Introduction

I. Overview

The worldwide success of franchising has triggered a surge of franchise-specific legislation. Consider the following: In 1980, there were only two countries (the United States and Canada (the province of Alberta)) with any national or local franchise disclosure requirements. In 1990, there were only four countries (Canada, France, Mexico, and the United States) with such laws. By 2000, nine more countries (Australia, Brazil, China, Indonesia, Macau, Malaysia, Romania, Spain, and Taiwan) had added such laws. As of the initial publication of this book in 2006, there were six more countries (Belgium, Italy, Japan, South Korea, Sweden, and Vietnam) that had implemented franchise legislation or had recognized pre-sale disclosure requirements. As of the date of publication of this edition, a total of 23 countries have adopted some form of franchise disclosure legislation of the type addressed in this book. While we may be at a plateau, it is obvious to most commentators that this stream of franchise-specific legislation has not yet been exhausted.

There are several reasons for the spate of activity and several broad trends underlying the quickened pace of international franchise regulation. First, there has been a dramatic increase in international franchise activity, with successful companies in countries around the world expanding outside their original domestic markets. Not surprisingly, with this level of commercial activity, franchising has drawn increased scrutiny from regulatory authorities in a wide array of countries. Second, as a business method, franchising still remains novel for many and warrants distinctive treatment.

Third, and most significantly for this book, the dominant means of regulating franchising has been through pre-sale disclosure as distinguished from registration or regulation of the franchise relationship. Such regulatory activity has been found not just in new countries or jurisdictions enacting new laws; many countries—now with experience in regulating the franchise sales process—are amending their laws and implementing or revising their regulations. This activity will no doubt continue.

A. Purpose of Book

The purpose of this book is to provide a thoughtful, useful, and succinct reference for the franchise practitioner to use in navigating the mostly uncharted waters of international franchise sales laws. As noted above, the overwhelming majority of these laws are either relatively new or have recently been updated. The novelty of the laws, the different regulatory schema used, and the different substantive and
formal requirements all present challenging questions to franchise counsel and their clients seeking to comply. Their scope, administrative implementation, and judicial interpretation are largely untested. That said, as Franchisors in the United States and other countries expand beyond their home borders, there is a great need for some guidance to interpret the vagaries of such laws. We hope this book fills that void.

**B. Scope and Methodology**

The book addresses disclosure requirements in the countries of Australia, Belgium, Brazil, Canada, China, France, Germany, Indonesia, Italy, Japan, Macau, Malaysia, Mexico, Romania, South Africa, South Korea, Spain, Sweden, Taiwan, the United States, and Vietnam. Each chapter addresses specific requirements under each of the disclosure laws, as described further below. In each chapter, two or more authors licensed to practice in the jurisdiction about which they are writing have addressed the same disclosure requirements in a uniform format. We have organized each country chapter section in this way to provide, first, a comprehensive discussion of each of these laws and, second, a practical and easy-to-use reference for counsel to comply with each jurisdiction’s laws. The sections address the following issues under each jurisdiction’s disclosure law:

- **What is a Franchise?** (Scope of the Law; Applicability to Master Franchisees; Exemptions; Discretion of Regulatory Authorities; and Jurisdiction)
- **Who Must Provide Disclosure?** (Franchisor; Master Franchisee; Franchise Consultant/Agent/Broker; Franchisor or Others in Master Franchise Agreement)
- **Who Must Receive Disclosure?** (Who Must Receive Disclosure Document?; Applicability to Renewing and Transferee Franchisees or Master Franchisees; Exemptions)
- **When Must Disclosure Be Furnished?** (Timing; Letters of Intent; Methods of Delivery of a Disclosure Document; Ongoing Disclosure Obligations)
- **Information to Be Included in Disclosure Document** (Specific Matters for Disclosure; Disclosure of Material Information; Use of Supplemental Disclosure Documents; Updating Requirements)
- **Governmental Filings or Approvals** (Initial Filing Requirements; Other

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1. Argentina and Tunisia are the only countries with franchise disclosure requirements that are not included in this book. In Tunisia, the editors were unable to identify two Tunisian attorneys with sufficient expertise to provide the peer review and thus the accuracy expected in each of the country chapters addressed in this book. Argentina’s law, which has minimal disclosure requirements, was passed in late 2014 as this edition was being finalized.
Filing Requirements; Discretion of Government Agency; Timing; Licensing of Brokers and/or Franchise Sales Personnel; Ongoing Filing Requirements; Filing or Registration of Executed Documents

- Other Requirements (Language Requirements; Filing of Trademark Licenses)
- Franchisor-Franchisee Relationship Laws (Applicable Laws and Regulations; Remedies for Violation; Other Applicable Relationship Requirements; Time Period for Commencing Legal Action)
- Violations of Franchise Sales Laws (Penalties for Failure to Comply with Disclosure Laws; Who May Bring a Legal Action?; Time Period for Commencing Legal Actions; Misrepresentations; Enforcement by Government: Judicial Trends)

The format or headings for each country section are based on a uniform questionnaire (Questionnaire) prepared for use in developing this book. The Questionnaire is included as Appendix A. This Questionnaire was distributed to each of the country authors, who were charged with responding to the questions in the Questionnaire and presenting their answers in prose responses.

The editors and the ABA Forum on Franchising’s International Division (Division) took several steps to insure the accuracy of responses to the questions. First, there are at least two authors for each chapter. Thus, chapters benefit from the experience of different practitioners, in part given the novelty of the laws, and in part to verify the accuracy through peer review. Second, there was an extensive review process that each chapter underwent. Each chapter was assigned to a regional editor (who was a member of the Division’s Steering Committee), who was responsible for reviewing chapters and consulting with the authors on specific issues. The editors reviewed each chapter as well. In addition, the ABA Forum on Franchising’s Publications Committee reviewed the entire first edition of the book and provided extensive comments. The authors for each chapter are listed at the beginning of the chapter and their biographical information is listed at the end of the chapter. Division members who acted as regional editors and reviewed chapters, for this and prior editions of this book, are listed in an acknowledgment at the end of each chapter following the authors’ biographical information.

There are several caveats that we, as editors, wish to bring to our readers’ attention. As a preliminary matter, we must note that the regulatory environment for franchise sales laws is evolving rapidly. This has two very significant implications. First, as noted at the outset of this Introduction, countries or jurisdictions are constantly enacting new franchise sales laws, and it is frequently difficult to monitor all of the legislation being proposed until it has been enacted. Second, jurisdictions that previously adopted such laws are frequently changing their requirements or supplementing them with administrative regulations. One example is that, in the United States, following a protracted rule-making pro-
ceeding, the Federal Trade Commission changed its Franchise Rule that governs disclosure required in jurisdictions subject to U.S. federal law, and that rule became effective for all franchisors in mid-2008. More recent examples are the changes to Australia’s Franchising Code of Conduct or to Taiwan’s franchise requirements, recently renamed “Principles for Handling Cases Relating to the Operation of Franchisors,” both of which became effective in January 2015. Third, this book addresses disclosure requirements in countries with explicit laws or judicial requirements that clearly mandate some form of pre-sale disclosure to prospective Franchisees. All the countries covered, except Germany, have legislation requiring pre-sale franchise disclosure. Germany’s courts have repeatedly mandated that franchisors provide pre-sale disclosure and we have accordingly included a new Germany chapter. The book does not seek to address possible requirements implied under other, more general, laws under which some practitioners believe that disclosure is required prior to commencement of any commercial agent or similar relationship. There is a small debate whether any countries other than Germany truly have such requirements. On this point, stay tuned for the next edition!

For these and other reasons, it is essential that the legal practitioner always consult the applicable law and regulations and with local counsel, and not rely solely on information in this book. Readers ought not to be lulled into assuming that the detailed responses in this book are a substitute for legal advice by counsel knowledgeable about the facts of a particular franchise offering and the applicable requirements in each jurisdiction. Finally, we fully anticipate that new laws and regulations will continue to be forthcoming and that future updates of this book will be required as amendments are enacted, administrative practice changes, cases are decided, and interpretations of these laws evolve.

II. Summary of Salient Issues

A. Scope of Law

The laws of the different jurisdictions surveyed in this book have one thing in common: they all require the disclosure of certain material information by one party to another in connection with the parties’ conclusion of a contractual arrangement characterized as a “franchise.” (However, as we point out below, under several of these laws, disclosure is required for many relationships that are not typically thought of as a “franchise.”) Beyond that common element, and in their definition and application of the above terms, the laws vary widely. For example, China requires the reciprocal disclosure by the Franchisee of some categories of information. In addition to disclosure requirements, several countries require that specific terms be included in franchise agreements. Thus, the law in China requires franchise agreements to include 15 categories of provisions, and Mexico specifies 12 minimum requirements for any franchise agreement.
The various countries’ laws also differ in their definition of the term “franchise,” with one country (France) leaving that term altogether undefined. The elements typically found in the definitions of “franchise” include the following:

- **Grant of rights.** The Franchisor typically grants the Franchisee the right to use the Franchisor’s trademark, trade name, patent and/or other industrial or intellectual property right or know-how in connection with the Franchisee’s operation of a business. The nature of the rights covered by this element of the various laws varies widely. In Belgium, for example, the grant addresses a business process comprised of a common trade name, a common sign, a transfer of know-how, or commercial or technical assistance. In Romania, this element is expressed as a grant by the Franchisor of the right to exploit or develop a business, product, technology, or service. In Spain, the grant covers the Franchisor’s system of commercialization of products or services.

- **Plan or system.** Most of the laws provide that the Franchisor will prescribe a plan, system, or method of operation under which the Franchisee may sell or distribute goods or services. In some jurisdictions (e.g., Malaysia, Canada (Ontario), South Korea, and Vietnam), this element is referred to as the Franchisor’s control or supervision of the Franchisee’s business. In Romania, the element is obliquely referred to as continuous collaboration between the Franchisor and Franchisee.

- **Fee or other compensation.** Another element found in most of the laws surveyed is the required payment of some fee or other compensation by the Franchisee to the Franchisor. However, some such laws (notably those of Mexico, Romania, and Vietnam) do not expressly include this element, thereby reaching more broadly to relationships beyond those typically understood to constitute franchises. A variation of this element is found in the French Loi Doubin, which specifies that Franchisees must make commitments of exclusivity or quasi-exclusivity, a form of consideration, in return for the grant of rights from the Franchisor.

**B. Who Must Provide Disclosure?**

Different jurisdictions impose the obligation to provide a Disclosure Document on different parties. The Questionnaire asked the authors to consider a Franchisor’s disclosure obligations to both prospective Master Franchisees and Franchisees; whether a franchise broker had such obligations; a Master Franchisee’s disclosure obligations to a prospective Franchisee; and whether a Franchisor had disclosure obligations to a prospective Franchisee if the Master Franchisee (and not the Franchisor) granted the franchise.

2. Although Sweden’s law does not define “franchise,” it does define “franchise agreement.”
All countries covered in this book require a Franchisor to provide disclosure to a Master Franchisee, except to the extent that the Master Franchisee is only granted sublicensing rights instead of the right itself to operate a franchised unit (e.g., Belgium). Our authors also indicated that all countries require a Master Franchisee to provide disclosure to a prospective unit Franchisee. Most of our commentators opined that, where a Franchisor is a party to a unit franchise (or sub-franchise) agreement, the Franchisor should provide disclosure to the prospective Franchisee, although there was little authority on this issue generally. Several, however, were unsure on this point. The results suggest that it may be a more prudent practice for Franchisors not to be a party to a unit franchise agreement lest they assume—perhaps unwittingly—disclosure obligations or liability.

Most of our commentators found no basis to require a broker, sales agent, or consultant to provide a Disclosure Document to a prospective Franchisee. Commentators in a handful of countries (Australia, Brazil, Indonesia, South Korea, and Taiwan) did, however, find there was a legal obligation, that the broker could incur liability for no or faulty disclosures, or that it was otherwise a good practice. This is particularly important, as many international franchise sales transactions involve multiple parties across the globe, working in concert to identify master Franchisees or developers. Requiring that those individuals provide disclosure may create some challenges that could be burdensome, and could lead to widespread noncompliance.

C. Who Must Receive Disclosure?

We asked our authors to address the following issues in connection with who exactly is required to receive the Disclosure Document from the Franchisor—who must receive a Disclosure Document for Franchisees; does this include renewing or transferee Franchisees; and are there any exemptions applicable as to who must receive a Disclosure Document (such as existing Franchisees buying additional franchises; sophisticated, large or experienced Franchisees; or others)?

Some of the responses to these questions were surprising. Our commentators were split as to whether a renewing or transferee Franchisee must be provided a Disclosure Document. About half opined that renewing Franchises either must or should receive a Disclosure Document, although disclosure requirements are frequently inapplicable if the franchise agreement is renewed without entering into a new agreement, if the agreement renews automatically or if renewal is on the same terms as the new agreement. Similarly, about two-thirds opined that a transferee must or should receive a Disclosure Document, particularly if the terms of the agreement were to change. Most of the jurisdictions have no exemptions for existing Franchisees or large or sophisticated Franchisees. Several commentators (in Japan, Malaysia, and South Korea) opined that existing Franchisees purchasing additional franchises should probably be exempt from the disclosure requirements, and the commentators in one country
(Sweden) observed that the disclosure requirements and time frame for disclosures may be less onerous in such a transaction.

**D. When Must Disclosure Be Furnished?**

We asked our authors to address the following issues in connection with when and how disclosure must be furnished: when must a Disclosure Document be given; must it be furnished prior to signing a letter of intent or other preliminary agreement or payment of a deposit (refundable or nonrefundable); may it be provided in an electronic format; and are there ongoing, pre-sale disclosure obligations to prospective Franchisees after their receipt of a Disclosure Document, after signing a franchise agreement, or to regulators?

Knowing the timing for providing a Disclosure Document to a prospective Franchisee is a particularly important issue in international franchise transactions, as international transactions are typically larger than domestic ones, with more substantial fees covering entire countries or even larger territories and with parties eager to finalize the arrangements. Most countries’ laws specify the number of days in which disclosure is required to be provided—either prior to signing of a franchise agreement and/or the receipt of funds. The laws of three countries—Indonesia, Japan, and Romania—do not provide any specific timing, while Sweden requires disclosures in “due time” before execution of a franchise agreement. And the range of timing is considerable—from as little as seven days prior to the signing of a franchise agreement, under certain circumstances in South Korea, to as much as one month in Belgium or as many as about 45 days (i.e., 30 business days) in Mexico. Mexico’s law may indeed prove to be a trap for the unwary franchisor.

An important and yet not always considered issue is whether the pre-sale payment of monies or execution of a binding or nonbinding letter of intent (or other preliminary agreement) triggers the pre-sale disclosure requirements. This is a matter of particular importance for international Franchisors, as the signing of a preliminary agreement is standard operating procedure for most international deals. Most of the authors opined that execution of a preliminary agreement (particularly if it was “binding”) triggered disclosure obligations prior to its execution. The implications here are that the most prudent course would be for Franchisors to move up the date on which disclosure is provided. It also suggests that Franchisors may want to include their letter of intent in the Disclosure Document.

The laws and authors were evenly split about the permissibility of providing some form of electronic disclosure—whether by email, through an Internet site, or via CD. Given the business community’s wholehearted embrace of electronic communications media, as well as the increasing legal recognition of electronic contracting and other electronic interactions, this is clearly an area of the law that could benefit from, and is likely to, change.
Finally, most countries’ laws do not require any ongoing disclosure obligations to existing Franchisees, but a few (Australia, Indonesia, South Korea, and Vietnam) do so to certain types of contractual, business, or relationship changes.

**E. Information to Be Included in Disclosure Document**

It is difficult to provide a brief summary of the disclosure items required under the disparate laws and regulations of 23 different countries.

Some of the specific disclosure requirements, though, merit further comment. Financial statements must be disclosed under the laws of almost all of the countries and are recommended in two others (Romania and Sweden) despite the absence of an explicit requirement. However, not all jurisdictions clearly permit the use of financial statements prepared under the accounting principles of a foreign country. In fact, the authors in only seven countries (Australia, Belgium, Brazil, Canada, France, South Korea, and Spain) have reported that foreign-prepared financial statements are undoubtedly acceptable. Some countries, notably Canada, require that financial statements be audited or reviewed under country-specific accounting standards. In addition, Australia and South Africa both require (1) a statement, signed by at least one director of the Franchisor, as to whether the Franchisor will be able to pay its debts when they fall due, and (2) inclusion in the Disclosure Document of financial statements prepared in accordance with the requirements of the companies laws, with certain exceptions.

Beyond the specific disclosure items surveyed in the respective country-specific chapters, some jurisdictions require the disclosure of other material information. Thus, each Canadian province requires the disclosure of all material facts, including any information about the Franchisor or franchise system that would reasonably be expected to have a significant effect on the value or price of the franchise to be sold or the prospective Franchisee’s decision to purchase it. France requires that the Franchisee receive genuine information enabling the Franchisee to commit to the franchise with full knowledge of the relevant facts. Italy requires the disclosure of all information the Franchisee would consider “useful or necessary,” provided that information is not confidential and does not infringe on third-party rights. Although Malaysia has no explicit requirement for the inclusion of material information, additional information is frequently requested as part of the franchise filing and registration process discussed below. Romania requires the disclosure of all information enabling a Franchisee to take part in a franchise agreement in full awareness. Accordingly, as the authors for these jurisdictions note in their respective chapters, the Franchisor, in preparing a Disclosure Document for these jurisdictions must broadly consider relevant information beyond the disclosure items specified in the jurisdictions’ laws or regulations.
A substantial majority of the jurisdictions surveyed also require that the Disclosure Document be updated, and, in five of those jurisdictions where such updating is not expressly required (Japan, Mexico, Romania, Spain, and Vietnam) the authors recommend the practice. Most such updating relates to the pre-contract phase, when a Disclosure Document has been provided to a prospective Franchisee that has not yet signed a franchise agreement. In those jurisdictions, Franchisors are required to update the Disclosure Document as necessary to ensure that the prospective Franchisee has current, accurate information prior to executing the franchise agreement. Some jurisdictions go further and require continuing post-contract disclosure to Franchisees. These jurisdictions include China, where the Franchisor must inform the Franchisee of any significant change in the information previously provided by the Franchisor; Romania, where local counsel recommends that the Franchisor continuously provide the Franchisee with the latest information on the most critical aspects of the franchised business; and South Korea, where Franchisors are required to prepare and deliver updated disclosures to Franchisees of changes related to the general status of the Franchisor.

F. Governmental Filing Requirements

Almost none of the jurisdictions surveyed have any requirement that the Franchisor’s Disclosure Document and/or franchise agreement be registered or filed with any government authority prior to the Franchisor’s engaging in the offer or sale of a franchise. Of the jurisdictions that do have such a requirement, Indonesia requires a filing to obtain a franchise business registration certificate prior to a Franchisor’s providing a disclosure document to a prospective Franchisee; Malaysia requires a Franchisor to register with and obtain approval from the Registrar of Franchising; Spain requires filing with the Registry of Franchisors; South Korea requires registration of the Disclosure Document with the Korea Fair Trade Commission; and Vietnam requires registration with the Ministry of Industry and Trade before a Franchisor commences franchising activity.

Other jurisdictions require filing after the franchise sale has been concluded. Indonesia requires the Franchisee to file its Disclosure Document and translated franchise agreement with the Department of Trade within 30 business days after execution of the franchise agreement. Similarly, Mexico requires that the executed franchise agreement or an abbreviated version of it, in either case translated into Spanish, be filed with the Mexican Institute of Industrial Property. Although no time period is specified for such filing, the purpose of the filing is to preserve the trademark owner’s rights against infringing third parties, so it is generally recommended that the Franchisor make the filing promptly after execution of the agreement.

In those jurisdictions where a franchise-specific filing is not required, other forms of filing or registration may be required or at least recommended. In Brazil, for example, registration of a franchise agreement with the Brazilian Institute of Industrial Property is necessary for it to be effective against third
parties, to permit the Franchisee’s remittance to foreign Franchisors, and to qualify
the Franchisee’s payments for tax deductions. In addition, if a franchise agree-
ment calls for fees or royalties to be paid by a Brazilian Franchisee to a foreign
Franchisor, the Franchisor must register its franchise agreement with the Brazil-
ian Central Bank. To similar effect, South Africa requires a filing with the rel-
vent exchange control authority to permit the Franchisee’s remittance of monies
to a foreign Franchisor.

In China, after registering with the local business registration and adminis-
tration authorities, a Franchisor must file at the tax bureau, customs, foreign
exchange control, finance, public security, and other applicable authorities, de-
dpending on the Franchisor’s specific trade or industry. Once the Franchisor has
operated at least two of its own stores for at least one year, the Franchisor may
commence franchising activity but must file certain documents with a govern-
ment agency—either a provincial Bureau of Commerce or the national Ministry
of Commerce—within 15 days after execution of its first franchise agreement.
The Franchisor must thereafter pass an annual inspection and submit an annual
report to its local bureau of commerce concerning franchises granted during the
past year.

In Indonesia and Malaysia, prior to the grant of any trademark license (in-
cluded in all franchises), the trademark that is the subject of the license must be
registered with the government. In Mexico, the trademark must either be regis-
tered or at least be the subject of a pending registration application. Similarly,
Romania requires the filing of all franchise agreements containing a trademark
license, as well as any franchise agreement that does not fully qualify for one of
the exemptions available under the Romanian Competition Law, which is simi-
lar to the European Union’s competition law. Taiwan also has a filing require-
ment derived from its competition law, known as the Taiwan Fair Trade Law.
Under that law, subject to market share thresholds and an annual turnover thresh-
old specified in the Law, if a transaction will result in one business controlling
the business operation of another company, it will be deemed a business combi-
nation requiring a merger notification filing with the Taiwan Fair Trade Com-
mission. For this purpose, the Fair Trade Commission has administratively
determined that a Franchisor’s direct or indirect control of a Franchisee’s busi-
ness through a franchise relationship is a form of business combination.

Even in those jurisdictions where a franchise filing is not required, govern-
ment authorities may require or encourage the filing of franchise documents.
For example, in Australia, an investigation of possible violation of the appli-
cable law may lead to the government’s requirement that the Franchisor submit
and possibly revise its Disclosure Document. Other jurisdictions may obtain a
copy of the Franchisor’s Disclosure Document in a proceeding asserting non-
compliance with applicable law, such as in, for example, the Franchisor’s pro-
viding an incomplete or inaccurate Disclosure Document. (See also Section G.
below.)
G. Other Requirements

Several of the countries surveyed require that disclosures be made in the language generally used in the country. In Indonesia and Vietnam, for example, a franchise agreement must be in the national language. While there is no such requirement for the related Disclosure Document, local counsel recommend that the Disclosure Document be provided in the Indonesian language as well as the language selected by the Franchisor. In Italy, Franchisors that have previously operated only outside the country must, at the request of the prospective Franchisee, provide the prospect all relevant information concerning the franchise agreement, including the Disclosure Document, in Italian. Mexico has no such requirement, but, as noted above, requires that any summary of the franchise agreement that is recorded under the industrial property law be in Spanish. Similarly, if the franchise agreement or its licensing portion must be filed in Romania, it must first be translated into the Romanian language. Similar requirements apply in South Korea, where the Disclosure Document and supplemental documents (e.g., the franchise agreement) must be translated into Korean for the purpose of registration; and in Spain, where any trademark license that is registered must be in the Spanish language.

While there is no explicit language requirement for Disclosure Documents in Canada, the official languages of Canada by federal legislation are English and French. As the provinces requiring disclosure are primarily English-speaking, Disclosure Documents are generally prepared in English.

Other countries have more broadly focused requirements that effectively require disclosures in the local language. For example, Brazil requires that a Disclosure Document be “in a clear and comprehensible language” permitting the Franchisee to understand all of the information furnished by the Franchisor. As a practical matter, this requires disclosures in Portuguese or any other language in which the prospective Franchisee is fluent. This concept is also found in France and Mexico, where the country authors recommend that a Franchisor obtain a certification of fluency in the language of the Disclosure Document and franchise agreement if that language is not the local language. Many authors also noted that in the event of litigation involving the franchise, all relevant documents would inevitably have to be translated into the local language.

Other legal requirements found in some of the jurisdictions include the filing of the franchise agreement as a trademark license. Such filing is either required or recommended in Belgium, Brazil, China, France, Indonesia, Mexico, Spain, Taiwan, and Vietnam and, for exclusive trademark licenses, in South Korea.

H. Franchisor-Franchisee Relationship Laws

Many of the jurisdictions surveyed impose some form of regulation upon the Franchisor-Franchisee relationship, apart from applicable franchise sales disclosure laws. It is difficult, however, to generalize about these relationship laws.
The most common franchise relationship law found is some restriction on the right of the Franchisor to terminate the franchise agreement. Such laws are found, for example, in Australia, China, France, Italy, Malaysia, Romania, South Korea, Taiwan, and Vietnam. Typically such laws require that there be some “good cause” for the termination, although the formulation of this restriction varies. For example, franchise agreements may be terminated only for cause in China, for breach in France, and for substantial breach in Italy.

Another common relationship law imposes upon the parties a duty of good faith, a duty that could limit a party’s discretion in performing under a franchise agreement and could require performance beyond that expressly required by the agreement. Some variation of this duty may be found in Australia, Brazil, Canada, China, France, Macau, Malaysia, and South Korea. Again, though, the specific requirement varies from jurisdiction to jurisdiction: Brazil requires good faith and probity, China requires fairness and reasonableness, and Malaysia requires agreement performance in an honest and lawful manner.

Other types of relationship laws found in the jurisdictions surveyed include the following:

i. A minimum term for the franchise agreement (e.g., three years in China, five years in Malaysia, and, in Italy, a term sufficient to allow the Franchisee to amortize its investment in the franchise business and, in any event, no less than three years).
ii. A prohibition on the Franchisee’s general release of the Franchisor in or as required by the franchise agreement.
iii. A prohibition on unconscionable, unbalanced, or unfair contract terms.
iv. A requirement that a franchisor not unreasonably withhold its consent to the franchisee’s transfer of the franchise agreement to a third party.
v. A prohibition on any restriction on the Franchisee’s right to join or participate in a franchisee association.
vi. Imposition of the jurisdiction’s laws in interpreting or enforcing the franchise agreement notwithstanding what is provided in the agreement.

It is critically important to understand the current relationship laws in any jurisdiction for which a Franchisor proposes to offer franchises, as such laws may require the modification of the franchise agreement to be offered in the jurisdiction or some aspects of the Franchisor’s performance under the agreement.

I. Violations of Franchise Sales Laws

Each jurisdiction surveyed provides some form of penalty or other consequences for the violation of franchise sales laws, but there is a wide variety of such consequences. A minority of the jurisdictions provide criminal penalties for some
violation of such laws. A few jurisdictions (such as China, France, Indonesia, Mexico, South Africa, South Korea, Spain, Sweden, and Taiwan) provide for some form of governmental fine that may be assessed in the event of a violation, and two of the countries surveyed (China and Mexico) also provide that the Franchisor’s business may be closed or its business license revoked.

The most common possible consequence of a franchise sales law violation is rescission of the parties’ franchise agreement, a remedy that may be found in some form in a majority of the jurisdictions surveyed. Some of these jurisdictions spell out exactly how the rescission is to be carried out. In Canada, for example, the Franchisor must, within 30 days after receipt of a Franchisee’s rescission notice, compensate the Franchisee for any losses incurred in acquiring, setting up, and operating the franchised business. A remedy of this nature is thus a powerful weapon against violations of the law.

Most jurisdictions also provide that a Franchisee may recover all damages suffered as a result of a violation of the franchise sales law. Such damages may arise out of the Franchisor’s failure to comply with the requirements of the law as well as from misrepresentations or other misleading conduct by the Franchisor. Some jurisdictions go further and make the Franchisor responsible in damages for misleading statements made by a Master Franchisee. This is true, for example, in Brazil, despite the fact that Franchisor-Master Franchisee agreement may be completely separate from the Master Franchisee-Unit Franchisee agreement and despite the fact that the Franchisor may not be at all involved in the Unit Franchisee sales process. In Romania, this principle is moderated, as a Franchisor may be held responsible for its Master Franchisee’s misrepresentations only if the Franchisor knew of the falsity of these misrepresentations.

III. The Use of International Disclosure Documents and Compliance with International Franchise Sales Laws

A. Issues to Consider

The presence of international franchise sales laws creates the challenge for Franchisors of how best to comply with their requirements and how to balance competing goals. An international Disclosure Document provides valuable information to prospective Franchisees; the document also creates potential liability for the Franchisor. At the same time, Franchisors and their counsel are accustomed to think in terms of uniformity and efficiency in administration and cost. Thus, the challenge is how to comply with international franchise sales laws with the least legal liability and cost as efficiently as possible.

A variety of issues come into play in making the international franchise sales law compliance analysis. Here are some of them: 
Are the same documents to be included in all Disclosure Documents—for example, do some countries’ laws require disclosure of the prospect at the letter of intent stage, and others not?

Are there common disclosure requirements?

To the extent disclosure requirements differ, are the disclosure requirements conducive to a uniform document and compatible? What issues are raised?

Are all jurisdictions’ laws consistent as to whether a specific transaction is to be described in a Disclosure Document—i.e., are deal points or other, additional negotiated changes required to be included?

To what extent are market differences (e.g., as to initial investment or market conditions) required to be included in the Disclosure Document?

What considerations affect how a given Franchisor should structure its global disclosure obligations?

Is it reasonable for a Franchisor to have a single international Disclosure Document for use in all countries (with international addenda or “wrap” document to supplement it), or must it have a separate document for each country?

If a single international Disclosure Document were used, how would one deal practically with differences in various countries’ disclosure requirements—for example, would it be permissible to remove and/or replace inappropriate disclosure for country B to that given in country A? Would this be construed as confusing or misleading to a prospective Franchisee?

Is it preferable to have separate Disclosure Documents for each country?

All of these are factors to be considered in structuring a program for disclosure, and the answers are likely to vary for different companies.

B. Approaches for International Disclosure Law Compliance, and the Chimera of Uniformity

There are several approaches that Franchisors may take for compliance with international franchise sales laws. The basic approaches are as follow:

- **Country-specific Disclosure Document.** One approach is to prepare a country-specific Disclosure Document for each country. This may be legally necessary in some jurisdictions (e.g., Australia, Canada, or the United States), given those laws’ requirements, but costs and inefficiencies may be an issue.

- **Standard International Disclosure Document.** Another approach is to prepare an “international” Disclosure Document for use outside the
franchisor’s home country. The advantage of this approach is the efficiency of using one document, but there may be issues as to “overdisclosure,” given the wide variety of requirements under applicable laws. The potential advantage of a uniform (or wrap-around) Disclosure Document is that it yields considerable benefits in time, cost, and efficiency by allowing use of one franchise disclosure document for all international franchise offerings. However, and as noted, it may not be used in all jurisdictions.

- **Standard International Disclosure Document with country addenda.** This approach utilizes a uniform international Disclosure Document with a country-specific addendum to conform the Disclosure Document to the different requirements of country laws. A so-called “wrap-around” document permits a Franchisor to utilize some form of uniform Disclosure Document, supplemented in different countries with an additional wrap-around document used along with—or “wrapped around”—the uniform document.

- **Geographic or Regional Disclosure Document.** Under this approach, a Franchisor may prepare a document for use in a particular region.

To address these issues, one must first consider the extent to which the various international franchise sales laws have a uniform set of requirements. Two clearly do not—Australia requires that specific formats be used, and Canada may also require a specific format. Further, both the Australian and Canadian provincial laws require the use of a single document, although it may be possible in Canada to use a material change statement to supplement the Disclosure Document under certain circumstances. Accordingly, in these two countries, a uniform or wrap-around document not prepared in accordance with the specific Australian or Canadian requirements either is not permitted or may not be recommended for use.

The reality is that, when closely examined, there are relatively few common disclosure requirements in the jurisdictions covered in this book. There are only three or four (i.e., basic Franchisor information, payments, investment costs and intellectual property rights) that are required or recommended in all the jurisdictions. Other types of disclosure (e.g., information on Franchisor management, existing Franchisees’ locations, former Franchisees, obligations of the Franchisor and the Franchisee, and territorial rights) are required in many, but not all, jurisdictions. Many of the types of disclosure that American franchise practitioners have come to view as basic, based on U.S. disclosure requirements, are not required in many jurisdictions: only about half the laws require inclusion of the franchise contracts in the Disclosure Document; about two-thirds of the laws require the Franchisor’s financial statements (and the financial statement requirements are far from uniform); and not all require disclosure of fees or initial investment costs. Moreover, close examination reveals that there also is little in
common among these laws about the specific disclosure required for a given category—e.g., the specific requirements on the Franchisor or payments disclosures differ from country to country.

Moreover, most such laws do not require types of disclosure beyond those required in the United States, but some do. For example, in France the Loi Doubin requires disclosure of a “market study.” Inspired by the French requirement, Belgian law requires disclosure of the history, status, and forecast of the market and market share of the franchise network, both generally and locally. In short, there are few common categories of information required in all the jurisdictions.

This raises a matter of particular concern, and one on which there appears to be no current consensus in the legal community. What is the risk of “over-disclosure”—i.e., whether a Franchisor increases its legal risk to an unacceptable level by including information in its Disclosure Document that is not required? This is an inevitable by-product of using an international Disclosure Document and including information not required in a given jurisdiction. As a general matter, we would advance the proposition that, generally speaking, a Franchisee is better informed the more factual information he or she receives and that, in theory, this should not pose a problem as long as the disclosure is accurate, relevant to the jurisdiction, and not misleading. However, there is some anecdotal evidence and there are many situations in which certain types of disclosure required in some jurisdictions may well be misleading for Franchisees in other jurisdictions—e.g., investment information, financial performance representations, or the types of assistance to be provided. For that reason, there remains significant concern among franchise practitioners in many countries that any such disclosure would likely be very confusing to a prospective Franchisee and would create the potential for misrepresentations.

C. Practical Considerations

How a given Franchisor will best comply with its obligations under international franchise sales laws will depend on several factors, which will likely vary for each company. These factors are as follow:

- **Franchisor’s Home Country Law.** If the Franchisor’s home country requires the use of a pre-sale Disclosure Document, this may affect a Franchisor in two ways. First, the Franchisor would already have some Disclosure Document prepared. Second, there may be jurisdictional reasons the Franchisor must use the document if its home country law were to apply to a given transaction.
- **Structure for International Franchise Sales Program.** The structure of a Franchisor’s international program—e.g., direct franchising or master franchising—will affect its disclosure. If the program varies by country, region, or transaction, then it will be more difficult to utilize a uniform document.
• **Risk Tolerance.** The risk tolerance of a company may affect the type of Disclosure Document that a Franchisor prefers to use. A company that has a lower risk tolerance may decide it does not wish to use an international Disclosure Document that “over-discloses” information that may not be required—and may create unnecessary liability. One example of such over-disclosure would be making representations about the initial investment when none is required.

• **Franchisor’s International Franchise Sales Plans.** Whether a Franchisor is or is not actively franchising internationally will have a significant effect on the practicality of preparing an international or country-specific Disclosure Document.

• **Negotiated Changes.** The extent to which a country’s law requires a Franchisor to prepare or amend its franchise disclosure document in the event of a negotiated change or agreement that varies from its standard international franchise offering may affect the practicality of using a unitary Disclosure Document.

• **Primary Purpose of International Disclosure Document.** The use of a single international document may depend on its primary purpose. For example, if the goal is to use an international Disclosure Document to “market” a company’s franchise opportunity, this may tilt the balance.

• **Language Considerations.** As several jurisdictions require use of their local language, language may play a role in determining how best to comply.

• **Required Exhibits.** The presence or absence of required exhibits (such as letters of intent, franchise agreements, or financial statements) that must be included in a Disclosure Document may also affect the decision whether to use a single or multi-country Disclosure Document.

• **Cost Considerations.** Cost considerations may play a role in a Franchisor’s decision not to prepare separate country Disclosure Documents in favor of an international Disclosure Document.

As noted above, each Franchisor must analyze the feasibility of using a uniform international Disclosure Document, and the approach one takes must be analyzed based on each company’s distinctive judgments as to these liability and efficiency considerations.

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We are hopeful that this book provides useful assistance to those seeking guidance on international franchise sales laws and to those seeking to plumb their still-uncharted waters.

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