A SURVEY OF INTERNATIONAL LEGAL TRAPS
AND HOW TO AVOID THEM
BEYOND THE FRANCHISE LAWS

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I. INTRODUCTION

Franchise law practitioners, to be effective for their clients, must be capable of dispensing the right mix of legal and business advice. This is true in all areas of a franchise law practice, whether the practitioner acts for the franchise purchaser, the beginning franchisor, the franchisor of a rapidly growing franchise system, a franchise system, or otherwise. But nowhere is this more of an imperative than when acting for a domestic franchisor that is considering first launching or accelerating an international expansion of the franchise system.

Ideally, the franchise lawyer is part of a business team helping the franchisor’s management assess the risks, set the strategic path, and implement the expansion plan. The franchise lawyer’s initial contributions would be in helping the analysis to assess the readiness of the system for international expansion, the countries to target and in which order and the most appropriate vehicles to carryout the expansion. While the use of local counsel will be indispensable, the home practitioner’s knowledge of the basic legal issues in the target countries will add enormously to the value of the advice given.

The goal of this paper is to provide the franchise law practitioner, who is given a mandate to help a domestic franchisor “go international,” with the tools necessary to discharge that mandate in the most effective manner. One obvious and intentional omission is that this paper will not deal with franchise specific legislation and case law of foreign jurisdictions. These areas have been well covered in other papers and articles. Rather, this paper is intended to present valuable business insights, legal analytic approaches and information about specific legal traps awaiting the unwary franchisor embarking internationally. While it is not possible to cover every business situation that could arise or every foreign law that could be a problem in every country, the information presented will contribute significantly to the lawyer’s ability to serve his/her client by providing the useful insights and strategies for international expansions.

This paper has been organized into five main sections. The first section is an introduction to the paper. The second section is intended to distill some of the most important business considerations to be taken into account before any attempt is made to expand the franchise system internationally. The third section of the paper is a survey of some of the possible legal traps to be aware of in other countries, by areas of greatest concern or which pose the most frequently encountered problems. The fourth and fifth sections are more comprehensive descriptions of the possible legal traps presented under the laws of Mexico and Canada, as the close proximity of these two countries to the United States make them the most logical first countries for international expansion for U.S. franchisors.

II. WHAT EVERY FRANCHISOR NEEDS TO CONSIDER

A. Success at Home

It would seem rather obvious that a United States franchisor would want to have first saturated the domestic market before expanding internationally. However, a strong franchise system in the northeast might find an expansion to eastern and central Canada more fruitful and cost effective than expanding into the western U.S. Expansion into Mexico might be more attractive for a system in the southwest U.S. than expansion to the northeast U.S. That being said, international expansion rarely works until the franchisor has a well developed concept, mark recognition, proven success and a solid franchise infrastructure, especially to assist international franchisees, not to mention a profitable system operating in the home country.
It is astounding how often an international expansion was “pulled” by the happenstance of a chance meeting with or approach by a foreign national who had the capital and desire to import the concept to his home country. Sometimes, such a move is justified by such arguments as, “well if it fails over there it won’t affect the system here”; “it is easy money that is much needed at home and we are not investing in this, there will be no cost”; “our competition is over there already”; or “it will enhance our image and make domestic sales easier when everyone sees we have gone global.” In reality, an international expansion has to be “pushed” by solid planning and the establishment of a sound foundation. The drain on resources, the loss of future possibilities and the potential for bad publicity, in this electronic and global age, of a failed international expansion may outweigh any perceived advantage.

**B. Can Domestic Success Be Replicated in Other Countries**

From the very inception of the franchise system, the question of replication is on the table. Can the original business be replicated in a franchise format? Can franchises be opened successfully at different locations, i.e. mall versus street locations? Is the business appropriate for other cities and other areas of the country?

With an international expansion, the question of replication becomes even more challenging. Is the product or service appealing in the foreign market? What is the competition like? Can the system be adapted for cultural and linguistic differences? Are there adequate supply chains for necessary inventory and supplies? Are there legal or practical impediments to operating the business in the same manner? How easy is it for franchisees to obtain necessary financing?

No matter what the challenges are in the foreign market, an international expansion is doomed from the beginning if the franchisor has not honed the franchise system into a successful and easily reproducible business model. Having done so, the next step is study and homework. There is no foreign market more complex and challenging than the U.S. market. Everything a franchisor needs to know to make a decision about expansion to a particular foreign market is ascertainable with a reasonable amount of effort and expense. In fact, the business model in the U.S. and the reasons for its success often provide an elegant checklist of matters that need to be researched in the foreign market.

**C. Does the Franchisor Have Sufficient Resources**

An evaluation of the franchisor’s resources should precede any expansion decision, whether domestic or international. On the international stage, there may be added costs including travel, market analysis, additional legal and accounting compliance issues, adaptation of the concept and agreements, translation of agreements and manuals and establishing foreign supply chains.

The needed resources are not just capital. Human resources may also be critically important. Developing the system in foreign markets often requires the addition of personnel who are experienced in such matters. While consultants may be retained, like many other areas of franchising, the franchisor often does better in the long run by establishing the needed capability within the franchisor’s own management group.

The choice of expansion vehicle will also influence the amount of capital and the human resources required. If, for example, the franchisor chooses to expand through master franchising, which is the most common method of international expansion, many of the required tasks may be downloaded onto the master franchisee. Of course, this has often proved to be a
dangerous activity, when the franchisor does not have some reasonable level of understanding of the foreign market and/or the wrong master franchisee is chosen. Initially, establishing corporate units or franchising directly to unit franchisees in the foreign market, while demanding more of the franchisor’s resources, may strengthen the franchisor’s knowledge of the foreign market and allow the franchisor to make better decisions about master franchising at a later date.

III. THE TRAPS

As mentioned earlier, this paper cannot survey all possible legal traps waiting to snare the unwary. Also, a lawyer representing an expanding franchisor should invariably work with competent local counsel. However, the following areas are of critical importance in analyzing the legal landscape for the franchisor contemplating a foreign expansion. By investigating the areas of law in the target country set out in this section, it is hoped a franchisor will discover and consequently avoid many of the most frequently encountered legal traps.

A. Intellectual Property

Intellectual Property, particularly trademarks, and increasingly copyright in software, is one of the most valuable assets of a franchise system. More and more, with the growth of the Internet and global communications, brands have value in other countries long before the products and services are available there. Certainly, if a franchise brand has broad and strong recognition in the home market, the marketing of the franchises in the system will be that much easier in other countries. In fact, it is arguable that the first point of investigation before entering a foreign market should be with respect to the availability of the system trademarks for use in that market and the ability to protect and grow the brand there.

Franchisors that wish to expand their horizons beyond the home market by offering their products or services through franchisees in foreign markets, must consider the selection of their trademark carefully, as the same mark may be received differently by foreign consumers and intellectual property offices.¹

Distinctiveness is a basic requirement for registration of a trademark in most countries. Some countries may permit registration of a mark that may become distinctive when used over a number of years so as to create a sufficient reputation and be recognized by consumers. These marks that are only “capable of being distinctive” are usually more difficult and costly to register, and for countries that follow British law, may even be put on a separate register.²

1. Basis for Application

Some jurisdictions require that an applicant state the basis upon which they are claiming rights to the trademark. Such basis may include prior use of the mark, intent to use the mark, making known, or use and registration in a foreign country. In Canada for example, an applicant must claim one or more of these four grounds in its application. These are discussed in greater detail below.

In many jurisdictions the applicant need not make such a claim. Rather, the applicant may simply file for the mark without stating the basis upon which they are asserting rights to the mark.

² Ibid.
2. Foreign Applications/Registration and Use Abroad

Under certain conditions and pursuant to the International Convention, if a trademark has been used and registered in a country of the Union, the applicant may, under the terms of the Convention seek registration of the trademark in another Union country.3

For countries, such as Canada, which require prior use registration or making known, the limiting conditions are that there has been no prior use, registration, or making known of a confusing trademark and that the trademark is otherwise registrable. For example, a U.S. trademark owner may seek to register its trademark in Canada solely on the basis of use of the mark and registration in the U.S.

Foreign applicants are entitled to register a trademark that would ordinarily be refused registration because it was a surname, or descriptive or misdescriptive, or the name of the wares or services if the trademark is not without a distinctive character.4 However, registration that is contrary to public order is prohibited.5 A mark that lacks inherent distinctiveness may not be registered unless the mark is shown to have acquired distinctiveness in the target country.6

The effective filing date of the application is the date of first filing in the Convention country if the applicant applies to register the trademark within six months of filing in the Convention country.7

3. Intellectual Property Treaties

Trademark rights were historically limited to protection within national geographical boundaries and each jurisdiction possessed its own law. Over time, with the increase in cross-border trade the desire for harmonization of intellectual property laws emerged and by the late nineteenth century, nations began cooperating in order to protect the rights of their nationals in neighbouring countries.

The three main Intellectual Property treaties that have ratified international uniformity for trademark law are the Paris Convention, the Madrid Agreement and the Madrid Protocol. Each treaty is separately discussed below. The European Community, by regulation, created the “Community Trademark” which allows for a single registration to protect a trademark in all 15 member states.

a. Paris Convention

The International Convention for the Protection of Industrial Property, known as the Paris Convention, was signed in Paris in March 1883 and became effective in March 1884. Since then, it has been revised several times, with the last one being in Stockholm in 1967. The contracting parties, including the U.S., formed themselves into the Paris Union, for the protection of industrial property, which includes industrial design, trademarks, service marks, trade names and indications of source or appellations of origins and the repression of unfair competition. Today, there are more than 100 countries in the Paris Union.8

The basis of the Paris Union is equal treatment of nationals and residents of the Convention countries. Furthermore, applications for registration of trademarks in Convention countries are

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3 Trade-marks Act, R.S.C. 1985, c. T-13, ss. 16(2), 31(2) [Trade-marks Act].
4 Ibid., s. 14(1).
5 Ibid., s. 14(1)(c).
7 Trade-marks Act, s. 34.
8 Roger T. Hughes, Hughes on Trade Marks (Markham: LexisNexis Butterworths, 2005) [Hughes on Trade Marks].

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\textbf{b. The Madrid System}

Maintaining and obtaining trademark portfolios in each country where franchisors intend to expand may be an expensive and complex process, so franchisors may wish to take advantage of an international system called the Madrid System.\footnote{Christopher Kelly & Marissa Faunce, “The Madrid System and a Streamlined Process for Registering Trademarks Around the World” (2003) The Franchise Lawyer 6:3 [Christopher Kelly & Marissa Faunce].} The filing of a single application in ones home country results in a priority “registration” date in as many countries as are designated and paid for.\footnote{On November 2, 2003, President Bush signed the implementing legislation for the Madrid Protocol.} Furthermore, a single filing accomplishes various post-registration requests such as renewal or assignment in all the protected countries. Access to the Madrid System presents an opportunity to simplify and significantly reduce the cost of international trademark acquisition and management, by increased efficiency, diminished workload in administering an international portfolio and the elimination of the need to use counsel in each country of protection for routine post-registration matters.\footnote{Ibid.}

The Madrid System is comprised of two treaties, the Madrid Agreement Concerning the International Registration of Marks (“Madrid Agreement”) and the Madrid Protocol for the International Registration of Trademarks (“Madrid Protocol”), both administered by the World Intellectual Property Organization (“WIPO”).

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\textbf{c. The Madrid Agreement}

The Madrid Agreement emanated from the Paris Convention and was authorized by Article 19 of the Convention, which states that member countries reserve the right to create “special arrangements” between and among themselves for the further protection of intellectual property. The purpose of the Agreement was not to harmonize trademark laws or enforce trademark rights globally, but to provide an international trademark filing system which was both cost-effective and procedurally simplified for trademark owners.

Under the Agreement, any person or entity with a trademark registered in its country of origin or domicile may obtain protection for the trademark in all other contracting countries by submitting a single application. International registration may be obtained for those goods and services covered by national registration in the country of origin or for a part of those goods and services. Despite the international registration, it has no effect in the country of origin and the mark is protected in that country under the ordinary provisions of the jurisdiction’s trademark laws. The registration has a uniform duration of 20 years in all the contracting countries. The total fee for filing established by the regulations is less then the sum of the national fees that would be required to be paid if a national filing were made in each of the countries party to the agreement. Accordingly, with the reduced filing fees and the savings in cost such as translation and agent fees, the international filing reduces costs from the beginning.\footnote{Christopher Kelly & Marissa Faunce, at 12.7.}

The Madrid Agreement enables an applicant to file an international registration on the International Register, and the applications are transmitted by the International Bureau of the World Intellectual Property Organization (WIPO) to all member countries designated by the
applicant. Those countries have a period of 12 months in which to make an objection to the application. In the absence of a rejection or “provisional objection”, the mark is deemed registered in the designated countries.14

But before being registered internationally, it must be confirmed that the applicant has a real and effective industrial or commercial establishment in a member country of the Madrid Agreement, have a domicile in a member country or be a national of the member country of origin. Furthermore, the trademark must have been registered nationally with the national office of the applicant’s country of origin. Merely filing an application in the country of origin is insufficient, except in those very few countries where filing constitutes registration.15

d. The Madrid Protocol
The objectives of the Madrid Protocol were to make the Madrid system more attractive to more countries and to create a link with other intergovernmental trademark systems including the European Community Trademark. The most significant revision of the Agreement in the Protocol is the requirement of only an application instead of a registration as a basis for the international application. If the home application should not mature into a registration, the applicant would have an opportunity to reapply nationally, but retain the priority date of the original application as filed in Geneva at WIPO.16

e. The European Community Trademark
The European Community (“EC”) of 15 states proposed the creation of one unified trademark law with one registration system to cover the entire Community.

The Community Trademark (“CTM”) enables trademark owners to file a single application for registration covering all 15 countries of the European Union. It gives the proprietor of the mark a uniform right applicable to all Member states.

A CTM proprietor has exclusive rights to the use of the trademark in the entire territory of the EC and may prevent registration of marks that are identical to the existing mark that is for identical goods or services. This is also true if the marks and goods or services are similar, provided that there is a likelihood of confusion on the part of the public. Where a similar mark is used for dissimilar goods or services, protection will be available where the CTM has a reputation in the EC and where use of the trademark without due cause takes unfair advantage of, or is detrimental to, the distinctive character of the CTM.17

Trademark owners who already have a registration in one or more of the European Community Member States may retain, in a Community Trademark registration, the priority granted by their earlier registrations in those European Union Member States, provided that the specification of goods claimed for the CTM is no broader than that of national registrations.18

4. Survey of Countries
In the European Community, non-traditional trademarks such as sound and

14 Ibid.
15 Ibid.
16 Christopher Kelly & Marissa Faunce, at 12.11.
18 Ibid.
smell generally cannot be registered. In Costa Rica however, sound marks may be registered as a trademarks whenever the sound has a direct relationship with the goods or services. In Greece, sounds and smells are registerable if they may be represented graphically.

In the European Community, trademark rights cannot be acquired by use. To register and enforce a trademark, there must be an application and successful registration of that trademark. Until the mark is registered by the user, anyone may register the mark and either use it themselves or sell the right to the user at an exorbitant price. Civil law jurisdictions generally require registration for ownership. To acquire and enforce a trademark, registration is compulsory in Argentina, Russia, Cuba, Indonesia, Paraguay, and the Virgin Islands. In Nicaragua and Syria, registration is necessary for sensitive products such as pharmaceuticals and toiletries.

In most countries, distinctiveness is necessary for a trademark. Some countries however, allow marks which are likely to become distinctive through a period of usage. To be eligible, the mark should be able to create a sufficient reputation and be recognised by consumers through usage. Registering such trademarks is typically more difficult and more costly than registering traditional trademarks and may need to be filed on a separate register.

When registering a trademark internationally, consider whether designations such as “Inc.” or “Co.” may be included. Consider whether a pictorial mark may be used, as pictures or designs are often useful in countries with low rates of literacy. Consider also whether the mark would be offensive in a particular jurisdiction or whether it has any negative connotations. The perfume “Opium” was originally considered to be offensive in Hong Kong. The word “mist” means “manure” in German.

In most countries the date of filing a registration determines priority with regard to multiple registrations of the same mark. In countries that are members of the Paris Convention, when the mark is registered once, any subsequent registrations in any convention country within six months, are given the same date of registration as the original filing.

When registering a trademark it is necessary to identify the wares and services that will be sold under that mark. In many countries, rather than itemising each product and service, the applicant may declare categories of goods or services. Costs of registration are often contingent on the number of categories that are selected. In Argentina, Brazil, China, Mexico, Pakistan, South Africa, Thailand, and Venezuela each category of goods or services associated with the trademark requires a separate application. Canada, the Bahamas and the British Virgin Islands do not use the classification system and each product or service associated with the mark must be itemized.

In some countries, an applicant must declare whether the application is based on prior use, intent to use, making known or use and registration in a foreign country. However, France,

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20 Ibid.
21 Ibid.
22 Ibid.
23 Ibid.
24 Courtesy of Marco Hero, TIGGES Rechtsanwälte Partnerschaft, Zollhof 8, 40221 Düsseldorf, online: <www.tigges-info.de>.
25 Carnegie, ibid.
Hong Kong, Israel, Japan, Russia the E.C., Argentina, Australia, Chile and China do not need to declare on what basis they are entitled to registration. In such countries, particularly where a showing of ownership is either easily accomplished or not recognized, it is not uncommon for trademark pirates to register well-known foreign marks either to prevent their use or to sell the marks at substantial prices back to the rightful owners.

If the trademark owner has not registered or used a trademark in a particular country, his/her rights may not be enforceable in that country. Some countries treat local trademarks distinctly from foreign trademarks, even though the Paris Convention requires equal treatment of all trademarks. Also, not all countries have ratified the Paris Convention; for example Kuwait is not a member of the Paris convention and therefore the priority system of registration has no bearing in Kuwait and Kuwait need not enforce the ownership of foreign trademarks as zealously as it enforces marks owned by Kuwaitis.

If the owner of a trademark does not use the mark for a period of time after it is registered, other parties may apply to have the ownership revoked. The length of time that constitutes non-use enabling revocation varies by country. In Nigeria, Bolivia, Canada, China, Columbia, Cuba, Ecuador, Hong Kong, Indonesia, Israel, Jamaica, Japan, Korea, Malaysia, Mexico, New Zealand, Nicaragua, Peru, Philippines, Russia, Taiwan, Thailand, Ukraine, U.S., and Venezuela the owner has three years in which to use the mark. In most other counties the trademark is protected for five years of non-use but the Cayman Islands, Chile, Jersey, Syria and Uruguay do not require the owner of a trademark to use it within any particular time.

Most civil law and British Commonwealth countries have adopted the Registered User Procedure by which the owner and the licensee of a trademark must file documents with the Trademarks Registrar stating the terms of their relationship. It is up to the registrar, upon review of the terms of the license, to determine whether the licensee should be a registered user of the trademark. Algeria, Argentina, Bolivia, Brazil, China, Columbia, Cuba, Czech Republic, Ecuador, Egypt, Georgia, Indonesia, Israel, Japan, Latvia, Lithuania, Mexico, Monaco, Nicaragua, Paraguay, Peru, Philippines, Portugal, Romania, Russia, Slovakia, Thailand, Tunisia, Ukraine, Venezuela, Vietnam, and Zimbabwe require agreements licensing trademarks to be registered.

Some common law countries such as the U.K. and Australia provide common law actions for the protection of unregistered trademarks. However, registered marks may be more easily protected.

In Georgia, it is common to find unlicensed software in use in businesses and even in the government. Internet service providers host websites that contain unlicensed material. The customs department has developed a new register to identify counterfeit goods at the border.

In Kuwait, foreigners (including companies and other juristic personalities) who are nationals or residents of countries that give Kuwait reciprocity are permitted to register patents in Kuwait. The patents are valid for 15 years, renewable for a further five years. Anybody may apply for

26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.
30 Ibid.
the registration of a trademark and those marks are valid for ten years, and renewable for a further ten years.32

In the UAE, trademarks are protected for ten years. A registered mark that has been in undisputed use for five years cannot be challenged. The UAE classes of trademark do not include alcohol as a category. Trademarks are retroactively protected as soon as they are registered. Unregistered trademarks are protected under passing-off legislation. Trademarks may be sold, mortgaged and licensed.33

Venezuela does not automatically recognise foreign patents, trademarks, or logos so foreign investors should be sure to register patents and trademarks appropriately and in as many categories as are applicable. The agent or distributor of the franchisor should not register the intellectual property in their name as that makes them the registered owner. Venezuelan law recognises use of a trademark in any of the Andean Pact countries (Bolivia, Colombia, Ecuador, Peru and Venezuela). So to be cancelled for non-use, the mark must have been out of use in all of those countries for three consecutive years.34

B. Foreign Labor

The issue of the movement of people across borders has three important levels of concern for a franchisor. First, representatives of the franchisor need to spend time in the foreign country initially to investigate the market, identify franchisee candidates (for master rights or otherwise), possibly for negotiations, and then for training and assistance to the franchisee(s). Second, depending upon the availability of an appropriately skilled labor force, the franchisor may need to be concerned about the ability of the local franchisee(s) to import additional human resources to operate successfully. Third, the franchisor must be able to have its designated personnel travel to the foreign country and possibly work there for some period of time. In the event of major difficulties, the franchisor must always be prepared to assist or even take over the operations completely.

Foreign investors who wish to bring in skilled personnel into Belize from abroad may do so, provided they also establish appropriate training programs to prepare Belizean nationals for such jobs in the future.35

In Kuwait, the employer is responsible for obtaining a work permit for their foreign employees and must ensure that the employee has it in his or her possession before arriving in Kuwait. Travellers arriving in Kuwait without a visa are placed on the next flight out of the country. The employer must undertake to employ the foreigner only in the job specified in the work permit. Residents of Kuwait must carry a civil identification card with them at all times.

Americans visiting Libya require visas, however, visa holders may still be refused entry to Libya.

if the American holds an Israeli passport or a passport containing a visa for Israel, is not
carrying at least US$500, or is a woman or child travelling without a No Objection Certificate
from the Libyan immigration department, unless the woman or child is met at the airport by their
husband, father or resident relative.36

Malaysian law allows companies to employ foreign nationals where there is a shortage of
qualified Malaysian talent. In any event, however, they are also allowed to employ a certain
number of foreigners in “key posts.” A company with foreign paid up capital above two million
US $ is allowed five expatriates – including those in key posts. Key posts will also be
considered where the foreign paid up capital is equal to 500,000 Malay Ringits. 37

In the Netherlands, to show that a job cannot have been filled by a Dutch or EU employee,
employers must advertise the job for five weeks in the Centre for Work and Income before
applying for a work permit for a non-Dutch and non-EU worker.38

Pakistan has a list of countries whose citizens must register with the Pakistani police despite
having been issued work visas for Pakistan. People employed in managerial positions from
countries on that list are exempt from registration with the police, unless they are Indian.39

The Russian government uses a quota system to determine the number of foreigners who may
be employed in Russia.40

Venezuela has no restrictions on bringing in skilled management or technical personnel from
abroad. However, no more than 10% of employees of a company in Venezuela may be
foreigners. Salary payments to foreigners cannot exceed 20% of a company’s entire payroll.41

Foreign visitors to Vietnam may find that they are placed under surveillance by Vietnamese
internal security personnel. The Vietnamese government has seized passports and blocked the
departure of foreigners involved in commercial and legal disputes in Vietnam.42

C. Domestic Labor

Domestic labor is often a very significant part of the overall costs in running a successful
business. To determine the viability of the franchisor’s business model in the foreign country, it
is often vital to ascertain, not only the availability of a labor force with the needed qualifications,
but also the cost of such labor in running the business.

This may be a challenge for a franchisor because of varying minimum wages levels, social
security contributions, guaranteed bonuses, severance payments, employee profit sharing or

Guides to Doing Business
<http://uk.sitestat.com/bakertillyinternational/bakertillyinternational/s?Doing_Business_in_Malaysia-
Apr06&ns_type=pdf>.
38 HLB International, Doing Business in the Netherlands (HLBI, 2005), online:
39 HLB International, Doing Business in Pakistan (HLBI, 2005), online:
40 HLB International, Doing Business in Russia (HLBI, 2005), online:
<http://www.hlbi.com/dbifiles/Russia.asp>.
41 HLB International, Doing Business in Venezuela (HLBI, 2005), online:
42 U.S. Department of State, Vietnam, online: <http://www.state.gov/p/eap/ci/vm/>. 
obligations to provide day care or meals. The franchised business may not operate as anticipated because the employees are entitled to work shorter hours during holy months, or to stop work when the temperature is extremely high. A franchisor may face unique situations regarding the operation of the franchise because of legislation governing vacation, parental leave, termination of employment, or worker safety. When selecting a country for expansion, a franchisor may want to consider the power of employees or unions under local law.

All salaried employees in Austria are under a noncompete obligation, prohibiting them from participating in their employer's line of business after they leave their job, unless they have negotiated an agreement allowing them to do so. Austrian employees are entitled to a month's salary as a vacation allowance and a month's salary as a Christmas bonus (14 salary payments per year). They are also entitled to a maximum of two years parental leave. By law, employers may terminate their employees without reason if they employ less than five people and they comply with certain notice and severance payment requirements. If there are more than five employees, this type of dismissal may be contested in front of the labor court. Pregnant and handicapped employees and those undertaking military service cannot be dismissed without cause.43

By Chilean law, companies employing 20 or more employees must provide a room, apart from the normal working area, where female employees may feed their children and where children under the age of two may be left while the mother is working. Unions in Chile cannot receive any form of finance from the companies in which their members are employed.44

Costa Rican law entitles employees to a bonus equivalent to one 12th of annual pay, payable in December and this “13th month salary” is known as the Christmas bonus. In Costa Rica, severance payments are calculated as 5.33% of actual salary for each year of continuous service, up to a maximum of eight years.45

In Ecuador, workers are entitled to two bonuses during the year – the “scholarship bonus” and a Christmas bonus. The Christmas bonus is equivalent to one month’s wages. Employees who work on weekends receive an overtime premium, equivalent to 100% of their hourly rate. All written contracts – whether they are full, part time or occasional - must be registered with the labor inspector. Employers must contribute one month of each employee’s salary to a social security fund each year. Ecuadorians get six days vacation a year plus nine national holidays.46

France provides incentives in the form of reduced social security contributions to companies who will employ young people or those who recruit from disadvantaged areas. Overtime in France is typically at a rate of 25% above the normal hourly wage. French employees receive five weeks vacation a year. French employers must pay 45% of each employee’s gross salary for social security.47

Greek employees receive half a month’s salary for holiday pay, half a month’s salary as a bonus at Easter and up to a month’s salary as a Christmas bonus. A corporation employing over 200 people is given a maximum number of employees that it may dismiss in a month: from four to 30 people. Corporations employing between four and 200 people may dismiss a maximum of four employees in a month. Greek employees are entitled to four months maternity leave, but the employer is responsible only for the mother’s salary for the first month of leave; the government pays the salary for the other three months.48

Malaysian law states that overtime work on public holidays is to be paid at a rate of three times the normal wage. The Malaysian Employment Act prohibits termination of employment for cause without an inquiry. The age of retirement in Malaysia is only 55.49

In the Netherlands, an employee may be terminated only for cause or with the approval of the Centre for Work and Income or by dissolution of the employment contract by a court. Approval and dissolution are only available where the employer may show economic necessity for the dismissal or a material change in circumstances. The employer is still required to pay severance, despite approval or dissolution. Termination of an employment contract is often not permitted during pregnancies or illness. 50

In Nicaragua, severance payments top out at one month for each year worked up to a maximum of five years of employment. Business groups say that this gives workers an incentive to seek dismissal once they have completed five years at a company. Nicaraguans are also entitled to a Christmas bonus of one month’s salary. Nicaragua’s Labor Code requires that employers demonstrate just cause and obtain approval from the Ministry of Labor before laying-off workers. However, these requirements are by-passed if the employer pays double severance benefits. Minimum wage is renegotiated every six months and the minimum varies by sector of the economy!51

In Nigeria, an employee’s gross pay is defined as the sum total of basic pay, housing (rent) allowance and transport (vehicle) allowance.52

In Pakistan, minimum wage rates are determined by the employees’ level of skill. There are 13 different categories of skill, each with its own rate. Pakistan has a Companies Profits (Workers’ Participation) Act which requires companies to pay 5% of their profits each year into a fund which is allocated among its employees. Where 250 or more employees are employed by a company, the Canteen Rules Act requires that canteen facilities be provided to employees.53

Saudi Arabian law does not permit the formation of labor and trade unions. Saudi Arabian law stipulates that a weekly maximum of 48 hours may be worked; except in the holy month of Ramadan when the maximum may not exceed 36 hours a week. Companies in Saudi Arabia are required to make social insurance contributions only for their Saudi Arabian

51 U.S. Department of State, Nicaragua, online: <http://www.state.gov/r/pa/ei/bgn/1850.htm>.
employees.\textsuperscript{54}

**Singapore** spends 20\% of its national budget each year on investments in education. In Singapore, housing benefits are calculated at the lower of 10\% of the assessable emoluments or 10\% of the annual value of the property. As so many employees in Singapore are foreigners, there is an income tax provision targeting the taxable benefit of plane tickets “home”. As a concession to foreign employees, only 20\% of the cost of the leave passage is assessed on the employee. To attract foreign employees to Singapore, they receive the benefit of time-apportionment of income. This means that their taxable income in Singapore is reduced by an amount representing the portion of the year that they were not in Singapore.\textsuperscript{55}

**Sweden** is under the civil law regime, meaning that legislation and preparatory works are the most important sources of legal information. Case law has some significance, but not to the extent as under a common law regime. In the 1970s, there was a flood of legislation designed to protect consumers and the labor force. Most of that consumer protection is now in force in other European countries. A distinctive trait of the Swedish labor market is the unions and the collective bargaining agreements. The unions may and do boycott companies that refuse to sign collective bargaining agreements. In those cases, the unions coordinate their efforts to such extent that no services from other union members are performed at the boycotted company. This means that, for example, waste disposal does not work, no deliveries are made by union members, no outside repair personnel perform work. A boycotted company may not keep up its refusal of signing a collective bargaining agreement for long. When Toys R Us first came to Sweden, they refused to enter a collective bargaining agreement and were boycotted. It has taken many years for the brand to recuperate from the resulting badwill. There is no way to end a boycott with legal means and there is no assessment of whether the unions' measures are proportionate to its effects. Another distinctive trait of Swedish labor law are two acts - The Act on Co-Determination in the Workplace (Swedish - the "MBL") and the Act on Employment Protection "LAS". MBL provides for an obligation for every employer that has union employees within its workplace to negotiate with the labor union on material changes in the business. The employer must negotiate before he/she has taken any decision to change the business. In case law, a not so small trucking company that decided to purchase two new trucks was found in breach of the MBL because the company had failed to negotiate with the union prior to taking the decision to purchase. Under the LAS, an employer may only terminate an employee for good or just cause. Good cause may consist of either redundancy or personal reasons. The redundancy regulation is fairly straightforward, but to terminate an employee because of personal reasons is very difficult. In case law, an employer that fired four employees for taking a sauna bath during work hours was found to be in breach of the LAS and the employees were reinstated. If a franchisor wants to minimize risks, it should join an employer's confederation which will mean that the company will automatically become a party to any collective bargaining agreement (for better or worse). The franchisor may also anticipate that the union will contact it before taking extreme measures, to give it a chance to enter into a collective bargaining agreement.\textsuperscript{56}

In **Turkey**, overtime cannot exceed three hours a day or 90 days a year. An employee cannot

work overtime if the job is performed underground. Union agreements require benefits to be paid on births and marriages and generate heating and clothing allowances. Generally, to retire and receive a full “old-age pension”, the employee must have worked and contributed to the fund for 7000 days. Those who have worked underground need only have contributed to the fund for 5000 work-days.  

Typically, employees in the U.A.E. do not work from 1.00 pm until 4.00 pm but they work until late in the evening. Nearly 90% of workers in the U.A.E are non-nationals. Collective bargaining is not permitted in the U.A.E.; instead the contracts of workers in the service and industrial sectors are subject to review by the Ministry of Labor and Social Affairs. There is no legislated minimum wage. Manual workers are not required to work outdoors when the temperature exceeds 45 degrees Celsius (112 degrees Fahrenheit). Employers may petition to ban from the U.A.E. any foreign employee who leaves his/her job without fulfilling the terms of his/her contract. Workers’ jobs are not protected if they remove themselves from working conditions that they perceive to be unsafe. However, the Ministry of Labor may require employers to reinstate such employees after an investigation into the working conditions.

Employers in Uruguay may expect social security payments to increase the employer’s basic wage costs by 50%. Uruguay also has a mandatory 13th month salary. In addition, employers in Uruguay must pay employees 1/30 of a month’s salary for each vacation day.

Rural workers in Venezuela earn a lower minimum wage than urban workers. Workers who earn fewer than 75,000 Bolivars a month receive a transport bonus from their employer of 10,000 Bolivars a month. Workers are entitled to a bonus of 26,000 Bolivars for food, until their salary exceeds 150,000 Bolivars a month. Workers who earn less than 9,800 Bolivars are entitled to a lunch program – the employer has to provide them either with food or 18.25 Bolivars per meal. Venezuelan companies must distribute to their workers 15% of their liquid profits at the end of the year. This means paying a minimum of 15 days and a maximum of four months salary in profit sharing to workers. For companies with fewer than 50 workers or under one million Bolivars in capital, the maximum is two months salary. Companies that are required to pay 15 days of salary in profit sharing are those in which the invested capital does not exceed 60 monthly minimum wages. Profit sharing must be paid separately from the 12 monthly salary payments. Venezuelans receive a holiday bonus equal to seven days of salary plus one day for each year of employment, to a maximum of 21 days. Employers have to pay ‘double severance’ indemnities in cases of unjustified dismissal. This works as a defacto form of employment insurance. It means that increases in salaries necessitate an increase in the company’s severance pay fund, particularly when it is senior management that is receiving the pay increases. Any business with more than 20 workers is required to have an on site daycare centre or bear the cost of daycare for employees’ children until the age of six. Workers who earn over five times the minimum monthly wage are not eligible for this childcare service.

## D. Legislative Requirements / Obstacles to Doing Business

Foreign investments laws and regulations of certain countries impose restrictions on foreigners for the acquisition (or possession) of real estate and to acquire an interest in entities engaged in specific activities which may be reserved to the corresponding Nation or its

nationals. Likewise, there are obligations that must be observed by foreign investors to obtain authorization to do business in foreign countries. Such restrictions and obligations may have an impact within the franchising industry if for any reason the foreign franchisor is encouraged to operate or acquire the franchised business, even under temporary basis.

If a foreign company wishes to acquire a significant interest in an Australian business worth over AU$ 50 million, it must first obtain the approval of the Australian government. A foreign company must also obtain permission if it proposes to start a business with an investment of AU$ 10 million or more. If the foreign company wishes to buy, lease or finance an interest in land, it may also need permission – depending on the value and whether the land is developed. Not all Australian companies are required to submit their financial accounts to the Australian Securities and Investments Commission (ASIC), however if a company is the subsidiary of a foreign company it must file its audited financial statements with the ASIC. A branch of a foreign company is required to lodge with ASIC its balance sheet, cash flow and profit and loss statement and other documents that the company would have to prepare in its country of origin. Relief may be granted on application if the burden placed on the branch is greater than the compliance requirements placed on a similar sized, proprietary limited Australian company. Both subsidiaries and branches of foreign companies must lodge an annual report.61

In Austria, the name of a company must be derived from either the object of the company or from the name of one of its members. There are two tiers of board members necessary for an Austrian company. One is the supervisory board which is elected by the shareholders and it appoints and supervises the board of directors. Therefore, the executive and supervisory functions are distinct. The name of a branch office of a foreign enterprise must include the name of the parent company but it may have words added to that name.62

Companies in Belgium must be listed on the official trade register; to be listed, the person in charge of the daily management of the company must obtain a certificate of professional capability. That capability is proved by submitting diplomas or showing professional experience. Belgian corporate law allows 100% foreign shareholding and directors to be foreigners who live abroad. Companies that have their principal establishment in Belgium are considered to be of Belgian nationality, even if they are incorporated elsewhere. In Belgium, partnerships may be either civil or commercial. In its civil capacity, the liability of the shareholders is equally divided. In a commercial partnership, all shareholders have unlimited joint liability. As a branch is not a legal entity in Belgium, all liability in Belgium lies with the foreign parent company.63

Foreign businesses may incorporate in Brunei if at least half the directors in the company are citizens or permanent residents of Brunei. Even without a physical presence in Brunei, companies generally need a license to do business there.64

In France, a branch has no legal identity and neither its assets nor its liabilities are separate

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from those of the parent company.\textsuperscript{65}

In \textbf{Ireland}, a branch is formed where an overseas company establishes a place of business in Ireland without forming an Irish limited company.\textsuperscript{66}

In \textbf{Kuwait}, a national must own at least 51\% of the shareholding in a limited liability company. As Kuwait’s corporate tax applies only to non-Kuwaiti corporate bodies, limited liability companies are nontaxable. A joint venture in Kuwait may only transact business with third parties through one of the joint venturers and that venturer is personally liable for the transactions into which they enter. If the transacting venturer is a non-Kuwaiti, then the Kuwaiti venturer in the company must guarantee that transaction. If the joint venture transacts business in its own name, all the joint venturers have unlimited joint and several liability.\textsuperscript{67}

Unlike in America, foreign companies that want to register a corporate entity in \textbf{Libya} need permission from the Ministry of Economy and Trade to do so. Joint Ventures must be at least 51\% Libyan owned. All documents submitted for the purpose of obtaining permission must be originals, endorsed by authorities in the country issuing the documents and with an Arabic translation. US firms have had problems providing “acceptable” certification and authentication of corporate documents. US companies have had difficulty registering branch offices because Libya’s Israeli boycott law is in direct conflict with US legislation. Libyan authorities have been known to require companies to fill out the Israel Boycott Questionnaire before registering them – Americans who receive this document are required by law to report the action to the US Department of Commerce, Bureau of Industry and Security. Companies who want to register a branch office must show proof of 150,000 euros as capital. They must show 3/10 subscribed capital in the case of a joint venture.\textsuperscript{68}

Under the Companies Act of \textbf{South Africa}, this country makes no distinction between locally owned and foreign owned companies. South Africa uses the concept of a ‘close corporation’. Only natural persons may be members of such a corporation. There may never be more than ten members.\textsuperscript{69}

\textbf{Tunisian} legislation protects minority shareholder interests which gives Tunisian minority partners a great deal of interest. Many Tunisian businesses are family owned and, while they welcome foreign investment, they may be very reluctant to relinquish management control. Companies that do not deal in tourism require government authorisation if the foreign capital share exceeds 49\%. Generally, domestic trading may be carried out only by a company set up under Tunisian law, in which the majority of the share capital is held by Tunisians and

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\textsuperscript{68} U.S. Department of State, Libya, online: <http://www.state.gov/p/nea/ci/c2415.htm>.

management is Tunisian.\textsuperscript{70}

With the exception of companies located in the free trade zone, all companies in the UAE must be 51% owned by a UAE national. A business engaged in importing and distributing a product must be either 100% UAE owned distributorship or agency or a 51% UAE owned and 49% foreign owned by a limited liability corporation. Subsidies for manufacturing are available only to companies that are at least 51% owned by UAE nationals. All industrial projects must be managed by a UAE national or have a board of directors that has UAE nationals as a majority. Foreign principals may distribute their products in the UAE only through exclusive commercial arrangements either with UAE nationals or with entities wholly owned by UAE nationals. The maximum foreign investment in public/private joint stock companies and in limited liability companies is 49%. Articles of incorporation are often accompanied by “management arrangements”, however, which state that management and possibly commercial responsibility are entrusted to the foreign investor. The Ministry of Economy and Commerce has said that the licensing of new branch offices in the UAE will be very restricted. Non-UAE nationals may be involved in limited liability partnerships only as a sleeping partner. Many companies operate under the legal cover of a citizen of the UAE – the company leases a trade license from the UAE national for a fee. These “sponsorship arrangements” are not necessarily legal and are both risky and unsecured.\textsuperscript{71}

In Vietnam, foreign companies must obtain a representative office license, a branch license or a foreign investment license, depending on the selected corporate structure. It is advised that foreign companies should decide at the time of application whether they want to have more than one representative office in Vietnam as it is more difficult to obtain multiple representative office licences if they are applied for separately. In Vietnam, a “branch” is a 100% foreign owned business that operates in designated service centres. Branch offices are permitted to conduct business only in the export of handicrafts, processed and raw agricultural products, vegetables or fruit, industrial consumer goods, meat and processed foodstuffs and in the import of machinery for mining or agriculture and raw materials for medicine or fertiliser/ insecticide. Joint ventures and 100% owned foreign companies fall within foreign investment licences.

1. Advertising

It is well known that effective advertising is often one of the most important factors in the success of a franchise system. In addition to the cultural and linguistic differences in foreign markets, frequently there are also legal hurdles which must be overcome. Aside from intellectual property laws, some other administrative regulations must be observed depending on the type of advertising.

Brunei requires that advertising in all media conform to the country’s decency and moral standards and censors ensure compliance.\textsuperscript{72}

In Ghana, it is the supplier of imported goods that is expected to provide the distributor with

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advertising and promotional support.73

In **Libya** most advertising is through word-of-mouth. Advertising on billboards had to be in English until 2004. “Untranslatable concepts” were also banned from advertisements. These regulations have been alternately lifted and relaxed since 2004, with advertisements ultimately determined to be “illegal”.74

In **Tunisia**, advertising rates in broadcast media discriminate against foreign-origin goods. Advertising time for foreign goods may cost three or four times as much as for goods of Tunisian origin. Legally, the dominant portion of any storefront sign must appear in Arabic although French signs are also permitted. This legislation is enforced only sporadically. References to religion are generally not acceptable.75

Advertising in **Vietnam** is heavily regulated. There are limits on the money that companies may spend on advertising and these limits are tied to total sales figures. Companies have to be registered in Vietnam to place advertisements. Ads for liquor (not beer) and tobacco are banned in the mass media. To advertise pharmaceuticals, agri-chemicals, cosmetics and toiletries a company must obtain the approval of the relevant ministry and register the advertisement. The Ministry of Culture and Information must also approve all advertising content. The interpretation and enforcement of advertising regulations is arbitrary and unpredictable. Most foreign advertising firms are not allowed to sign contracts directly with newspapers or TV stations, and must instead use a local advertising firm as an intermediary. Decree No 24 states that ad campaigns on radio and T.V. cannot exceed eight continuous days. Films shown on T.V. may be interrupted only twice for advertising, with each interruption under five minutes. Other T.V. programs may be interrupted four times. The decree prohibits ads being shown immediately after the opening music or titles in news and documentary programs, although ads may be shown at those junctures in sports and light entertainment programs. The same decree provides that billboard advertising is generally prohibited because of its negative effect on the environment, urban planning, aesthetics and social safety. In Ho Chi Minh billboard ads are permitted only by the airport. Ads on umbrellas, scooters and roofs are permitted and do not require permits; however, they must comply with advertising regulations.76

2. **Labelling**

The labelling requirements of some countries may be challenging and costly. Often, mistakes with regard to printing of labels and obtaining certificates cannot be rectified after the fact. Labelling may also be an important factor when importing goods into certain countries.

Labels of all products sold in **Argentina** must be in Spanish with the exception of foreign words and phrases commonly used in trade. Imported products may retain the label of the country of origin and the Spanish label may be stuck on to the product.77

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74 U.S. Department of State, Libya, online: <http://www.state.gov/p/nea/cic/c2415.htm>.
Brunei requires that the expiry dates on all products be no less than three millimetres in height. Brunei imports more than 80% of its food — every one of those products must be labelled with the name and address of the local importer or distributor or agent. Any product that is to be labelled as “halal” meat requires approval from the Ministry of Religious Affairs. For food to be designated as halal, two Religious Affairs officers will go to the country in which the animals are slaughtered to ensure that the slaughtering procedure is in accordance with the custom. Their trip is paid for by the importers of the meat. Halal foods must be stored and processed separately to be certified as halal under the Halal Certificate and Halal Label Order of 2005.\(^78\)

In Egypt, it is permitted to label products using English dates but the words “produced” and “expires” must be written in Arabic. Meat or poultry must be packaged and sealed in bags and the labels must be inserted inside the package as well as on the outside. Products must fully occupy the space of the container in which they are packaged. If the product is packaged in a wooden container, the container should be accompanied by a certificate from an official source stating that it is free from harmful insects.\(^79\)

Products imported into Qatar must arrive with at least half their shelf life duration remaining. Production and expiry dates must be printed onto the manufacturer’s original label or container — affixing a sticker with the dates is not acceptable. However Qatar enforces shelf-life standards set by the GCC (Cooperation Council for the Arab States of the Gulf) for 170 food products. Food labels must have the country of origin on them and the net weight must be shown, in metric units.\(^80\)

### 3. Currency Controls

Currency controls may create a number of problems for franchisors expanding internationally, including restricting the repatriation of royalties or lengthening the time that a franchisor may have use of the money. Where goods are being purchased from abroad with foreign exchange, there are often rules requiring the goods to arrive before payment may be made.

Australia requires that international currency transfers of AU$50,000 be reported under the Cash Transactions Reports Act. The purpose is to control tax evasion and money laundering and the government will not use the information to inhibit currency transfers associated with legitimate trade.\(^81\)

The Bangladeshi Taka is fully convertible for current account transactions. Nonresidents may open a Taka or foreign currency bank account with foreign exchange brought into the country and those balances may be fully repatriated. Foreign investors may repatriate the sales proceeds, including capital gains, of shares of a company traded on the Bangladesh Stock Exchange, if the shares were bought through a nonresident bank account. If the company is not traded on the stock exchange, the Bangladesh Bank must provide permission to repatriate the


funds. Branches of foreign firms are free to remit their post-tax profits. These remittances are treated as dividends. Foreigners employed in Bangladesh may, with the approval of the government, remit 50% of their salary, actual savings and their retirement benefits.\(^{82}\)

The Egyptian government is committed to maintaining profit repatriation systems. Banking Law 88 of 2003 regulates the repatriation of profits and capital. The system requires banks to open foreign and local currency accounts for foreign investors which are exclusively maintained for stock exchange transactions. The two accounts serve as a channel through which foreign investors process their sales, purchases, dividend collections, and profit repatriation transactions, using the bank’s posted daily exchange rates. Transactions are cleared within two days.\(^{83}\)

In Japan, companies may freely exchange foreign currency. However, the transfer of funds abroad must take place through regulated channels as it is classed as an exchange transaction and requires ministerial permission.\(^{84}\)

In Korea, it is important to become an approved Foreign Investment Promotion Act investor, as that guarantees unlimited remittance of profits. Ministry of Finance and Economy regulations permit foreign companies to remit dividends and repatriate capital through authorized foreign exchange banks after governmental approval has been obtained.\(^{85}\)

To repatriate income from India, a foreigner may open a Nonresident Rupee account. The account may be in the form of savings, current, recurring or fixed deposit accounts, opened by inward remittance of funds in foreign exchange. Interest on these accounts is tax exempt and the balance may be freely repatriated. Foreign currency accounts may be held only by non-residents and individuals or legal entities from Bangladesh or Pakistan must obtain permission to open such an account. The account may only be in the form of term deposit, for terms of between one and three years. Interest on these accounts is also tax free.\(^{86}\)

Bank transfers in Liberia may take place only after the funds have been in the account from which they are being transferred for three days.\(^{87}\)

People with Libyan residence permits may hold foreign currency in Libyan accounts. Withdrawals are limited to 5,000 US$ in cash or 10,000 US$ in travellers cheques. To export US$, a receipt from the bank of purchase is required. It is illegal to import or export Libyan currency.\(^{88}\)

In Nicaragua, bank letters of credit are the most common and secure method of payment in

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\(^{88}\) U.S. Department of State, Libya, online: <http://www.state.gov/p/nea/ci/c2415.htm>.
international trade although small transactions are often handled through advance payment via
bank transfers. A legal parallel exchange system operates free of government restrictions.
Remittance of capital and profits from foreign investment is guaranteed if the investment was
registered in compliance with the Foreign Investment Law. Capital and profit from unregistered
investments may still be remitted through the parallel market and are not guaranteed.89

Nigeria makes foreign exchange available only for ‘eligible transactions’ which are a short list of
transactions through which foreign exchange may be officially purchased. A bid must be
placed at the Foreign Exchange Market to purchase foreign exchange; local currency must be
deposited ahead of time, in case the bid is successful. The release of the foreign exchange will
depend on the time needed for the documentation to be completed and the goods to arrive in
Nigeria. Foreign currency may also be bought at Bureau de Change, though at a higher rate.90

Generally, all transactions conducted in Poland must be in Polish Zloty. Foreign exchange
transactions typically require a permit issued by the Ministry of Finance.91

The Sri Lankan government regulates capital account transactions in foreign currency, i.e. the
sale or purchase of a capital asset. Current account transactions have been liberalised.92

Tunisian law prohibits the export of currency as payment for imports before customs authority
documents are presented to a bank showing that the merchandise has entered Tunisia. Letters
of credit authorising payment against documents may sometimes bypass this requirement.
There is ambiguity as to whether foreign companies are allowed to receive payment in foreign
currency for services to customers resident in Tunisia.93

Foreign currency may not be remitted to Turkey and converted into Turkish lira unless the legal
formalities for ultimate repayment have been completed first. Any deficiencies in the formalities
and documents may not be rectified later. With some exceptions, foreign currency or Turkish
lira revenues derived from exports must be transferred into the country within 180 days. One
exception is where at least 70% of the foreign exchange from exports is brought into the country
and sold to a bank within 90 days, in which case the exporter is free to dispense with the
remaining 30% as it chooses. If foreign currency payments for exports are not brought into the
country until the stipulated period, any positive difference arising between the official rate of
exchange on the final day of the period (even if extensions have been granted) and the rate of
exchange on the day when the foreign exchange is sold is not paid to the exporter but is instead
passed to the Support and Price Stability Fund.94

Investments in Venezuela are registered in U.S.$ so that the base upon which dividend

89 Alvarado y Asociados, Guide to Doing Business: Nicaragua (Nicaragua: Lex Mundi, 2006), online: Lex Mundi
Jun06&ns_type=pdf>.
91 Wardynski & Partners, Guide to Doing Business: Poland (Poland: Lex Mundi, 2006) online: Lex Mundi Guides to
Doing Business
Service, 2007) online:
94 Pekin & Pekin, Guide to Doing Business: Turkey (Turkey: Lex Mundi, 2004), online: Lex Mundi Guides to Doing
remittances are calculated is not lowered by a devaluation of the Bolivar between the date of the investment and the date the remittance is made. Dollars may be bought on the free market at the rate prevailing on the date on which the repatriation is made.95

The State Bank of Vietnam has conditions on opening bank accounts, conversion of Vietnamese Dong into foreign currency and remittance of foreign currency out of the country. Foreign businesses are allowed to remit profits, shared revenues from joint-ventures, income from services and technology transfers, legally owned capital and properties in foreign currency. Foreigners are also permitted to remit abroad royalties and fees paid for the supply of technology and services, principal and interest on loans obtained for business operations, and investment capital and other money and assets. But their ability to convert Vietnamese Dong into other currencies is subject to availability, which may create problems for U.S. franchisors. Approval by investment authorities is needed to increase or decrease the capital of a foreign invested business. The government assumes that foreign companies are self sufficient for their foreign exchange needs. However, the government guarantees assistance to foreign companies that invest in the construction of infrastructure.96

4. Import Restrictions / Tariffs

There are franchise systems in which an important portion of their operation is related to the supply of goods, their quality and that of the corresponding providers, which in several cases are based in the home country. In consequence, any tariff restrictions on the import of goods into the country where a franchise may be granted must be carefully analyzed before implementing an international expansion to avoid a potential problem. On the opposite side of this scenario, there are certain countries with which the United States has entered into free trade agreements or other arrangements to promote and protect foreign investment, which may facilitate the import of goods from a tariff and nontariff restriction standpoint.

The law in Argentina requires prior governmental approval for imports of pharmaceuticals, food, insecticide, cosmetics, toiletries and other ‘sensitive’ goods. Commercial invoices must be completed in Spanish.97

Food and goods for industrial use are generally exempt from import duties when imported into Brunei. Computers are also tax free. The average tariff rate for most favoured nations is 2%. In addition to the Hazard Analysis Critical Control Point (HACCP) certificate, suppliers must produce a list of all ingredients and certify that the products do not contain alcohol or any derivative from slaughtered animals.98

In Egypt, foreign motion pictures are subject to a screen quota and distributors are allowed to import only five prints of any foreign film. Egyptian labor law prohibits foreigners from being employed as export and import customs clearance officers. For a shipment to be accepted at Egyptian Customs a number of documents must be presented and one of these is a letter of

Since 1999 all banks must ensure that letters of credit are covered 100% in cash by the importer of goods. In general, the exporter may not ship the goods before the Egyptian bank has been notified of the opening of a letter of credit. If the goods are shipped before the letter of credit is opened, the importer runs the risk of being fined up to a maximum of the value of the goods. If the importer does not bear the cost, the exporter will have lost the value of such a shipment and the delay at customs may cause the goods to spoil. As under-invoicing is common in Egypt as a manner of avoiding tax, the Customs Authority’s tariff valuations are based on either the worldwide price list received annually from foreign producers / distributors or on the highest price available in the local market. Where under-invoicing is suspected, the customs officials add between 10% and 30% to the invoice value. Importers may take legal action against the Customs Authorities, including arbitration but, while that is going on, the disputed shipments are withheld and the importer must pay the fees as a deposit until the arbitration is concluded. Current importing regulations require that every component of a product be inspected regardless of the compliance history of the product, country of origin or exporter.\textsuperscript{99}

Imports to \textbf{Tunisia} from the EU are mostly exempt from import duties, which give EU goods a price advantage over American goods. Imports may be subject to tariff rates over 200%. Goods are also subject to a customs formality fee which is equal to 3% of the duty paid on the imported goods. Consumption tax is applicable to some imported goods, with rates varying from 10% to 700% on luxury items such as champagne. Import licences, tariffs and quotas are typically applied to consumer products that compete against locally produced goods. When a foreign drug, similar to one produced in Tunisia, appears on the Tunisian market, the Tunisian manufacturer may have the importation of the foreign drug suspended. The government’s use of nontariff barriers to import has on occasion caused goods to be delayed or rejected when they are shipped to Tunisia. This is not specifically targeted at US products, nor does it happen frequently.\textsuperscript{100}

\textbf{Turkey}, as a member of the European Customs Union has no customs charges for goods imported from Europe – which makes US products more expensive by comparison.\textsuperscript{101}

Imports into \textbf{Uruguay} that arrive on foreign registered airlines are subject to a 4% \textit{ad-valorem} tax. Freight that arrives on the national airline – Pluna Varig – is exempt from the tax. US carriers are also exempt from the tax because of a civil aviation agreement between Uruguay and the United States.\textsuperscript{102}

\section*{5. Technology Transfer}
Transfer of technology in some countries is an essential element of the franchise definition, but together with a trademark license, it is in fact a common component of a number franchise systems. Transfer of technology may have intellectual property, tax and other regulatory implications which require legal analysis.


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In **Argentina**, all contracts that are designed to facilitate the transfer, assignment or granting of licenses for foreign technology or brands of non-Argentinean residents to be executed in Argentina must be registered with the National Institute of Industrial Property for information purposes. There are no penalties for not making such registration but the amount of the contract will not be tax exempt and the foreign party to the corresponding agreement will have to pay taxes on the total amount received, with no deductions for expenses. Contracts must be submitted in Spanish or in other language but accompanied by its corresponding translation.  

In **Brazil**, technology transfer agreements, including those involving patents and trademarks, must be approved by and registered with the National Institute of Industrial Property. This approval depends on whether the services are necessary and whether the technology is available within Brazil. If the licensing company wishes to receive royalties, it must show that the related patent or trademark is registered and valid in Brazil in order to receive the Institute’s approval. Where the contract is for technical assistance, the Institute has the right to verify that the services have been effectively rendered.

The government of **China** is concerned that because of intellectual property considerations and the lower technical level prevailing in the China market, foreign companies will attempt to license older technology to Chinese businesses, promising higher-level access at some future date or in the context of a future joint venture arrangement. As a result, licensing contracts must be approved by and registered with the Ministry of Commerce (formally, the Ministry of Foreign Trade and Economic Cooperation) and a tax of 10-20 percent (depending on the technology involved and the existing applicable bilateral tax treaty) is withheld on royalty payments.

There are regulations restricting the transfer of technology when it is not freely available in **Ghana**. The transfer is governed by the Technology Transfer Regulations of Ghana. To the extent that provisions in the agreement between the parties are inconsistent with Ghanaian regulations, they are unenforceable in Ghana.

To encourage the transfer of technology, the Pioneer Status Scheme in **Mauritius** provides companies with technology and skills above the Mauritian average with incentives. They may export and sell locally without any restrictions, their corporate tax is 15%, they pay no tax on dividends, they may freely repatriate their profits, dividends and capital and there is no customs duty or sales tax on scheduled equipment or materials. Mauritius has a scheme providing incentives to companies who wish to establish regional headquarters in Mauritius and who have a minimum share capital of one million Mauritian Rupees.

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In **Vietnam**, under a decree governing technology transfers, the government restricts the level of royalties that may be paid to foreign franchisors to a maximum of 5%.

### E. Financing

The ability of franchisees to raise money is crucial to a franchisor. As such, a franchisor must thoroughly understand not only the methods and challenges in raising money in a foreign country, but also the likelihood of an investor deciding that particular franchise would be a good investment.

It is possible to list a foreign company on the **Chinese** stock markets but the banking and capital markets are poorly managed. People continue to place money in banks because there is a general belief that the government would not allow any large financial institution to fail. As the Chinese Huan is not convertible under the capital account, China has had to create exceptions to the rule to encourage financial investment from abroad. Foreign financial entities may invest in China via domestic securities companies in certain shares and repatriate profits and principal if the financial institution is stable with good credit standing and meets risk and asset scale requirements. The institution must also be located in a country with a legal and regulatory system, and its securities regulating authority must have agreed to regulatory cooperation.

Although there are almost no direct subsidies to businesses in **Denmark**, developmental grants are available to businesses in five areas. The Nordic Investment Bank may finance foreign investment in the Nordic and Baltic states. For certain projects, the Investment Fund for Central and Eastern Europe will provide partial financing – so long as the project is also being financed by a Danish business partner. This financing comes with the condition that a member of the fund must be able to sit on the board of directors. The Copenhagen Stock Exchange will list companies only with an established record and substantial market value. Other markets in Denmark have less stringent listing and disclosure requirements.

Raising capital in **Ghana** is extremely difficult; bank loans have interest rates of over 25% and treasury bills bear interest at a rate of 17%. The largest bank in the country has a net worth of about $US 50 million. Forty-five percent of all private sector financial savings are estimated to move through informal channels. Moving the money from the informal sector to the formal sector has proven to be difficult however, partly because of Ghanaians mistrust of formalized banking systems.

The Ministry of Finance reviews all inward investment in **France**. If the investor is an EU national and has an EU majority among its directors and shareholders, the investor must simply inform the Ministry of the size and nature of the investment to be realized and the funds that will be raised. If those criteria are not satisfied, the investor must wait for the approval of the

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While some sectors of the economy in India allow 100% foreign direct investment (such as hotels and advertising), others have limits and still others (such as real estate and print media) do not allow foreign investment at all. FDI is not allowed from Bangladesh or Pakistan. FDI may also be used to buy shares or debentures of an Indian company. Nonresident Indians and persons of Indian origin cannot repatriate funds invested in certain sectors.\(^\text{113}\)

To stimulate the Kuwaiti economy and labor market, purchases by the Kuwaiti Government from foreign contractors trigger offset obligations. This means that 35% of the value of the contract bought by the Kuwaiti Government must be invested in Kuwait by the foreign contractor within eight years. To trigger the offset obligation, the money spent by the Kuwaiti Government must exceed one million Kuwaiti Dinars if it is contracting with a foreign defence company and ten million Kuwaiti Dinars for all other contracts.\(^\text{114}\)

Companies already listed on foreign stock exchanges may have their securities traded on the Maltese Stock Exchange through an introduction by a broking firm. Rights issues, auction placing or further offers for sale may then be used to generate more capital. Malta Enterprise is a governmental organisation which provides tax incentives and grants to encourage foreign investment. To be eligible, the company must be incorporated and reside for tax purposes in Malta and its business must be largely within Malta.\(^\text{115}\)

To list on the Kuala Lumpur Stock Exchange, foreign incorporated companies must show that their listing will benefit Malaysia or that they will provide a steady income stream for their Malaysian investors through dividends.\(^\text{116}\)

The total assets in the Nicaraguan financial system totalled $2.5 billion in 2005. Long-term loan rates were at 10.78% in such year. All loans denominated in Cordobas include maintenance of value provisions which index the loan to the exchange rate with the US$.\(^\text{117}\)

The Saudi Industrial Development Fund is a main financier of private industry in Saudi Arabia. Its loans may account for up to 50% of the cost of a project, are long term and are offered at a low cost. The National Industrialisation Company participates in joint venture project proposals from companies that want 30-50% equity participation in new industrial joint ventures.\(^\text{118}\)

Business entities that are more than 75% owned or controlled by nonresidents of South Africa

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have restrictions on their power to borrow locally.\textsuperscript{119}

In Turkey, the equity participation ratio of foreign shareholders is restricted to 20% in broadcasting and 49% in aviation, as well as in many value added telecom services.\textsuperscript{120} Companies which are deemed to contribute to the industrial and/or social development of Turkey receive a certificate which entitles them to certain benefits. There is an investment allowance which discounts expenses relating to buildings, machinery, equipment, freight and installation by 40% such that 40% of fixed investment costs may be deducted from future taxable profits. If it is capitalized this benefited amount is not subject to tax. If an investor operates in a province of Turkey that has a GDP per capita below a prescribed amount, and employs at least ten people, the investor may benefit from a maximum of 50% reduction in electricity expenses. To be eligible for these and other investment incentives, the investment must be at least 200 billion Turkish Lira or 400 billion Turkish Lira depending on the region in which the investment is made and there must be a minimum equity rate of 20%. The certificate provides investors with exemption from some customs duties and levies, VAT deferral for machinery, exemption from some taxes, and subsidised credit facilities.\textsuperscript{121}

There are no investment or merchant banks in the UAE. Commercial banks do not deal in medium-term or long-term industrial finance and are discouraged from providing finance in the form of equity capital. Commercial banks do, however, provide working capital for the industry. The Emirates Industrial Bank provides investment capital mostly through loans but also through the equity of industrial enterprises. Bill discounts may be arranged with the commercial banks. The concept of factoring is not used in the UAE. Investors in the UAE are not subject to corporate tax, nor to personal income tax. Dubai Investments PJSC may provide equity participation in private developments.\textsuperscript{122}

\textbf{F.\quad Tax}

The tax analysis of any potential international expansion is essential. This is especially true if according to the tax effects or consequences that may derive from payments to be made by franchisees, franchisors’ budgets and estimated earnings could be affected, or if any tax withheld by the franchisee could be credited by the franchisor based on international tax treaties between the home country and the country of the franchisee. Likewise, if a franchisor is willing to develop company owned units in a foreign country, it must determine the most effective tax structure.

In Australia, companies are taxed at a flat rate of 30%. They are also required to be registered for the Goods and Services Tax (GST) if they carry on an enterprise and the annual turnover exceeds A$50,000 per year (A$100,000 per year for not-for-profit bodies).\textsuperscript{123}

Except for companies operating in the Oil & Gas sector in Bahrain there are no income or profit taxes levied on business entities. The income tax rate for the Oil & Gas sector is 46%. There

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\textsuperscript{121} \textit{Ibid}.
\end{flushleft}
are also no personal taxes in Bahrain, but social security contributions are compulsory on business entities having ten or more employees, and are based on the total monthly salary paid to the employee.124

Companies operating in some regions of high unemployment prescribed by the government in Bulgaria are exempt from corporate income tax provided they invest their tax saving in manufacturing activity within a period of three years.125

Companies with foreign investment in China are taxed at 30% on their taxable income, plus local tax computed on the taxable income at the rate of 3%. Foreign invested companies in China may apply for tax exemption for three years starting from the year they generate profits and for a 50% tax deduction for the additional two years after the three year tax exemption period.126

In Cyprus nonresident companies are exempt from tax. Residency is determined by the location in which management and control is exercised.127

Denmark has a favorable regime for holding companies because they are typically not taxed on income received from foreign subsidiaries, or on capital gains from the sale of shares in foreign subsidiaries provided they have been held for at least three years. The 28% withholding tax on dividends paid abroad is eliminated for intermediate holding companies paying dividends to foreign shareholders owning 20% or more of the paying company.128

Companies in Egypt pay tax on their profits at 20% unless they are an oil company, in which case they are taxed at the rate of 40.55%. The following industries are exempt from tax for a period of ten years: land reclamation or cultivation, poultry production, bees breeding, cattle breeding, and fisheries.129

Companies that are ordinarily resident in Gibraltar but whose total income or profits derive from activities outside Gibraltar are not taxed. It should be noted, however, that exempt company status is being phased out and existing companies will cease to have this concession by 2010.130

There are free trade zones in Piraeus and Salonica (Greece), and at Iraklion in Crete where there is a 100% tax exemption.131

In Hong Kong unincorporated businesses are taxed at 16% and corporations at 17.5% on their profit. Most notably, there is no social security tax and there are no sales or value-added taxes.132

124 Baker Tilly International, Guide to Taxes in Europe, the Middle East, and Africa (Baker Tilly, 2005), online: <http://uk.sitestat.com/bakertillyinternational/bakertillyinternational/s?Guide_to_Taxes_in_Europe_the_Middle_East_Africa-2005-06&ns_type=pdf> [Guide to Taxes in Europe, the Middle East, and Africa].
125 Ibid.
126 Guide to Taxes in the Asia Pacific Region.
127 Guide to Taxes in Europe, the Middle East, and Africa.
128 Ibid.
129 Ibid
130 Ibid
131 Ibid
132 Guide to Taxes in the Asia Pacific Region.
Corporations and firms in India are taxed at an effective rate of 35.88% on their profit and foreign (nondomestic) companies are taxed at 41%. Income arising out of investments made in infrastructure projects including power, telecommunication, construction, and developing of a special economic zone is specifically exempt from tax either partially or fully.\textsuperscript{133}

Resident Isle of Man companies engaged in manufacturing, shipping or films are not taxed, in other trading and service activities at 10%, and in investment activities at 18%. Dividends are treated as deductible expenses.\textsuperscript{134}

There are no personal taxes in Kuwait and most Kuwaiti companies are exempted from tax on their profits. Foreign companies are taxed on their profits from Kuwaiti sources at rates which depend on the level of profits, ranging from 5% where profits are between KD 5,250 and KD 18,750, to 55% where profits are in excess of KD 375,000.\textsuperscript{135}

There is no capital gains tax in Malaysia and special tax incentives are given to companies for setting up operations in the Multimedia Super Corridor (MSC) or setting up International Procurement Centers in Malaysia.\textsuperscript{136}

There is a tax exemption for a period of three years in Montenegro for profits invested in undeveloped regions. In addition, an amount equal to gross salaries paid to employees hired during the year may be deducted from income tax payable.\textsuperscript{137}

In Norway, companies are exempt from tax on dividends received and profits from the sale of shares.\textsuperscript{138}

Significant tax incentives may be available in Poland for investment in specific economic zones and areas of high unemployment. Tax relief of up to 50% (large companies) or 65% (small and medium-sized companies) of eligible investment costs is potentially available, depending on the amount invested, the number of people employed and circumstances specific to particular zones.\textsuperscript{139}

The general corporate tax rate in Russia is 24% but small businesses may elect to pay one uniform tax rate and to be exempt from other principal taxes. The rate is 6% if income is used as the tax base and 15% if income less expenses is used as the tax base.\textsuperscript{140}

All companies owned by nationals of Saudi Arabia and/or of Gulf Co-operation Council (GCC) countries are subject to a religious tax (zakat) of 2.5%. Companies engaged in oil and hydrocarbon production are taxed at 85% and all other companies are taxed at 20%.\textsuperscript{141}

Capital gains are not taxable in Singapore and tax incentives are available to businesses operating in certain industries, mainly high technology, services, finance, treasury and export

\textsuperscript{133} Ibid
\textsuperscript{134} Guide to Taxes in Europe, the Middle East, and Africa.
\textsuperscript{135} Ibid
\textsuperscript{136} Guide to Taxes in the Asia Pacific Region.
\textsuperscript{137} Ibid
\textsuperscript{138} Ibid
\textsuperscript{139} Ibid
\textsuperscript{140} Ibid
\textsuperscript{141} Ibid
orientated manufacturing in the form of pioneer status, reduced tax rates, tax exemptions and investment allowances.\textsuperscript{142}

**Spanish** corporations and other business entities are subject to a 35\% corporate income tax (Impuesto sobre Sociedades, “CIT”) levied on the company’s world-wide net taxable income, including capital gains. Corporate income tax residents are companies that either have incorporated under Spanish law or have registered their managing offices in Spain. Nonresident taxpayers are generally subject to a Non-resident Tax (Impuesto sobre la Renta de no Residentes, "NRIT") on income obtained in Spain, including, inter alia, personal and business income related to an economic activity conducted in Spain, with or without a permanent Spanish establishment. Nonresident entities owning or enjoying certain other rights over Spanish real estate are subject to a special corporate tax amounting to 3\% of the property’s assessed value.\textsuperscript{143}

Income derived by foreign subsidiaries controlled by a **Taiwanese** resident company is not subject to income tax until it is repatriated in the form of dividends.\textsuperscript{144}

In addition to a standard tax rate of 30\% **Thailand** imposes withholding taxes on certain fees and business income paid to nonresidents. A taxpayer is required to be registered for GST if they carry on a taxable activity with an annual turnover in excess of Thai Baht 1,200,000.\textsuperscript{145}

The **United Arab Emirates** offers a largely tax-free environment for businesses and there are several duty free zones including Dubai, Sharjah and Ajman. Employers must pay End of Service Benefit to expatriates when they complete their contract. This is calculated as three weeks basic salary for each of the first five years of service, then approximately one month’s basic salary for each year of service. The payment is reduced by two-thirds if the employee leaves voluntarily during the first three years and by one-third if the employee leaves voluntarily after three to five years.\textsuperscript{146}

In the **United Kingdom** companies pay corporation tax on their profits at rates ranging from 0\% to 30\%. For companies with no associated companies the top rate of tax applies if profits for the year are more than £1,500,000. For others this threshold figure is divided by one plus the number of associated companies which the company has.\textsuperscript{147}

**G. Competition Law (Economic Concentrations)**

Within the franchise industry, economic competition and antitrust laws of a country could be of importance if they could have an adverse effect in the duties of the franchisee in connection with the determination of prices and other control that the franchisor may exercise on the business of the franchisee to comply with the system. Likewise, if for any reason a franchisor can acquire one or more franchised businesses, such transactions may need to be analyzed from a competition standpoint to determine if they could be considered as a prohibited concentration or if certain requirements, such as prior notice, should be fulfilled before the antitrust authority of a country.

\textsuperscript{142} Guide to Taxes in the Asia Pacific Region. \\
\textsuperscript{143} Ibid \\
\textsuperscript{144} Ibid \\
\textsuperscript{145} Ibid \\
\textsuperscript{146} Guide to Taxes in Europe, the Middle East, and Africa. \\
\textsuperscript{147} Ibid
In Barbados The Protection Against Unfair Competition Act provides protection against unfair competition practices by both private and commercial entities and official government authorities, providing for criminal and civil proceedings against offenders. Offences include passing off, misleading the public, damage to goodwill or reputation, or disclosure of secret information.\(^{148}\)

In Brazil the Act provides that all acts of concentration, regardless of whether it is a merger, acquisition, joint venture, whether or not against the economic order, be submitted for approval. Three different outcomes may occur after submission: (i) approve it with unconditional clearance; (ii) disapprove it; or (iii) approve it upon the satisfaction of certain conditions.\(^{149}\)

Antitrust regulations apply to licenses even though El Salvador has a Competition Act in effect since January, 2006. The Constitution sets the general rule by forbidding monopolies, except those in favor of the State or Municipalities. The Code of Commerce governs the actions of merchants and mandates them to conduct business according to the laws, without prejudicing the public or the national economy.\(^{150}\)

The rules concerning the control of concentrations are quite recent in France. Local antitrust and competition laws do apply to licenses in France. There is a legal obligation for the undertakings concerned to notify a concentration to the Minister. Once a notification is filed, the Minister’s power to control the concentration will be limited to a specific timeframe. Procedural rules are set forth in a Government Decree of April 30, 2002. Overall, very few concentrations have been blocked in France. Operations are usually given the go-ahead after having been subject to amendments where necessary.\(^{151}\)

There are no specific antitrust laws requirements for the exercise of business activities by foreigners in Greece. Local antitrust laws, which resemble EU ones, equally apply to nationals and non-nationals.\(^{152}\)

The Icelandic Competition Act applies to any economic operation, including manufacturing industry and trade in goods and services, irrespective of whether such operation is conducted by individuals, companies, public parties or others. Economic operations are defined as any commercial activity, irrespective of form of ownership and irrespective of the nature of the goods, services or rights exchanged or managed for a consideration. The scope of the Act is, however, limited to agreements, terms and actions which are intended to have an effect in Iceland.\(^{153}\)

Israeli antitrust laws apply to licenses granted in respect of intellectual property rights. Such licenses may well be considered restrictive arrangements, if they contain restrictions with


respect to use of the relevant intellectual property rights, such as exclusivity, payment of royalties, etc.\textsuperscript{154}

The basic Spanish merger control provisions are contained in Articles 14 to 18 of Law 16/1989 for the Defense of Competition ("LDC"). The LDC defines a concentration as an operation leading to a lasting change in the structure of control of the undertakings concerned, by means of: (1) a merger of two or more previously independent undertakings; (2) an acquisition of control of the whole or part of one or more undertakings; or (3) the creation of a joint venture and, in general, the acquisition of joint control of an undertaking which performs on a lasting basis all the functions of an autonomous economic entity and which does not give rise to coordination of the competitive behavior of undertakings which remain independent.\textsuperscript{155}

The United Kingdom is a European Union Member State, and therefore, EU law has direct effect in the UK and actions based on EU law may be brought in the national courts. One of the areas more heavily regulated by the EU is competition law. The key provisions of the UK’s Competition Act 1998 mirror the EU Rules (Articles 81 and 82). The Act prohibits agreements or concerted practices which have the effect of preventing, restricting or distorting competition in the UK (known as “the Chapter I prohibition”) and conduct by one or more undertakings which amounts to abuse of their dominant position in the UK marketplace (“the Chapter II prohibition”). The UK authorities are required by the Act to ensure that application of these prohibitions is consistent with EU jurisprudence to the extent that this is possible.\textsuperscript{156}

Notification of mergers and acquisitions to the Swedish Competition Authority is mandatory if: 1) The transaction brings about a lasting change in the control over one or several undertakings or businesses (including mergers, acquisitions of a controlling interest, full-function joint ventures and operations that bring about a change in the quality of control over an undertaking or business), (2) the aggregate world-wide turnover of all undertakings concerned during the preceding financial year exceeds SEK 4 billion; and (3) at least two of the undertakings concerned each had a turnover in Sweden during the preceding financial year exceeding SEK 100 million.\textsuperscript{157}

IV. MEXICO

As previously explained, a specific analysis was made on certain laws of Mexico because of its proximity to the United States and to show the type of in depth study of laws that should be surveyed before expanding internationally. Mexico has a civil law system which implies an additional challenge for foreign franchisors and their legal counsel. Even though franchising is specifically regulated under Mexican law, there are important differences between the laws of Mexico and the legislation of common law countries, such as disclosure obligations, contractual requirements, labor issues, enforcement of obligations and remedies available at law, among others.


A. Intellectual Property

Trademarks in Mexico are protected through their registration before the Mexican Institute of Industrial Property, in Spanish, Instituto Mexicano de la Propiedad Industrial ("IMPI"). The registration of trademarks must be renewed every ten years and the use of the trademarks must be evidenced every three years before the IMPI; otherwise, a cancellation action may be exercised by any third party claiming lack of use by the holder. The Industrial Property Law allows proving the use of a trademark through a licensee (franchisee), provided that the corresponding license is recorded before the IMPI.

There is no legal obligation for franchisors and/or franchisees to register a franchise agreement before the IMPI; however, foreign franchisors should be the first interested in making such recording for purposes of proving the use of their trademarks and protecting their industrial property rights against third parties, as explained above.

To register a license and/or franchise agreement before the IMPI, it is necessary to submit a writ accompanied by one original of the trademark license/franchise agreement.

Notwithstanding the foregoing, to maintain the confidentiality of certain information it is possible to register a summary of the license/franchise agreement. In such regard, pursuant to the provisions of Article 10 of the Regulations of the Industrial Property Law, the summary to be submitted for registration purposes before the IMPI may omit the inclusion of those contractual provisions related to: (i) royalties and any other consideration to be paid by the franchisee; (ii) confidential information regarding the form or means of distribution and commercialization of the goods and services; and (iii) the technical information.

It takes approximately three months for the IMPI to issue a resolution acknowledging the registration of the agreement; however, the effects of the registration are retroactive to the date in which the agreement was submitted for recording. Governmental fees in the amount of approximately US$40 must be paid for each licensed trademark contained in the trademark license agreement or in the franchise agreement, as applicable.

Nonauthorized use of intellectual property rights is considered as an administrative infringement under the Industrial Property Law and, therefore, the IMPI is entitled to exercise specific actions against the corresponding infringer. Specific violations to the Industrial Property Law may be considered as felonies.

B. Foreign Labor

Pursuant to the Federal Labor Law, all entities and establishments in Mexico shall hire, at least, ninety percent of Mexican employees, in the understanding that such restriction is not applicable to the managers and directors of entities. The violation of the aforementioned restriction may result in the imposition of fines by the administrative authority.

For purposes of hiring foreign employees, the General Law of Population establishes the rules for the transit and residence of foreigners in Mexico. There are different kinds of visas to which a foreign resident nonimmigrant may apply, which vary depending on the period that the foreigner will reside in Mexico; however, one common type of visa allowed under Mexican immigration laws and derived from NAFTA is the Business Migratory Form, which allows residents of the United States and Canada to enter Mexico for business purposes during a term of 30 days, without the need to comply with any formality, except for filling the corresponding form, which is available at the Embassy or Consulates of Mexico abroad, and also on arriving airplanes or at Mexico City’s International Airport and some other important airports within
Mexico. Such a visa is commonly used by the franchisors’ personnel who visit Mexico to assist franchisees.

As a solution for the hiring of a higher percentage of foreigners, it is common to establish structures where an entity (employer) contracts the services of a civil partnership which is composed by various natural foreign individuals, who are partners and not employees of such partnership. Under the aforementioned structure, the entity pays to the partnership a periodic compensation which is distributed among the partners in accordance with certain rules established by the civil partnership.

C. Domestic Labor

The applicable law in Mexico for labor matters is the Federal Labor Law, which regulates all labor relationships, agreements, procedures and practices of labor nature within Mexico. Pursuant to the Federal Labor Law, a labor relationship exists when an individual (employee) provides services to another individual or entity in a subordinated manner. The employees are entitled to certain minimum benefits which must be granted by the employer and may not be waived by the employees. These minimum benefits consist of: (i) salary; (ii) Christmas bonus equivalent to at least 15 days of base salary; (iii) fully paid vacation period; (iv) vacation premium equivalent to at least 25% of the base salary corresponding to the employee during the vacation period; (v) profit sharing; (vi) full salary during the holidays established by the Federal Labor Law; (vii) payment of overtime, if applicable; (viii) maternity leave; and (ix) social contributions such as housing, social security and retirement fund. Any additional benefits granted to the employees constitute an acquired right which may not be reduced or diminished by the employers without compensation.

With regard to the profit sharing, article 117 of the Federal Labor Law establishes that the National Commission for the Sharing of Profits with Workers must determine the percentage of the profits that employers are obligated to distribute among their employees every year. Currently, the percentage fixed by said Commission is 10% of the earnings of the employer before the payment of taxes (said percentage has not suffered changes in many years, and it is not expected to be modified in the near future). Distribution of profit-sharing amounts must be made no later than May 31 of each year. The officers with the highest levels of authority (i.e. CEO and General Manager) are not entitled to profit sharing; however, other employees holding positions of trust will have a share in the company’s profits; nevertheless, if the salary of such employees is higher than that of the highest paid unionized/based worker, such salary plus 20% will be considered as the maximum salary for purposes of calculating their share in the distribution. Temporary workers are entitled to their share of profits, provided that they have worked at least 60 days during the respective year. It is important to mention that newly-formed companies are exempted from the profit sharing during the first year of operations. There are certain corporate/labor structures which are commonly used in Mexico to diminish the impact derived from the mandatory profit sharing, which consist of the creation of operative (profit center) and services (labor force) entities, which enter into a services agreement for the latter to provide different services to the operative company.

In connection with the labor liability that franchisors could assume with respect to the franchisees and the employees of the franchisees, none of the applicable Mexican laws contain a provision related to the possibility of considering the existence of a labor relation between a franchisor and a franchisee or between the employees of the franchisee and the franchisor; however, when entering into a franchise agreement with a franchisee the franchisor should take into consideration that under Mexican law the contracts are ruled by their contents and not by their denomination; therefore, if by mistake the franchisor includes or accepts the inclusion of
provisions within the franchise agreement that may be interpreted as constituting or creating a labor relation, then the Mexican labor courts would have sufficient authority to determine labor obligations in charge of the franchisor and in favor of the franchisee being an individual or in favor of the franchisee’s employees derived from the nature of the agreement regardless of its name and to sanction franchisor for the non compliance of such labor obligations. In accordance with the provisions of the Federal Labor Law an employee is defined as “the individual who renders to other individual or entity a personal subordinated service”. In such regard, article 20 of the Federal Labor Law establishes that a labor relation exists, regardless of the act or agreement originating the relation, when an individual renders a subordinated personal service which is remunerated with a salary. Mexican federal courts have issued judicial precedents which determine that a labor relation exists if a worker proves that the following three elements exist:

I. The obligation in charge of the worker to render a material and/or intellectual service to the employer;

II. The obligation in charge of the employer to pay to the worker a consideration for the services rendered; and

III. The existence of subordination.

For purposes of the above, subordination is understood as the employer’s legal power of command and its correlative obedience obligation in charge of the employee.

In conclusion, in all franchise agreements, franchisor shall avoid the inclusion of language and the performing of activities that may be considered as creating a labor relationship, based on the elements previously explained.

D. Legislative Requirements / Obstacles to Doing Business

In accordance with article 28 of the Mexican Constitution and in terms of the First Title of that: the Foreign Investment Law applicable in Mexico, there are certain activities that (i) are exclusively reserved to the Mexican State (e.g.: petroleum and other hydrocarbons, electricity and generation of atomic energy); (ii) are exclusively reserved to natural persons of Mexican nationality and to Mexican entities with foreigner exclusion clause (i.e. national land transportation of passengers, tourism and load, credit unions, etc); and (iii) percentage of foreign investment that may participate in the activity or in the entities which perform the specific activities is limited (e.g. national air transportation up to 25%, insurance institutions up to 49%). Notwithstanding the foregoing, pursuant to the Foreign Investment Law there are mechanisms of neutral investment under which the maximum percentages of foreign investment could be exceeded, in the understanding that for such purposes the prior approval of the Ministry of Economy must be obtained.

All Mexican entities with foreign investment (including those with foreign investment participation through a trust or with neutral investment), foreign natural persons and entities that usually perform commercial acts (business activities) within Mexico and trusts which grant rights in favor of the foreigner, shall have to be recorded before the National Registry of Foreign Investments and shall have to renew such recording yearly. Additionally, any modification to the information provided for the recording must be notified to the National Registry of Foreign Investments.
The violation of the restrictions imposed by the Foreign Investment Law may result in the nullity of the acts, agreements and contracts executed in contravention of the legislation, as well as in the revocation of any and all authorizations granted by the Ministry of Economy and in the imposition of fines.

1. Advertising
Advertising and promotions in Mexico are basically regulated in a general manner by the Consumer Protection Federal Law, the local Civil Codes of the places where the advertisements and promotions have effect, in some specific cases, the General Health Law and local regulations of the state governments. Naturally, the Industrial Property Law also applies to advertising, to protect the industrial property rights used in promoting products or services and to prohibit unfair competition.

In general, so long as franchisors and franchisees avoid the use of advertisements which: (i) are contrary to morals; (ii) promote unfair competition; and (iii) induce the consumers to an error; franchisors and franchisees will not find in Mexico legal hurdles to overcome regarding advertisement.

2. Labeling
Products manufactured in Mexico or imported into Mexico which are offered to the consumers within the Mexican territory must be labeled in accordance with the Mexican Official Standards applicable to the specific products and in accordance with the Mexican Official Standard NOM-050-SCFI-2004 which is of general application. Among other information, such labeling must contain the following information: (i) name or generic denomination of the product; (ii) amount or number of products; (iii) name and fiscal address of the manufacturer or the importer; (iv) country of origin; (v) warnings and other symbols applicable to dangerous products; (vi) handling and conservation instructions; and (vii) expiration date. The information included in the label must be in Spanish language, without prejudice of any other language that may be also included in the product.

Failure to comply with the requirements of the corresponding Mexican Official Standard could result in a restriction to commercialize the products ordered by the administrative authority and in: (i) the imposition of fines; (ii) temporary or definitive seizure of the business; (iii) administrative arrest up to thirty six hours; and (iv) suspension, revocation of authorizations and registrations, as applicable.

3. Currency
Mexico has no currency restrictions; therefore, the parties to a franchise agreement may agree to make any and all payments in any currency of their convenience. Notwithstanding the foregoing, under Mexico’s Monetary Law, if according to the corresponding contract or agreement, the payment is to be made within the territory of Mexico, then, the party obligated to make the corresponding payment may freely elect to make such payment either in the foreign currency agreed in the contract or agreement or in Mexican Pesos according to the exchange rate published by our Central Bank (Banco de Mexico) in the Official Gazette of the Federation on the date of payment. If payments are agreed to be made abroad, then the party obliged to make such payment cannot elect to make it in Mexican currency based on the provisions of the Monetary Law.
4. Import Restrictions and Tariffs
In general terms, according to Mexico’s Import Tax Law and the North America Free Trade Agreement, the import of products are subject to specific tariffs and/or duties or exemptions depending on the specific products to be imported. The import of specific goods must be analyzed on a case by case basis to determine the taxes and/or duties to be paid, if any. Likewise, the import of goods is subject to value-added tax. Analyses of import taxes and any tariff and nontariff barriers are commonly made by local customs agents, which need to be licensed by the Ministry of Finance and Credit Public.

5. Technology Transfers
The former Technology Transfer Law was substituted by the current Industrial Property Law, which contains no restrictions for the transfer of technology.

There are two alternatives that could be used jointly or separately to protect know-how and technology in Mexico. One is through copyrights based on the Federal Copyright Law and the other is through patents and/or trade (industrial) secrets based on the Industrial Property Law. In addition, and to efficiently safeguard intellectual property rights, it is always advisable to execute confidentiality agreements with the individuals that will have access to information containing know-how and technology.

Trade secrets are known under Mexican law as “industrial secrets” and are specifically protected by the Industrial Property Law. In certain cases, disclosure of industrial secrets may be considered as a felony. The breach of a confidentiality obligation may result in the payment of damages and losses caused, which have to be determined by civil court with jurisdiction over the matter; therefore, it is always advisable to include a conventional penalty (liquidated damages) in the confidentiality agreements; otherwise, the damages and losses determined by a court could be low.

In Mexico the transfer of technology is not subject to the previous approval of a governmental agency and is based on the principle of contractual freedom.

E. Financing
The financial system in Mexico is integrated by the institutions and governmental bodies regulated by the Ministry of Finance and Public Credit and the National Banking and Securities Commission (when applicable), and supervised by Mexico’s Central Bank (Bank of Mexico).

The Mexican financial system is a flexible system which facilitates the flow of capitals. Mexico has a permanent economic stability which has increased the foreign investment, reduced the interest rates, increased the offering of credits to the general public and facilitated the access to such credits.

There are a wide number of foreign and local credit institutions offering their products in Mexico, which has stimulated the competition between them for the benefit of their costumers.

Franchisees should encounter no barriers in Mexico to reasonably obtain access to credits and support from financial institutions; however, the scheme of collaterals is always the most important element analyzed by banks when approving a credit.
F. Tax

There are federal, state and local taxes imposed in Mexico. Federal taxes are collected by the Administration Revenue Service, while state and local taxes are collected by the Treasuries of the State and Municipal Governments.

In accordance with article one of Mexico’s Income Tax Law, individuals and entities are bound to pay income tax in Mexico in the following events: (i) Mexican residents, with respect to all their income without regard of the location of its source; (ii) nonresidents with a permanent establishment in Mexico, but only with respect to the income attributable to such permanent establishment; and (iii) nonresidents, with respect to the income proceeding from a source located within Mexico, when they do not have a permanent establishment within Mexico or when, having a permanent establishment, the income is not attributable to such permanent establishment.

In such regard, article two of the Income Tax Law provides that if a foreign resident performs activities within Mexico through an individual or entity, which is different from an independent agent, it would be considered that the resident has a permanent establishment in Mexico with respect to the activities performed by such individual or entity on behalf of the foreign resident if such individual or entity exercises powers of attorney to execute agreements in the name of and/or on behalf of the foreign resident. Likewise, a foreign resident has a permanent establishment in Mexico when the foreign resident performs activities in Mexico through an independent agent and this agent carries out such acts outside his normal activities or course of business.

Foreign franchisors not having a permanent establishment for tax purposes in Mexico, but obtaining an income from a source located within the Mexican territory are normally taxed by income tax, which is of a federal nature, being said tax paid in Mexico by the foreign franchisor through retention or withholding made by the corresponding franchisee.

Likewise, the Income Tax Law establishes that the benefits of International Tax Conventions shall be applicable when the taxpayer evidences residence in the corresponding foreign country. Mexico’s Supreme Court of Justice has determined that the application of Tax Conventions is over the Federal Tax Laws (such as the Income Tax Law). This means that a foreign franchisor, as a resident for tax purposes of its country of origin, has the right to be submitted to taxation under the terms of the corresponding Tax Treaty or Convention, if any, instead of being submitted to the provisions of the Income Tax Law. Normally, the applicable withholding tax rates included in International Tax Conventions to which Mexico is a party are lower than the income tax rate provided for in the Income Tax Law. This means that a US franchisor, as a resident, for tax purposes, of the United States of America, has the right to be submitted to taxation under the terms of the Convention to Avoid Double Taxation and Prevent Fiscal Evasion entered into by the governments of Mexico and of the United States of America (the “Convention”), instead of being submitted to the provisions of the Income Tax Law.

Regarding fees that may be paid by a franchisee to a franchisor, such as “Initial Franchise Fee”, “Advertising Fee”, “Renewal Fee”, “Royalty Fee” and “Technical Assistance Fee”, the following shall apply:

**Initial Franchise Fee:** When this fee amounts a fixed sum that would be paid as a consideration for the granting of the franchise by franchisor, then this payment would qualify as a payment of royalties, in which case the applicable withholding rate according to article 12 of the Convention would be 10%.
Advertising Fee: When this fee is paid as a consideration of the creation and development of advertising, marketing and similar activities or services, then, in accordance with the provisions of the Convention, it may be considered as entrepreneurial activities performed abroad, such as business profits according to article 7 of the Convention, or as the performance of independent personal services pursuant to article 14 of the Convention. In any of such events, franchisor would then be performing an entrepreneurial activity, which is a commercial activity consisting in advertising services and, therefore, these payments would not be subject to any withholding tax.

Renewal Fee: When this fee is paid as a consideration of the renewal of the franchise agreement, then this payment qualifies as a business profit according to article 7 of the Convention, in the form of an entrepreneurial or commercial activity not performed in Mexico by means of a permanent establishment and, therefore, in such event this payment is not subject to any withholding tax.

Royalty Fee: When this fee is paid as a consideration of the right to use a licensed trademark; then, such fee qualifies as a payment of royalties and, in consequence, the Convention establishes a withholding rate of 10%.

Technical Assistance Fee: When this fee is paid as a consideration for the help, aid, guidance and support to be provided by franchisor and/or its employees, agents, contractors and designees with respect to the use and implementation of the technical information to be provided by franchisor in developing and operating a franchise, then, in accordance with the provisions of the Convention, such service is considered as technical assistance and, therefore, as a business profit under article 7 of the Convention. In such event, this payment is not subject to any withholding tax; however, in accordance with paragraph 11 of the Comments to the Convention by the Organization for Economic Cooperation and Development (OECD), when the technical assistance is referred to matters that require confidentiality in charge of the recipient, the fees to be paid are not considered as technical assistance, but as royalties, thus, being subject to the withholding rate of 10%.

In any event, regardless of the name given to any concept of payment, the description of said concept for which a fee must be paid under a Franchise Agreement must be carefully analyzed to determine the category applicable to said fee from a tax standpoint according to the provisions of the Convention.

G. Competition Law

The Mexican law applicable to competition matters is the Economic Competition Federal Law. This Law places some restrictions on the general principle of contractual freedom, when through agreements, arrangements or a combination of acts between economic agents the production, processes, distribution or commercialization of goods and services is diminished, harmed or impeded and pursuant to such laws the aforementioned situations are deemed to be monopolistic practices.

Violations of the provisions of the Economic Competition Federal Law may result in (i) the nullity of the acts and agreements in violation of the law, (ii) the imposition of administrative fines and (iii) the payment of damages and losses to third parties.

As an example, the obligation imposed by a franchisor to a franchisee to sell its products at determined prices could be considered as a monopolistic practice, therefore, it is advisable to include in franchise agreements that the franchisor will provide franchisee with a list of
suggested retail prices, which will not constitute an obligation for franchisee, but only a mere recommendation.

Additionally, according to the Economic Competition Federal Law and depending on the volume of sales, value of assets and accumulation of interest by the economic agents participating in a “concentration” (either in the form of a purchase, merger or similar act), there is an obligation for the agents to notify the concentration act prior to executing it and to obtain the corresponding approval from the Antitrust Commission.

V. CANADA

Canada, culturally, linguistically and economically is more like the U.S. than any other country in the world. Add to these factors the close proximity of Canada and one can understand why Canada is usually the first or one of the first countries to which U.S. franchisors expand. A corollary to this proposition is that many foreign franchisors view Canada as an excellent gateway into the U.S. market.

A. Intellectual Property

Various types of intellectual property including: patents, trademarks, trade names, copyright, industrial designs, and "know-how" may be protected under Canadian law. The inventor of a patent may obtain patent protection by making an application to the federal government.

A patent is an exclusionary right to make, have made, sell and use an invention for the term of the patent (under the recently enacted Patent Act) for a term of 20 years from filing. To obtain patent protection, the invention must comprise of: proper subject matter, be useful, new, and not obvious to a person skilled in the art.

A trademark is a word, logo or distinguishing shape, packaging, and the like used to distinguish the goods or services of one individual or corporation from those of another. In Canada, an individual or corporation may obtain trademarks protection by means of registration. Trademark registrations are valid for a term of 15 years, and may be renewed indefinitely for further 15-year terms. Registration gives the owner the exclusive right to use the trademark throughout the country in association with goods or services for which the mark is registered. Owners of United States' trademarks should register in Canada to preserve exclusivity and avoid unauthorized use.

An original work is automatically granted copyright protection for the lifetime of the author or creator plus an additional 50 years. Copyright has traditionally been understood to protect only the form of expression and not the underlying idea. However, with recent developments in common law, the definition of copyright has expanded. Copyright protects an individual or corporation from actual copying of the work, but not from reproduction of a similar work independently conceived by another author.

An industrial design is the ornamentation of a good and it generally takes a particular shape or pattern and is applied to the good in question for aesthetic purposes. Industrial design protection provides the owner with rights over aesthetic parts of the good for a period of five years and may be renewed for an additional five years.

Unless the license agreement specifically provides to the contrary, the licensor is entitled to
collect royalties under the contract for the duration of the contract even if the patent, copyright or trademark has been held invalid or has expired.

Employers may not enjoy shop rights. Generally, an invention made by an employee while in the employ of the employer belongs to the employee and not the employer even if made on the employer’s time and using the employer’s resources unless there is an express contract to the contrary or the employee was employed to invent. In Canada, the term “work-for-hire” has no legal meaning.

The concept of “moral rights” in Canada includes the right associated with a work, the right to remain anonymous, and the right to the integrity of the work. These rights arise automatically upon creation of a work and extend to all authors of works. This includes authors of computer software programs, databases and other technology-related copyright works. Licensees should ensure that licensors have obtained waivers of such moral rights from any authors of the licensed technology.

Exclusion of warranty clauses used in US license agreements generally only exclude implied “warranties” and do not exclude implied “conditions” which are referred to in the sale of goods legislation applicable in most Canadian provinces.

B. Foreign Labor

Canada’s Immigration and Refugee Protection Act (IRPA) was enacted in June 2002. The IRPA puts the onus on employers to ensure they are in compliance with immigration laws.

At times Canadian employers need to facilitate the entry of a cross-border transferee or foreign recruit quickly and some employers may be tempted to have the foreign worker pass themselves off as a business visitor in order to facilitate entry. This would not be a wise decision, however. Under IRPA, misrepresentation and counselling misrepresentation are very serious offences. If guilty, foreign workers risk potential bans from working in Canada, as well as hefty fines and possible imprisonment. Furthermore, anyone who assisted with the application, including human resource personnel or other employees who prepared supporting documents, or otherwise advised the foreign worker regarding entry, could also risk sanction.

Working without a work permit when one is required would clearly be a breach of IRPA. However, Canadian employers often do not realize that the following may also constitute unauthorized employment:

(i) failing to renew a work permit after it has expired;
(ii) transferring the foreign worker to a different location, or company than that expressly stated on the original work permit; or
(iii) promoting the foreign worker to a new position without ensuring the work permit is properly adjusted.

In regards to admissibility issues at the Canadian border, prior convictions for driving under the influence (DUI), while not considered serious in the United States, may make foreign nationals inadmissible to Canada.

C. Domestic Labor

The majority of legislation and regulation governing labor and employment issues falls within the jurisdiction of the provinces. Certain federally-regulated sectors such as banking and telecommunications, the transportation sector, and any sector of the broader federal public
service are governed by federal labor legislation. Labor and employment law varies somewhat from province to province, however, each province has legislation governing labor standards, health and safety, workers compensation and labor relations.

Labor standards legislation (in Ontario, the Employment Standards Act) regulates such things as minimum wage, hours of work, vacation pay, termination and severance pay. In addition, employers operating in Canada must comply with health and safety legislation with respect to their workplace. Employers are required to contribute to workers’ compensation programs set up by each of the provincial governments for workers in that province and to remit on behalf of their employees premiums with respect to the federally-run unemployment insurance program. In Ontario, employers are subject to the Employee Health Tax which funds the Province’s health insurance system.

Certain provinces such as Ontario, have also enacted Pay Equity legislation which requires equal pay for work of equal value for employees covered by the Act, based on a review of the skill, effort, responsibility, and working conditions associated with a respective job class.

Each of the provinces (and the federal government with respect to federally-regulated industries) has enacted labor relations legislation (in Ontario, the Labor Relations Act) which govern collective bargaining between employers and the unionized labor force. While labor relations legislation does vary somewhat across the country, Canadian labor legislation generally provides that employees have the right to be members of a trade union, subject to some exceptions for certain occupational groups and managerial employees in certain provinces. An employer may not engage in discriminatory or retaliatory tactics against any employee for union activities or activities with respect to the certification of a bargaining unit. Once a bargaining unit has been certified, the employer must recognize and bargain with the union towards a collective agreement which will determine wage rates and other conditions of employment. Once a collective agreement has been signed, it is binding on the employer, the union and all of the employees for its duration; strikes and walk-outs are prohibited during the term of a collective agreement. Disputes concerning any violations of the various labor relations statutes are heard by neutral independent tribunals in each province (or the federal labor relations board in the case of violations of the Canada Labor Code).

In Quebec, employment law differs from the law of the other Canadian jurisdictions in many ways. For example, employment contracts will not be enforceable unless they comply with the Charter of the French Language, which requires that many contracts be in French. Also, employees in Quebec have the right to seek reinstatement if they are terminated without cause after working for an employer for at least two years.

1. Alcohol and Drug Testing in the Workplace

Alcohol and drug testing of employees is much less prevalent in Canada than in the United States. Policies must comply with human rights legislation that sees substance abuse as a disability and protects the dignity of individuals. Most mandatory testing is *prima facie* discriminatory and the employer will have to justify it as a *bona fide* occupational requirement (“BFOR”). Testing after an incident has occurred, random alcohol testing, testing based on reasonable cause to believe someone is impaired or has otherwise breached the employer’s policy, and all testing post-reinstatement for an earlier incident may be justifiable as BFORs. Pre-employment alcohol and drug testing and random drug testing will be more difficult to justify. In the case of drug testing, this is particularly true because the drug testing technology most commonly used (urinalysis) does not prove impairment, but only the presence of drugs in the system.
To date, random alcohol testing has rarely, and random drug testing has not been upheld as appropriate by an arbitrator in Canada. Even if an employee is found to be impaired by alcohol or drugs, an employer may have a duty to accommodate the employee.

**D. Legislative Requirements / Obstacles in Doing Business**

1. **Advertising**
   The Quebec **Charter of the French Language** requires that public signage and commercial advertising must be in French. However, they may also be in another language as long as French is displayed and it is prominent. Assume the French wording must be twice as large and come first to avoid potential problems. A way around this requirement is companies with English brand names may use their name or brand without any problem assuming that they do not have a French name or brand name as well. If they do, the French name would need to be used.

   The rest of Canada (everywhere but Quebec) does not have a language requirement in relation to advertising.

2. **Labelling**
   There are different labelling requirements in Canada than the United States for a variety of products, including: food, drugs, and cosmetics. Food is the biggest area of concern, partly with respect to nutrition.

   The **Consumer Packaging and Labelling Act** requires products imported into Canada to have a label containing the net quantity of the product, identity, and principal place of business of the person for whom the product was produced, and information relating to the nature, quality, age, size, and nutritional value where appropriate. The Act makes it a crime to provide labels that are misleading. Also important for American manufactures to remember is that all units of measurement must be metric.

   In Quebec, documentation addressed to the public in general (like advertising, ads, notices, standard customers’ agreements, instructions, etc.) or to franchisees’ employees (like application forms, confidentiality agreements, employment agreements, etc.) together with labels on products or attached to products and instructions as to how to use the products must be in French first. The same rules apply to software made available to the public, cash receipts, and invoices directed to purchasers.

3. **Language Laws**
   In regard to the adaptation of standard agreements, a question is often raised as to the requisite to translate the franchise documents into French. The Quebec **Charter of the French Language** stipulates that contracts predetermined by one party and contracts containing printed standard clauses and all related documents, must be drawn up in French. However, it also provides for the drawing up in another language at the express will of the parties.

   The interpretation of this rule is to the effect that business agreements, even if predetermined by one party or containing printed standard clauses and their related documents, may be executed in English insofar that they contain (generally at the end of the agreement) a provision written in

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158 Charter of the French language, R.S.Q. c. C-11, s.58.
both English and French stating that the parties have expressly required that the agreement be drafted and executed in English.

This provision generally reads as follows: “Les parties aux présentes ont formellement demandé à ce que la présente convention et tous les documents auxquels celle-ci réfère soient rédigés et signés en langue anglaise. The parties have specifically required that the present agreement and all related documents be drafted and executed in English.”

If this provision is not found in an agreement executed in English, this does not make such agreement null or void. However, in such a case the franchisor may be found to have breached the Charter of the French Language and be subject to statutory recourses (which could result in a fine for not complying with the act).

In Quebec the franchisor technically does not have to provide a disclosure document. The added bonus is that it does not have to be translated into French either. Most franchisors do provide it as a gesture of goodwill and also because it does answer most of the typical questions franchisees ask. Most importantly, if a franchisor does provide it, it should NOT be signed it. If the franchisor signs the disclosure document they will be bound by all the representations made in it.

4. Import Restrictions and Tariffs

The governance of import and export regulations in Canada is primarily a federal responsibility. Trade of goods across provincial boundaries is essentially unrestricted; however, trading parties must be aware of each particular province’s specific legislation concerning the carrying on of business operations in that province. Inter-provincial trade in services is generally unrestricted; however, specific provincial licensing requirements may be triggered.

To import commercial goods into Canada, a franchisor will require a federal import number under which to report such goods. In reporting goods on importation, a franchisor will need to consider a range of issues, including the proper classification of the good under the federal Customs Tariff. The correct determination of the applicable tariff classification may be challenging but it is an important exercise as the tariff rate applicable to any given good is dependent on a combination of the tariff classification of the good and its country of origin.

It is important that a franchisor who is importing goods into Canada not assume that goods purchased from a supplier in the United States necessarily originate in the United States and, therefore, qualify as duty free under the North American Free Trade Agreement (NAFTA). In general, to qualify as originating from a NAFTA country (being the United States, Mexico and Canada), a good must either have been created 100% from materials originating in a NAFTA country, or it must have undergone a sufficient transformation to establish the good as being of NAFTA origin. The degree of transformation required to establish a good that includes non-NAFTA originating materials differs from individual tariff classification to tariff classification and is frequently counterintuitive.

Since the proliferation of high tariffs and retaliatory trade measures which characterized international trade prior to the creation of the General Agreement on Tariffs and Trade ("GATT")

159 Customs Tariff, S.C., c. 36 (1997) (codified as amended) (The Schedule to the Customs Tariff is several hundred pages in length and describes all goods that may be imported into Canada, assigning to them a ten digit tariff classification code. The first six digits of this code are consistent with the tariff classifications of most other countries, the next two digits distinguish goods for various Canadian tariff purposes, and the last two digits are used by the Canadian government for statistical purposes).
in 1948, Canadian protective tariffs have been gradually reduced. Canada is a signatory to the GATT and has participated in all of the subsequent rounds of negotiation concerning the GATT. The GATT, which governs trade in goods among member countries, relies on the two fundamental principles of "most-favored-nation" and of "national treatment". The most-favored-nation principle provides that any advantage granted by one contracting party to the GATT in respect of a product must be granted to any other contracting party. The national treatment principal requires any contracting party to the GATT to treat goods from any other contracting party in a manner which is no less favourable to the treatment it accords similar goods of domestic origin.

On January 1, 1994, the North American Free Trade Agreement ("NAFTA") among Canada, United States and Mexico, came into effect. It superseded the bilateral trade agreement ("FTA") between Canada and the United States, then in place, and extended FTA-like provisions to bilateral trade between Canada and Mexico (and the United States and Mexico) in goods and services which are "North American." The NAFTA extends the GATT principles contained in the FTA to services and investments among the three countries, excluding Canada's cultural industries and, to some extent, its financial institutions. The ten year tariff phase-out period under the FTA as between Canada and the U.S. continues notwithstanding the NAFTA; tariff duties between Canada and Mexico are to be similarly phased-out over a ten year schedule. While the NAFTA contains provisions requiring each of the member countries to negotiate a level of conformity among their laws governing weights and measures, production and consumer standards and health/sanitary issues, Canada still imposes its own (relatively stringent) requirements in these areas.

5. Technology Transfers
With respect to technology licensing and development in Canada, a licensee may be precluded from challenging the validity of the licensor's patent through an express covenant not to attack the validity of the patent or at common law through the relationship of the parties as licensor and licensee. This also applies to copyright and trademark rights.

6. Provincial Marketing Boards
Many provinces have marketing boards which control things such as the promotion, production, storage, marketing, and labelling of certain goods. In Ontario, these marketing boards include the Ontario Bean Producers' Marketing Board, the Ontario Tender Fruit Producers Marketing Board, Chicken Farmers, Dairy Farmers, and many others. A franchisor must always check to see if a marketing board regulates the product or service the company sells or provides. For example, natural health products are often regulated as food supplements in the United States but in Canada they may be a subcategory of drugs needing specific licensing and labelling.

7. Implicit Obligations
In the case of Provigo Distribution Inc. vs Supermarché A.R.G. Inc. et al. (1998) R.J.Q. 47 (hereinafter referred to as the "Provigo case") the Quebec Court of Appeal has decided that, further to its obligations towards its franchisees stipulated in the franchise agreement itself, a franchisor has the following legal obligations (which have been considered by the Court of Appeal as deriving from the nature of the franchise agreement and in conformity with usage, equity or law):

- a loyalty obligation;
- an obligation to provide its franchisees with technical and commercial support;
• an obligation to act, at all times, in good faith towards its franchisees;
• a collaboration obligation with its franchisees; and
• an obligation to act towards its franchisees in such a way that they may benefit from the advantages of their franchise.

Furthermore, the Court of Appeal also interpreted article 1434 of the Code as meaning that, in the case where a franchisor would, in any way, compete with any of its franchisees (if the franchisor is not prohibited to do so by the franchise agreement or by virtue of any other agreement), the following additional legal rules would then apply:

• unless the franchise agreement provides for some type of exclusivity in favour of the franchisee, a franchisor is not precluded per se to compete with any of its franchisee;
• however, if a franchisor competes, in any way, with a franchisee, it must ensure that it still performs all of its legal obligations towards its franchisee, including those provided in the franchise agreement and those described above;
• the franchisor should make its competition to its franchisee in such a way that the franchisee could still benefit from the advantages of its franchise; and
• the franchisor should compete with its franchisee only in such a way as to minimise the impact of its competition on its franchisee.

E. Financing

1. Alberta Guarantees Acknowledgement Act

Most franchisors require a personal guarantee by the principals of a franchisee. This helps ensure that the principals are committed to the business and gives the franchisor some security. In Alberta, a guarantee is not enforceable against the guarantor unless a specific form is completed by the guarantor and it is sworn before a notary as mandated by the Alberta Guarantees Acknowledgement Act.

2. Security Interests in Quebec

Quebec does not have the Personal Property Security Act (PPSA) but rather other legislation that, summarily, grants a right in all moveable property. Unlike other provinces though, commercial landlords have the legal right to, and always do, register a prior charge against all the assets in the premises, moveable and immovable, generally equivalent to the value of the gross rent for the term of the lease. The franchisor may still register his security interest but will rank after the bank and the landlord.

Also in Quebec, where there is more than one guarantor, the franchisor has the right to first seize all the assets of the principal debtor before looking to any of the other guarantees.

F. Tax

In the simplest form of entry into the Canadian market, a U.S. franchisor will contract with either separate Canadian franchisees or with a single Canadian master franchisor to receive a royalty under the franchise agreement. In certain circumstances, there may also be a supply of goods and/or services provided by the U.S. franchisor to the Canadian franchisee(s).

In the above scenario, provided that certain steps are taken, the U.S. franchisor should not become subject to Canadian income tax. The mere execution of the franchise agreement will likely not constitute the carrying on of business in Canada by the U.S. Franchisor. Cautious U.S. franchisors should ensure that the agreement is executed in the U.S. and, where possible,
is governed by U.S. law. If the circumstances require that goods and/or services are to be provided by the U.S. franchisor, they should be delivered in such a manner that, even if the U.S. franchisor is considered to be carrying on business in Canada, it is not considered to be carrying on the business through a permanent establishment in Canada. If possible, arm's length third parties should be used to ship goods into Canada. If an inventory of goods is required to be maintained in Canada, care should be taken to fit within the Treaty exception for the use of facilities for the maintenance of a stock of goods or merchandise belonging to the resident for the purpose of storage, display, or delivery of goods or merchandise. The U.S. franchisor should not have its own employees at such Canadian warehouse, but should use employees of an arm's length service provider.

To the extent that the U.S. franchisor is required to provide ongoing services, such services should be provided from the U.S. If services are required to be performed in Canada, such services should be provided by independent agents to the greatest extent possible. If the U.S. franchisor's own employees are required to be in Canada themselves, the time spent in Canada should be kept to a minimum and any services should be performed at the Canadian franchisee's place of business during business hours. Where extended stays in Canada become necessary, the U.S. franchisor's employees should stay in a hotel and not enter into a lease for short or mid-term rental accommodations, to minimize the likelihood that they would be considered as having a permanent establishment in Canada.

Royalties earned by the U.S. franchisor will be subject to Canadian withholding tax. The rate of withholding under the Income Tax Act is 25%. This rate is reduced to 10% under the Treaty if the recipient of the royalty is a resident of the U.S. for the purposes of the Treaty. An interesting issue arises in the case of a U.S. franchisor that is a limited liability company or LLC and that has elected under the U.S. “check-the-box” regulations to be treated as fiscally transparent for U.S. tax and accounting purposes. Because the Treaty defines a “resident of a Contracting State” to be any person that is subject to tax therein, the Canada Revenue Agency takes the position that because a fiscally transparent LLC is not subject to U.S. tax, it is not a resident of the U.S. within the meaning of the Treaty and cannot benefit from the reduced rates of withholding. It should be noted that any withholding tax that is deducted from the royalties paid to the U.S. franchisor will likely be eligible for foreign tax credits against the U.S. taxes payable by the owner of the U.S. franchisor (since the U.S. franchisor in this scenario is treated as fiscally transparent). Therefore, provided that such owner has sufficient U.S. taxes otherwise payable, the higher rate of withholding tax may not have any affect on its overall tax liability. If this is not the case, it may be advisable to interpose a U.S. C-corporation as a subsidiary of the U.S. franchisor LLC and have the C-corporation enter into the franchise agreement and earn the royalty. Royalties paid to the C-corporation would be subject to the lower 10% rate of withholding. However, such a structure introduces a U.S. taxable entity, which may raise additional U.S. tax issues.

Another interesting issue arises where the Canadian franchisee is in breach of it obligations under the franchise agreement and the U.S. franchisor exercises its remedy under the agreement to “take-over” the Canadian franchisee operations and run the business for some period of time. In most such circumstances, it may become unavoidable for the U.S. franchisor not to have a permanent establishment in Canada. While the permanent establishment is maintained, the U.S. franchisor must pay Canadian income taxes on that portion of its income earned through the permanent establishment. This often may result in significant accounting issues for the U.S. franchisor when it tries to compute that portion of its expenses that were allocable to carrying on the Canadian business. For example, to the extent that U.S.-based officers or employees devote a portion of the time during the year to the carrying on of the
Canadian business, a portion of their salaries as well as common overhead must be allocated to the “Canadian side” of the books. This exercise may become cumbersome and expensive.

In order to avoid this scenario, an alternative to the U.S. franchisor exercising its remedies under the franchise agreement in its own name is for the U.S. franchisor to incorporate a Canadian subsidiary and assign its rights and under the franchise agreement to such subsidiary. The Canadian subsidiary would then be the party exercising the remedy under the agreement and the party that carries on the Canadian business. The tax issues involved in operating a business through a Canadian subsidiary are discussed below. While the absolute Canadian income tax cost of carrying on the business through a Canadian subsidiary is similar as compared to the U.S. franchisor carrying the business directly, the accounting and tax filing obligation costs are greatly reduced.

Where a franchisor must act as supplier of goods to a franchisee, there is the issue of whether the franchisor or franchisee will import the goods into Canada. Where there is only a single master franchisee or a limited number of importations, it may be practical to require the franchisee to take title and delivery of the goods in the United States, whether at the U.S. facility of the franchisor or on the U.S. side of the border. However, this is less likely to be practical where there are multiple franchisees requiring multiple importations, as smaller franchisees are unlikely to have the necessary sophistication to act as the importer of records of goods on a routine basis. In such circumstances, consideration may be given to having the franchisor act as the importer of record, pay the applicable GST and transfer the right to recover the GST to the franchisee. Alternatively, it may be desirable to have the franchisor register for GST purposes while remaining unregistered for other taxation purposes.

1. Canadian Controlled Private Corporation

A “Canadian Controlled Private Corporation” (“CCPC”) is entitled to a preferential tax rate on the first CAD $250,000 of active business income in a taxation year (increasing to CAD $300,000 in 2005). For example, a corporation resident in the Province of Ontario would pay Canadian income tax at the combined federal/provincial rate of 18.6% instead of 36.6%. To qualify as a CCPC, the corporation must be a private corporation that is resident in Canada and is not controlled by non-residents, or public corporations. Non-residents may own an interest in a CCPC as long as they do not own more than 50% of the voting shares of the company or exercise de facto control over the company.

2. Residency

The term “resident” is not defined under the Canadian Income Tax Act. Therefore, the determination of a person’s residence for income tax purposes is based upon an examination of Canadian jurisprudence, certain “deeming” rules under the Income Tax Act and the administrative position of the Canada Revenue Agency. The factors which are determinative of a corporation’s residency status in Canada differ from the factors that are determinative of an individual’s residency status.

The seminal Canadian case for determining an individual’s residency is the Supreme Court of Canada’s decision in Thomson v. M.N.R.,160 which held that for the purpose of income tax legislation, it must be assumed that every person has at all times a residence somewhere; that

a person may be a resident of more than one jurisdiction at a time; and that, while the intention of the taxpayer is relevant in determining their residency, it alone is not determinative.161

The *Income Tax Act*162 deems a corporation to be resident in Canada throughout a taxation year if the corporation was incorporated in Canada after April 26, 1965.163 However, there is also a common law test for determining the residence of a corporation, which is principally the jurisdiction in which the central management and control of the corporation is located.164

The *Income Tax Act*165 also deems persons which otherwise would be resident in Canada, but are considered resident in another country by operation of a tax treaty, to be resident in that other country and not resident in Canada for any purpose of the *Income Tax Act*. Corporations that are incorporated in one jurisdiction but are "continued"166 into another jurisdiction are also subject to special deeming rules with respect to their residence.

If a corporation is resident both in Canada and in another country under the respective domestic laws of each of the countries, there are "tie-breaker" rules set out in the relevant treaty between Canada and that other country that determine residency for tax purposes. For example, Article IV(3) of the *Treaty* provides as a "tie-breaker" rule that provides a corporation to be deemed resident in the country in which it was first incorporated. Thus, a company incorporated in the United States with its management and control in Canada would be resident in Canada under the Canadian common law test described above. Under Article IV(3) of the *Treaty*, however, it would be deemed resident only in the United States and as a result would, for all Canadian income tax purposes, also be deemed to be resident only in the United States under the *Income Tax Act*.

3. Carrying on Business in Canada

The phrase "carrying on business" is not defined in the *Income Tax Act*. The determination of whether or a taxpayer is carrying on business in Canada is a common law concept. The *Income Tax Act*167 does, however, provide an extended meaning of "carrying on business in Canada" that supersedes and overrules the common-law principles where they differ.

The two-pronged test most commonly used by the courts in determining whether a business is being carried on in Canada is the place where the contract is made and the location of the operations from which profits arise.168

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163 If the corporation was incorporated in Canada before April 27, 1965, the corporation is deemed resident in Canada if at any time after April 26, 1965 it was resident in Canada under the common law or if the corporation carried on business in Canada.
166 A corporation that is incorporated in one jurisdiction but subsequently take the necessary legal steps to leave that jurisdiction and be governed by the laws of another jurisdiction is said to have been "continued" into that jurisdiction. See, e.g., *Ross & Company Ltd. v. M.N.R.* [1967] 67 D.T.C. 421 (T.A.B.) and *The Queen v. Gurd's Products Company Limited* [1985]
The principal factor in connecting a business to a jurisdiction is the place where the taxpayer enters into its profit-making contracts. However, if a franchisor carries on substantial amount of work in Canada leading up to the signing of a contract, but the actual execution of the contract takes place outside Canada, the place of execution may be considered ancillary. In this regard, Canadian courts have looked at the total of the business activity in determining where the business is carried on.

In determining the location of the operations from which profits arise, Canadian courts have considered a number of factors including, but not limited to, the place of delivery, the place of payment, the place where purchases are made, the place of manufacture or production, the place from which transactions are solicited, the location of a branch office, the place where agents or employees of the non-resident are located, the place where the business assets are located, the place where the assets used in the business are purchased, and whether activities in Canada are merely ancillary to the main business, e.g., the business of buying, storing, selling, or manufacturing the product.  

4. Permanent Establishment

Once it has been established that a business is being carried on in Canada by a non-resident, one must look to the relevant income tax treaty to determine whether the income from the business is subject to Canadian income tax. Under the Treaty, only a U.S. resident that carries on business in Canada through a permanent establishment will be subject to tax in Canada.

The Treaty generally defines a permanent establishment to be a fixed place of business through which the business is wholly or partly carried on. A permanent establishment includes, but is not limited to, a place of management, a branch, an office, a factory, a mine, oil or gas well, a quarry, or any other place of extraction of natural resources. The Treaty also specifically excludes certain items or activities of a resident of a particular jurisdiction from constituting a permanent establishment in the other jurisdiction, including the use of facilities for the purpose of storage, display, or delivery of goods or merchandise belonging to the resident and the maintenance of a stock of goods or merchandise belonging to the resident for the purpose of storage, display, or delivery, or the maintenance of a stock of goods or merchandise belonging to the resident for the purpose of processing by another person. The Treaty also provides that the mere establishment of a Canadian subsidiary by a non-resident will not automatically result in a permanent establishment for the non-resident.

A case that is of particular concern to non-resident franchisors seeking to expand into the Canadian market is lower court decision of Fowler v. M.N.R. In that case, the non-resident taxpayer attended the same trade show annually for a three week period each year. The business generated from his attendance at the trade show constituted a significant portion of the taxpayer’s annual revenues. The Tax

C.T.C. 85 (F.C.A.) (where it was held that the corporation was carrying on business in Canada even though the contract was concluded outside Canada).


170 See Article VIII(1) of the Treaty.

171 Ibid. at Article V(1).

172 Ibid. at Article V(2).

173 Ibid. at Article V(6).

174 Ibid. at Article V(8).

Court of Canada held that Fowler’s recurring presence in Canada in the same physical location each year was sufficient to constitute a permanent establishment with the result that the revenue earned from business generated from his attendance at the trade show was taxable in Canada.

In summary, a U.S. resident franchisor should take careful steps to avoid having a permanent establishment in Canada, given that a failure to avoid a permanent establishment results in the obligation to file Canadian tax returns and pay Canadian taxes. While the decision in Dudney provides some comfort that in certain circumstances, a permanent establishment cannot easily be established, the Fowler decision remains of concern.

5. Sales Tax and the G.S.T.

GST is imposed on all imports of goods into Canada. Accordingly, a franchisor that wishes to import goods into Canada for sale to franchisees will be required to register for purposes of the GST in order to recover the 6% GST incurred on the value for duty of imported goods.

There are alternative structures available to a franchisor that wishes to avoid registering for GST purposes. One alternative is to have the franchisee acquire the goods in the United States, whether at production facilities in the United States or at the Canadian/U.S. border. A second alternative is to have the franchisor provide to the franchisee the import documentation establishing that the franchisor has imported the property into Canada and paid GST on the importation. The franchisee may use this documentation to claim the input tax credits of the non-resident franchisor that is not registered for GST purposes. However, this will require a transfer of importation documentation from the franchisor to the franchisee, a process which may become unwieldy where there are multiple importations or multiple franchisees.

The Excise Tax Act\(^{176}\) also addresses a situation where, for commercial reasons, it is desirable to have a franchisor transfer goods to a franchisee outside of Canada, but where it is convenient or otherwise desirable to have the franchisor remain as the importer of record for the goods. Specifically, the legislation would permit a franchisor and a franchisee to enter into an agreement whereby goods are transferred outside of Canada from the franchisor to the franchisee. These goods may be imported by the franchisor, which pays the applicable GST. However, the goods are deemed to be supplied in Canada, such that the franchisor is required to collect GST on the sale of the goods to the franchisee notwithstanding that the supply was actually made outside of Canada. By virtue of deeming the supply to be made inside of Canada, a GST registered franchisor will be entitled to claim input tax credits to recover GST incurred on the importation of the goods.

It is important to note that a sale for resale is not subject to Sales Tax in Canada. Therefore, a franchisor selling to a franchisee for resale to a consumer will not be required to register for Sales Tax purposes, nor to collect the Sales Tax. However, a corporation not incorporated under Canadian federal or provincial law is not entitled to issue a purchase exemption certificate in certain Sales Tax provinces, including Ontario, for goods purchased for resale.

An interesting exception to the general relevance of the “carrying on business” test is the Province of British Columbia, which, like the Province of Manitoba, has imposed a special set of rules that require non-resident sellers to register for provincial Sales Tax purposes. Specifically,

since 2000 the *Social Services Tax Act*\textsuperscript{177} has provided that every person located outside of British Columbia that, in the ordinary course of business, solicits persons in British Columbia for orders to purchase tangible personal property, accepts orders for tangible personal property from locations in British Columbia, sells tangible personal property to a person in British Columbia for their own consumption or use, and delivers the tangible personal property into British Columbia, will be required to levy and collect the Sales Tax in British Columbia. It is not clear that this aggressive legislative position is supported at common law, particularly as Canada’s *Constitution Act, 1867*, limits the taxation powers of the provinces to taxation “within the province”.\textsuperscript{178} It remains to be tested by the Courts whether a province’s taxation powers are unconstitutional when imposing a requirement to collect a consumption or use tax on a non-resident of the province.

Finally, it is worth noting that a person providing “taxable services” for Sales Tax purposes will rather easily be considered to be carrying on business in a particular province, as the place where the profits arise will be in the particular province.

**G. Competition Law**

1. **Antitrust Law**

   The federal Competition Act is designed to maintain and encourage competition in Canada by preventing individuals and corporations from engaging in various kinds of anti-competitive conduct. The Act distinguishes between conduct which is a criminal offence, subject to fines and/or imprisonment, and conduct which is a civil reviewable practice, subject to a remedial order. The criminal offences include agreements which unduly lessen competition (such as price fixing, market sharing and boycotts), bid-rigging, price discrimination, price maintenance and predatory pricing. The reviewable practices include mergers, abuse of dominant position, refusal to deal, tied selling, market restriction and exclusive dealing. Criminal offences are dealt with by the courts while reviewable practices are dealt with by the Competition Tribunal. The Act also provides the right of civil action to any person who has suffered damage as a result of conduct proscribed by the criminal offences.

2. **Conspiracy and Agreements with Competitors**

   Under the conspiracy provisions of the Act, it is a criminal offence to be a party to an agreement that prevents or limits competition unduly. The agreement may be either explicit and formal, or tacit and informal. Moreover, direct evidence of the existence of an agreement is not required; the courts may infer an agreement from all of the surrounding circumstances. Canadian courts have held, however, that conscious parallelism, or pricing that emerges out of an oligopolistic market setting without actual communication or agreement, is not enough to constitute conspiracy without further evidence of behaviour inconsistent with independent business decisions. The Act also identifies certain specific conspiracy offences including bid-rigging and giving effect to a conspiracy or arrangement entered into outside of Canada.

3. **Mergers and Acquisitions**

   Mergers and acquisitions are subject to administrative review by the Competition Tribunal on application by the Director of Investigation and Research of the Competition Bureau. Much like the Hart-Scott-Rodino process in the United States, parties to proposed mergers exceeding a certain size (generally, the Canadian business to be acquired has assets or annual revenue over $35 million and the parties to the transaction, including affiliates, together have


assets in Canada or annual gross revenue from sales in, from or into Canada of over $400 million) are required to comply with the pre-notification provisions of the Act and file specified information prior to completion. A merger is defined broadly under the Act to include the direct or indirect acquisition or establishment of control over or significant interest in the business of another person. Thus, joint venture arrangements may be subject to review under the merger provisions of the Act. (Though the Act includes an exemption for joint ventures, it has limited application.) If the Tribunal determines that a merger lessens or is likely to lessen competition substantially, it may prohibit or dissolve the merger, or allow it to proceed under certain conditions. In determining the competitive effects of the merger, factors considered include the extent of foreign competition, the likelihood of a business failing in the absence of a merger, the availability of acceptable substitutes to the products supplied by the parties, the extent of entry barriers, the extent of remaining, effective competition, and the nature of change and innovation in relevant markets. Even if a merger is found to lessen or be likely to lessen competition substantially, it may still be allowed to proceed if the merger creates gains in efficiency that exceed the losses due to any lessening of competition. Generally, the Director may challenge a merger prior to, or within three years after, the transaction.

4. Monopolies

While the existence of a monopoly is not in itself illegal under the Act, the Competition Tribunal has broad remedial powers under the abuse of dominant position provisions if it finds that: (i) one or more persons have substantial or complete control of a class of business in Canada; (ii) the persons have been or are engaged in a practice of anti-competitive acts; and (iii) the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially. The Competition Tribunal is required, however, to consider whether the practice complained of is a result of superior competitive performance.

H. Franchise Contract between U.S. Franchisor and Canadian Franchisees

In Quebec, any franchisor wishing to terminate a franchise agreement to which Quebec laws apply, by virtue of a default committed by the franchisee to its obligations under such franchise agreement, will also have to take into consideration Article 1604 of the Civil Code of Quebec which states: 179

Where the creditor does not avail himself of the right to force the specific performance of the contractual obligation of the debtor in cases which admit of it, he is entitled either to the resolution of the contract, or to its resiliation in the case of a contract of successive performance.

However and notwithstanding any stipulation to the contrary, the franchisor is not entitled to resolution of the contract if the default of the debtor is of minor importance, unless, in the case of an obligation of successive performance, the default occurs repeatedly, but he is then entitled to a proportional reduction of his correlative obligation. 180

Another trap in the Quebec Civil Code is contained in articles 1435, 1436, and 1437 that collectively state: in a contract of adhesion an external clause is null if, at the time of formation

180 Courtesy of Jean H. Gagnon, Lawyer, Longueuil, Quebec, online: <www.jeanhgagnon.com>.
of the contract, it was not expressly brought to the attention of the adhering party.\textsuperscript{181}

“As a general principle of law, article 1435 states that an external clause referred to in a contract is binding on the parties. An external clause is a clause which is referred to in a contract as forming part of the contract but which is not as such spelled out in the contract. It is a clause included in the contract by reference."\textsuperscript{182} In a license agreement or a franchise agreement, such an external clause will be considered null if, at the time of the execution of the agreement, it was not expressly brought to the attention of the licensee or the franchisee, unless the licensor or the franchisor proves that the licensee or franchisee otherwise knew of it.\textsuperscript{183} Most importantly, it is not a defence for the licensor or franchisor to prove that the provisions contained in the external clause are a current practice in the trade.\textsuperscript{184}

\textsuperscript{182} Ibid.
\textsuperscript{183} Ibid.
\textsuperscript{184} Ibid.
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