees⁹.

The CPA does not specify the language in which the disclosure document must be made available, but most franchise agreements (including disclosure documents) in South Africa are in English (as English is South Africa's most commonly used business language).

The CPA does not distinguish between the franchisor and the master franchisor when determining who is required to provide the disclosure document (i.e., the regulations simply refer to the franchisor providing the disclosure document).

A franchisee may seek to enforce any right in terms of the CPA or in terms of a transaction or agreement (including the failure to provide the required disclosure document) by (i) referring the matter to the National Consumer Tribunal; (ii) referring the matter to the applicable ombud with jurisdiction (if the supplier (i.e., franchisor) is subject to the jurisdiction of any such ombud); (iii) if the supplier (i.e., franchisor) is not subject to the jurisdiction of an ombud, the matter can be referred to the applicable industry ombud, application can be made to the consumer court of the province

8 Regulation 3(1) of the CPA Regulations
9 Regulation 3(3) and 3(4) of the CPA Regulations

with jurisdiction (if there is such a consumer court), the matter can be referred to another alternative dispute resolution agent or a complaint can be filed with the National Consumer Commission or (iv) approaching a court with jurisdiction over the matter (if all other remedies available to that person in terms of national legislation have been exhausted)¹⁰. Damages may be awarded to the complainant. Damages in South Africa are generally compensatory and not punitive.

In broad terms, if the franchisor is a company, the assets and liabilities belong to the company, and not to the shareholders. Therefore, the shareholders of a franchisor ordinarily cannot be held liable for the liabilities of the franchisor. The Companies Act, 71 of 2008 ("Companies Act") prescribes certain statutory duties (in addition to any common law ones) which are placed on the directors of the company and the directors of a company may be held liable for any loss, damages or costs sustained by the company as a consequence of any breach by the director of the duties contemplated in the Companies Act.

Legal restrictions

The CPA and the CPA Regulations set out the International Franchise Handbook 2021

requirements for franchise agreements and provide that such agreement must be in writing and signed by or on behalf of the franchisee, must include the prescribed information set out in the CPA and must be in plain and understandable language¹¹.

The following words must be included at the top of the first page of any franchise agreement

10 Section 69 of the CPA
11 Section 7(1) of the CPA



(together with a reference to the relevant section number and the CPA):

“A franchisee may cancel a franchise agreement without cost or penalty within 10 business days after signing such agreement, by giving written notice to the franchisor.”¹²

A franchise agreement must, amongst others:

- contain provisions which prevent (i) unreasonable or overvaluation of fees, prices or other direct or indirect consideration; (ii) conduct which is unnecessary or unreasonable in relation to the risks to be incurred by one party; and (iii) conduct that is not reasonably necessary for the protection of the legitimate business interests of the franchisor, franchisee or franchise system;¹³
- contain a clause informing the franchisor that it is not entitled to any undisclosed direct or indirect benefit or compensation from suppliers to its franchisees or the franchise system (unless otherwise disclosed in writing with an explanation of how such benefit or compensation will be applied);¹⁴
- include:
 - the name and description of the types of goods or services which the franchisee is entitled to provide, produce, render or sell;
 - the obligations of the franchisor and franchisee;
 - a description of the franchise business system;
 - the consideration payable by the franchisee to the franchisor;
 - territorial rights;

- a description of the site or premises and location from which the franchisee is to conduct the franchise;
- the conditions under which the franchisee or its estate may transfer or assign the rights and obligations under the franchise;
- a description of the trade mark or any other intellectual property owned by or licensed to the franchisor;
- the master franchisor’s identity (if applicable);
- particulars of the initial training and assistance provided by the franchisor;
- the duration and the terms of renewal of the franchise agreement;
- specific information regarding the costs of advertising, marketing or other similar funds (if the franchisee must directly or indirectly contribute to such advertising or marketing);
- the effect of the termination or expiration of the franchise;
- extension or renewal terms (or whether there is no option to renew or extend the agreement);
- written explanation of any terms not fully understood by the prospective franchisee (if requested by the franchisee);
- full details of the franchisor;
- full details of the franchisor’s directors or equivalent officers;
- details of any proprietor, member or shareholder of the franchisor;
- particulars of any restrictions imposed on the franchisee;
- the nature and extent of the franchisor’s involvement or approval in the process of site selection;

12 Regulation 2(2)(a) of the CPA Regulations, read with section 7(2) of the CPA

13 Regulation 2(b) of the CPA Regulations

14 Regulation 2(c) of the CPA Regulations

- the terms and conditions relating to termination, renewal, goodwill and assignment of the franchise;
- the main obligations of the franchisor in respect of initial and ongoing training to be provided;
- confirmation that any deposits will be paid into a separate bank account; and
- full particulars of the financial obligations of the franchisee.¹⁵

Franchise fees

As noted above, a franchise agreement must contain provisions which prevent unreasonable or overvaluation of fees, prices or other direct or indirect consideration.¹⁶ In addition, full particulars of the financial obligations of the franchisee must be included in the franchise agreement, including (i) the initial fee payable to the franchisor (including the purpose for which it is to be applied); (ii) the funds required to establish the franchised business; (iii) the initial working capital and the basis for its calculation; (iv) the total investment required; (v) a clear statement as to whether or not any expenses, salary/wages of employees and the costs of servicing loans are included in the purchase price; (vi) the amount of funding that is available from the franchisor and the applicable conditions; (vii) the total amount that the franchisee must contribute towards the necessary funding before borrowing and (viii) ongoing amounts payable to the franchisor.¹⁷

In the event that the National Credit Act, 34 of 2005 (“NCA”) applies, and non-payment by the franchisee results in an “incidental credit

¹⁵ Regulation 3(a) to (y) of the CPA Regulations

¹⁶ Regulation 2(b)(i) of the CPA Regulations

¹⁷ Regulation 3(v) of the CPA Regulations

agreement”, the maximum prescribed interest rate is currently 2% per month. In the event that the NCA does not apply, the interest rate should be set out in the franchise agreement. If the NCA does not apply and the franchise agreement is silent on interest, the Prescribed Rate of Interest Act, 55 of 1975 provides that interest should be charged at the prescribed rate, which is currently 7% per annum.

Payment of franchise fees by a local franchisee to a foreign franchisor (including any loans) will be subject to the Exchange Control Regulations.

Confidentiality

Confidentiality clauses in franchise agreements are generally enforceable in terms of South African law, provided that such clause is fair, just and reasonable.

Amendments

Franchise agreements may not be unilaterally amended by the franchisor and any amendments must be agreed between the franchisor and the franchisee.

Termination

A franchisee is entitled to cancel a franchise agreement without cost or penalty within 10 business days after signing such agreement, by giving written notice to the franchisor.¹⁸

In terms of our common law, an agreement may be cancelled by either party for material breach (i.e., one which goes to the root of the contract). The CPA provides that the franchise agreement must stipulate the terms and conditions relating to termination¹⁹, and events or breaches which constitute a material breach

¹⁸ Section 7(2) of the CPA

¹⁹ Regulation 3(v) of the CPA Regulations

(entitling the innocent party to terminate the agreement) are usually expressly included in the franchise agreement.

Renewal and transfer

The franchise agreement must set out the duration and the terms of the extension and renewal of the franchise agreement, provided that such terms and conditions are not inconsistent with the purpose and policy of the CPA.²⁰ Therefore, if the franchise agreement provides, for example, that the franchisee has an automatic right of renewal, the franchisor will not be entitled to refuse to renew the franchise agreement. The franchise agreement must also stipulate the terms and conditions relating to the assignment of the franchise. Accordingly, a franchisor may²¹ generally restrict a franchisee's ability to transfer its franchise by agreement with the franchisee.

Dispute Resolution and Applicable Law

Dispute resolution, court system

It is common for agreements in South Africa to state that disputes should, in the first instance, be referred to mediation and thereafter to arbitration.

The CPA provides that a consumer (which includes a franchisee) may seek to resolve any dispute in respect of a transaction or agreement by referring the matter to an alternative dispute resolution agent who may be (i) an ombud with jurisdiction; (ii) an accredited industry ombud; (iii) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes or (iv) the consumer may

20 Regulation 3(l), read with regulation 3(o) of the CPA Regulations

21 Regulation 3(v) of the CPA Regulations

apply to a consumer court of the province with jurisdiction over the matter, if there is such a consumer court.²² If an alternative dispute resolution agent concludes that there is no probability of the parties resolving their dispute through the process provided for, a complaint may be filed with the National Consumer Commission.²³ If all other remedies available to that person in terms of national legislation have been exhausted, a person may approach a court with jurisdiction over the matter.²⁴

Arbitration is recommended to resolve disputes in franchise agreements, although it should be noted that arbitration can be quite expensive.

At a high level, the judicial system in South Africa is made up of the Constitutional Court (which is the highest court in South Africa), the Supreme Court of Appeal (which is an appellate court), the High Courts of South Africa (there are nine divisions of the High Court, one for each province) and the magistrates' courts (consisting of district and regional courts). There are also special courts in South Africa such as the Labour Court and the Tax Court.

Applicable law

Parties to an agreement, including a franchise agreement, are free to choose the law which will govern the agreement. It should, however, be noted that the CPA will nevertheless apply to a franchise agreement concluded between a foreign franchisor and a South African franchisee (in respect of a franchise business in South Africa).

COVID-19

A national state of disaster has been declared

22 Section 70(1) of the CPA

23 Section 70(2) of the CPA

24 Section 69(d) of the CPA



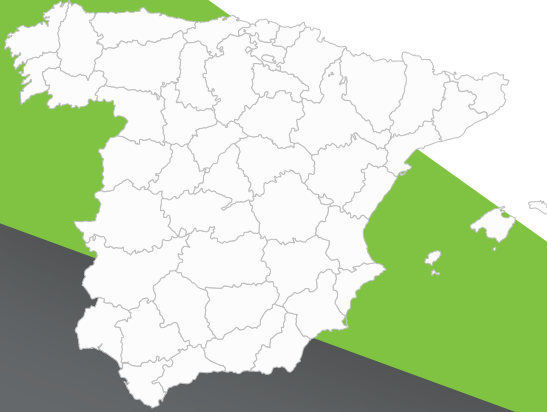
in South Africa in terms of the Disaster Management Act, 57 of 2002 as a result of the COVID-19 pandemic. Various levels of restrictions on movement of people and on the economy (including restrictions on the sale of certain products) have applied since March 2020, which has had a significant impact on the South African economy. A curfew has also been in place since the national state of disaster was announced, with the curfew times being varied as and when COVID-19 cases increase and decrease. The curfew, as well as social distancing, and occasional bans on the sale of alcohol and other products, have had a big impact on the operation of businesses, especially in the retail and food services sectors.

The regulations issued under the DMA

(“COVID-19 Regulations”)²⁵ also prescribe detailed protocols to be followed in every workplace to prevent the spread of COVID-19. A failure by an employer (such as a franchisee that employs employees) to adhere to these protocols will result in the employer contravening the COVID-19 Regulations, as well as the Occupational Health and Safety Act, 85 of 1993 (which requires employers to bring about and maintain a work environment that is safe and without risk to the health of the workers).

²⁵ Government Notice No. 480 published in Government Gazette No. 43258 of 29 April 2020

Spain



266

Legal professionals



Region

EMEA



Offices

Alicante, Barcelona, Bilbao, Las Palmas, Madrid, Palma de Mallorca, Seville, Valencia

Essentials

about Spain's franchising law

- 1 There is no specific franchise law in Spain regulating the commercial relationship between franchisor and franchisee. Nevertheless, there are several laws and other regulations in Spain applicable to franchising activity.
- 2 Franchisor must disclose to the potential franchisee the correct and non-misleading information on the franchise, in writing, at least 20 business days before execution of the franchise agreement, any pre-agreement or payment by the potential franchisee to the franchisor of any consideration.
- 3 Since 8 December 2018, there is no obligation for franchisors operating in Spain to register and update the information about their franchise network in the Spanish Franchisor's Registry.

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Find and reach out to local contacts in the **Contacts** section on page 288.

Relevant areas of Law

Legal basis of Franchise Law

Legal definition of “franchise” can be found in article 62.1. of Spanish Law 7/1996 of 15 January 1996 on the Regulation of Retail Trade (subsequently amended) as the “commercial activity carried out by virtue of an agreement or contract whereby a company, identified as the franchisor, assigns to another company, identified as the franchisee, the right to exploit its own system for marketing products or services”. Additionally, Royal Decree 201/2010 of 26 February 2010, provides a very limited regulation on the exercise of commercial activity under franchise system.

Apart from the above, there is no specific franchise law in Spain regulating the commercial relationship between franchisor and franchisee. Therefore, Spanish case law and doctrine consider that there is no complete material regulation of the franchise agreement in Spanish and consequently, franchise agreement must be considered as an “atypical” contract. In this respect, Spanish Supreme Court has stated that the franchise agreement “like any atypical contract, in this case a commercial one”, must be governed by the will of the parties as expressed in the clauses of the relevant agreement.

Corporate Law

The most common corporate form to set up business in Spain is the private limited liability company (“sociedad de responsabilidad limitada” or “S.L.”). An S.L. can be incorporated by one or more shareholders and requires a minimum capital of EUR 3,000. Shareholders of an S.L. shall not be held liable to S.L.’s creditors as the liability is limited to the capital contribution. An S.L. must be incorporated by means of granting a public deed before a public notary and said deed must be filed with the competent commercial registry.

Consumer Protection Law

Under Spanish law, franchisees or individuals seeking to become franchisees should not be considered as consumers, provided they negotiate and enter into the franchise agreement in the development of their commercial or professional activity. Therefore, in general terms, franchisees will not be protected by Spanish consumer protection laws and especially the Royal Legislative Decree 1/2007 of 16 November, approving the revised text of the General Law for the Defence of Consumers and Users.

Antitrust/Competition Law

Franchise agreements are subject to EU competition law to the extent where they may contain anticompetitive practices as foreseen in article 101 of the Treaty on the Functioning of the EU (“TFEU”). Examples of these restrictions are vertical or horizontal price-fixing, sharing markets, prohibiting passive sales or imposing a direct or indirect ban on internet sales. In such an event, the agreement is null and void and is unenforceable, and a fine can be imposed on the franchisor. There are some franchise schemes that are exempt from EU competition law, for example, intercompany agreements, franchises that are integrated within the franchisor’s group of companies, activities that are not economic activities and under certain conditions, where each of the parties to a franchise have a market share below 30% within the relevant market.

Employment Law

Conditions under which the franchise business is developed should be analyzed in order to determine whether personal dependency concurs, as well as to confirm that the franchisee assumes risks and benefits deriving from the franchise, irrespective of the conditions agreed in the relevant contract. Pursuant to Spanish regulations,



self-employees should be free to design their activities, working days and hours, holidays, hire their own employees and in addition to that, the franchisee should assume exclusively the costs and risks deriving from the franchise.

Should an individual franchisee's working time be determined by the franchisor, as well as receive instructions on a recurrent basis on the way services are rendered or activity is performed and/or risks deriving from the activity be assumed by the franchisor, the nature of the relationship could be an employment relationship rather than a mercantile/civil relationship. In that scenario, the individual franchisee could be considered employee of the franchisor and therefore all the guarantees and rights foreseen by the Spanish Workers' Act would be applicable (salary guarantees, dismissal under limited grounds, termination of the relationship could be considered unfair dismissal with the obligation etc.). From a Social Security law perspective, the franchisor would be obliged to register the individual franchisee with the Spanish Social Security and pay the relevant contributions.

Law on commercial agents

The possible analogical application of the compensation provided for in Article 28 of Spanish Law 12/1992 of 27 May 1992 on Agency Contracts is subject discussion.

The aforementioned rule provides for a compensation for the agent when (i) the agency contract is terminated; (ii) the agent has brought new customers to the principal (or significantly increased operations with pre-existing customers); (iii) the agent's previous activity may continue to produce substantial advantages for the principal; and (iv) the compensation is equitably appropriate due to the existence of agreements

limiting competition, the commissions lost by the agent or other circumstances that concur in the termination. The rule also establishes that the compensation may never exceed the average annual amount of the remuneration received by the agent during the last five years or during the entire duration of the contract, whichever is less. Legal doctrine and case law are divided on this issue. With this, the Supreme Court seems to be opening the door to the analogical application of Article 28 of the Agency Contract Act to the termination of franchise contracts. However, the potential application of this provision should be analyzed on a case-by-case basis, according to the specific terms and conditions of each franchise agreement and the specific business developed under the franchise.

IP Law

Under Spanish Law:

- A franchise agreement must include, at least (and among others) the right for the franchisee to use (i) the common brand names, trademarks, and other intellectual property related to the franchise and (ii) the transfer of specific know-how owned by the franchisor, substantial and unique.
- As part of the precontractual information to be provided by the franchisor to the franchisee, the franchisor must provide evidence of its ownership of (or license for) the intellectual property rights to be licensed to the franchisee under the franchise agreement.

Franchisors are entitled to protect their trademarks by registering them with the Spanish Patent and Trademark Office (Oficina Española de Patentes y Marcas -OEPM-) or, in the case of European Union trademarks, with the Office for the Harmonisation of the Internal Market.

As for the know-how, provided it meets several specific requirements, it could be protected under Law 1/2019 of 20 February 2019 on Trade Secrets. Additionally, the know-how could also be protected by a Non-disclosure Agreement (“NDA”) to be entered by parties or by confidentiality clauses agreed under the franchise agreement.

Selected questions/aspects

Precontractual disclosure

Franchisor must disclose to the potential franchisee correct and non-misleading information on the franchise, in writing, at least 20 business days before execution of the franchise agreement, any pre-agreement or payment by the potential franchisee to the franchisor of any consideration.

The minimum information that the franchisor must provide in writing, according to current Spanish regulations, is the following:

- identification details of the franchisor;
- evidence of the ownership (or license) of the trademark and brands;
- description of the sector of activity that is the object of the franchise business;
- experience of the franchisor;
- content and characteristics of the franchise and its operation;
- structure and extension of the franchise network in Spain; and
- essential terms and conditions of the franchise agreement (e.g., rights and obligations of the parties, term of the agreement, termination conditions, exclusivity commitments).

Franchise fees

There are no laws in Spain regulating the calculation or payment of franchise fees.



Confidentiality

At a precontractual stage, the law empowers the franchisor to impose a duty of confidentiality on the franchisee, regarding all precontractual information received or to be received by the franchisee. At a later stage, it is common to include confidentiality clauses in the franchise agreement.

Amendments

In general, the relevant clauses may not be modified unilaterally. However, according to several court rulings in Spain, the franchisor could be entitled to make periodic modifications or adaptations to the franchise manuals in order to adapt the business concept to the trends and circumstances of the market.

Termination

The lack of substantive regulation of the franchise agreement raises difficulties when dealing with its termination. The franchise agreement has the term agreed between the parties. An indefinite duration may also be agreed upon, but including unilateral termination clauses. In general, it is understood that the early termination or opposition to the automatic extension of the term of agreement must be accompanied by a written notice with a reasonable period of notice. Unless otherwise agreed, a period of notice of one month per year of duration of the agreement, with a maximum of six (6) months could be considered as reasonable.

Renewal and transfer

Given that we are dealing with an atypical contract, the possibility of extending or renewing the contract will depend on what the parties have agreed in the franchise agreement. It is admissible to contractually restrict franchisee's ability to transfer its franchise, typically by requiring an explicit prior written approval of the franchisor.

Dispute Resolution and Applicable Law

Dispute resolution, court system

In Spain, the Court System is organized in different instances: the First Instance Courts, the Provincial Courts that resolve the appeals and the Supreme Court, that resolve the extraordinary appeals.

It is also admissible that the parties agree on solving their disputes by alternative methods of conflict resolution, such as the arbitration or the mediation. These alternative methods should be specifically provided in the franchise agreement. The main advantage of these methods is the time effectiveness, as the judicial proceedings may last for years. On the other hand, the main disadvantage could be the cost, as these alternative methods may be expensive.

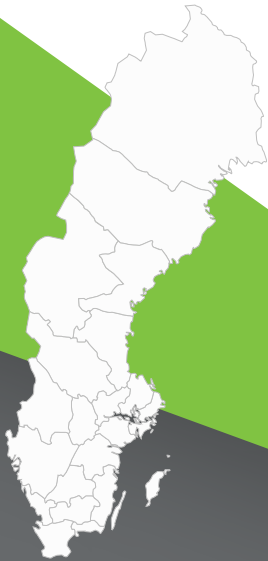
Applicable Law

Spanish conflicts of law rules recognize a choice of governing law in a franchise agreement. Parties can therefore choose any governing law for a franchise agreement. Nevertheless, the chosen applicable law should have a link to the parties and/or the franchise business to be developed under the agreement.

COVID-19

The COVID-19 pandemic brought an abrupt halt, especially during the period between March to June 2020, in which a severe lockdown restricted much of the economic activity and social life in Spain. Notwithstanding this, no specific regulation regarding franchise agreements or franchising activity has been issued in Spain in the last year, since March 2020..

Sweden



13

Legal professionals



Region

EMEA



Offices

Gothenburg, Malmo,
Stockholm

Essentials

about Sweden's franchising law

- 1** In Sweden, there is no unambiguous legal definition of "franchise" or "franchising", nor a codified franchise law regulating franchising as a whole. Swedish franchising has instead sprung out of standard-form contracts, analogies and general principles of contract law.
- 2** The only direct franchise-related legislation is a disclosure obligation for the franchisor (Law no. 2006:484).
- 3** The Swedish Franchise Association (Sw. "Svenska Franchise Föreningen") provides guidelines regarding the minimum information to be disclosed. The guidelines are treated as a Code of Ethics. Even though these code/guidelines are only binding towards the members of the association, they might be relevant to determine fair practice.

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Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of Law

Legal basis of Franchise Law

Franchising is based on a franchise contract between two independent parties, who continue to be independent legally and economically throughout the cooperation. In Sweden, there is no unambiguous legal definition of “franchise” or “franchising”, nor a codified franchise law regulating franchising as a whole. Swedish franchising has instead sprung out of standard-form contracts, analogies and general principles of contract law. Still, there is are some relevant areas of legislation to consider. The primary areas are contract law, intellectual property law, agency law, competition law, commercial law and consumer protection legislation. The only direct franchise-related legislation is a disclosure obligation for the franchisor (Law no. 2006:484).

Contract Law

The Swedish Contracts Act (Law no. 1915:218) regulates how agreements are entered into as well as how they can be terminated. The Contracts Act further contains provisions for when agreements can be declared invalid, for example in case of coercion, usury and betrayal. The Contracts Act offers an important possibility for adjustment or removal of unfair contract terms according to section 36. This section can be applied when a provision is considered unfair with regard to circumstances existing at the time of the agreement or later.

The Act on Contract Terms Between Traders (Law no. 1984:292) aims to be an instrument for reorganization of mainly small companies' contract terms, e.g., by strengthen the conditions for small business organizations in negotiations on contract terms issues. According to

the law, the Market Court can prohibit a trader, who sets contract terms in relation to another trader which are to be regarded as unreasonable, to continue to use the same or essentially the same conditions in similar cases. In assessing whether a contract term is to be regarded as unreasonable, special consideration is given to the need of protection for those who occupy an inferior position in the contractual relationship, such as a franchisee.

The fact that the franchise agreement content often changes to some extent by allowing the franchisor to alter the concept through changes in the handbook is also a matter of contract law. What changes may be made? How should the changes be made? Does the franchisee have the right to refuse or terminate the agreement? If these issues are clearly regulated, it will be easier to solve the problems if they arise.

Corporate Law

Starting a company in Sweden is a quite straight forward process. One of the most common corporate form to set up business in Sweden is the private limited liability company (Sw. “Aktiebolag”). It is easy to set up by one or more people and requires a minimum share capital of SEK 25,000 or the equivalent sum in Euros.

The easiest and most common way to set up a private limited liability company in Sweden is to use an “off-the-shelf” solution provided by a company agent or law firm. Notwithstanding foreign trade law regulations regarding foreign investments in certain sectors, Swedish corporate law does not impose any general restrictions on foreign operations in Sweden, nor on franchise systems in particular.

Consumer Protection Law

Under Swedish law, individuals seeking to become franchisees are not qualified as consumers, as the intention of their conduct is business oriented.

Commercial Law

The franchisor's sale of goods to the franchisee for their resale of these goods to the customer within the framework of the business concept and the franchise agreement is regulated by the Sales of Goods Act (Law no. 1990:931). That is, if the parties have not already regulated conditions for sale of goods separately in the franchise agreement or in the operations manual. The Sales of Goods Act regulates how buyers and sellers are to behave with regard to obligation to investigate and reject the received goods, how errors or deviancies are to be dealt with, what sanctions can be enforced and so on. In the franchise collaboration, it is common to prescribe that the franchisee must purchase certain goods and/or services from the franchisor.

The Sales of Goods Act states, among other things, that delivered goods must be in accordance with what the parties have agreed on regarding nature, quantity, quality, other characteristics and packaging. If nothing has been agreed, the product must be suitable for its purpose and correspond to the samples that the seller has shown. The buyer has a duty to investigate and must immediately reject when a defect has been discovered. The seller usually has the right to re-do the delivery before the buyer can cancel and claim damages.

Since a franchise agreement, and related purchase and delivery terms are long-term agreements, it is common for the franchisor to

reserve the right, in a special contract term if certain specified conditions are met, to during an agreement period change the price on the goods sold to the franchisee, a so-called price adjustment clause. Such clauses are valid, presupposing that they are clear and that the supplier/franchisor does not go beyond the scope of such a condition.

Right of intermediaries

Franchising may be described as a right to market and sell goods or services on behalf of another, indicating that franchising includes elements of distribution law or intermediary law. Franchisees can act as an intermediary, which can vary significantly from proxy to commercial agent. Different intermediary law relationships naturally affect the franchise relationship and the franchise agreement.

The basic regulation appears from the general provisions for intermediaries are found in the Agents Act, law no. 1991:351 and the Commission Act, law no. 1914:45. Unless the intermediary is not classified as either an Agent or a Commissionaire, the relationship is not directly regulated in law. This is the case for retail and reseller agreements. However, it should be emphasized that it is the actual circumstances in particular case areas that ultimately matters, regardless of what is written in the franchise agreement.

Taxation and Employment Law

Taxation and Employment Law are areas of law affecting franchising in terms of demarcation between employment and self-employment. If you run a business in Sweden, you can be approved for F-tax, after applying to the Swedish Tax Agency,. If you show that you are approved for F-tax or state that you are approved for F-tax

on invoices, quotations, tenders or similar with a register extract, the payer shall not deduct tax or pay social security contributions. In order to receive an F-tax certificate, you need to be considered a trader for which three conditions must be met: independence, profit-making purpose and duration. If these conditions are not met, it is not considered a business activity but can instead be a matter of an assignment or an employment. Anyone who covers an employment with a franchise agreement is likely guilty of a violation of labor law. The exact criteria of who is to be considered an employer or a trader has not been decided in Swedish law but must be tried from case to case.

The labor law regulations and the social benefit system that currently exist in Sweden for employees do not include those who are self-employed and thus does not consider them franchisees either. Instead, as a franchisee, one has to be an employer of the employees who, on the other hand, are covered by the aforementioned regulations and benefits.

IP Law

Franchisors need to protect their Intellectual Property (IP) against third parties' attacks or imitations, especially by registering their trademarks—either as International Registration ("IR") with the World Intellectual Property Organisation ("WIPO"), as EU Trademark ("CTM") with the EU Intellectual Property Office ("EUIPO") in all 27 EU member countries, or as national trademark in Sweden only with the Swedish Patent and Registration Office ("PRV").

The Trademarks Act (law no. 2010:1877) regulates how protection arises for a trademark and how one can grant the right for another to use a protected trademark.

The most common way to protect a trademark in Sweden is to register it with the Patent and Registration Office. However, it is possible to achieve trademark protection through incorporation without the trademark being registered. since the franchise collaboration revolves around a concept that is identified by using one and the same sign throughout the chain, it would entail great risks to not register the sign (the trademark).

The registration procedure is also a good test that the trademark can be registered. If a similar trademark is already registered in Sweden or through a so-called Community trademark (EU-trademark), there is an obstacle to registration. In such a situation, one has to rethink and narrow down or change/create a new brand. It is recommended to reach out to a lawyer to get the registration correctly handled.

As a franchisee, one gets the right to use the franchisor's registered trademark during the contract period. Such a right may be granted separately through a trademark license, but such a license is incorporated as a separate chapter in all franchise agreements.

The franchisee pays a license fee or royalty for the use of the trademark, but this fee is usually included as a subset of the service fee to the franchisor. Since the license expires as soon as the agreement expires, the franchisee must cease using the trademark immediately upon termination of the agreement.

Should the franchisee have any right to terminate the business for a certain period after the contract period, a special agreement should be written about this.

Real Estate/Tenancy Law

The Swedish tenancy law is regulated in Chapter 12 of the Land Code (Law no. 1970:994). It is the relationship between the landlord and tenant that is regulated, both in commercial conditions and with regard to private housing. In franchise collaborations, it is not uncommon for the franchisor to own the premises or have a first-hand lease for the premises in which the franchisee operates.

A vast majority of the rules in the tenancy law are mandatory. Therefore, it is important for the parties to know how to regulate subletting and ensure that the lease agreement and the franchise agreement are linked. Otherwise, there is a risk that the franchisor cannot terminate the lease in connection with terminating the franchise agreement.

Selected aspects

Disclosure obligation for the franchisor

Under the Swedish disclosure rules, a franchisor must provide a prospective franchisee with certain information about the meaning of the agreement, and other considerations that are necessary with regard to the circumstances, in good time before a franchise agreement signed.

The information shall include:

- a description of the intended franchise business;
- a description of other franchisees with whom the franchisor is in business with, within the same franchise system;
- the financial terms;
- the intellectual property rights to be granted to the franchisee;

- the goods or services that the franchisee is obliged to buy or rent;
- the non-competition that shall apply during or after the period of the franchise agreement;
- the term of agreement, the conditions for change, extension and termination of the franchise agreement and the financial consequences of a termination; and
- a description on how a dispute due to the agreement is to be tried and what is to apply in respect of cost liability for such dispute.

If a franchisor does not fulfill the information obligation, the Market Court may, on the basis of a fine, order the franchisor to provide information in accordance with what is stated in the legislation. The legislation covers all franchise contracts in Sweden: domestic and foreign contracts; master franchise contracts and unit contracts; new contracts; and renewals of old contracts.

The obligation affects all data available (only) to the franchisor and necessary to enable the potential franchisee to generate own calculations of profitability and to draw own conclusions about the prospects of success regarding the franchise. Furthermore, it also comprises general information about the franchise system as well as the basic content of the (master-, sub-, or) franchise agreement. Notwithstanding the foregoing, the franchisor is not obliged to disclose trade secrets.

For reasons of proof, precontractual information should be carried out in writing. In addition, franchisors need to anonymize references and examples when disclosing information in order to comply with the requirements of the General Data Protection regulation ("GDPR").

Further, the Swedish Franchise Association (Sw. "Svenska Franchise Föreningen") provides guidelines regarding the minimum information to be disclosed.

Legal restrictions

Antitrust/Competition Law

A franchise relationship might involve certain anti-competitive moments, primarily by giving the franchisee an exclusive right to sell goods or services in a certain area or by the franchisee feeling obligated to follow the franchisor's price recommendations. The rules of the Competition Act (Law no. 2008:579) are therefore, in principle, applicable to franchise agreements. However, under certain circumstances, the franchise agreements fall under a group exemption. The group, or block-, exemption in Swedish law is a direct implementation of the European regulation text and is therefore structured in the same way. Franchise agreements may contain restrictions that collide with art. 101 Treaty on the Functioning of the EU ("TFEU"). Exemptions from the prohibition in art. 101 TFEU are possible under the EU-Vertical Block Exemption Rule ("V-BER"), provided that the respective parties to a franchise agreement do not have a market share of more than 30 percent each. The V-BER contains some clauses ("core restrictions"), rendering the entire agreement null and void, as well as grey clauses, rendering solely the specific provision in an agreement null and void. Examples for black clauses are provisions dictating fixed prices or prohibiting passive sale outside a designated territory (including sale via the Internet), whereas provisions prohibiting competition for more than five years or for an unlimited time are grey clauses.

According to the exemption, a franchisor may prescribe a non-compete obligation even after the contract period. However, such a prohibition may only apply for one year after the agreement has expired and is limited to the premises and the land where the franchisee has conducted the business during the agreement period.

Law on general terms and conditions ("T&Cs")

Franchise agreements as preformulated agreements significantly limit the other party's contractual freedom, which is why their T&Cs are subject to a judicial effectiveness control. This is lessened in b2b-only agreements such as franchisor-franchisee-relationships. However, still, such T&C-clauses are ineffective that unreasonably disadvantage the other party.

Franchise fees

Besides the prohibition of usury, there are no laws in Sweden regulating the payment of franchise fees.

Confidentiality

Confidentiality clauses in franchise agreements (often in combination with a contractual penalty) are common and enforceable in Sweden. The franchisor may file an interim injunction against an infringing franchisee, claim damages occurred due to the breach, and possibly terminate the franchise agreement. Furthermore, a confidentiality clause is advisable in order to adequately protect existing trade secrets.

There is nothing preventing the franchisor from requesting the potential franchise to sign a confidentiality agreement to protect the recipient, in order to protect the business concept information with confidentiality.

Amendments

Simply put, if the franchise agreement contains a precise and reasonable change reservation clause, considering the franchisee's interests, unilateral amendments of the agreed terms by the franchisor are admissible as an expression of the franchisor's obligation to continuously develop its franchise system according to changing market conditions. Without a respective provision, amendments of the franchise agreement may only be agreed unanimously between franchisor and franchisee – an almost impossible task in terms of uniform regulations once a franchise system has reached a size with a large number of franchisees.

Termination

Franchise agreements are entered into for a certain time and terminate with lapse of that time. A regular termination by one of the parties before that is not admissible, unless both parties unanimously agree on the same. It is, for example, common that the franchisor reserves the right to terminate the franchise agreement with a notice period of three months if the franchisee does not achieve a turnover amounting to a minimum turnover amount. If the franchisor wants damages for the early termination of the franchise agreement due to non-fulfilment of minimum commitments, this must be clearly stated in the franchise agreement.

However, franchise agreements may also be terminated by each party without notice if it is unreasonable for the terminating party to continue the contractual relationship until the agreed time of termination (good cause). If the cause for the termination is a breach of a contractual obligation by the other party, e.g., non-payment of franchise fees, the

termination for good cause is only admissible after having issued a fruitless warning (advisably in writing), and within a reasonable period of time after learning about the circumstances for the termination. Unjustified terminations by a franchisor might entitle the franchisee to claim damages.

Renewal and transfer

Franchisors are, generally speaking, free to decide whether or not to renew a franchise agreement. If they do so, renewals should be done explicitly and in writing. It is admissible to contractually restrict a franchisee's ability to transfer its franchise, typically by requiring an explicit prior written approval of the franchisor.

Dispute Resolution and Applicable Law

Most disputes in business are optional, i.e., the parties themselves choose how to resolve the dispute. In principle, it is admissible for the parties to a franchise agreement to agree on a choice of law to be applicable on their contractual relationship, and if the franchisee is a merchant, to agree on a venue clause. The most common factor would be to let either a court or an arbitration tribunal decide the dispute.

An arbitration tribunal is generally faster, judged by experts in the specific field and confidential. An arbitration tribunal could be expensive, but so can a dispute in an ordinary court procedure since the losing party normally is obligated to pay for the lawyers of the winning part.

COVID-19

For two periods of time, the Swedish government has presented a regulation on a discount for fixed rental costs in vulnerable industries as a way of mitigating the economic consequences of the virus outbreak. This has included, for

example, retail, accommodation, restaurants and arrangements of fairs, as well as consumer services such as dentists, physiotherapeutic activities, hair and body care. The support means that the landlord who reduces the fixed rent for tenants during the periods of 1 April to 30 June 2020 and/or January-March 2021 in these vulnerable industries has been able to apply for support to compensate for part of the reduction. The compensation was given a maximum of 50 percent of the reduced fixed rent, i.e., the discount itself, however, a maximum of 25 percent of the original fixed rent. The compensation was to be sought by the landlord via the county administrative board and covered all landlords.

For a period of time, there were also support in the form of:

- Temporarily reduced employer contributions and deductibles;
- Increased provision for accruals fund.
- Other, still current support are:
- Sales support to sole traders and trading companies;
- Adjustment support to companies based on turnover loss;
- Short-term layoffs for reduced wage costs;
- Rental support;
- Event support;
- Increased state responsibility for sick pay costs;
- Shutdown support;
- Deferment of tax payments;
- Government loan guarantee for small and medium-sized enterprises;
- Expanded loan opportunities via Almi, EKN and SEK;
- Increased space for Almi Invest as an active investor in innovative companies;
- Increased investment power for Almi Invest;
- Tax reduction for investments in equipment;
- Reduces employer and deductibles for young people;
- Temporarily abolished benefit taxation for gifts to employees.

Other current measures and support for specific industries:

- Government loan to organizers of package tours for repayment to travelers;
- Reimbursement for costs for competence initiatives in short-term work;
- New time-limited basis for entrepreneurs' unemployment;
- Increased opportunity for unemployment insurance for dormant companies;
- Temporary rules shall facilitate annual general meetings;
- Measures in health insurance due to the new coronavirus.

Franchise fees, however, were not covered by these and therefore, had to be paid continuously.

Switzerland

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Legal professionals



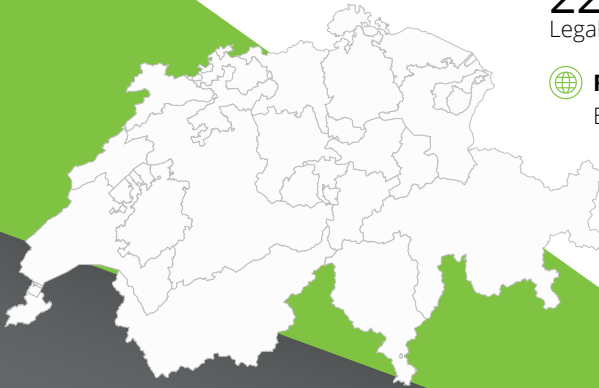
Region

EMEA



Offices

Geneva, Zurich



Essentials

about Switzerland's franchising law

- 1** Franchise agreements are not explicitly regulated by Swiss law. A franchisor and franchisee are free to determine the content of the agreement, but any mandatory law will override the agreement.
- 2** Switzerland is politically and economically a stable country leading to legal certainty. Franchise agreements are therefore often concluded under Swiss law.
- 3** The WIPO Arbitration and Mediation Center (WIPO Center) headquartered in Geneva offers specialized mediation, arbitration, expedited arbitration and expert determination in cases of franchising disputes related to IP.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of Law

Legal basis of Franchise Law

Swiss legislation and particularly, the Swiss Code of Obligations does not explicitly regulate franchise agreements and there is accordingly no legal definition of “franchise” in Switzerland. A franchisor and franchisee are free to determine the content of the agreement, but any mandatory law will override the agreement. As with any other contract in Switzerland, the general contract law applies to a franchise agreement. Furthermore, the specificity and typicality of a franchise agreement is qualified by general doctrine and case law as a contract that has various elements of several types of contracts. Franchise agreements can touch on a number of different areas of law, ranging from corporate law, agency law, copyright and trademark law, real estate and tenancy law to antitrust and competition law, and in some cases also to employment law.

Corporate Law

Two primary types of companies are suitable for the incorporation of a franchise business in Switzerland: a share corporation (“AG” or “Ltd.”) and a limited liability company (“GmbH” or “LLC”). For the incorporation of an AG, a minimum capital of CHF 100,000 is necessary (GmbH: CHF 20,000).

Principally, under both forms, liability is limited to the share capital. Directors and managing officers are only personally liable to the company, its creditors and if applicable, its shareholders for damages resulting from an intentional or negligent breach of their duties. At least one director or managing officer (with single signatory power) must be a Swiss resident (irrespective of that

person's nationality). Alternatively, a foreign franchisor can also set up a branch or incorporate a subsidiary in Switzerland. Whereas a branch of office acts on behalf of its head office and the latter thus remains liable for the actions undertaken by the branch, a subsidiary is liable for its own actions. There are no fundamental restrictions under Swiss company law in the area of franchising. However, when establishing a company, the founder must fill in a standard form confirming compliance with Swiss law with respect to the purchase of real estate (called “Lex-Friedrich-Declaration”). Further, as taxation in Switzerland varies from each canton to another, the domicile of a legal entity should be considered from a tax point of view. It is therefore recommended to closely coordinate an entity's establishment with both legal and tax advisers.

Employment Law

The decisive criteria for the delimitation of the franchise agreement to an employment contract is the personal dependence of the franchisee on the franchisor. Whereas the employee is personally, organizationally, temporally and economically dependent on the employer, the franchisee acts, apart from the right of franchisor to issue instructions, fully independently from the franchisor. However, in very limited cases of a so-called subordination franchising, if the franchisee is personally and economically dependent on the franchisor, it may well be justified to apply individual provisions of employment law analogously to the franchise agreement (e.g., provisions relating to social security), if the franchisor is a natural person and the application appears to be appropriate and consistent.

Law on commercial agents

An agent is a direct representative of the principal, whereas the franchisee acts on its own name and for its own account (and risk). Opinions differ as to whether the franchisee is entitled, in analogy to the agency contract, to a compensation for clientele after termination of the franchise agreement ("Kundschaftsentschädigung"). Certain authors argue that the analogous application of agency law regulations concerning the compensation for clientele is justified and agency law should be applied analogously if the franchisee is firmly integrated into the franchisor's sales system and the franchisor retains the clientele after the franchise agreement is terminated.

Furthermore, in cases where the parties agree on a post-contractual non-compete clause, subject to the general limits of the legal order and by analogy with agency law, the franchisee may have an inalienable entitlement to adequate special remuneration ("Karenzentschädigung"). It is therefore recommended to explicitly include corresponding rules in the agreement as to whether compensation for clientele and a special remuneration are owed or not.

IP Law

The franchisor grants a license to use its know-how and other Intellectual Property (IP) rights (e.g., trademarks, designs or patents) to the franchisee so that the latter can distribute the franchisor's products or services under the franchisor's IP rights. IP rights have a great monetary value and it is therefore, of utmost importance that the franchisor registers its IP rights and protects them against unauthorized use prior to the conclusion of a franchise

agreement. In Switzerland, the Swiss Federal Institute of Intellectual Property ("IPI") is the center of competence regarding the protection of IP rights. An IP right related to a trademark is protected by its registration in the Swiss trademark register ("Swissreg"). The application for a registration can be made online. Protection in other countries can be obtained by filing an application in the country concerned.

Furthermore, the "Madrid system" allows for an extension of the Swiss trademark protection to other contracting states and organizations. A franchisor who has filed a registration application of an IP right in Switzerland may accordingly request that its IP right is also protected in other member countries on the basis of a single application with the World Intellectual Property Organization ("WIPO"). Additionally, in order to obtain international protection in all member countries of the EU, an application may be made at the EU Intellectual Property Office ("EUIPO") in Spain.

Real Estate/Tenancy Law

Often, franchise agreements contain real estate and tenancy law elements, namely if the purpose of the franchise agreement is the distribution of the franchisor's products by the franchisee. If the location of the franchisee's business is particularly important to the franchisor, the franchisor may buy or rent a location itself and (sub-) lease it to the franchisee. In this case, the franchisor acts as a landlord to the franchisee. Since the lease element of the franchise agreement has a dominant role, the termination rules under tenancy or lease law should be coordinated with the overall termination rules of the franchise agreement.

Selected questions/aspects

Precontractual disclosure

Swiss law does not stipulate a general (pre-contractual) obligation for a party to regularly inform the other party about all and any information that is available. However, in the precontractual relationship, the principle “culpa in contrahendo”, derived from the principle of good faith, may be violated if a party to the contract negotiations culpably breaches precontractual obligations, such as the duty to negotiate seriously or the duty to explain. The association Swiss Distribution (www.swissdistribution.org; formally known as Swiss Franchise Association (“SFV”)) aims to promote distribution organizations such as licensing, franchise or agency systems. Whereas there is no formal franchise law in Switzerland, members of Swiss Distribution undertake to comply with the Code of Conduct of Swiss Distribution. Clause 3 of the Code stipulates that prior to the signing of a binding agreement, information and documentation relevant to the cooperation shall be available to prospective distributors to enable them to enter into any binding agreement in full knowledge of the facts. However, there is no definition included of what information and documentation is relevant to the cooperation. As in any other contract negotiation, data protection laws must be complied with. Furthermore, to ensure the confidentiality of negotiations and information shared, it is recommended to sign a Non-Disclosure Agreement (NDA).

Legal restrictions

Antitrust/Competition Law

Even if there are no specific regulations in Swiss antitrust law regarding franchise agreements,

the private autonomy of the parties can be restricted under certain conditions. In particular, it must be examined whether inadmissible vertical agreements on competition exist.

Amongst others, agreements between actual or potential competitors to fix prices or agreements to allocate markets geographically or according to trading partners are presumed to lead to the elimination of effective competition. In case a party holds a dominant position in the relevant market, its business conduct must be examined in more depth.

Law on general terms and conditions (“T&Cs”) In order to ensure uniformity in the franchise system, franchise agreements are usually standard form contracts accompanied by T&Cs issued by the franchisor. The franchisee’s ability to negotiate the agreement is therefore rather limited. In contrast to some other jurisdictions, Switzerland does not have a codified law regarding T&Cs. The T&Cs are subject to a limited content control only by the courts, according to which unusual provisions in the T&Cs are not considered part of the contract and as a result, the corresponding statutory law applies (“Ungewöhnlichkeitsregel” or “Unusual rule”) and ambiguous clauses are interpreted against the party who drafted the contract—the franchisor (“Unklarheitenregel” or “Ambiguity rule”). According to the Federal Act against Unfair Competition, any behavior or business conduct that is unfair and unlawful or otherwise contrary to the principle of good faith may be punished. Particularly T&Cs that provide for, to the detriment of consumers, a significant and unjustified imbalance between the contractual rights and the contractual obligations between the parties are qualified as unfair. However, as franchisees are generally

not considered to be consumers, such control is normally not applicable to the relationship between franchisor and franchisee.

Franchise fees

It is the franchisee's obligation to pay franchise fees, which usually consists of an entry fee that compensates the franchisor for planning and setting up the franchise system, as well as an ongoing, turnover-dependent fee, which compensates for the rights arising from the franchise agreement. The amounts of the franchise fees are not regulated by law. Where the franchise fee is not paid, the usual default interest rate is 5% per annum.

Confidentiality

Confidentiality clauses in franchise agreements are considered to be must-haves, due to the sensitive nature of the information shared (e.g., know-how, business secrets and technology) and the associated high contract value. The confidentiality clauses should also explicitly survive the termination of the agreement. A breach of confidentiality can result in certain contractual penalties, which can be claimed by the franchisor in addition to any liquidated damages the franchisor may claim for damages incurred. Furthermore, a breach of confidentiality is usually considered to be a material breach of the agreement, which gives the franchisor the right to terminate the franchise agreement for good cause with immediate effect.

Termination

Franchise agreements are usually entered into for a minimum fixed term, during which an ordinary termination is not possible. After expiry of the minimum term, the agreement is often renewed for certain periods of time

(e.g., renewal for periods of two years each), if not terminated ordinarily by either party upon written notice to the other party. The extraordinary termination of a franchise agreement is possible for good cause at any time and with immediate effect (e.g., in case of a permanent neglect of sales promotion obligations or repeated disregard of information obligations by the franchisee), if the continuation of the agreement is unreasonable for the terminating party. A good cause for the franchisor may often simultaneously be considered to be a material breach of the agreement by the franchisee. The franchisor may therefore demand compensation for the damage caused by the premature termination of the franchise agreement, provided that the franchisee is responsible for the cause.

Renewal and transfer

Under Swiss law, the parties are free to renew a franchise agreement. Further, unless expressly prohibited in the franchise agreement, the transfer of agreement to another party is permitted. However, one often sees that the assignment is only allowed with the prior written consent of the franchisor.

Dispute Resolution and Applicable Law

It is important to note that in Switzerland, the courts are organized on a cantonal level. Accordingly, depending on the canton in which the competent ordinary court has its seat, the language of the court is different (e.g., German or French). However, the rules on civil procedure are the same throughout Switzerland. The parties to a franchise agreement can freely choose the law to be applicable to the franchise agreement. Switzerland is politically and economically a stable country leading in legal

certainty. Franchise agreements are therefore often concluded under Swiss law. Switzerland is also well known for international dispute settlement particularly because of its globally-oriented economy. The advantage of arbitration is that the parties can choose the language of the court and the judges themselves. In addition, specific expertise of the judges can be drawn upon. In the case of franchising disputes related to IP, the WIPO Arbitration and Mediation Center (WIPO Center) headquartered in Geneva, an independent and neutral international institution in the field of dispute resolution, offers mediation, arbitration, expedited arbitration and expert determination.

COVID-19

Overall, it can be stated that especially in times of lockdown and closed stores and restaurants, franchisors and franchisees were (and still are) badly affected by the COVID-19 pandemic and requested to adapt their sales model, their planning and implementation to the circumstances. COVID-19 global disruption not only affected one sole franchise business but a whole franchise system has been challenged.

In light of the COVID-19 pandemic, the Swiss Federal Council took certain measures to prevent COVID-19 related bankruptcies. A temporary relief from the obligation to report over-indebtedness, which would usually lead to immediate bankruptcy, was introduced. The measures of the Federal Council apply to the whole of Switzerland and in view of the changes in the pandemic, are regularly adjusted. Cantons adopt additional stricter measures where the number of cases in their area increases (e.g., ban on large events). As a result, the measures in place can differ from one canton to another. Overall, it is recommended to

monitor developments both on a Federal and a cantonal level.

Regarding business rental costs, several cantons provide support for businesses. In Zurich, for example, tenants who rent commercial premises from the city of Zurich receive rent reductions if they are affected by orders in connection with the containment of the COVID-19 pandemic.

According to the principle “*pacta sunt servanda*”, contracts must still be honored despite the COVID-19 pandemic and the parties must therefore perform their obligations in accordance with the contract. As a contract may be adversely affected by the COVID-19 pandemic, there exist, however, exceptions to this principle. In case the contract doesn't provide for an exception based on a force majeure clause or other contractual clauses (e.g., clauses on delivery dates or respectively their non-observance), the remedies under the general provisions of Swiss contract law still apply. Accordingly, for example, an obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor. Further, a fundamental change of the circumstances after conclusion of a contract (meaning a change, which was neither reasonably foreseeable nor avoidable at the time of the conclusion of the contract and results in a serious disruption of equivalence for one party; “*clausula rebus sic stantibus*”) may allow the contract to be adapted. The consequences for a contract and the parties (e.g., right to adjust the contract, right to adjust the price or even right to extraordinarily terminate contract) will always depend on an assessment of the contract and the circumstances of the individual case.

Taiwan



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Legal professionals



Region

APAC



Offices

Kaohsiung, Taipei

Essentials

about Taiwan's franchising law

- 1 Franchisors shall follow the Guideline of Franchisor's Business Behavior announced by the Fair Trade Commission, especially regarding its precontractual disclosure obligation.
- 2 There are no specific rules or regulations stipulated for the details of a franchise agreement.
- 3 When using the Franchisor's standard form of franchise agreement, ensure that provisions in the franchise agreement do not violate Article 247-1 of the Civil Code.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

There is no codified franchise law in Taiwan. Therefore, the franchise agreement plays an important role between the Franchisor and Franchisee. Several different areas of law, such as Civil Code, Company Act, and Fair Trade Act shall be complied with when operating a franchise business in Taiwan.

Corporate Law

The most common corporate form to set up business in Taiwan is the company limited by shares. It is a relatively easy process and can be set up by one or more people without minimum capital requirement. The shareholder is only liable in the amount of its contribution, and not the shareholders personally. The cost for forming such a company is very moderate. For a foreigner to invest and set up a company in Taiwan, government approval is required under the Statute for Investment by Foreign Nationals. Once the company is set up after the relevant authority's approval, the Taiwan Company Act does not impose any general restrictions on foreign operations in Taiwan nor on franchise systems, in particular.

Consumer Protection Law

Under Taiwan laws, individuals seeking to become franchisees are not qualified as consumers, as the intention of their conduct is business-oriented. However, if the franchisor, when using its own standard form of franchise agreement, leaves no room for the franchisee to negotiate the terms of the franchise agreement which are obviously unfair, such provisions shall be treated as void according to Article 247-1 of the Civil Code.

Employment Law

Under the Taiwan Labor Standards Act, 'employer' means a business entity which hires workers, the responsible person of business operations, or the person who represents the business owner in handling labor matters. To that end, the decisive criteria is the level— of personal dependency of the franchisee. Pursuant to Taiwan jurisdiction, a person is an independent businessperson who is—contractually as well as factually free to design their activities and set their own working hours, and who assumes a self-entrepreneurial risk. Since the franchisee is not under direct command and supervision of the franchisor, the franchisee is not regarded as an employee of the franchisor.

IP Law

Protection of trademarks and trade secrets is crucial for franchisors. In Taiwan, the franchisor can register its trademark with the Taiwan Intellectual Property Office ("TIPO"). It is recommended to also carry out a research for the trademark to be registered before its application in order to avoid possible infringement or lawsuits, which may result in loss of the trademark and corresponding claims for disclosure and damages. In addition, some franchisors may hold trade secrets of their business models, ingredients, manufacturing procedures or other know-how. Such trade secrets can be protected under the Trade Secrets Act. IP licensing should be covered in detail in the franchising agreement to avoid uncertainty or ambiguity.

Selected questions/aspects

Precontractual Disclosure

Prior to signing a franchise agreement, franchisors have the duty to inform each potential franchisee accurately and in advance about

all circumstances recognizably relevant for the conclusion of the franchise agreement. However, the abovementioned obligation is not specifically promulgated in the statute. Instead, it is stipulated in the Guideline of Franchisor's Business Behavior ("Guideline") announced by the Fair Trade Commission in Taiwan.

According to the Guideline, the franchisor shall provide the following information to the franchisee at least 10 days prior to the franchise agreement's execution:

- Details of expense or fees prior to operation: this includes franchise fee, educational training fee, price of products that must be purchased from the franchisor, raw materials, equipment, construction and renovation expenses, etc.;
- Details of expense or fees during the franchise operation: calculation methods of royalty, management instruction, sales marketing, purchasing of products or material that are payable to the franchisor or its designated person;
- Names, scopes and limitations of licensing franchisor's trademarks, patent rights or copyrights;
- Details of operational assistance and training guidelines;
- Business plan or estimated plan for establishing the franchise store located within the territory;
- During the term of franchise agreement, limitations on the franchising relationship; and
- Conditions or methods of amendment, termination or revocation of the franchise agreement.

For reasons of proof, precontractual information should be carried out in writing or in electronic means such as email, electronic device or social media.

Failure to disclose the precontractual information shall be regarded as unfair practice. If such failure affects the market order, it will violate Article 25 of the Fair Trade Act. Consequently, the authority can impose a fine from NTD 50,000 to NTD 25,000,000. The Guideline and Fair Trade Act are administrative laws that protect market order. On the other hand, the contractual relationship is not stipulated in such laws. However, the franchisee can claim damages against the franchisor on the grounds that the franchisor has violated the regulation.

Legal restrictions

Antitrust/Competition Law

If franchise agreements contain restrictions on the resale prices, it will be in violation of Article 19 of the Fair Trade Act. The authority can impose a fine of NTD 50 million or imprisonment of two (2) years or under. Refraining from competing in price coercion, inducement with interest, or other improper means are also prohibited under the Fair Trade Act.

Civil Code: Franchise agreements as preformulated agreements significantly limit the other party's contractual freedom, which is why such agreements are subject to a judicial effectiveness control. According to Article 247-1 of the Civil Code, if the franchise agreement contains either of the following provisions which are obviously unfair, such provision shall be void:

- to release or to reduce the franchisor's responsibility;
- to increase the franchisee's responsibility; or
- to make the franchisee waive their right or to restrict the exercise of their right.



Confidentiality

Confidentiality clauses in franchise agreements (often in combination with a contractual penalty) are common and enforceable in Taiwan. The franchisor may file a claim against an infringing franchisee for damages occurred due to the breach, and possibly terminate the franchise agreement extraordinarily. Furthermore, a confidentiality clause is advisable in order to adequately protect existing trade secrets. According to the Taiwan Trade Secrets Act, a trade secret is only protected if the (alleged) owner of the secret has taken appropriate measures to maintain secrecy.

Updating material information of Franchise Agreements

Since the franchisor has advantage status over the information regarding the franchise relationship, if there is any material information regarding the franchise agreement being changed or updated, the franchisor shall notify the franchisee—whether through bilateral amendment agreement or unilateral amendment—of franchisor’s franchising policy.

Termination

Franchise agreements are entered into for a certain time and terminate with lapse of that time. A regular termination by one of the parties before that is not admissible, unless both parties unanimously agree on it or unilateral termination right has been agreed upon and written in the franchise agreement. However, franchise agreements may be terminated by each party without notice if it is unreasonable for the terminating party to continue the contractual relationship until the agreed time of termination (good cause). If the cause for termination is a breach of a contractual obligation

by the other party, e.g., non-payment of franchise fees, the termination for good cause is only admissible after having issued a fruitless warning (advisably in writing), and within a reasonable period of time after learning about the circumstances for the termination. Unjustified terminations by a franchisor might entitle the franchisee to claim damages.

Renewal and transfer

Franchisors are free to decide whether or not to renew a franchise agreement. If they do so, renewals should be done explicitly and in writing. It is admissible to contractually restrict a franchisee’s ability to transfer its franchise, typically by requiring an explicit prior written approval of the franchisor.

Dispute Resolution and Applicable Law

In Taiwan, adjudication adopts the “three-level and three-instance” system in general; and “three-level and two-instance” as an exception. Civil cases are heard by the District Courts, High Court and Supreme Court. Please note that in case the litigation amount is less than NTD 1.5 million, such a case cannot be appealed to the Supreme Court. In principle, it is admissible for the parties to a franchise agreement to agree on a choice of law to be applicable on their contractual relationship, and if the franchisee is a merchant, to agree on a venue clause.

It is also admissible to agree on arbitration as the exclusive way of resolving disputes between the parties, thus waiving the due process of law. This may be favorable, as the parties may choose the language of the proceedings and have influence on the arbitrators selected. Also, arbitration proceedings are quicker, cheaper and unlike proceedings before ordinary courts, not held in public.

COVID-19

From early 2020 until now, the COVID-19 pandemic has been having a huge impact especially on the franchise sector. Recently, the Taiwan government has imposed strict measures to contain the pandemic. Some legislations were passed in Taiwan to address labor issues and relief packages to alleviate the impact of the pandemic. However, franchise fees are not covered by these and therefore, has to be paid continuously.

Even though under Article 227-2 of the Civil Code, a party is allowed to assert change of

circumstances where there are unpredictable events after execution of the franchise agreement and request the court for increasing or reducing the payment, or altering the original obligation, it is strongly suggested to insert or amend the Force Majeure clause to cover this pandemic situation into the franchise agreement. Otherwise in practical terms, the court will be more discreet and careful when deciding to allow a change of circumstances under the article to change what has already been agreed between the franchisee and franchisor.



Thailand



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Legal professionals



Region

APAC



Offices

Bangkok

Essentials

about Thailand's franchising law

- 1** No specific law on franchise in Thailand.
- 2** Franchisor is required to disclose essential information to the franchisee prior to conclusion of the franchise agreement.
- 3** No specific law specifying the amount and payment method of franchise fees.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

As of date to this guideline, Thailand does not have specific law on franchise. However, Thailand has a Guideline for the Assessment of Unfair Trade Practices in Franchising (“Guideline”), issued by the Trade Competition Commission (“TCC”). The Guideline defines “franchise” as a business involving an undertaker which is called ‘a franchisor’ entering into a written agreement with another undertaker which is called ‘a franchisee’ to do business using the franchisor’s business method, model, system, procedure, and Intellectual Property (IP) rights or those the franchisor has a right to license within a specific period of time or location, and that business operation is under support and a business plan of the franchisor and the franchisee has a duty to pay fee(s) to the franchisor. Nevertheless, the Guideline is not a specific rule and franchise businesses today are rather regulated by several set of laws, such as the Civil and Commercial Code (“CCC”), Trademark Act 1991, Unfair Contract Terms Act 1997, and Trade Competition Act 2017 (“TCA”).

Corporate Law

For franchisors, the two most common form of business entity in Thailand are (i) private limited company and (ii) public limited company. Private limited company is a recommendable form of business entity in Thailand as the requirement and application process are much simpler than that of public limited company. To set up a private limited company, the minimum number of shareholders is three (3) and each shareholder must own at least one share—each share having the amount of not less than THB 5. Under the Foreign Business Act 1999 (“FBA”), foreign entities (fully owned or majority-owned by

foreigners) are restricted from conducting certain businesses in Thailand, unless a license is obtained or otherwise permitted by other laws. Foreign franchisor granting franchise business, in general, is unlikely to be subject to the FBA. However, if the foreign franchisor sends its personnel to Thailand to provide certain services to its franchisee e.g., ad-hoc training (with additional fee and not part of the start-up package prior to business operation), advice on business operations, quality check on franchise business operations, it can be regarded as conducting “service business” in Thailand, which requires a foreign business license from the Department of Business Development, Ministry of Commerce (“MOC”).

The process of applying for the license can take approximately four to six months and the license is granted based on the MOC’s discretion on a case-by-case basis. For franchisees, it is more likely that they will be in a form of partnership or individuals rather than a private/public company like the franchisor. Under the CCC, there are two types of partnership: (i) ordinary partnership and (ii) limited partnership—and both types of partnership require two or more persons to form the partnership. However, the latter requires registration and the liability is limited.

Consumer Protection Law

Since franchisees are business operators, they will unlikely be treated by law as a consumer under the Consumer Protection Act 1979. This Act defines “consumer” as a person who buys or has been offered or invited to obtain services from a business person even if they are not a person who pays the remuneration. Nevertheless, the Consumer Protection Act 1979 still governs the relationship between the franchisee and the consumer.

Antitrust/Competition Law

The TCA, as a general law, restricts business operators from jointly undertaking a conduct which monopolizes, reduces or restricts competition in different ways, such as to fix (whether direct or indirectly), purchasing or selling price, or any trading conditions that affect the price of goods or services. Failure to comply with the TCA could result in penalties of a fine of not more than THB 1,000,000 or an imprisonment of at least two (2) years, or both. If the business operator wishes to conduct a business that has dominant power in the market, the business operator must inform TCC for consideration prior to conducting such business.

Employment Law

Thailand does not have an employment law that directly governs the franchisor's and franchisee's relationship. The Labor Protection Act 1998, and as amended, defines "employer" as a person who agrees to accept employee for work by paying wage, and "employee" as a person who agrees to work for an employer in return for wages. In reliance on the definition of "employer" here, where the franchisee neither work nor receive wages from the franchisor, the franchisee will not be deemed as the employee of the franchisor.

Even though the franchisor must oblige to the terms of the franchise agreement, the franchisor still has no direct control over the franchisee. To reduce the aforementioned risk, it is recommended that there should be a clause in the contract explicitly stating that the relationship between the franchisor and the franchisee will not be deemed as an employment relationship

Law on commercial agents

The law on agency in Thailand is governed by the Civil and Commercial Code ("CCC"). This defines an agency as a contract whereby a person, called the agent, has authority to act for another person, called the principal, and agrees so to act. Once again, the CCC is not a specific law on franchise and by nature of the franchise agreement, it is unlikely that the franchisee will be deemed as the agent of the franchisor.

The relationship between the franchisor and the franchisee is a relationship between two business operators rather than a relationship between an agent and a principal. To reduce the risk of misinterpretation, it is recommended that there should be a clause in the contract clearly stating that any act of the franchisee, arising from the franchise agreement, shall not be deemed as an act of an agent and the franchisor shall not be deemed as a principal.

IP Law

The franchisors trademarks and know-how are protected under the Trademark Act 1991 and Trade Secret Act 2002. The know-how of the franchisor, if it falls under the definition of "trade information", is automatically protected under the Trade Secret Act 2002.

However, in order to protect the franchisors' mark from third party infringement, it is critical that the franchisors' trademarks are registered with Thailand's Department of Intellectual Property before entering into any franchise agreement. Depending on the type of mark being registered, the process and application fee may differ. It is recommended that interested applicant conduct research before applying.

Since Thailand is part of the Madrid Protocol for the International Registration of Marks with the World Intellectual Property Organization (“WIPO”), interested applicant can also register the mark via the international trademark system and choose Thailand as the designation country.

Selected questions/aspects

Precontractual disclosure

Generally, there is no law that forces business entities to make precontractual disclosure. However, the Guideline established by TCC, which has been made in reference to the TCA, does require precontractual disclosure from the franchisor. One of the requirements in the Guideline requires that the franchisor must disclose essential information on the nature and operation of the franchise system to the franchisee prior to a conclusion of a franchise agreement. The essential information includes (i) information on fees (e.g., franchise fee, royalty fee etc.) and expenses (e.g., training, equipment, calculation of expenses etc.) to operate a franchise, (ii) franchise business plan, (iii) information concerning rights on relevant intellectual property, and (iv) renewal, revision, termination, or withdrawal of the franchise agreement.

Under the TCA, if the franchisor fails to disclose any essential information, the franchisee has the right to file a lawsuit for damages and the franchisor will be subject to an administrative fine of not more than 10 percent of the turnover in the year of offence. In a case where it is an offence committed in the first year of business operation, the person committing the offence shall be subject to an administrative fine of not more than THB 1,000,000 under the TCA. In addition to an administrative fine, if the TCC has sufficient evidence to believe that the franchisor fails to

disclose essential information, the TCC has the right to make an order in writing to instruct that business operator to suspend, stop, or correct the wrongful conduct.

Aside from the Guideline, the CCC also states that a declaration of intention is void if it is made under a misunderstanding as to an essential element of the juristic act. Although the CCC doesn't explicitly require precontractual disclosure, the CCC still provides protection to the parties, if an undue advantage of that party is taken.

Regarding the language of the franchise agreement, there is no legal requirement on which language must be used. Nevertheless, if the documents were to be used with the Thai authority or the Thai courts, if the the document is in a foreign language, it must be translated in Thai.

Legal restrictions

Trade Competition Act

Franchisors should not, without justifiable reasons, (i) set conditions on franchisee's right, (ii) set additional conditions after the execution of franchise agreement, (iii) prohibit franchisee from purchasing products or services from other sources, (iv) prohibit franchisee from selling perishable goods at a discounted price, (v) set different standards for each franchisees; and (vi) set inappropriate contractual conditions on franchisees that does not aim to maintain the reputation, quality and standards in accordance with the franchise agreement. These are restrictive guidelines issued under TCA by the TCC with a purpose of preventing the use of unfair trade practice against franchisees. Failure to comply will cause a fine up to 10 times the company's income in the year of breach.

Unfair Contract Terms Act

As the franchise agreement is likely to be drafted in favor of the party who initiates it, the agreement should contain the restriction by specifying the terms in a manner that either party should not bear more burden than what a reasonable person in normal circumstance could anticipate. The terms should not render an advantage only to one side. For instance, franchisees should not be obligated by the unfair term to be liable and to bear all responsibilities to compensate the damages of both criminal and civil cases, including attorney's fees and other expenses incurred in the event of contractual breach.

Franchise fees

The law does not specify the amount and payment method of franchise fees. However, franchisors are required to disclose the details of franchise fees, including expenses and remuneration from running their business to franchisees prior to entering into the franchise agreement as specified by the Guideline. There is no specific regulation on payment currency. However, the CCC provides that interest being charged on monetary debt during default to be 5% per year, unless agreed otherwise.

Confidentiality

Confidential clause in franchise agreement is a common practice and enforceable in Thailand. The franchise activities generally involve aspects that may include recipes, earnings projections, proprietary products, and sales techniques disclosed to franchisees with the confidential information. It is necessary to clearly define the scopes and details of confidential information to prevent a risk where the information may be publicly disclosed.

Amendments

The CCC does not prohibit amendments made to agreement(s) based on the mutual intention of contractual parties. The TCC Guideline provides that amendment to the Franchise Agreement after being executed by both parties, which may create unfair terms and damages to the franchisee (subject to penalty under the TCA), unless such amendment is for (i) justifiable reasons for business purposes or (ii) to maintain reputation, quality, and standard of franchise business. In any case, such amendments should be made in writing.

Termination

There are no specific statutory limitations on the right of a franchisor or franchisee to terminate franchise agreement. The termination can be governed by the terms of the agreement where the end date is as agreed upon. However, if termination period is not fixed, the agreement can be ended when a party unilaterally terminates the agreement at any time by providing advance notice to the opposing party.

Renewal and transfer

There are no statutory provisions providing franchisee a right to renew and to transfer its rights. Right of renewals are usually included as a term in franchise agreement where, in commercial practice, the agreement will set out the franchisee's material obligations to fulfil the initial terms of agreement as a condition of renewals and it is common for a renewable fee payable on renewal. As for the franchisor's right to restrict a franchisee's ability to transfer its franchise, the agreement would be drafted in a way to restrict a franchisee's ability to transfer the rights thereunder to third parties

(unless with certain conditions and subject to prior consent of the franchisor), as granting of the franchisee's rights relies upon the specific qualifications/conditions of such franchisee.

Dispute Resolution and Applicable Law

There are three dispute resolution options available under Thai law which are litigation, mediation and arbitration. Most franchise disputes that are usually resolved by the litigation process includes but are not limited to intellectual property infringement. These disputes are filed with the Central Intellectual Property and International Trade Court (IP&IT Court) where a specialized court hears the matters relating to intellectual property law and IP licensing. However, after the case is filed, the IP&IT Court regularly encourage parties to mediate disputes and either party can also file a request with the Office of Mediation at the IP and IT Court to arrange mediation process with the opposing party.

For arbitration process, it is enforced by the Thailand Arbitration Act under the competent court of jurisdiction or the Arbitration Rules of the Thai Arbitration Institute, Office of the Judiciary under the Thai Arbitration Institute. This process may be preferable for the franchise agreement where confidentiality must be maintained with the foreign franchisor, as Thailand is a party to the New York Convention on the Enforcement of Arbitration Awards. Here, any arbitral award made in a member

state of the New York Convention is recognized and enforceable in Thailand. In addition, Thailand has adopted the choice of law rule which, in commercial practice, a foreign franchisor's choice of law is mostly upheld by the Thai courts in governing a master franchise agreement. However, since there is no specific law governing franchise businesses in Thailand, the disputes between franchisor and franchisee must therefore consider the legal rights and obligations of the parties in determining the resolution.

COVID-19

The spread of Coronavirus disease 2019 ("COVID-19") caused an immense financial instability on national and worldwide economies. Thus, the CCC was amended to aid SMEs and individual debtors by (i) reducing the interest from 7.5% per year to 3% per year, (ii) reducing the interest rate during default from 7.5% per year to 5% per year, and (iii) setting an appropriate calculation method of the default interest rate, where if debt is agreed to be paid in installments, interest rate will apply only on the defaulted installment, as oppose to interests on the whole principle amount. Furthermore, the Government has also announced other relief measures to support and remedy the business owners. For instance, the measure to postpone corporate income tax payment and the arrangement of loan project to help SMEs affected by the COVID-19 virus outbreak.

Turkey

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Legal professionals



Region

EMEA



Offices

Istanbul



Essentials

about Turkey's franchising law

- 1 No specific form or procedure prescribed by law regarding franchise agreements.
- 2 Because of their sui generis nature, franchise agreements are governed by the general principles of contract law and provisions applicable to typical agreements. These are considered as having similar elements with them such as sales agreements, mandate agreements and agency agreements.
- 3 Franchisees may be entitled to compensation payment upon termination of the franchise agreement.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

There is no specific legislation directly governing franchise agreements. They are considered as sui generis type of agreements, containing aspects of various agreements specifically defined under the Turkish Code of Obligations no. 6098 ("TCO") such as sales agreements, mandate agreements and agency agreements. In terms of Turkish franchise agreements, the provisions specific to these agreements within the scope of the TCO and the Turkish Commercial Code no. 6102 ("TCC") will be applied according to the nature of the agreement's provisions.

As Turkish law does not include a definition, the Court of Appeals defines franchise agreement as "long-term and continuous contractual relations whereby franchisee has the right to market a product or service on its own by using franchisors' trademark or trade name, and operation methods and franchisor undertakes to provide support and information to organization and administration of the relevant business".

Corporate Law

There is no restriction regarding the form of entity for the parties of the franchise agreements. In this respect, any form of an entity (even sole proprietorship and ordinary partnership of real persons) can become party of a franchise agreement. There is no specific restriction of foreign business entities for conducting the franchise business in Turkey.

Consumer Protection Law

Under Turkish law, consumer is defined as an individual or a legal entity that benefits from a product and/or a service without any commercial purpose. As both franchisor and franchisee carry out commercial activities as merchants,

they will not be deemed as consumers and cannot benefit from the rights granted to consumers under the applicable legislation. However, franchisees are bound by the obligations under the relevant legislation if consumers benefit from products provided by franchisees while conducting the business activities.

Employment Law

Both franchisor and franchisee conduct commercial activities to gain profits. In this regard, the relationship between these parties is purely commercial and does not contain any employment-related items. Accordingly, employment law legislation is not applicable to franchise agreements and does not generate a risk in specific for the parties of the franchise agreements.

Law on commercial agents

As indicated above, there is no particular law that directly regulates franchise agreements in Turkey. As a sui generis agreement, franchise agreement is mainly subject to the general principles and rules of contract law as in the scope of TCO, which are applicable to certain kind of agreements that have similarities with the franchise agreements.

Turkish scholars believe that certain provisions of the TCC regulating agency agreements should be applied both to distribution and franchise agreements since there are similarities between these three types of agreements, such as "continuous relationship between the parties, grant of right (either exclusive or non-exclusive) to sell products in a defined territory, and obligations to protect principles' commercial interests and promote business in the defined territory." Apart from these similarities, franchise agreements could differ from agency agreements with the use of know-how, operation system, and trademarks.



IP Law

One of the most important features of franchise agreements is the use of intellectual property rights and the transfer of know-how. For this reason, a franchise agreement will be subject to intellectual property laws and rules in the fields of license requirements, registration, infringement etc. Accordingly, franchisors should register their intellectual property rights with the Turkish Patent Institute (the "TPI") for protection. The trademarks can be registered for a period of ten years, which may be renewed consecutively. Since Turkey is a party to Madrid Protocol and the Patent Cooperation Treaty, foreign franchisors may register their intellectual property rights before the TPI in an expedited way accordingly.

Real Estate/Tenancy Law

Some legal implications may arise from real estate and tenancy law depending on the nature of the parties' franchise system. In case of the franchisor subleases the property to the franchisees, the franchisor can restrict the franchisee's right to sublease the property in any case.

Selected questions/aspects

Precontractual disclosure

Under Turkish law, there is no precontractual disclosure requirement regulating franchise agreements. Accordingly, the parties are entitled to freely determine the term of the confidentiality clause. In most of the cases, a breach of the confidentiality clause would result in a penalty payment in the scope of the agreement.

Legal restrictions

Antitrust/Competition Law

Since franchise relations are based on marketing and distribution of a product or service, these agreements are deemed vertical agreements in respect to the competition law. The prohibitions stipulated under the Law on Protection of Competition no 4054 ("Competition Law") will apply to franchise relations. Accordingly, franchise agreements will be assessed as to whether they cause prevention, distortion, or restriction of competition directly or indirectly in a specific market. Franchise agreements or their provisions violating the Competition Law will be deemed invalid and a monetary fine up to 10% of the infringing entity's turnover generated in the previous year may be imposed by the Competition Authority. If franchisor's market share does not exceed 40%, the relevant agreement will be entitled to benefit from the block exemption. Another condition to benefit from such block exemption is that the non-compete clauses under franchise agreements must not exceed a period of five years.

Franchise fees

Turkish law does not include any laws regarding the franchise fees since franchise agreements are deemed as a *sui generis* type of agreement and does not classify or regulate the elements of the franchise agreements in such way.

Confidentiality

Under Turkish law, the parties of a franchise agreement are free to decide on the confidentiality conditions in respect to the scope and the duration.

Amendments

If the franchise agreement contains a precise and reasonable change reservation clause, considering the franchisees' interests, unilateral amendments of the agreed terms by the franchisor are admissible. Without a respective provision, amendments of the franchise agreement may only be agreed unanimously by and between the franchisor and the franchisee.

Termination

Franchise agreements can be arranged for a definite or indefinite period. In an indefinite franchise agreement, the agreement may be terminated (i) upon notice of termination with reasonable time, or (ii) for justifiable reasons (e.g., if the franchisee fails to compensate for the breach within a reasonable time despite the breach of the agreement). In the absence of a contractual arrangement between the franchisor and the franchisee regarding the termination, the relevant party must provide appropriate termination notice prior to the date on which the termination is requested.

The fixed-term franchise agreement expires at the end of the contract period, unless the parties stipulate a special arrangement for spontaneous renewal. However, in any case, the parties can rely on the "existence of justifiable reasons" for the contract's termination.

In the event that one of the parties terminates the contract without good cause, the other party may claim damages that can be proved such as material damage (e.g., direct material damages, loss of earnings, return of products left in stock, etc.) and/or intangible damage (e.g., loss of commercial reputation).

Renewal and transfer

Franchisors are generally free to decide whether or not to renew a franchise agreement. In such a case, renewals should be done explicitly and in writing. In practice, franchise agreements contain a transfer prohibition clause stating that the agreement cannot be transferred without the permission of the franchisor. The prohibition clause generally covers the change in management and shareholding structure of the franchisee company, as well.

Dispute Resolution and Applicable Law

All disputes arising from franchise agreements are held by civil courts. Civil litigation is governed under the Civil Procedure Law and the International Private and Procedure Law, depending on whether or not the nature of the claim has a foreign element. The Turkish legislation allows disputes to be brought before a litigation or arbitration proceeding. If parties cannot agree on the jurisdiction of an arbitration tribunal regarding the dispute, as a general rule, such dispute would be subject to a litigation procedure to be carried out before the competent court. Considering the fact that the litigation procedures carried out before the Turkish courts can be time-consuming, determining the of jurisdiction of an arbitration tribunal can be more time-efficient for the parties.

In principle, Turkish law will be applicable to franchise agreements, if both of the parties are

located in Turkey. However, certain scholars argue that the parties can also agree on a foreign law to be applicable, provided that there is a foreign element in the franchise relationship. In case one of the parties is a foreign entity, the parties are free to choose the governing law in franchise agreements.

COVID-19

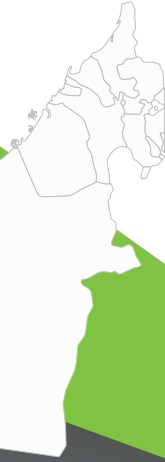
The global COVID-19 pandemic has severely impacted especially the franchise sector along with other wide range of sectors due to the governmental measures. In order to mitigate the negative impacts of the pandemic, all enforcement and bankruptcy proceedings at execution offices have been suspended to prevent the spread of the COVID-19 epidemic from 22 March 2020 until 30 April 2021.

An additional judiciary measure has been imposed by the Grand National Assembly of Turkey which enacted Law No. 7318 ("Law") on 29 April 2021, regarding the suspension of (i) the deadlines for submission of checks and (ii) the enforcement proceedings of bills of exchange in order to prevent any prejudice to affected people/entities during the nation-wide curfew.

However, those suspensions did not have the characteristics of temporary payment moratoria. The franchise fees and other payments arising from the franchise agreements have been paid during the COVID-19 pandemic.



United Arab Emirates



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Legal professionals



Region

EMEA



Essentials

about United Arab Emirates' franchising law

- 1 There does not appear to be any specific legislation that regulates franchising in the UAE;
- 2 Franchise agreements may be registered under the Federal Law No. 18 of 1981 on the Organization of Commercial Agencies ("CAL"), which grants numerous benefits to franchisees; and
- 3 Trademarks should generally be registered with the relevant local authority to be enforceable under UAE law.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

There does not appear to be either a legal definition of “franchise” under UAE law or specific legislation addressing franchising arrangements. Such arrangements are governed by general principles of contract law as codified in the UAE Civil Code and legislation of general application, such as the CAL, which relates to agency relationships and agreements.

We understand that the CAL’s definition of “agent” will likely apply to franchisees and therefore to franchise agreements, too. If so, such agreements may be registered in the commercial agencies register, which is maintained by the UAE Ministry of Economy. To undertake such registration, among other requirements, the franchise agreement must be prepared in (or be notarized and go through a certified translation into) Arabic and the franchisee must be one of the following:

- a UAE national;
- a UAE public joint stock company (“PJSC”) which is at least 51% owned by UAE nationals;
- a UAE private entity owned by a PJSC which is at least 51% owned by UAE nationals; or
- a UAE private entity that is 100% owned by UAE nationals.

Registration confers numerous benefits upon franchisees, including limiting a franchisor’s right to terminate the franchise agreement and providing franchisees with a right to unilaterally renew such an agreement.

Specifics regarding foreign franchisors

Apart from the language requirements relating to the registration of the franchise agreement as noted in “Legal Basis of Franchise Law” above, there do not appear to be any specific laws in the

UAE which require a franchising agreement prepared by a foreign entity or governed by a foreign law to be in or substantially in any prescribed form in order to be enforceable in the UAE.

Corporate Law

Generally, save for entities registered in designated “free zones” under UAE law (where each have their own tax, customs and import regime distinct from the rest of the UAE), all UAE entities must be at least 51% owned by UAE nationals.

The most common business structure in the UAE is a limited liability company incorporated in accordance with the relevant company law regime, as administered by the Departments of Economic Development of the respective emirates and in the Free Zones, the relevant Free Zone Authority (“Relevant Corporate Regulators”).

To incorporate a company in the UAE, the following requirements (among others) must be met:

- Shareholders/directors: Every company must have a minimum of one (1) individual director (who does not need to be resident in the UAE) and two (2) shareholders (subject to the requirement for UAE entities to be at least 51% owned by UAE nationals as noted above).
- Corporate information: Among others, the names of the proposed directors/shareholders of the company and the proposed local address of the company’s office must be provided.
- Charter documents: A memorandum of association must be prepared in Arabic, notarized and submitted (along with the “Corporate information” above) to the Relevant Corporate Regulator.

We understand that most required filings with and payments to relevant authorities must be made in person, and a company can generally be incorporated within approximately six weeks.

Consumer Protection Law

Franchisees do not appear to be covered by the definition of “consumer” under the Federal Law No. 24 of 2006 on Consumer Protection and are unlikely to be protected by its provisions.

Antitrust/Competition Law

We have noted earlier that while there do not appear to be any specific laws in the UAE addressing franchising arrangements, general principles of contract law as codified in the UAE Civil Code would apply and in this regard, the provisions of the Federal Law No. 4 of 2012 on The Regulation of Competition, which generally places restrictions on, among others, agreements that substantially reduce competition, territorial restrictions and resale price maintenance (e.g., a franchisor pressuring a franchisee not to sell products below a certain price), may also apply to such arrangements.

Employment Law

Franchisees do not appear to be covered by the definition of “worker” under the Federal Law No. 8 of 1980 regarding The Organisation of Labour Relations and are unlikely to be protected by its provisions. These provisions provide a “worker” with, among others, rights to minimum notice periods and severance payments in circumstances where their employment contract is terminated.

To help mitigate the risk of characterization as an employment relationship, a franchise agreement may also stipulate that the franchisee will be acting in their capacity as an independent contractor and nothing in the agreement should be construed as creating an employment relationship between the franchisor and the franchisee.

Law on commercial agents

As noted in “Legal Basis of Franchise Law” above, a franchisee is likely to be an “agent” of a franchisor under the CAL, which as noted earlier, confers numerous benefits on a franchisee in respect of their relationship with the franchisor.

IP Law

Franchise agreements may allow the licensing and/or transfer of all forms of Intellectual Property Rights (“IPRs”), depending on the nature of the intended activity or business of the franchisee. A franchisor may control, supervise, and impose conditions and limitations on the exploitation and use of their IPRs by a franchisee.

While UAE law does not appear to require trademarks or licences to be registered to engage in franchising activities, undertaking relevant registrations with the Ministry of Economy is necessary to help obtain statutory protection of such IPRs.

Selected questions/aspects

Precontractual Disclosure

There do not appear to be any laws in the UAE which require franchisors to disclose any matters to potential franchisees prior to entering into a franchising arrangement.

It would therefore be advisable for potential franchisees to undertake some due diligence in terms of the franchisor and the proposed franchise arrangement before entering into any franchising arrangement.

Confidentiality

Confidentiality clauses are generally enforceable under UAE law.



Franchise Fees

The parties to a franchise agreement are generally free to agree on any matters in connection with franchise fees, subject to the provisions of the UAE Civil Code.

Amendments

The parties to a franchise agreement are generally free to agree on terms which allow a franchisor to unilaterally amend the terms of the franchise agreement, subject to the provisions of the UAE Civil Code.

Termination

The parties to a franchise agreement are generally free to agree on the length of a fixed-term franchise agreement, which would then automatically terminate on the expiry of such fixed term, subject to the provisions of the UAE Civil Code.

Where the franchise agreement is registered under the CAL, a franchisor or franchisee can only terminate a franchise agreement before the expiration date for a “material reason”—this term does not seem to be defined in the CAL and we understand it will likely be interpreted



narrowly by UAE courts, such as only egregious breaches by the franchisee, abandonment of the franchise business, may constitute a “material reason”. Otherwise, there do not appear to be any limitations on the right of a franchisor to terminate a franchising agreement under UAE law and parties are free to agree on the grounds for termination such as material breach, repudiation and others—again, subject to the provisions of the UAE Civil Code.

Renewal and transfer

Where the franchise agreement is registered under the CAL, we understand that a franchisor must renew the franchise agreement unless they have a “material reason” not to do so, which will likely be difficult to prove—see our comments on this term in “Termination” above. Otherwise, there do not appear to be any laws in the UAE which require franchisors to renew or transfer a franchise agreement and parties are free to agree on such terms subject to the provisions of the UAE Civil Code.

Dispute Resolution and Applicable Law

Dispute resolution, court system

Cross-border franchising arrangements may be governed by foreign laws, and the parties can opt for dispute resolution by arbitration in a “neutral” location (rather than a UAE court or local arbitration). In the absence of a binding arbitration agreement expressly reflected in the agreement or otherwise agreed by the parties, the parties may choose to commence proceedings in a UAE court. However, please note that arbitration clauses in a franchise agreement registered under the CAL will generally not be enforceable under UAE law, which we understand provides that any disputes arising out of such an agreement will fall under the exclusive jurisdiction of the UAE courts.

The UAE is a federal state and thus, its legal structure comprises a dual system: (i) the Federal Judiciary and (ii) the local judicial departments of the individual Emirates which have elected not to participate in point number (i).

Generally, courts in both judicial systems are broadly classified into three (3) levels (in descending order of superiority):

- Federal Supreme Court/Courts of Cassation (for (i) and (ii) respectively, appellate jurisdiction only);
- Courts of Appeal; and
- Courts of First Instance.

Applicable Law

As noted in “Dispute resolution, court System” above, UAE courts will have exclusive jurisdiction over disputes arising out of franchise agreements registered under the CAL.

In respect of unregistered franchise agreements, UAE courts will defer to the law that parties have chosen to govern a franchise agreement, subject to exceptions such as where the chosen governing law is contrary to public policy in the UAE.

COVID-19

Businesses in the UAE have been severely impacted by the COVID-19 pandemic, and the UAE Government has offered financial support for businesses, including reductions in Government fees, moratoriums on certain loan repayments and refunds of certain customs duties. As of 4 August 2021, there does not appear to be any COVID-19 related legislation in the UAE that specifically relates to franchising matters.

United Kingdom



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Legal professionals



Region

EMEA



Offices

Birmingham, Leeds,
London, Manchester,
Reading

Essentials

about United Kingdom's franchising law

- 1 There are various franchise business models which, due to the flexibility of English common law, can be combined to form hybrid structures.
- 2 There is no requirement to be registered with a professional or regulatory body before entering into a franchising arrangement; it is a self-regulated industry.
- 3 There are no laws that confer compensation rights on the franchisee on the expiry, or non-renewal of a franchise agreement.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

In the United Kingdom, there is no legislation that applies specifically to franchising relationships. Franchising agreements will be subject to general UK laws relating to contracts, real estate, intellectual property and competition law. In addition, franchisors and franchisees need to be aware of the potential application of the Trading Schemes Act 1996 and the Trading Schemes Regulations 1997. The Act and Regulations relate to the practice of 'pyramid selling' and potentially apply to certain multi-tier franchise arrangements. Where they apply, the franchisor, and any franchisee that appoints sub-franchisees, will need to comply with certain obligations including the provision of certain information in advertisements, a right for participants to return goods on termination of the agreement, and a 14 day cooling off period during which participants may terminate the agreement. The regulations do not apply to franchising relationships where the franchise operates as a single-tier trading scheme (i.e., the relationship involves the franchisor and one level of franchisees below it) and for multi-tier franchising arrangements, their application can be avoided if all franchisees in the network are VAT-registered at all times during the term of the franchising agreement.

In addition, the British Franchise Association requires its members to comply with its code of ethical conduct.

Corporate Law

The most common corporate form to set up business in the United Kingdom is a private limited liability company. The formation costs are low. English law does not impose any

special regulatory requirements for foreign franchisors seeking to establish a franchise in the United Kingdom, and there is no requirement to register a franchise.

Consumer Protection Law

Under the laws of England and Wales, franchisees, and individuals seeking to become franchisees, are recognized as businesses and as such, are not subject to consumer protection legislation.

Employment Law

As there is no statutory recognition of the legal and financial independence of the franchisor and its franchisees, care needs to be taken to ensure that a franchisee does not qualify as an employee of the franchisor. Under English law, it would be difficult for a deemed employer/employee relationship to override express provisions to the contrary in the franchise agreement. To that end, the parties should always ensure that the franchise agreement makes it clear that the relationship between the franchisor and franchisee is one of legal and commercial independence and does not give rise to either an employment or a partnership relationship.

Law on commercial agents

Under the Commercial Agents (Council Directive) Regulations 1993 (implementing Directive 86/653/EEC on self-employed commercial agents), commercial agents can be entitled to compensation on the expiry or termination of the agency agreement. However, under a typical franchise arrangement, where the franchisee sells products or provides services in its own capacity, and not as an agent on behalf of the franchisor, the Regulations do not apply.



IP Law

Applicable IP should be registered to protect the franchisor's interests and provide a platform for entering into franchising arrangements. The franchisee will need to ensure that its rights to use any applicable IP is properly secured and documented in the applicable franchise agreements. This should also include the right to use any new and/or substitute intellectual property rights as and when created by the franchisor.

Under the British Franchise Association's Code of Ethical Conduct, the franchisee's rights to use the franchisor's IP must be:

- referred to in the franchise agreement; and
- capable of verification.

Data protection

Care needs to be taken to ensure that the franchise agreement deals with both the franchisors' and franchisees' obligations and liabilities in relation to the transfer and protection of information and data.

Real estate

With the exception of short-term leases, most leases will generally permit the tenant to enter into a sub-leasing arrangement with a third party. In a structure where the franchisor sub-leases the premises to a franchisee, harmonizing the termination rights of the sub-lease with those detailed in both the head lease and the franchise agreement is critical.

It is common for landlords to impose controls on the sub-leasing process designed to protect the financial interests of the landlord. For example, the current tenant may be required to guarantee the financial obligations of the incoming tenant. Where such requirements exist, the franchisor and franchisee can manage the risk in the applicable franchise agreement.

A franchisor that leases its premises to a franchisee, needs the ability to remove the franchisee at the end of the term of the franchise agreement. It is vital that the sub-lease does not provide security of tenure to the franchisee under the Landlord and Tenant Act 1954. In order to contract out of security of tenure protection, the franchisor needs to document it clearly, and the franchisee needs to formally confirm that it is aware that it is waiving its rights under the 1954 Act.

Selected questions/aspects

Precontractual disclosure

There are no legal precontractual disclosure requirements in the UK. English law adopts the principle of "buyer beware", and as such there is no obligation on the franchisor to inform each potential franchisee accurately and with reasonable advance notice about all circumstances relevant for the conclusion of a franchise agreement.

Having said that, the British Franchise Association's code of ethics does require its members to disclose certain information in advance of entering into a franchise agreement. A prudent franchisee would also look to carry out some form of due diligence on the potential franchise arrangement, which may lead to precontractual questions and disclosures. In those circumstances a franchisor may wish to make certain formal precontractual disclosures to prevent any potential misrepresentation claims. In addition, the franchisor can mitigate these risks via the use of appropriate limitation of liability, entire agreement and non-reliance clauses being included in the franchise agreement.

Legal restrictions

Acting in good faith

It is likely that English judges will take the view that, where the franchise agreement does not expressly confer certain rights, benefits and protections on the parties, then the parties should not be subject to an implied obligation to subordinate their own commercial interests to those of the other party. The British Franchise Association's Code of Ethical Conduct requires the parties to exercise fairness in their dealings with each other, however, unless provisions to that effect are detailed in the franchise agreement, they do not constitute contractual terms.



Competition Law

Franchise agreements may contain restrictions (clauses that prevent, restrict, or distort competition within the common market) that conflict with principles of the Competition Act 1998. However, provided that duration of the non-compete obligation does not exceed the duration of the franchise agreement, non-compete obligations are not restricted where the obligation is necessary to maintain the common identity and reputation of the franchised network.

Local law provisions

There are currently no legal requirements under English law to include certain provisions in franchise agreements for them to be enforceable. The primary test under English law is the one which applies to all contracts, in that the content of such agreements needs to be clear and concise with no vague or ambiguous terms.

Franchise fees

There are no legal restrictions on the range of fees or payments that can be agreed to between the parties. Case law sets the requirements for contractual penalties, which in a nutshell, must not be unconscionable in order for them to be enforceable.

Confidentiality

Confidentiality clauses in franchise agreements are common and enforceable in England and Wales. The franchisor may file an interim injunction against an infringing franchisee, claim damages arising from the breach, and possibly terminate the franchise agreement where such breach is drafted as a termination event.

Amendments

Unless otherwise agreed between the parties, no variations to the franchise agreement will be effective unless the variations are in writing and signed by the parties (or their authorized representatives).

Termination

The terms of the franchise agreement will govern what, if any, grounds a party has for termination—for example, insolvency, specified defaults etc. If the cause for termination is a breach of a contractual obligation by the other party, e.g., non-payment of franchise fees, then the parties should follow the contractual provisions (e.g., notification in writing to remedy the breach) to ensure the termination right is enforceable. Unjustified terminations by a franchisor might entitle the franchisee to claim damages and potentially obtain an injunction, or an order of specific performance. The law does not generally provide for compensation to the franchisee in the event of legitimate termination, either on contractual expiry or on legitimate non-renewal of the agreement.

Renewal and transfer

Franchisors are, generally speaking, free to decide whether or not to renew a franchise agreement. If they choose to, renewals should be done explicitly and in writing. It is permissible to contractually restrict a franchisee's ability to transfer its franchise, typically by requiring the explicit prior written approval of the franchisor.

Exclusion and entire agreement clauses

Provisions in franchise agreements, which seek to exclude/limit the liability of either party, must be reasonable and satisfy the 'reasonableness test' set out in the Unfair Contract Terms Act 1977.

Choice of law and jurisdiction.

Subject to the application of mandatory public policy, the parties to a franchise agreement are free to choose the governing law. If applicable, local courts will recognize a foreign jurisdiction if selected by the contracting parties.

Dispute Resolution and Applicable Law

Dispute resolution

Most formal claims are resolved by mediation or litigation as opposed to arbitration. However, the parties are free to agree on arbitration as the exclusive way of resolving disputes if they wish. This is more common with international agreements. This may be favorable, as the parties may choose the language of the proceedings and have influence on the arbitrators selected. Also, arbitration proceedings are—unlike proceedings before ordinary courts—not held in public. In England and Wales, where courts have jurisdiction, before issuing court proceedings, the parties should follow the pre-action protocols detailed in the Civil Procedure Rules.

COVID-19

The COVID-19 pandemic has had a significant impact on the franchise sector due to the government measures, especially shutting down public life to contain the pandemic and there are many lessons to be learned from the COVID-19 crisis. Areas of key focus have included:

- insurance and the need for franchisees to obtain business interruption insurance;
- the use of online channels to distribute products and services; and
- the need for flexibility, so that the franchise relationship can adapt during a crisis, e.g., waiving performance targets or reducing fees.

Uruguay



5

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Essentials

about Uruguay's franchising law

- 1** No specific legislation regarding franchise agreements in Uruguay. However, it may be assimilated to various types of contracts, such as distribution, license, supply agreements, among others.
- 2** Franchisees may be entitled to compensation payment upon termination of the franchise agreement.
- 3** Recent Law N° 19.920 modified the Uruguayan Civil Law and individuals may freely choose the applicable law of an agreement whose parties are domiciled in different countries.

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 Find and reach out to local contacts in the **Contacts** section on page 280.

Relevant areas of law

Legal basis of Franchise Law

In Uruguay, there is neither a legal definition of “franchise” nor a codified franchise law.

In Uruguayan legislation, the franchising agreement is known as an “unnominated agreement” (agreements with no specific regulation in law), and therefore governed by the autonomy of the will of the agreement’s parties.

By virtue of art. 16 of the Uruguayan Civil Code, and since there are no specific rules to be applied in these agreements, therefore: i) analogous legislation may be applied, ii) general law principles, and iii) most recognized doctrine and iv) uses and customs (art. 297 of the Commercial Code).

Different regulations may be applied, especially civil, commercial and corporate law.

The franchising agreement is assimilated to different types of contracts such as distribution, license, concession, and supply agreements, among others. Therefore, by virtue of art. 16 of the Uruguayan Civil Code, and since there are no specific rules for the franchising agreement, the rules applicable to such contracts may be applied by analogy.

It is worth mentioning that in our country, the registration of the license that necessarily contains franchising is not compulsory. However, if registered, it constitutes proof of the contract’s existence, and therefore, protects both parties of the agreement.

Corporate Law

The most recommended corporate form to set up business in Uruguay is a corporation or a corporation of simplified shares (known as an

“SA”, or as an “SAS”). These are easy to set up by two or more people (save for the SAS that can be set up by one or more person) and does not require a minimum capital. The formation cost for an SA/SAS is very moderate. The SAS formation process is much quicker and requires less audit controls, therefore it is much simpler constituting an SAS than an SA.

Consumer Protection Law

The definition of consumer is set forth in article 2 of Law 17,250, which establishes that a consumer is any person who acquires or uses products or services as the final recipient in a consumer relationship or as a function thereof. Therefore, in Uruguay, people seeking to become franchisees would typically not qualify as consumers, since the intention of their conduct is business-oriented.

Antitrust/Competition Law

In Uruguay, Antitrust/Competition Law is regulated under Law N° 18.159. In such a law, there are no specific provisions for franchise agreements. The main aspects regulated by this law are the following:

- Prohibited practices: refers to a non-exhaustive set of practices that the law typifies as prohibited, when an enterprise has a dominant position in the market.
- Relevant M&A requirements: certain mergers and share purchases (considering annual revenue of both companies) are subject to prior control of Commission for the Promotion of Competition Defense.

Franchise fees

Besides the prohibition of usury, there are no laws in Uruguay regulating the payment of franchise fees.

However, these payments may become subject to transfer prices if it is determined that there is a relationship between the parties. Please note that Uruguay follows the OECD guidelines for transfer pricing. There are no exchange restrictions for payment.

Employment Law

Under Uruguayan Law, the franchisee is not qualified as an employee of the franchisor. Personal independence is the primary criteria to determine the labor relationship between the parties. (i.e., an independent businessperson is—contractually as well as factually—free to design its activities, set the working hours, and assume an own entrepreneurial risk).

From a Labor Law perspective, courts understand that the franchisor is not responsible when it has no control of the franchisee's personnel. Uruguayan courts understand that there might be management power over the employees of the franchisee, for the franchisor to become liable for responsibility (Court decision N° 16/2021 Appeals Labor Court, 3rd. turn, February 4, 2021).

In this sense, courts have condemned franchisors in cases where the franchisor controls, among others:

- the clothing of the franchisee's personnel;
- when the franchisor participates in the franchisee's personnel selection process;
- when it gives instructions on the franchisee's employees' leave regime, overtime and distribution of working hours, among others.

In conclusion, to avoid any risks and/or liabilities regarding Employment Law, the franchisor must be an independent company of the franchisee.

Law on Commercial Agents

Typically, the franchisor grants the use of a trademark, logo, design, and "know-how" to the franchisee. In exchange, like a commercial agent, the franchisee may be entitled to a compensation payment that may be fixed (initially or periodic), percentual (royalty) or combined (fixed and percentual).

IP Law

For companies acting as franchisors, their technology, industrial property and intellectual property are an essential part of their assets. Therefore, it is necessary to safeguard the integrity of these rights in the agreement.

In franchise agreements, the franchisee is typically granted with the right to use the trademark, trade name, logos and designs, which characterize and identify the commercial activity of the franchisor and its products.

Franchisors must consider protecting their intellectual property against attacks or imitations by third parties, especially by registering their trademarks, either in international registries, or as a national trademark in Uruguay in the Trademark Registry of the National Directorate of Industrial Property.

Selected questions/aspects

Pre-contractual disclosure

Master franchising is a form of the franchisor-franchisee relationship, in which the master franchisee essentially becomes a mini-franchisor for a specified territory. Within that territory, the master franchisee recruits, trains, and provides ongoing support to each franchisee that they sign. In exchange, the other party typically pays some price as well as agreeing to take on some or all of the responsibility to

train and support new franchisees in their area. Because the role of a master franchisee within their territory is similar to that of a franchisor, they are often referred to as sub-franchisors.

The master franchisee acts as an intermediary between the franchising chain and the final franchisee, so that its functions are similar to those performed by the franchisor with respect to the franchisees in the domestic market: search and selection of franchisees, hiring and subsequent control of the same, transmission of know-how, etc. In return, the master franchisees' remuneration is usually fixed through a negotiated percentage of the royalties paid by the franchisees in the new market. In addition, the master franchisee usually keeps a percentage of the purchase price of the brokered product, in many cases.

Before signing a franchise agreement, franchisors must inform each prospective franchisee accurately and reasonably in advance of all circumstances recognizably relevant to the conclusion of the franchise agreement.

That said, there is no statutory list of which information should be made available and in what form, nor is there a standard procedure for compliance.

In Uruguay, there is no legal obligation to continuously update the pre-contractual information. However, such obligation may arise during the term of the franchise agreement (or even before the signing) if certain circumstances occur or change, being recognizably relevant to the franchisee.

If pre-contractual information is provided, it should refer to data necessary for the potential franchisee to generate its own profitability calculations and draw its own conclusions

about the franchise's prospects for success. In addition, it also includes general information about the franchise system, as well as the basic content of the franchise agreement. Notwithstanding the above, the franchisor is not obliged to disclose trade secrets.

Non-compliance by the franchisor shall be regulated by empowering the franchisee to terminate the agreement with the imposition of the penalty clause provided for, and in this case it may also be agreed to terminate the agreement by operation of non-compliance law.

A breach of the pre-contractual duty to inform may entitle the franchisee to terminate the franchise agreement for good cause, as well as give rise to claims for damages by the franchisee. To that end, the franchisee may elect to terminate the franchise agreement and claim the entire franchise fees paid and all expenses incurred in connection with the franchise business.

The rights and obligations of each party, in the event of breach of contract by either party, must be agreed upon in the agreement. This implies establishing a series of style clauses, such as the penalty clause, outstanding monetary obligations, expiration of the term if applicable, restitutions if any, clause of judicial or extrajudicial expenses originated by the non-fulfillment, etc.

In this sense, article 1341 of the Civil Code allows the non-default party to claim for damages only in case of contract resolution.

The customers of the sub franchisees could claim indemnification from the sub franchisor, provided that the sub franchisor is the one who caused the damage for which indemnification is sought. Likewise, such customers could eventually allege a liability of the principal



franchisor, if it was an omission of the latter that caused the negligent action of the sub franchisor and thus, the damage of the sub franchisee's customers.

There is no special liability provided for these parties, therefore, this shall be subject to the general liability regime or to what the parties have convened in the agreement, provided that it does not violate any general principles of law.

Legal restrictions

There are no specific legal restrictions apart from the ones stipulated in each row of the present questionnaire.

Confidentiality

Confidentiality clauses in franchise agreements (often in combination with a contractual penalty) are very common and enforceable in Uruguay. The franchisor may claim damages occurred due to the breach, and possibly terminate the franchise agreement immediately and extraordinarily.

Amendments

Unless parties agree otherwise in the agreement, without a respective provision, amendments of the franchise agreement may only be jointly agreed between franchisor and franchisee.

Termination

The termination clauses shall depend on the agreement of the parties stipulated in the contract. However, franchise agreements are entered into for a certain time and terminate with lapse of that time. A regular termination by one of the parties before that term is not admissible, unless both parties unanimously agree on it. Nonetheless, franchise agreements may be terminated by each party without notice if it is unreasonable for the terminating party to continue the contractual relationship until the agreed time of termination, generally in case of breach of a contractual material obligation by the other party, e.g., non-payment of franchise fees, the termination for good cause is only admissible after having issued a fruitless

warning (advisably in writing), and within a reasonable period of time after learning about the circumstances for the termination. Unjustified terminations by a franchisor might entitle the franchisee to claim damages.

Renewal and transfer

Franchisors are, generally, free to decide whether or not to renew a franchise agreement. In case of non-renewal, this should be done explicitly and in writing. It is admissible to contractually restrict a franchisee's ability to transfer its franchise, typically by requiring an explicit prior written approval of the franchisor.

Dispute Resolution and Applicable Law

Dispute resolution, court system

Uruguay is not divided in states. Therefore, there are no federal courts in this country.

Uruguay has two authorities regarding jurisdictional activity:

- The Supreme Court of Justice for all judicial matters such as crime law, civil law, commercial, labor, and bankruptcy law.
- High Administrative Court that has exclusive jurisdiction in administrative acts in one single instance.

The judicial process has three instances. For the first instance, Civil Law claims are presented in "Juzgados Letrados" or "Juzgados de Paz" depending on the amount claimed in the complaint (prior a constitutional requisite of a conciliation process among the parties). For non- Civil Law claims, first instance is always presented at "Juzgados Letrados".

Above these courts, there are Appeal Courts that are divided in to Labour Appeal Courts, Civil Appeal Courts and Crime Appeal Courts.

Depending on the amount of the case and some other requisites, the case may go to the third instance and will be decided by the Supreme Court of Justice.

Arbitration procedures in Uruguay are used mainly in cross-border and/or important agreements. Parties could benefit with arbitration procedures in privacy matters and in some cases, in a fast-paced process (depending on the arbitration rules they choose). However, if both parties are located in Uruguay and it is not a cross-border transaction, we believe the ordinary courts will be the best choice, considering the cost of an arbitration process.

Applicable Law

Recent Law N° 19.920 modified the Uruguayan Civil Law and individuals may freely choose the applicable law of an agreement whose parties are domiciled in different countries.

COVID-19

There were no specific rules/legislation with direct impact for franchising agreements. The core legislation set forth on this period was focused on shutting down the circulation of individuals. However, Uruguay did not impose a strict lockdown, being permissible to shopping centers, restaurants, etc., to remain open.

This particular scenario is related to the strict concept of force majeure that Uruguayan courts have adopted. In Uruguay, parties could invoke force majeure for the non-compliance of the agreement. (This was of course applicable if the agreement does not regulate something different).

Force majeure is configured if there is a strange, irresistible and unforeseeable event.

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03

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