The Devil’s In the Details: International Disclosure Laws

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Jurisdictions Not Covered

- Albania
- Azerbaijan
- Georgia
- Latvia
- Moldova
- Mongolia
- Romania
- Turkmenistan
At first glance things seem similar...

- Franchising is essentially a contractual relationship;
- Laws focus for the most part on pre-contractual disclosure;
- Laws have a conceptual similarity in terms of process, time periods and types of information required to be disclosed;
- A relatively common definition of a franchise.
But then a few challenges emerge….

• No two countries do things exactly the same way, with all slightly different from the US;
• In Canada, the law is provincial, not Federal;
• Laws change quickly, and specific information is hard to find;
• There can be differences between franchising law and franchising practice;
• What is the Cost/Benefit Analysis of legal compliance?
Some preliminary traps....

- Civil law countries do things differently;
- Things are different in Asia – “laws” may be more grey letter than black letter;
- Things that you would expect to be the same are different – Australia highly regulated, New Zealand entirely de-regulated;
- More countries are enacting laws, and are doing so at an early evolutionary stage.
US exemptions rarely replicated....

• Most countries have no exemptions at all;
• The exemptions in Australia, Canada and South Korea are more narrow than the US:-
  – Australian master franchising exemption;
  – Canadian province exemptions;
  – South Korean exemption for low-cost or small franchises.
• Japan’s definition of a franchise does not cover service businesses.
Not all franchisors can franchise....

• Pre-qualification requirements before a franchisor can franchise in China, Indonesia, Italy, Malaysia, Tunisia and Vietnam;
• Pre-qualifications often linked to filing or approval by local authority;
• Length of existence in market is common:-
  – China 2 outlet rule;
  – Indonesia, Malaysia, Vietnam – time periods;
  – Italy – “business concept tested” in the market.
Registration has its own issues….

• Most countries do not require registration, but those that do can be tricky:
  – Registration in Indonesia, Malaysia, South Korea, Spain, Tunisia and Vietnam;
  – China quasi registration;
  – Voluntary registration in some countries;
• Registration often necessitates translation;
• Note possible collateral registration for trade mark or foreign exchange purposes.
Some expected issues in timing

• Most countries focus on signing date as the key date;
• More sophisticated laws have earliest of signing date, or date of first payment or signing of any agreement;
• 10 calendar days – 1 month is the range, but not prescribed in Japan, Macau and Sweden.
Some unexpected differences in timing

• Signing of a binding non-disclosure agreement will only trigger disclosure in Ontario, and possibly Brazil;

• Australia has a unique new disclosure obligation after first application or expression of interest by a prospective franchisee.
The Special Case of LOI’s

- Binding vs. Non-binding
- No Deposit vs. Refundable Deposit vs. Non-refundable Deposit
- Technical Requirement vs. Common Practice
Expected disclosure issues

• Most countries are not prescriptive about language or format of disclosure document:-
  – Only Indonesia, South Korea, Tunisia and Vietnam require agreements to be translated;
  – Translation may still be necessary in registration countries;
  – Only Australia, Malaysia, South Korea and Vietnam require disclosure in the prescribed form.
Unexpected disclosure issues

- Australia, China, Indonesia, Macau, Malaysia, South Korea and Vietnam require timely continuous disclosure of any changes;
- Australia has unique extra requirements:– update disclosure document annually;
  – franchisee can require an updated disclosure document at any time;
  – Legal and business advice certification;
  – 7 day cooling off period after signing.
Financial disclosure

• Some countries do not require financials;
• Differences in requirements for audited financials, phase in and parent financials;
• Malaysia requires a 5 year forecast;
• South Korea requires larger franchisors to provide information on projected sales;
• Asia more prescriptive than Europe or US.
Practical tips on dancing with the devil

• Over-disclosure or under-disclosure?
• Disclosure in civil law countries with no specific franchise laws?
• How to get the best outcomes when briefing local counsel.
Questions and Discussion
THE DEVIL’S IN THE DETAILS:
INTERNATIONAL DISCLOSURE LAWS

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Appendix A Map of Franchise Laws Around the World

Appendix B Exemptions from Disclosure Obligations under Canadian Franchise Laws

Appendix C List of Foreign Lawyers Who Reviewed the Paper
THE DEVIL'S IN THE DETAILS:  
INTERNATIONAL DISCLOSURE LAWS

I. INTRODUCTION

Webster's dictionary identifies the first use of the term “International” in 1780 and to
mean: “of, relating to, or affecting two or more nations,” with the first example as “international
trade”. 2 Long before that, as soon as governments came into being, rules and laws were
instituted to regulate trade across borders. Once a transaction involves the legal systems of
more than one nation there are a myriad of legal and business related issues that must be
considered, such as treaties, duties (stamp and other), tax implications (withholding, rates,
structuring, and allocation of risk), intellectual property (ownership, registration and protection)
and applicable legal systems, governing law, contract enforceability, dispute resolution, trade
regulations (trade and consumer protection laws), etc.

In the 1980s and 1990s, and especially in the last decade, there has been a proliferation
of franchise laws outside of the United States of America. 3 In 2002’s Forum meeting in
Scottsdale, Arizona, Andrew Loewinger and Michael Lindsey’s “International Franchise
Disclosure Laws” program covered 12 jurisdictions. 4 In 2005, Richard Asbill and Jane
LaFranchi covered 14 jurisdictions in their “International Franchise Sales Laws – A Survey”
program. 5

In the ten years since then,

• a number of new jurisdictions joined the ranks of countries that have franchise
disclosure laws: Vietnam (2005), Prince Edward Island (“PEI”) – Canada (2006),
Canada (2011), South Africa (2011), and Manitoba – Canada (2012);

• a number of other jurisdictions substantially revised their franchise disclosure
laws and/or implementation regulations: Australia (2008, 2010 and 2014), China (2012),

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1 The authors wish to thank the lawyers named in Appendix C, who helped review the paper and provided comments
from the local law perspectives. The authors also wish to recognize the efforts of and Michael Lindsey and Andrew
Loewinger, the editors of the ABA Forum Book “International Franchise Sales Laws” second edition and the 46
authors who contributed to the country specific chapters contained in the book, which was consulted during the
drafting of this paper.


3 Philip F. Zeidman, With the Best of Intentions: Observations on the International Regulation of Franchising, Stanford

4 Andrew P. Loewinger & Michael K. Lindsey, International Franchise Disclosure Laws, American Bar Association

Indonesia (2007, 2012 and 2014), Malaysia (2012), South Korea (2008, 2010 and 2014), and Taiwan (2014 and 2015); and

- additional jurisdictions have proposed franchise disclosure laws, including the Netherlands\(^6\), British Columbia – Canada\(^7\) and Egypt\(^8\) which currently have proposals pending.

Many countries address franchising in some legislative or regulatory manner, whether as part of their broader commercial regulations or via specific legislation. The focus of this paper is on those countries outside of the United States with specific franchise disclosure laws. As this paper goes to press, there are 31 jurisdictions\(^9\) outside of the United States of America that have some form of franchise specific law or regulation that requires the delivery of a disclosure document to a prospective franchisee before the prospective franchisee purchases the franchise. For an overview of these laws, please refer to the map attached to this paper as Appendix A.

We will be highlighting many – but not all – unique aspects of the following 23 jurisdictions’ franchise disclosure laws:

- Australia
- China
- South Africa
- Belgium
- France
- South Korea
- Brazil
- Indonesia
- Spain
- Alberta (Canada)
- Italy
- Sweden
- Manitoba (Canada)
- Japan
- Taiwan
- New Brunswick (Canada)
- Macau
- Tunisia
- Ontario (Canada)
- Malaysia
- Vietnam
- PEI (Canada)
- Mexico

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\(^6\) See generally Nederlandse Franchies Vereniging (Dutch Franchise Association) News, available at [http://www.nfv.nl/nieuws/year/2015/](http://www.nfv.nl/nieuws/year/2015/) (the Dutch Franchise Association recently released a draft franchising code, which provides (in Section 2.5) that “the franchisor and franchisee should provide each other with the information needed to further strengthen, develop and maintain the franchise formula”).


\(^8\) Based on a draft shared by the Egyptian Franchise Development Association with the International Franchise Association.

\(^9\) For the purpose of this paper, we are treating the five Canadian provinces that currently have franchise legislations, and mainland China, Hong Kong and Macau, as separate jurisdictions.
In this paper, we are not examining the disclosure obligations of the following 8 jurisdictions in any detail, even though their franchise laws do require pre-sale disclosure, because these disclosure laws lack any specificity based on which a meaningful analysis could be conducted:

Albania\textsuperscript{10} \quad Latvia\textsuperscript{11} \quad Romania\textsuperscript{12}

Azerbaijan\textsuperscript{13} \quad Moldova\textsuperscript{14} \quad Turkmenistan\textsuperscript{15}

Georgia\textsuperscript{16} \quad Mongolia\textsuperscript{17}

Argentina passed its new Argentine Civil and Commercial Code (Law No. 26,994), with provisions (in Book 3, Title IV, Chapter 19) governing franchise relationships. One of the

\textsuperscript{10} Albanian Civil Code Ch. XX,- art. 674 contains a good faith obligation, art. 675 addresses disclosure, noting that where “a contracting party possess professional knowledge and evokes the other side of her full confidence, it has an obligation to provide information and guidance in good faith.” Art 1057 refers to this obligation generally in the context of franchising.

\textsuperscript{11} Latvia Commercial Law , Div. XXI, ch. 7, Section 476 (which sets forth that a "franchisor has an obligation to provide the [information set forth in Section 476(1)] in writing to the potential franchisees prior to entering into a franchise contract regarding franchise").

\textsuperscript{12} Romanian Government Ordinance No. 52/1997 - Art. 2, Para. 3 (Regarding the Franchise Legal Framework), as amended by Law No. 79/1998 (which sets forth the rules covering the pre-contractual relationship between the parties, including that the franchisor must provide to the prospective franchisee sufficient information concerning the franchise to enable it to “take part in a franchise agreement with full awareness.” This includes the business to be acquired as well as the details of financial terms of the agreement).

\textsuperscript{13} Civil Code of the Azerbaijan Republic, ch. 35, Art. 726, which provides that "[w]hile signing franchise agreement, parties must acquaint each other plainly and completely with conditions related to franchise, especially with franchise system and honestly inform each other."

\textsuperscript{14} Law of the Republic of Moldova on Franchising No. 1335 of 1 January 1997, and Chapter XXI of the 2003 Civil Code. The legislation does not have specific disclosure obligations, other than what may naturally occur in relation to the preparation of a franchise proposal that includes a business plan as part of the process for registration with the State Agency for the Protection of Intellectual Property.

\textsuperscript{15} Turkmenistan Civil Code of Saparmurat Turkmenbashi ch. 7, Art. 632, July 17, 1998 ("[w]hen concluding a contract the parties must candidly and fully familiarise one another with the obligations of the matter connected with franchising and in good faith provide information to each other. They shall be obliged not to divulge information entrusted to them also if the contract is not concluded").

\textsuperscript{16} Civil Code of Georgia, Tit. One, ch. Seven, Art. 607 – 614, May 31, 2001; Civil Code of Georgia, Tit. Two, ch. One, Art. 361 (the principle of good faith extends to pre-contractual relationships in that is requires the franchisor to disclose to the franchisee all material facts regarding the franchise system prior to the execution of the franchise agreement. Specifically, "[w]ith respect to the performance of an underlying obligation, such obligation must be performed duly, in good faith, and at the time and place determined."); available at http://www.lexadin.nl/wlg/legis/nofr/oeur/arch/geo/CIVILCODE.pdf .

\textsuperscript{17} Civil Code of Mongolia, Ch. 29 (Franchising), Art. 335, Jan. 10, 2002 (providing that the "[p]arties shall exchange all necessary information if a contract is concluded and to maintain the confidentiality of received information if a contract is not concluded").
provisions of this law requires that prior to signing a franchise agreement, a franchisor must provide the franchisee with economic and financial information covering the last two years for units that are similar to those offered to the franchisee. This information can be about other units in Argentina or abroad (i.e., the franchisor’s home country or, technically, from any country). But, it is unclear whether this disclosure requirement means that newer franchise systems (that have less than two years’ worth of economic and financial information) can open in Argentina by disclosing just the limited financial information that they do possess. Given the limited scope of this disclosure requirement, we will not discuss Argentina in this paper.

In addition, this paper will not analyse in detail the implications and potential duties of pre and post contract disclosure under civil law in jurisdictions that do not have specific pre-contractual franchise disclosure laws, such as, for example Germany,18 Lithuania and Norway,19 where legal systems include a general principle that parties owe to each other a duty of good faith and fair dealing during pre-contractual negotiations, which can be interpreted to impose a pre-sale disclosure obligation on the part of the franchisors (and for that matter, on the part of the franchisees as well). The vague nature of these disclosure obligations do not provide sufficient basis for the comparative analysis under Section III of this paper.

This paper will attempt to address three topics: (a) a very brief overview of the franchise disclosure laws in the 23 jurisdictions; (b) a comparative study of some key features of these franchise disclosure laws; and (c) a discussion of some practical issues that international franchisors face in complying with these myriad of foreign franchise disclosure laws.

This paper covers definitional elements of a franchise and applicability of such laws, including exemptions from coverage. It discusses certain technical requirements such as the pre-qualification and registration requirements, local language restrictions, and disclosure

18 See generally Bürgerliches Gesetzbuch (BGB) (German Civil Code) S. 311(2) and 241(2) (highlighting the pre-contractual relationship of trust with mutual obligations of protection that arises). Further, in Germany, there is no specific franchise law, but the courts have long interpreted that under the German Civil Code parties have obligations to act in good faith in connection with entering into the performance of contracts. That obligation under their Civil Code extends to pre-contractual matters related to the negotiation of the contract. The code prevents a party that has superior knowledge (in this case generally deemed to be the franchisor) from using that information to the detriment of the weaker party (perceived to be the franchisee). In connection therewith, the courts have held that a franchisor has a duty to share the information in its possession to the franchisee in advance of entering into the contract to rectify the informational imbalance. There have been numerous decisions in the German courts that have been utilized to form a standard of practice of the types of information that a franchisor must provide in order to meet the threshold of adequate disclosure. That threshold varies depending on the facts and circumstance related to the specific instance in question.

19 While there is franchising legislation contained in Articles 6.766 – 6.779 of the Civil Code of the Republic of Lithuania, there is no pre-contractual disclosure requirement contained therein. Rather, Articles 6.163(1) and (4) in the Civil Code of the Republic of Lithuania (applicable to the formation of contracts) provide the general authority for pre-contractual disclosure as follows: “[i]n the course of pre-contractual relationships, parties shall conduct themselves in accordance with good faith” and “[t]he parties shall be bound to disclose to each other the information they have and which is of essential importance for the conclusion of a contract.” In Norway, while there is no specific franchise legislation it has been observed that courts likely will apply a duty of disclosure on the part of both the franchisee and franchisor based on statutory and non-requirements. Section 25 of the Norwegian Marketing Act (09.01.2009) roughly translates that “in conducting business, one must not perform any act that is contrary to good practice between businessmen”. As a general principal of contract under Norwegian law, the parties have a duty to disclose information essential to the formation of the contract.
format requirements. The paper also addresses certain substantive requirements, such as triggers on the delivery of disclosure, whether only pre-sale disclosure is required or whether there are on-going disclosure obligations of the franchisor to its franchisees, and the specified holding periods for delivery of the disclosure document.

Other substantive requirements covered by the paper include financial statement disclosure requirements, regulation and use of financial performance representations, and the consequences for failing to comply with such laws. Throughout the paper there are quick reference charts that identify the jurisdictions covered by this paper and various elements of the applicable laws. The purpose of the charts is to assist practitioners to issue spot the applicability and requirements of such laws and to direct the practitioner to additional resources for further analysis.

In addition, certain practical aspects of international franchise disclosure document usage are addressed, such as whether country-specific disclosure documents versus a single international disclosure document with – country specific addenda can or should be used, including the risk of over-disclosure or under-disclosure based on such choice.

Unlike the 2002 and 2005 programs, this paper will not cover the Model Franchise Disclosure Law adopted by UNIDROIT (the International Institute for the Unification of Private Law) in September 2002. Although there were expectations after the adoption of the Model Law that it would be followed, or at least consulted, by legislators in countries considering adopting franchise laws (and perhaps even those with existing franchise laws) those expectations remain unfulfilled. To the authors’ knowledge, no amendments to the franchise laws after 2002 were to reflect any elements of the Model Law, and certainly no law adopted after 2002 has any resemblance to the Model Law. Its most prophetic observation may be its statement in the accompanying Explanatory Report that a uniform law should be restricted to the pre-sale disclosure requirements, rather than trying to prescribe any “relationship” requirements that would interfere with the parties contractual dealings, stating that it had “arrived at the conclusion that the experience of States with relationship laws had been negative.” Some countries seem to have had regard to this principle in framing their franchising legislation, but most do not seem to have appreciated the merit in the distinction. Notwithstanding the substance of the UNIDROIT deliberations and the common sense appeal of having some uniformity in the global regulation of franchising, UNIDROIT’s Model Law serves as a reminder of the difficulty of achieving any uniformity in franchise disclosure laws across jurisdictions.

In the United States of America, Canada and Australia, the development of legislation occurred as a consequence of the development of the franchising industry, often in response to allegations of inappropriate behaviour in the sector, and after a vigorous rule-making process that includes ample opportunities for public comment. However, outside of these few Anglophone countries, the adaptation of franchise laws has tended to occur with little public participation, and in anticipation of franchising rather than as a result of any demonstrated

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21 Id. at 14.
regulatory need. Countries such as Azerbaijan, Mongolia, Romania, Tunisia and Vietnam have enacted legislation notwithstanding that franchising is in its infancy in those countries. Perhaps there is a fear of franchising in some countries, but more likely some countries take a different view to countries such as the US, Canada and Australia and see the early establishment of a regulatory framework as important in helping the development of franchising. This is particularly the case in the Asia region.

Franchising remains fundamentally a contractual relationship, and most franchise laws look to supplement the contractual process via a pre-contractual disclosure process. A few countries have an ongoing disclosure obligation, and some supplement disclosure by some form of registration requirement. The features of the disclosure regimes are discussed below.

There is a remarkable lack of uniformity in global requirements concerning pre-sale disclosure. There are blocks of countries that seem to have followed a similar conceptual framework – civil law countries with their more general disclosure requirements, Asian countries with more prescriptive requirements with some apparent Australian influence or countries in the Baltic region – where there are no detailed requirements and are still quite different. The same applies in relation to ongoing disclosure. Where disclosure is required, the triggers and disclosure period are relatively similar, but each country still seems to have been intent on doing their own thing. As the title to our paper observes, the devil is very much in the detail when it comes to disclosure obligations in international franchising.

II. A BRIEF OVERVIEW OF INTERNATIONAL FRANCHISE DISCLOSURE LAWS

Australia has one of the most comprehensive pre-disclosure regimes in the world.22 The Franchising Code of Conduct was first adopted in 1998, after a long history of a self-regulatory code. The Code has been amended several times through the years. The most recent amendment took effect in January 2015. It has highly prescriptive requirements that include having to give preliminary disclosure via an Information Statement (which is essentially a brochure on the nature, advantages and disadvantages of franchising) at the earliest opportunity. It is then necessary to provide a detailed disclosure document in a prescribed form prior to signing a franchise agreement (or obtaining any non-refundable consideration), and there are various other pre-contractual process requirements described in more detail in the following sections. Australia is the only country to require franchisors to recommend that prospective franchisees obtain legal and business advice prior to signing the franchise agreement, and to require franchisors to produce a certificate that the franchisee has either done so, or elected not to obtain advice, notwithstanding the franchisor’s recommendation. Australia is also one of the three countries (China and South Africa being the other two) to have a statutory cooling off period where a franchisee can withdraw from the franchise agreement without cause.23


Belgium in December 2005 adopted the legislation pertaining to the pre-contractual information relevant to commercial partnership agreements, which includes franchise arrangements.24 The legislation was amended in 2014, and is now part of the Belgian Business Law Code Article 1.11, 2° and Articles X.26 to X. 34. It essentially has two parts: the disclosure of significant contractual provisions, and the disclosure of “facts contributing to the correct appreciation of the agreement.” The Belgian law was based on the French “Loi Doubin” and requires disclosure of the history, status and forecast of the market share of the network both generally and locally (similar to the French required market study described below). In addition to the general disclosure requirement which requires that the disclosure be provided at least 30 days before signing of the franchise agreement or payment of consideration, the law provides for a one-month cooling off period and requires a franchisor to deliver a simplified disclosure document describing the terms of any modifications negotiated to the standard form before execution of the franchise agreement or payment of consideration. Those periods can run concurrently depending on when the first disclosure was provided and the negotiations are completed.

Brazil adopted its franchise law in December 1994.25 It deals solely with pre-contractual disclosure. One of the more unique disclosure requirements under the Brazil franchise law is the requirement for the franchisor to provide the “characteristics of an ideal franchisee,” 26 which requirement (perhaps not surprisingly given the Portuguese link) appears as part of the disclosure requirements in Macau.27

In Canada franchise regulation occurs at the provincial level, with Alberta28, Manitoba,29 New Brunswick,30 Ontario31 and Prince Edward Island32 having franchise legislation.33 Alberta


26 Brazil Franchise Guidelines, supra note 25, at Art. 3(V).


29 Manitoba Franchises Act, C.C.S.M c. F156.

30 New Brunswick Franchises Act, S.N.B 2007, c. F-23.5

31 Ontario Franchise Act and Ontario Regulation 581/100 (amended to O.R. 199/05)


took the lead by passing Canada’s first franchise legislation in 1971. This legislation was replaced in 1995 with a new Act, which moved away from governmental oversight, the “prospectus” and registration and instead focused on disclosure requirements. In Ontario the Arthur Wishart Act (Franchise Disclosure) 2000 received Royal assent in 2000, with its disclosure requirements coming into force in early 2001. The Act borrowed a number of elements from the Alberta legislation. Prince Edward Island (effective 2006), New Brunswick (effective 2011) and Manitoba (effective 2012) all followed suit, adopting in large part the disclosure requirements contained in the Ontario legislation.

The first attempt to regulate franchising in China came in 1997. It proved wholly inadequate, which is not surprising as franchising was a novel business practice in China at the time. Such piecemeal efforts continued in 2004 and 2005, with the adoption of interim regulations that were, again, inadequate for the task, and were hastily put in place to meet the WTO commitments. It all changed in February 2007, when the State Council (the highest executive agency) issued the Administrative Regulations of Commercial Franchises, which are still effective today. The Ministry of Commerce, the agency in charge of enforcing the franchise regulations, issued its implementation rules in 2007 when the regulations were adopted, and updated those regulations in 2011.

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34 Alberta Franchises Act, R.S.A, c F-17.1

35 The Arthur Wishart Act was proclaimed in parts, with the disclosure obligations coming into force on January 31, 2001.

36 As with Ontario’s legislation, the disclosure obligations were phased in following a brief delay, with effect from 1 January 2007.


France is the first country outside of the United States of America and Canada to regulate franchising, with the adoption of the so-called "Loi Doubin" (Law Number 89-1008 of 31 December 1989, Relative to the Development of Commercial and Trade Enterprises and the Improvement of Their Economic, Legal, and Social Environment) in 1989. Loi Doubin is a general disclosure law that has application to franchising, with disclosure to be provided at least 20 days before signing the agreement or paying any money. Although the law has fewer specific disclosure requirements than other disclosure laws, the general obligations also include requirement to provide a franchisee with a description of the general and local market conditions for all franchised products and services as well as the outlook for development of the market, which is a singular requirement of France and no other jurisdiction (other than the French inspired, Belgium required market share disclosure). In addition to the enumerated disclosures, the Loi Doubin requires the disclosure of all information necessary to assess the business experience of the franchisor and its management.

The franchise legislation in Indonesia was first adopted in 1997. It was substantially modified in 2007 to require that the franchisors register the franchise disclosure documents and the franchisees register the executed franchise agreements. The Ministry of Trade has also issued a series of regulations to implement the 2007 regulation, including Regulation 53, (which has been subsequently amended by Regulation 57 and which contains the 80% local sourcing requirement as discussed below), Regulation 68 (which deals with modern store franchising) and Regulation 7 (which deals with food and beverage service business franchising).

Italy adopted its franchise regulation in 2004. In addition, Ministerial Decree No. 204 of September 2005 applies to foreign franchisors that have not operated in Italy. Law 129/2004 distinguishes between information that has to be included in the text of the franchise agreement (specifically listed in Article 3.4) and information to be disclosed to the prospective

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43 Id.


46 Government reg. no. 42/2007 (Republic of Indonesia).


51 Il Decreto 2 settembre 2005, n. 204 (Decree No. 204 of Sep. 2, 2005).
franchisee at least 30 days before the signature of the agreement (listed in Article 4). This distinction is rather confusing, as most of the information required to be included in the text of the agreement is customarily included only in disclosure documents – for example, the initial investment estimates. Also, the disclosure must include any information the franchisee would consider necessary or useful.

Japan’s franchise regulatory regime dates back to 1983, when the Japan Fair Trade Commission issued its guidelines on franchising, which were replaced in 2002 by a new set of guidelines.\(^5\) In addition, Japan also adopted the Medium and Small Retail Business Promotion Act in 1973 (amended in 2002), which is supplemented by the Ministerial Order to Implement the Act issued by the Ministry of Economy, Industry and Trade.\(^5\) It should be noted that the Medium and Small Retail Business Promotion Act only applies to certain retail businesses up to a certain size, and is not applicable to all franchise businesses.\(^5\) The disclosure requirements under both the JFTC guidelines and the Medium and Small Retail Business Promotion Act are somewhat more limited than in other jurisdictions, but still relatively extensive.

Macau adopted its franchise law back in 1999, with little notice by the outside world, very much depicted from the French and inspired by the Brazilian legislations.\(^5\) In a similar manner to China, the legislation does not require a rigid format for disclosure but rather generally stipulates categories of information that must be truthfully disclosed. As discussed above, similar to Brazil, it also has the unusual requirement of requiring disclosure of the “characteristics of ideal franchisees,” but also the general obligations include providing a franchisee with a description of the franchisor market, network and prospect investment, as well as, sufficient relevant information to enable the franchisee to evaluate the sustainability of the franchise. Adding to these general requirements, also as part of this evaluation to be done by the future franchisee, the franchisor must also provide the contract and pre-contract drafts prior to the signing of the franchise agreement.\(^5\)

The Malaysian legislation was first adopted in 1998,\(^5\) is conceptually similar to the Australian law. The law was amended in September 2012.\(^5\) The format of the disclosure


\(^5\) See International Franchise Sales Laws at Japan p. 5 (Andrew Loewinger and Michael Lindsey, Editors, American Bar Association, 2nd ed. 2008) (the "International Franchise Sales Laws Book") ("[a]ccording to the Japan M-SRBP Act, a retailer is "medium- or small-sized" if (a) its amount of stated capital is 50 million yen or less, (b) the number of its permanent employees is 50 or less, or (c) it is an individual or a cooperative.")


\(^5\) Macau Commercial Code, Book III, Tit. VIII, Ch. I, Art. 680.

document is contained in and prescribed by the legislation, and the content requirements are comprehensive.

The franchise laws in Mexico dates back to 1994, and are a part of its Industrial Property Law and its Regulations. The law requires franchisors to provide information to the franchisee concerning the situation of the franchisor’s business prior to entering into the franchise agreement. Disclosure is focused on technical, economic and financial information, and is less concerned with the business history or financial position of the franchisor.

The South African franchise disclosure obligations, which came into force in April 2011, are unique in the sense that these obligations are contained in the country’s consumer protection laws. These disclosure obligations are less extensive than countries with a comprehensive set of disclosure obligations, and are focused on fundamental issues such as the franchisor’s turnover, profitability and financial position, organisational structure and existing franchises.

South Korea has comprehensive legislative requirements overseen by the Korea Fair Trade Commission. The regulatory regime started out with a set of guidelines issued by the Korean Fair Trade Commission in 1997. The guidelines were replaced by the legislation in 2002, which legislation was substantially amended in 2008, in 2010, and again in 2014. The South Korean franchise law is distinguished by its comprehensive disclosure requirements, and intrusive requirements with regard to the franchisor-franchisee relationships, including for

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64 South Korea Franchise Act, supra note 58, at Art. 2(10); 7.
example the requirements on the initial franchise fee collection, termination procedures, renewal issues, and contribution by the franchisor towards franchisees’ renovation costs.

While Spain first enacted franchise legislation in 1996, its pre-contractual disclosure obligations were not introduced until 1998. The law is contained in a broader statute regulating retail trading, and in franchising specific regulations. Franchisors must register with the Registry of Franchisors within three months after the franchisor begins offering franchises in Spain. Disclosure must be provided at least 20 days before the signing of the franchise agreement, any pre-agreement or payment of any money. In addition to the specific disclosures identified in the statute, franchisors must provide a disclosure document containing “all information regarding the franchise network” to be able to decide “freely and knowingly about incorporation into the franchise network.”

Sweden adopted its franchise law in 2006, which is one of the more recent franchise disclosure laws. It is not particularly prescriptive with respect to the specific disclosure requirements or timing. Unlike the other franchise disclosure laws that prescribe a significant number of required disclosures and then have a general additional disclosure obligation, the Swedish law generally requires the franchisor to disclose a summary of the content of the franchise agreement and other information necessary to understand the franchise, and then identifies a minimum of 8 disclosure items related to the franchise business, the franchise agreement, franchise fees and other charges, intellectual property and goods and services offered, and restrictions on competition. There is no specific time required for the delivery of the disclosure document, only that it be delivered in “due time” before entering the agreement (which has been identified as somewhere between 14 and 21 calendar days).

The Fair Trade Commission of Taiwan in 1999 adopted the “Rules Governing the Disclosure of Information by Franchisors,” which sets forth the Commission’s view as to what kind of information should be disclosed. This regulation was most recently amended in January

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65 South Korea Franchise Act, supra note 58, at Art. 2(6); 6-5; 10.
66 South Korea Franchise Act, supra note 58, at Art. 11(2).8; 14.
67 South Korea Franchise Act, supra note 58, at Art. 13.
68 South Korea Franchise Act, supra note 58, at Art. 12-2(2).
70 Royal Decree 201/2010 of February 26, 2010 on Franchise Agreements and the Franchisors' Register (por el que se regula el ejercicio de la actividad comercial en régimen de franquicia y la comunicación de datos al registro de franquiciadores) (the “Spain Franchise Law”).
2015 and renamed as the Principles for Handling Cases Relating to the Operation of Franchisors.\textsuperscript{73}

**Tunisia** has one of the most recent franchise disclosure laws, which went into effect in 2009.\textsuperscript{74} It contains quite comprehensive disclosure requirements similar to those typically found in countries with prescriptive disclosure laws. One of the unique aspects of this law, however, is the requirement that all foreign franchisors must be specifically pre-approved, unless they fall into a list of pre-cleared industries.\textsuperscript{75}

**Vietnam** has legislation regulating franchising\textsuperscript{76} that includes specific and quite prescriptive disclosure obligations that are substantively similar to the detailed provisions of Australian law and are discussed in the sections below. The 2005 Commercial Law is supplemented by a number of regulations, including Decree No. 35/2006/ND-CP of the Government, dated March 31, 2006 (Decree 35) as amended by Decree 120/2011/ND-CP of the Government dated December 16, 2011 (Decree 120), and Circular No. 09/2006/TT-BTM of the Ministry of Industry and Trade (MOIT), dated May 25, 2006 (Circular 09).

### III. A COMPARATIVE STUDY

#### A. Definition of “Franchise”

In the United States, the Federal Trade Commission’s Franchise Rule defines a franchise arrangement as having three elements: (a) a license of a trademark; (b) significant control/assistance by the licensor; and (c) payment of franchise fee.\textsuperscript{77}

Little uniformity exists among the international franchise disclosure laws as to the precise language used to define a franchise. Most of these laws, however, employ some or all of these three elements in defining a “franchise.”

\textsuperscript{73} International Franchise Sales Laws Book, supra note 51, at Taiwan. The amendment on April 13, 2015 amended sections 5 and 7 to reflect the amendment of the Taiwan Fair Trade Act in February 4, 2015.

\textsuperscript{74} Law N° 2009-69, dated Aug. 12, 2009, amended bysupplemented by Decree N° 2010-1501 of Jun. 21, 2010 (the “Tunisia Franchise Code”). Prior to August 12, 2009, franchise agreements in Tunisia were governed primarily by the Civil Code of Tunisia (Code des Obligations et des Contrats) and Law No. 99-44 dated July 1, 1991 on the organization of distribution trade.

\textsuperscript{75} Decree N° 2010-1501 of Jun. 21, 2010, supra note 71, at Art. 53.


\textsuperscript{77} 16 C.F.R. § 436.1(h) (Mar. 30, 2007).
<table>
<thead>
<tr>
<th>Country</th>
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It should come as no surprise that a majority of the jurisdictions’ definitions of “franchise” encompass all three elements.

Belgium does not have a statutory definition of “franchise.” The disclosure obligation arises under the Act of 19 December 2005 ‘regarding pre-contractual information within the framework of commercial cooperation agreements’ (the “Disclosure Act”). The Disclosure Act applies to “commercial cooperation agreements,” which are defined as: “agreements, concluded between several persons, by which one of these persons grants to other the right to use, in the course of the sale of products or of the provision of services, a business process, under one or several of the following elements: (i) a common brand; (ii) a common commercial denomination; (iii) a transfer of know-how; or (iv) technical or commercial assistance.” The definition is, at least according to the text, extremely broad and could potentially cover a number of arrangements in addition to franchise arrangements. Some commentators think, however, that

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78 Although the franchisor retains significant control of the franchise system and network, amendments operative from 2012 have modified the definition of “franchise” so as to remove the franchisor’s responsibility in providing assistance to franchisees in certain aspects of operating the franchise, including the supply of materials, training, marketing and technical assistance.

this definition will be construed narrowly, with the emphasis on "an organized business process or business format."  

Similarly, Belgium’s next door neighbour, France, does not define “franchise” in its statutes either. Rather, Loi Doubin applies to arrangements under which a “person ... makes available a trade name, trademark or commercial sign to another person, while requiring from such other person a commitment of exclusivity or quasi-exclusivity for such other person’s activity” – a definition even broader than that under the Belgian law. It is unclear under the Loi Doubin, whether the exclusivity or quasi-exclusivity is determined based solely on the activity of the franchised business or in relation to the whole activity of the franchisee. Some have suggested that the law would not cover a franchise arrangement under which there is no exclusivity whatsoever on the part of the franchisee – that is, an arrangement by which the franchisee is not prohibited from engaging in activities outside of the franchised business, whether competitive or not. Commentators have suggested that French courts will likely consult the definition of “franchise” under the European Ethics Code for Franchising, which is a more traditional three-element definition.  

Brazil’s definition of “franchise” focuses on the license of the right being on an “exclusive or semi-exclusive” basis, not unlike the approach taken by France’s Loi Doubin. It, however, does not require the substantial control/assistance element, or that the franchisee operates under a prescribed system or as part of a network.  

Mexico and Vietnam are the only jurisdictions in the world, at least as of now, that defines a “franchise” without requiring a payment of franchise fee.  

B. Exemptions  

By exemption, we mean that even though an arrangement meets the definitional elements of the statute or the regulation, the law excludes such arrangement from (some or all of) the requirements under such law. As such, we are not including instances where, for example, a country’s law does not apply because its definitional elements have not been satisfied. The best example would be the Medium and Small Retail Business Promotion Act in Japan, which only applies to “retail” businesses (as defined under the 1972 edition of the Japan Standard Industry Classification), and not businesses where the provision of services accounts for more than 50% of the revenues, and only applies to “medium and small” business,  

80 International Franchise Sales Laws Book, supra note 51, at Belgium.  

81 See Loi Doubin, supra note 40.  


83 Brazil Franchise Law, supra note 25, at Art. 2.  

84 Mexico Franchise Law, supra note 56, at Ch. VI, Art. 142.  

85 Note the class of "retail" business under the 1972 edition of the Japan Standard Industry Classification includes restaurant and other eating and drinking establishment business.
not franchised businesses where they employ more people or have more capital than the prescribed maximum. This limitation obviously excludes a number of franchise arrangements from the coverage of this law. Articles 2.3. and 2.4 of Spanish Royal Decree 201/2010 state that commercial contracts like consignment, exclusive distributorship, manufacturing license, brand license, technology transfer or trade name license shall be not consider a franchise proper, although these exclusions may probably not be deemed as an "exemption".

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86 See generally Japan M-SRBP Act", supra note 50.

87 Belgium’s franchise law requires disclosure upon the renewal or modification of a franchise agreement, but allows the use of a simplified disclosure document under certain circumstances, and completely exempts the franchisors from this disclosure requirement under certain other circumstances; see also International Franchise Sales Laws Book, supra note 51, at Belgium, Section III.C, p. 5.

88 For completeness, it should be noted that Malaysia exempts franchise transactions entered into prior to October 8, 1999 (when the Malaysia Franchise Act came into effect). See Malaysia Franchise (Exemption) Order 2004. In addition, under Section 58 of the Malaysia Franchise Act, the regulators may prescribe exemptions from the requirements under the Malaysia Franchise Act. To date, the only exemption that has been prescribed applies to the gas stations. See Malaysia Franchise (Exemption) Order 2001 (PU(A) 27/2001).

89 In South Africa franchise agreements entered into before April 2011 are exempt from the requirements. However if such an agreement is renewed after that date, it must be treated as a new agreement and comply with all requirements.
It turns out that the concept of “exemption” is a distinctively Anglophone one – no countries outside of Australia, Canada and the United States of America provide for any kind of exemption from their franchise disclosure laws. The only exception is South Korea, which excludes two types of franchise transactions from its coverage: (a) the total amount of franchise fee that a franchisee pays to a franchisor for any 6-month period from the date of the initial payment to franchisor is less than KRW 1 million (approximately US$900); or (b) the franchisor’s total annual worldwide sales are less than KRW 50 million (approximately US$48,000); provided, however, that this exemption does not apply if the franchisor has 5 or more franchise units worldwide.\footnote{South Korea Franchise Act, supra note 58, at Art. 3.}

In Australia there are only very limited exemptions from the application of the Code. A complete exemption applies to a franchise agreement entered into prior to 1 October 1998,\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 1, Div. 1, Cl. 3(1).} or to which another prescribed industry code applies.\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 1, Div. 1, Cl. 3(2).} A fairly restrictive fractional franchise exemption applies where the franchise agreement is for goods or services substantially the same as those supplied by the franchisee before entering into the franchise agreement, the franchisee has supplied the goods or services for at least 2 years immediately prior to entering the franchise agreement and sales are less than 20% of the franchisee’s gross turnover.\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 1, Div. 1, Cl.3(2), 3(3).} There are qualifications to the definition of a “franchise agreement” that may see a franchise agreement fall outside the scope of the Code, such as where the only amount payable by the franchisee to the franchisor is payment for goods and services supplied on a genuine wholesale basis, repayment of a loan, goods on consignment or market value for the purchase or lease of real property, fixtures, equipment or supplies needed to start or continue the business under the franchise agreement.\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 1, Div. 2, Cl. 5(d)(iv) – (viii).}

The changes to the Code that took effect 1 January 2015 does, however, create a new exemption from the obligation to comply with the obligations in Part 2 of the Code (which relate to the provision of disclosure) for a master franchisor in relation to a subfranchisee.\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 2, Div. 1, Cl. 7.} Similarly, a franchisor is no longer obliged to update the disclosure document after the end of a financial year, if (a) the franchisor did not enter into a franchise agreement, or only entered into 1 franchise agreement during the year; and (b) the franchisor does not intend, or if the franchisor is a company, its directors do not intend to enter into another franchise agreement in the following financial year.\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 2, Div. 2, Cl. 8(7).} However, in a classic case of the devil being in the detail, if a franchisor receives a request under clause 16(1) of the Code for an updated disclosure document, a franchisor must update the disclosure document so that it reflects the position of

\footnote{South Korea Franchise Act, supra note 58, at Art. 3.}

\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 1, Div. 1, Cl. 3(1).}

\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 1, Div. 1, Cl. 3(2).}

\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 1, Div. 1, Cl.3(2), 3(3).}

\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 1, Div. 2, Cl. 5(d)(iv) – (viii).}

\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 2, Div. 1, Cl. 7.}

\footnote{Australia Franchising Code of Conduct, supra note 22, at Pt. 2, Div. 2, Cl. 8(7).}
the franchise as at the end of the financial year before the financial year in which a request is made by a franchisee.\textsuperscript{97}

For the five Canadian provinces, it is important to remember that there are, broadly speaking, two types of exemptions: (a) those which would exempt a franchisor from the requirement to disclose financial statements; and (b) those which would exempt a franchisor from complying with the disclosure obligations entirely. The exemptions referred to in (a) are very unique in that they are not found in any other jurisdictions, and frankly are of limited importance to franchisors because, as mentioned below, to qualify for the exemption, the franchisor (and, if applicable, its parent) will generally need to have audited financial statements in the first place and will need to meet certain financial and other criteria. For an overview of the exemptions referred to in (b), please see Appendix B. None of these exemptions, however, exempts franchisors from complying with other aspects of the franchise laws, including, e.g., the duty to act in good faith.

C. Pre-qualifications to Franchise

In the few countries that do impose pre-qualifications on franchisors, these requirements appear to go much further than they do in the United States.\textsuperscript{98} In most countries the pre-qualification requirements appear to seek to prevent “unqualified” franchisors from being able to franchise in that jurisdiction entirely, and do not provide such franchisors with any opportunity to overcome any failure to satisfy these preconditions by providing alternatives. However that may not necessarily be the case in practice. The advice of local counsel should be obtained, as there is often an opportunity to work around the apparent strict wording of the legislation. China, Malaysia and Indonesia are examples of countries where it may be possible, in the authors experience, to overcome an apparent prohibition.

<table>
<thead>
<tr>
<th>Country</th>
<th>Pre-qualification to Franchise</th>
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\textsuperscript{97} Australia Franchising Code of Conduct, supra note 22, at Pt. 2, Div. 2, Cl. 8(8).

\textsuperscript{98} It would be wrong to suggest that imposing a pre-qualification on franchisors before they are allowed to franchise is a distinctively ‘foreign” concept, and nothing of this sort exists in the United States. It certainly does in some states, where the regulators are given the authority to review aspects of the franchisor’s financial structure. The focus tends to be on financial assurance.
### Table: Country Pre-qualification to Franchise

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Among the jurisdictions that impose pre-qualifications to franchise, China is probably the most prescriptive, by requiring that all franchisors must first operate at least two company-owned operations for at least a year – the so-called “2+1” rule. When the rule was initially proposed, the two units had to be located within China. This “within China” limitation was removed before the formal promulgation of the regulation in early 2007. After eight years, two key issues remain: (a) whether units owned by a franchisor’s affiliates are permitted; and (b) for certain business sectors (e.g., hotels), whether a substitute for full ownership is acceptable. Although the Chinese officials have dealt with these issues in a practical manner, whether such stance will continue is difficult to predict, especially with the regular rotating of Chinese officials.

Indonesia’s Franchise Regulation requires a franchisor to be in existence for at least 5 years, but that requirement is rarely enforced in practice. However, it does require that the franchisors must disclose two years’ worth of audited financial statements, and provides no phase-in for new entities. As such, it effectively blocks any franchisor with less than two years’ of history from being able to franchise in Indonesia. In addition, Indonesia’s Franchise Regulation requires the franchisors and franchisees to source at least 80% of the FF&E and supplies used in franchised business comes from within Indonesia.

Similar to Indonesia, Malaysia’s Franchise Act requires the disclosure of three years’ worth of audited financial statements, and does not accommodate new entities.

Vietnam, on the other hand, expressly requires that the franchised concept must be in existence for at least a year before it can be franchised in Vietnam.

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100 Government reg. no. 42/2007 (Republic of Indonesia), Art. 7.


102 See implementation regulations for Malaysia Franchise Act, Section 7, Art. 18.1.

103 Vietnam Gov. Decree No. 35/2006/ND-CP, Article 5.
Italy has a similar concept, but does not impose a minimum time. It simply requires that a franchisor to have first “tested its business concept in the market.” 104

Tunisia requires that all foreign franchise offerings must first be approved, unless it falls into one of the pre-cleared categories. 105 Foreign franchisors operating in the sectors mentioned by the Order of the Trade and Handicrafts Minister dated July 28, 2010 are automatically authorized to franchising. Foreign franchisors not within one of the categories listed in the aforementioned Order must make a prior authorization request. This authorization is granted by the Ministry of Trade basis on the prior obligatory consultation with the Competition Council. Before the Arab Springs, such approvals were impossible to obtain unless the franchisor agreed to work with the government officials, which explains the dearth of franchised businesses in Tunisia (and makes its adoption of a franchise law during that time doubly ironic).

D. Registration Requirements

Registration is a concept that is familiar to all franchise practitioners in the United States of America – a state agency reviews the franchise offering for compliance with the state’s law (including the franchise disclosure document) before the franchisor is permitted to offer such franchises within that state. Outside of the United States, however, such registration regime is rather rare.

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<td>No</td>
</tr>
<tr>
<td>Macau</td>
<td>No</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Yes</td>
</tr>
<tr>
<td>Mexico</td>
<td>No</td>
</tr>
<tr>
<td>South Africa</td>
<td>No</td>
</tr>
<tr>
<td>South Korea</td>
<td>Yes</td>
</tr>
<tr>
<td>Spain</td>
<td>Yes</td>
</tr>
<tr>
<td>Sweden</td>
<td>No</td>
</tr>
<tr>
<td>Taiwan</td>
<td>No</td>
</tr>
</tbody>
</table>

104 Italian Franchise Law, supra note 47, at Art. 3(2).
It may be surprising to some that China is not a “registration” jurisdiction, at least in the true meaning of the word “registration.” It does require a franchisor to make a filing, but such filing is only made after the signing of the first franchise agreement in China. The agency is not approving any franchise offering; in fact, it does not even review the franchise disclosure documents used in China. Rather, the purpose of the filing is to provide the government with certain information regarding the franchisor for its regulatory purposes. However, the fact that the government does review a franchisor’s compliance with the “2+1” rule and would refuse to approve the filing if the franchisor fails to meet such requirement, indicates that this filing regime in some ways resembles that of a “registration/approval” regime.

Indonesia, Malaysia, South Korea and Vietnam all have a more traditional “registration” regime, by requiring that the franchisors must first obtain approval of the franchise disclosure documents and the franchise agreements before they can franchise in that country. As such, it is necessary to translate the disclosure documents (and the franchise agreements) into local language for filings in Indonesia, South Korea and Vietnam. In Malaysia, the registration and filing process is electronic and all information provided for the purposes of registration is also considered to be information provided for the purposes of disclosure.

Spain’s registration regime is a unique one. First, it is to be filed within 3 months after a franchisor’s commencement of franchise activities in Spain, rather than before. Second, it does

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106 Vietnam does not require domestic franchisors to register in the same manner as foreign franchisors (i.e. cross-border). Generally, domestic franchisors would instead undertake a rather simple notification.


108 Since 29 May 2012 all applications have been done online through myfex.gov.my. While previously an applicant had to file both the application form (Form 2) and the disclosure document (Form 1) at time of application, with the online filing, all information provided at time of filing in relation to the franchise business and franchisor is also the disclosure document. There is no separate filing of the same. Once approved, the form can be printed out and represents the disclosure document. While the format varies slightly from the information presented in Form 1, the information contained in the new application form essentially encompasses those in the former Form 1 together with some further details of the company as present in Form 2 such as capital structure, particulars of directors and shareholders/partner and capital, ownership, and particulars of management.

109 Note that registration is only required for foreign franchisors in Vietnam.

110 The Vietnamese law does not require franchise agreements to be approved. In certain circumstances the authorities will ask to see it as part of the franchise registration application, but this is not common.

111 In principle, the KFTC only reviews and approves the FDD. The KFTC does not conduct a substantive review of the franchise agreement itself. The KFTC requires the franchisor to submit the franchise agreement as an ancillary document to verify the information in the FDD.
not involve any review of the disclosure document or agreement; rather, franchisors are required to submit an informational memorandum to the Franchise Registry laying out certain information regarding the franchise system. Third, EU-based franchisors without a permanent establishment in Spain are exempt from this requirement.\textsuperscript{112} A notification of the beginning of the activities in Spain would be the only requirement.

As discussed above, in Tunisia, unless the franchise offering falls into a select list of exempted industries, the franchisor must obtain the government’s approval before franchising there. Therefore, for most franchisors, Tunisia is a “registration” regime.

It should be noted that there could be a number of other “registrations” involved in a cross-border franchise transaction. For example, in some jurisdictions, the executed franchise agreement (or a summary thereof or a short-form agreement) needs to be registered with the government authorities, often to establish the franchisee’s status as a registered user of the trademarks, or to establish the authenticity of the transaction for foreign exchange approval purpose. This, obviously, is outside of the coverage of this paper and we will not attempt to survey those jurisdictions here.

\section*{E. Language of the Disclosure Document}

\begin{tabular}{|l|l|}
\hline
Country & Language Requirement \\
\hline
Australia & No \\
Belgium & No \\
Brazil & No \\
Canada - Alberta & No \\
Canada - Manitoba & No \\
Canada - NB & No \\
Canada - Ontario & No \\
Canada - PEI & No \\
China & No \\
France & No \\
Indonesia & Yes \\
Italy & Yes, but \\
Japan & No \\
Macau & No \\
Malaysia & No \\
Mexico & No \\
South Africa & No \\
South Korea & Yes \\
Spain & No \\
Sweden & No \\
Taiwan & No \\
Tunisia & Yes \\
Vietnam & Yes \\
\hline
\end{tabular}

\textsuperscript{112} Spain Franchise Law, supra note 67, at Ch. III, Art. 5(4).
No jurisdictions explicitly require that the franchise disclosure document must be in the local language, except for Italy, where the Regulation 204/2005 provides that, if requested by the prospective franchisee, the franchisor must provide the pre-contractual information and the relevant annexes (which include the text of the contract) in the Italian language. In practice, however, if a jurisdiction requires the registration of the franchise disclosure document, then it will need to be translated into local language for the officials to review and approve. Therefore, a local language version of the disclosure document is required in Indonesia, South Korea, Tunisia (either in Arabic or French) and Vietnam. English is one of the official languages of Malaysia, so no translation is required.

That said, most countries have some form of legal requirement or expectation that the prospective franchisee understand the agreement or be able to understand it (through the advice of counsel). Where disclosure is required to be provided, it could be argued that there is an expectation that the recipient is capable of receiving the disclosed information. It could be argued that an obligation to disclose or exchange information on matters relevant to the franchise may not be met if the material is in a language that is unfamiliar to the prospective franchisee. In some jurisdictions, the franchisor may have the burden to establish that the prospective franchisee has sufficient command of the English language to understand the disclosure document. For example, in the case of Spain, the Spanish Constitution states that Spanish is the "official" language. If a franchisee were provided an English language document, the franchisee could argue that disclosures made in another language would not be binding on them because they are not legally obliged to understand a language other than Spanish, and that they did not understand the English version. Having said this, if it can be demonstrated that all the other contractual documents were executed in another language and that the company representative or their advisors had a reasonable knowledge of the other language, disclosures in that other language would be normally acceptable.\(^\text{113}\)

In addition, if the disclosure document and/or the agreement need to be presented to the local authorities for enforcement, registration and other purposes, then a local translation will be necessary.

**F. Format of the Disclosure Document**

<table>
<thead>
<tr>
<th>Country</th>
<th>Format of the Disclosure Document</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Yes</td>
</tr>
<tr>
<td>Belgium</td>
<td>No</td>
</tr>
<tr>
<td>Brazil</td>
<td>No</td>
</tr>
<tr>
<td>Canada - Alberta</td>
<td>No</td>
</tr>
<tr>
<td>Canada - Manitoba</td>
<td>No</td>
</tr>
<tr>
<td>Canada - NB</td>
<td>No</td>
</tr>
<tr>
<td>Canada - Ontario</td>
<td>No</td>
</tr>
<tr>
<td>Canada - PEI</td>
<td>No</td>
</tr>
<tr>
<td>China</td>
<td>No</td>
</tr>
</tbody>
</table>

\(^\text{113}\) See, e.g., International Franchise Sales Laws Book, supra note 51, at Brazil – pp. 17, 18; but see Id. at France - p. 19, French language is not required for disclosure or commercial contracts, but franchisee may argue misunderstanding or mistake if a dispute later arises, and Id. at Spain – p 14.
France  No  
Indonesia  No  
Italy  No  
Japan  No  
Macau  No  
Malaysia  Yes  
Mexico  No  
South Africa  No  
South Korea  Yes  
Spain  No  
Sweden  No  
Taiwan  No  
Tunisia  No  
Vietnam  Yes  

Most countries focus on the substance rather than the form of the disclosure document, and allow franchisors to fulfil the disclosure obligations in whatever way they deem fit. Only Australia, Malaysia and Vietnam specify the format of the disclosure document. In these countries it is not possible to use a disclosure document in the US format, or any form of composite international disclosure document. The information must be included in the prescribed format – that is, it is not sufficient to ensure that all required information is included in the disclosure document; the franchisors must also disclose such information in the order and the format prescribed by the regulations.

In Australia the information in the disclosure document must be set out in the form and order, and use the headings and numbering, of Annexure 1 to the Franchising Code of Conduct. Effective 1 July 2015 the requirements in Australia have been slightly relaxed, in that the headings and numbering must be used for the items that are applicable, and an attachment must list the headings and numbering of items that are not applicable.  

Malaysia and Vietnam took essentially the same approach by providing a sample disclosure document format that the regulators expect all franchisors to follow.

The South Korean government actually issued a standard disclosure document format, and the franchisors are required to use that standard form to complete their disclosure documents.

114 Australia Franchising Code of Conduct, supra note 22, at Pt. 2, Div. 2, Cl. 8(3).


116 South Korea Franchise Act, supra note 58, at Art. 2(10); 7(1).
### G. Disclosure Triggers and Timing

<table>
<thead>
<tr>
<th>Country</th>
<th>Triggers</th>
<th>Timing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>franchise agreement; agreement to sign franchise agreement; non-refundable deposit</td>
<td>14 calendar days</td>
</tr>
<tr>
<td>Belgium</td>
<td>franchise agreement; renewal or modification of the franchise agreement</td>
<td>1 month</td>
</tr>
<tr>
<td>Brazil</td>
<td>franchise agreement; any binding agreement; any fee payment</td>
<td>10 calendar days</td>
</tr>
<tr>
<td>Canada - Alberta</td>
<td>franchise agreement; any agreement relating to the franchise; any fee payment</td>
<td>14 calendar days</td>
</tr>
<tr>
<td>Canada - Manitoba</td>
<td>franchise agreement; any agreement relating to the franchise; any fee payment</td>
<td>14 calendar days</td>
</tr>
<tr>
<td>Canada - NB</td>
<td>franchise agreement; any agreement relating to the franchise; any fee payment</td>
<td>14 calendar days</td>
</tr>
<tr>
<td>Canada - Ontario</td>
<td>franchise agreement; any agreement relating to the franchise; any fee payment</td>
<td>14 calendar days</td>
</tr>
<tr>
<td>Canada - PEI</td>
<td>franchise agreement; any agreement relating to the franchise; any fee payment</td>
<td>14 calendar days</td>
</tr>
<tr>
<td>China</td>
<td>franchise agreement</td>
<td>30 calendar days</td>
</tr>
<tr>
<td>France</td>
<td>franchise agreement; any fee payment</td>
<td>20 calendar days</td>
</tr>
<tr>
<td>Indonesia</td>
<td>franchise agreement</td>
<td>14 calendar days</td>
</tr>
<tr>
<td>Italy</td>
<td>franchise agreement</td>
<td>30 calendar days</td>
</tr>
<tr>
<td>Japan</td>
<td>franchise agreement</td>
<td>Not prescribed</td>
</tr>
<tr>
<td>Macau</td>
<td>franchise agreement</td>
<td>Not prescribed</td>
</tr>
<tr>
<td>Malaysia</td>
<td>franchise agreement</td>
<td>10 calendar days</td>
</tr>
<tr>
<td>Mexico</td>
<td>franchise agreement</td>
<td>30 business days</td>
</tr>
<tr>
<td>South Africa</td>
<td>franchise agreement</td>
<td>14 calendar days</td>
</tr>
<tr>
<td>South Korea</td>
<td>franchise agreement; any fee payment</td>
<td>14 or 7 calendar days</td>
</tr>
<tr>
<td>Spain</td>
<td>franchise agreement; any &quot;pre-agreement&quot;; any fee payment</td>
<td>20 calendar days</td>
</tr>
<tr>
<td>Sweden</td>
<td>franchise agreement; transfer of the franchise agreement</td>
<td>Not prescribed</td>
</tr>
<tr>
<td>Taiwan</td>
<td>franchise agreement; any pre-agreement; any non-refundable deposit</td>
<td>10 calendar days</td>
</tr>
<tr>
<td>Tunisia</td>
<td>franchise agreement</td>
<td>20 calendar days</td>
</tr>
<tr>
<td>Vietnam</td>
<td>franchise agreement</td>
<td>15 business days</td>
</tr>
</tbody>
</table>

Not surprisingly, every country with a disclosure regime requires that disclosure must be provided before signing a franchise agreement.

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117 The Italian Franchise Association also recommends that franchisors should provide a disclosure document before collecting any deposit or similar payment; see also Italian Franchise Law, supra note 47, at Art. 6(1) (providing that the franchisor must conduct itself with honesty, fairness and good faith and must promptly provide the prospective franchisee with all data and information that it considers necessary or useful for the purpose of entering into the franchise agreement, unless it is objectively confidential information or the disclosure of which would constitute violation of third party).
The signing of a binding non-disclosure agreement will not specifically trigger an obligation to provide a disclosure document in any jurisdiction except Ontario (Canada)¹¹⁸ and possibly Brazil¹¹⁹.

Australia stands alone with an additional disclosure obligation that will usually be triggered even before signing an NDA. As part of the amendments to the Australian franchising legislation that took effect 1 January 2015 there is an additional disclosure obligation requiring that a franchisor must give a copy of the prescribed information set out in Annexure 2 to the Code “as soon as practicable after the prospective franchisee formally applies or expresses interest in acquiring a franchised business”¹²⁰. The document must be set out in 11 size font, and be contained in no more than 2 pages.¹²¹ The information statement is standard form, and essentially a brochure setting out the risks of franchising. The Government notes at page 10 of the Explanatory Statement that accompanied the enactment of the legislation - “this is a generic statement designed to inform prospective franchisees of the risks and rewards in franchising before they make the psychological commitment to enter into a franchise agreement.”

Most countries require that disclosure is provided a specified number of days before signing a franchise agreement (or earlier, if required). Time periods vary, ranging from 7 to 30 calendar days, Mexico being one out with a 30 business day requirement.¹²²

Japan, Macau and Sweden do not have a specific time period specified. In Japan a 7-day period is common practice; Macau requires disclosure “with adequate advance”¹²³ notice; and Sweden requires the delivery of a franchise disclosure document “ample time before a franchise agreement is entered into.”

¹¹⁸ See Arthur Wishart Act (Franchise Disclosure), 2000. S.O. 2000, ch. 3, c. 3, s. 5 (1) “franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of: (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor’s associate relating to the franchise.) (emphasis added). In contrast the other Canadian provinces specifically exclude non-disclosure agreements from being included in “agreements relating to a franchise”, with some additional requirements imposed on the terms of excluded non-disclosure agreements.

¹¹⁹ The Brazilian Franchise Law appears to require disclosure before signing any agreement or paying any amount. Arguably this could apply to a Confidentiality Agreement, although the better view would seem to be that it would only relate to a franchise agreement or agreement to enter a franchise agreement. Similarly a standard non-binding Letter of Intent would not be an “agreement”.

¹²⁰ Australia Franchising Code of Conduct, supra note 22, at Pt. 2, Div. 3, Cl. 11(3).

¹²¹ Australia Franchising Code of Conduct, supra note 22, at Pt. 2, Div. 3, Cl. 11(2).

¹²² Mexico Franchise Law, supra note 56, at Ch. VI, Art. 142.

¹²³ Macau Commercial Code, Book III, Tit. VIII, Ch. I, Art. 680(1).
Fee payments

Most countries are now alive to the commercial practice of seeking payments from prospective franchisees at an early stage of negotiations, and the attendant risk that a prospective franchisee may feel committed to proceed once a payment has been made. Australia, Brazil, all Canadian provinces, France, South Korea and Spain specifically require disclosure prior to any fee payment under a franchise agreement, with Australia being more explicit and linking disclosure to any non-refundable payment – so, in Australia, payment of an amount is permitted without disclosure provided the payment is fully refundable.

Letters of Intent

Somewhat ironically given the inconsistencies that exist more broadly with the international regulation of franchising, Letters of Intent are treated in the same manner globally. We were unable to find any law\textsuperscript{124} that required the provision of disclosure in the context of a Letter of Intent that contained some or all of the proposed commercial terms, but was not legally binding on the prospective franchisee. Similarly the execution of a confidentiality agreement would not give rise to a formal disclosure obligation in any country, except for Ontario, where the execution of any binding agreement that relates to the franchise, even just a confidentiality agreement, will trigger the disclosure obligation.

We did need to probe local counsel slightly on this point, as some counsel did indicate that disclosure may be necessary before signing a Letter of Intent. What we discovered was that the issue is not with Letters of Intent as such, but what is actually meant by a Letter of Intent. In our view the true meaning of a Letter of Intent is a document reflecting “intent” – its purpose is essentially to see if the parties are on the same page. This is to be contrasted with a document described as a Letter of Intent that is in effect (in whole or in part) a binding legal agreement.

In franchising practice it appears that Letters of Intent are sometimes stretched beyond statements of intent to endeavour to bind a party. Where the binding obligations relate solely to confidentiality of information, this is not a problem. The key issue is whether the Letter of Intent is a binding agreement in relation to the proposed franchising transaction, as opposed to the disclosure of information and confidentiality.

Letters of Intent that purport to bind a prospective franchisee to a deal would be likely to come within the definition of a franchise agreement for the purposes of all countries where disclosure was required prior to entering into a franchise agreement. That is essentially because they are not really Letters of Intent, but binding franchise agreements or agreements to enter into a franchise agreement.

There are of course shades of grey in this distinction. On which side of the line does a Letter of Intent that contains a confidentiality obligation supported by a non-compete clause

\textsuperscript{124} Excluding the new requirement in the Australian Franchising Code of conduct, clause 11, to provide an Information Statement. However this obligation does not require the provision of a detailed disclosure document, so has been ignored in the context of the discussion of Letters of Intent.
should the transaction not proceed fall? What if the Letter of Intent is binding, but allows a party to withdraw in certain circumstances, such as unsatisfactory due diligence?

It is beyond the scope of this paper to form a view on the numerous drafting permutations and combinations, or to attempt to articulate the precise demarcation line, as to do so would likely to be little more than an educated guess. Suffice to say that a pure Letter of Intent containing a confidentiality obligation will not give rise to disclosure obligations in any country that requires pre-contractual disclosure. On the other hand a Letter of Intent that purports to bind a party to the commercial terms goes beyond intent and is likely to be construed as a franchise agreement or an agreement to enter into a franchise agreement across jurisdictions. Accordingly the table in G above remains relevant in the context of Letters of Intent.

As to best practice, that is, like beauty, often in the eye of the beholder. The authors can find no compelling reason to provide disclosure prior to executing a Letter of Intent unless the content of the Letter of Intent is such that it creates legally binding obligations beyond confidentiality. Further, many countries have laws that apply to pre-contractual representations. Although an analysis of relationship laws is beyond the scope of this paper, suffice to say, as a generalisation, that whatever is voluntarily provided ought to be truthful, accurate and relevant. If it is not there could well be legislation that will apply. Indeed in countries such as Australia, you are under no obligation to make a representation and are entitled to remain silent and stick to the precise requirements of disclosure contained in the Franchising Code of Conduct. However if you make a representation it must be truthful, must be the whole truth and must create a truthful impression. Otherwise you will infringe the prohibition on misleading or deceptive conduct.125

In the absence of a compelling reason to make disclosure prior to providing a Letter of Intent, our view is that disclosure is best linked only to the franchise agreement.

H. Ongoing Disclosure

Not all countries that require pre-contractual disclosure also require ongoing disclosure to existing franchisees. Those that do require ongoing disclosure have differing requirements. Azerbaijan, Brazil, Japan and Taiwan do not expressly require ongoing disclosure, but Australia, Indonesia, Malaysia, Macau, South Korea and Vietnam have explicit ongoing disclosure obligations.

<table>
<thead>
<tr>
<th>Country</th>
<th>Ongoing Disclosure</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Yes</td>
<td>Continuous disclosure obligations in relation to specified matters to franchisees within 14 days of change occurring.</td>
</tr>
<tr>
<td>Belgium</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Brazil</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Canada - Alberta</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Canada - Manitoba</td>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>

125 Australian Competition and Consumer Act 2010 Cth, s18.
<table>
<thead>
<tr>
<th>Country</th>
<th>Ongoing Disclosure</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada - NB</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Canada - Ontario</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Canada - PEI</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>China</td>
<td>Yes</td>
<td>Timely disclosure to franchisees where material changes to information originally disclosed.</td>
</tr>
<tr>
<td>France</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Indonesia</td>
<td>Yes</td>
<td>To the Ministry of Trade, not franchisees</td>
</tr>
<tr>
<td>Italy</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Japan</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Macau</td>
<td>Yes</td>
<td>Timely information to franchisees of any changes to matters relevant to running the business.</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Yes</td>
<td>Annual report to the Registrar of Franchises, not franchisees</td>
</tr>
<tr>
<td>Mexico</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>South Africa</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>South Korea</td>
<td>Yes</td>
<td>Continuous disclosure obligations in relation to specified matters to franchisees within 90 days of change occurring.</td>
</tr>
<tr>
<td>Spain</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Taiwan</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Tunisia</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Vietnam</td>
<td>Yes</td>
<td>To franchisees, and also to Ministry of Industry and Trade.</td>
</tr>
</tbody>
</table>

Australia sets the global high water mark, with requirements to provide a current disclosure document to existing franchisees on request, and to notify all existing franchisees should specific issues arise that might potentially concern a franchisee. Specifics differ between countries, with Australia again the most prescriptive.

Australia requires a franchisor to tell all franchisees in writing of any change in majority ownership or control of the franchisor, an associate or of the franchise system; proceedings by a public agency or any judgement or award against the franchisor, an associate or a director alleging breach of a franchise agreement, contravention of trade practices or corporate law, unconscionable conduct, misconduct or an offence of dishonesty; judgement against the franchisor or an associate (excluding unfair dismissal) under a law regulating workplace relations or independent contractors; civil proceedings by the lower of at least 10% or 10 franchisees; a civil judgement for at least $100,000 (or $1,000,000 for a large company); insolvency of the franchisor or an associate; change in the intellectual property, or ownership of intellectual property, that is material to the franchise system; and any court undertaking or order in relation to an undertaking against the franchisor or an associate.\(^{126}\)

\(^{126}\) Australia Franchising Code of Conduct, supra note 22, at Pt. 3, Div. 2, Subdivision A, Cl. 17(3).
Australia also specifies that the reasonable notification time period is not more than 14 days after the franchisor became aware of the matter.\textsuperscript{127} Australia has an additional de facto continuous disclosure obligation not mirrored in any other countries. Combined with the obligation to update the disclosure document annually is an obligation to provide a copy of the current disclosure document to an existing franchisee on request. A request can only be made once every 12 months.\textsuperscript{128} Where the franchisor already has a current disclosure document because the franchisor is required to update it annually, the current disclosure document must be provided within 14 days.\textsuperscript{129} If the franchisor is exempt from updating because the franchisor did not enter into more than 1 franchise agreement during the year and does not intend to enter into a franchise agreement in the following year, the franchisor still has to update and then provide the disclosure document, but has 2 months from the date of the request to do so.\textsuperscript{130}

China requires a franchisor to make further disclosure in a timely manner to franchisees where there is a material change in the information originally disclosed.\textsuperscript{131}

Indonesia requires a franchisor to submit an annual activities report to the Ministry of Trade which shall include among others the number of outlets in a relevant year, the amount of franchise and royalty fees received, and application of the 80% local sourcing requirement.\textsuperscript{132}

Malaysia does not impose ongoing disclosure obligations in relation to existing franchisees, but a franchisor must provide an annual report to the Registrar of Franchises in the prescribed form each year including material changes. The Registrar is entitled to seek further clarification relating to material changes.

Macau requires a franchisor to inform a franchisee in a timely manner of changes to goods, conditions of sale, rendering any service or other matters concerning the running of the franchise.\textsuperscript{133}

South Korea imposes an ongoing obligation on all franchisors to keep the registered disclosure documents up-to-date, and various deadlines for making such updates, depending on the nature of the change. If the disclosure document is updated, the franchisor then must send a notice to the existing franchisees within 15 days after updating the registration. If the

\textsuperscript{127} Australia Franchising Code of Conduct, supra note 22, at Pt. 3, Div. 2, Subdivision A, Cl. 17(2).

\textsuperscript{128} Australia Franchising Code of Conduct, supra note 22, at Pt. 3, Div. 2, Subdivision A, Cl. 16(2).

\textsuperscript{129} Australia Franchising Code of Conduct, supra note 22, at Pt. 3, Div. 2, Subdivision A, Cl. 16(1)(b).

\textsuperscript{130} Australia Franchising Code of Conduct, supra note 22, at Pt. 3, Div. 2, Subdivision A, Cl. 16(1)(a).

\textsuperscript{131} Article 23, the Franchising Regulation.

\textsuperscript{132} MOT reg. no. 53/M-DAG/PER/8/2012, Aug. 24, 2012.

\textsuperscript{133} Macau Commercial Code, Book III, Tit. VIII, Ch. I, Art. 688.
existing franchisee requests a delivery of the updated disclosure document, the franchisor must deliver the updated disclosure document within 15 days after receiving the request.\textsuperscript{134}

Vietnam requires a franchisor to update the franchisee on important changes to the franchise system that affect the franchise business of the franchisee. Changes to key matters such as the legal status of the franchisor or intellectual property ownership must be notified to the Ministry of Industry and Trade within 30 days of the change. For less critical matters a foreign franchisor must submit an annual report to the Ministry noting such changes no later than 15 January in each year.

I. Other Related Obligations

Australia has unique requirements concerning prescriptive pre-disclosure, with significant additional obligations not found in any other legislation.

The purpose of the additional requirements is to endeavour to encourage prospective franchisees to obtain expert assistance prior to entering into a franchise agreement. The Australian experience has been that the vast majority of complaints by aggrieved franchisees, and the highest levels of dissatisfaction amongst franchisees with the amount of pre-contractual disclosure, come from parties that did not seek legal or business advice prior to signing the franchise agreement.\textsuperscript{135} Anecdotally these requirements seem not to have increased the number of franchisees who actually seek advice, with the major barrier appearing to be the compliance cost to franchisees of obtaining advice given the size and complexity of pre-disclosure materials.

A franchisor must not enter into, renew, transfer or extend the term or scope of a franchise agreement unless it has received a written statement from the franchisee that the franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the legislation.\textsuperscript{136} Further, before a franchise agreement is entered into the franchisor must have received a written statement that the franchisee has been given independent legal, accounting or business advice about the franchise agreement or the franchised business, or has been told to seek it, but has decided not to seek it.\textsuperscript{137}

\textsuperscript{134} International Franchise Sales Laws Book, supra note 51, at South Korea, p. 9.


\textsuperscript{136} Australia Franchising Code of Conduct, supra note 22, at Pt. 2, Div. 2, Cl.10(1).

\textsuperscript{137} Australia Franchising Code of Conduct, supra note 22, at Pt. 2, Div. 2, Cl.10(2).
### J. Financial Statements

<table>
<thead>
<tr>
<th>Country</th>
<th>Mandatory</th>
<th>Audited</th>
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<td>Vietnam</td>
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<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

Not all countries requiring provision of a disclosure document require the provision of financial statements. For example, Italy requires the financial statements be delivered only if

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¹³⁸ See Australia Franchising Code of Conduct, *supra* note 22, at Annexure 1, Item 21.5 (noting that if the franchisor or consolidated entity has not existed for 2 or more financial years the franchisor must provide a statutory declaration of the entity’s solvency and an audit report of the entity’s solvency).

¹³⁹ The disclosure document must be accompanied by a certificate on an official letterhead of an auditor/ accounting officer certifying that the business of the franchisor is a going concern; to the best of their knowledge the franchisor is able to meet its current and contingent liabilities; the franchisor is capable of meeting all of its financial commitments in the ordinary course of business and the franchisor’s audited financial statements for the most recent financial year have been drawn up in accordance with IFRS; except to the extent stated, on the basis of accounting policies consistent with prior years. Financial statements of the franchisor or parent do not need to be provided. However the growth in turnover and net profit for the immediately preceding financial year must be provided. A statement must be provided in the disclosure document that there have been no significant or material changes in the company or franchisor’s financial position since the last certificate (by an auditor/ accounting officer or ‘similar reviewer’) was issued confirming that the company/ franchisor has reasonable grounds to believe that it can pay all of its debts as and when they fall due.
the franchisee requests and, Mexico, Spain, Sweden and Taiwan have no explicit requirements.

**Australia**

Australia requires financial reports to be included in the disclosure document for each of the last 2 completed financial years franchisors prepared in accordance with Australian law or a foreign equivalent. The reports do not need to be audited, but if the franchisor is part of a consolidated entity that is required to provide audited financial reports and the franchisee requests the audited consolidated financial reports the audited group accounts must be provided.\(^{141}\)

Australia also has a requirement that the franchisor’s directors provide a solvency statement as of the end of the last financial year that in their opinion there are reasonable grounds to believe that the franchisor will be able to pay its debts as and when they fall due.\(^{142}\)

Further, a company can avoid providing its financial statements entirely if the solvency statement of the directors is supported by an independent audit (by a registered company auditor or foreign equivalent), and a copy of the audit is provided with the solvency statement.\(^{143}\) There are additional requirements if the franchisor or consolidated entity has not existed for at least 2 years or has been insolvent in the past 2 years, notably that there is a statutory declaration of solvency and an independent report on the entity’s solvency.\(^{144}\)

**Brazil**

Brazil requires 2 years of financial information of the franchisor to be provided\(^{145}\), but in practice the Brazilian Institute of Intellectual Property requires 3 years. The financial statements need not be audited, and may be prepared in accordance with Brazilian or foreign accounting standards. Consolidated statements may be used in lieu of the franchisor’s own statements. Where a master franchisee is involved common practice is that those financial statements are also included.\(^{146}\) Brazil explicitly accepts financial statements from a parent or affiliate in lieu of financial statements from the franchisor.

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\(^{140}\) Spanish law requires the disclosure of a corporate franchisor’s share capital and net shareholder equity according to its most recent balance sheet. but there is no requirement that the financial information be audited and foreign financial statements may be used. See, Spain Franchise Law, supra note 67, at Ch. II, Art. Art. 3(a).

\(^{141}\) See Australia Franchising Code of Conduct, supra note 22, at Annexure 1, Item 21.3.

\(^{142}\) Australia Franchising Code of Conduct, supra note 22, at Annexure 1, Item 21.1.

\(^{143}\) Australia Franchising Code of Conduct, supra note 22, at Annexure 1, Item 21.4.

\(^{144}\) See Australia Franchising Code of Conduct, supra note 22, at Annexure 1, Items 21.5, 21.6.

\(^{145}\) Brazil Franchise Guidelines, supra note 25, at Art. 3(II).

Although the Brazilian legislation is not as prescriptive as other countries common practice is to follow international practice and provide the sort of information typically found in the US even if the legislation does not specifically require this to occur.

Canada

Canadian legislation is provincially based, with regulation in Alberta, Manitoba, New Brunswick, Ontario and Prince Edward Island.

In the context of disclosure obligations concerning financial statements the requirements of all provinces are essentially the same. The financial statements must be for the most recently completed financial year, but the previous year’s statements may be provided within 180 days of financial year end if the current financial statements have not been prepared. If a franchisor has not completed a full year of operation the franchisor’s opening balance sheet must be provided.

Financial statements must be audited or reviewed, and must be prepared in accordance with Canadian generally accepted accounting standards, or a foreign equivalent.

Exemptions from including financial statements differ between provinces, but are similar in substance. For example in Ontario a franchisor can be exempt from including financial statements if it (or its controlling corporation) has a net worth of at least C$5,000,000, had at least 25 franchisees in the five years preceding the disclosure document engaging in business at all times in Canada (or another single jurisdiction), had been in franchising for at least 5 years and not had any judgement, order or award against it (or any associates, directors or officers) relating to fraud, unfair or deceptive practices or breach of franchise law.\footnote{For more detail on the differences see International Franchise Sales Laws Book, \textit{supra} note 51, at Canada, pp. 35 – 38.}

China

The regulations in China do not specifically allow or prohibit the use of the parent/guarantor’s financial statements, nor do they provide for a phase-in mechanism for new franchisors. The regulators have so far declined to clarify these issues in their implementation rules. From discussions with the officials, it seems that they think the issue should be treated on a case by case basis, with the guiding principle being whether the use of the parent’s financial statements or the new franchisor’s incomplete financial history is somehow “misleading” to the prospective franchisees. Because franchise disclosure documents are not required to be reviewed or approved by the regulators in China, each franchisor will need to examine these issues from a risk/benefit perspective, and make their own decisions.

K. Financial Performance Representations

In most countries there is no obligation to make financial performance representations – the exception being Malaysia, which also requires information to be provided on projected revenue. Malaysia requires a financial forecast to be provided for 5 years. This is generally seen to be projected profits and losses of the franchised business for 5 years. The intent of the
provision is more to ensure proper planning than to specifically expose a franchisor to liability, although that is an obvious consequence of a seriously erroneous forecast. Franchisors are able to state that forecasts are made on various assumptions, and no sales performance guarantee is intended.\textsuperscript{148}

A number of countries expressly or implicitly require information to be provided about establishment and operating costs. Although the very explicit and comprehensive requirements of Australia are conceptually different to the broad general obligations in civil law countries such as Italy and France, the outcome is likely to be similar.

Where financial performance representations are made there will either be additional legislative expectations, such as in Australia where representations must be based on reasonable grounds, or the financial performance representations will be assessed under laws relevant to misrepresentation, misleading or deceptive conduct or inadequate disclosure. In Taiwan if projected sales or revenue/profit are provided to the prospective franchisee, the calculation methodology or the actual operating results of existing franchisees must be disclosed. Again the outcome is likely to be similar.

Some countries, such as Australia, Malaysia, Indonesia and Vietnam, require the disclosure of historical information in a manner that is broadly similar to that required in a US disclosure document. However, most are less prescriptive, and countries such as France, Indonesia, Italy and several others follow the general model of requiring disclosure of such information as a franchisee might need to make an informed decision. In Taiwan, a franchisor is required to disclose the number and locations of all franchisees/outlets in all cities/counties, as well as the statistics on the ratio of franchise agreements cancelled or terminated in the preceding year. See the comments above in Part II.

In South Korea franchisors with 100 franchisees or more (however, "small and medium enterprises" prescribed in the Franchise Act are excluded) must provide information on projected sales revenue and the method for its calculations to prospective franchisees at the time of executing the franchise agreement.\textsuperscript{149} Prior to the amendment of the Act in 2014 franchisors had only to provide information to franchisees on sales forecasts on request. A range of expected sales revenue can be provided, noting the minimum and maximum of expected annual sales revenue in the first year immediately following the commencement of business. (However, the maximum amount cannot exceed 1.7 times the minimum amount). Alternatively the franchisor can provide the range of the second lowest and second highest annual sales revenue of the preceding year amongst five franchisees that are most closely to where the particular franchise will be operated.

L. **Consequences for Failure to Disclose**

Those countries having quite prescriptive disclosure obligations also typically have specific penalties for failure to disclose. However most countries prefer to leave matters in the hands of the parties to pursue civil remedies.

\footnote{\textsuperscript{148} See International Franchise Sales Laws Book, supra note 51, at Malaysia, p. 13.}

\footnote{\textsuperscript{149} South Korea Franchise Act, supra note 58, at Art. 9(5).}
All countries provide for rescission or cancelation of the contract as a potential remedy in the event of failure to disclose or material breach of disclosure obligations. Damages will also apply in all countries, either explicitly under the franchise legislation or by virtue of the general law. Claims are subject to normal statutory limitation periods in most countries, but there is no limitation period for damages claims in Malaysia or South Korea, and 30 years in Indonesia.

The Table below provides a summary of the consequences in each country.

<table>
<thead>
<tr>
<th>Country</th>
<th>Regulatory penalties</th>
<th>Rescission</th>
<th>Damages</th>
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<tbody>
<tr>
<td>Australia</td>
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</tr>
<tr>
<td>Belgium</td>
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<tr>
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<td>Yes\textsuperscript{151}</td>
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<td>Canada - Ontario</td>
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<td>France</td>
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</tr>
<tr>
<td>Japan</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

\textsuperscript{150} Regulatory action may be brought against a foreign franchisor if the cross-border franchise agreement is not properly registered with the INPI and Central Bank and payments have been remitted overseas.

\textsuperscript{151} The Canadian provincial legislation provides for rescission rights for a limited period of time if the required disclosure is either late (60 days following receipt of the required disclosure) or is not made at all (2 years following the franchisee entering into the franchise agreement).

\textsuperscript{152} Id.

\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Id.

\textsuperscript{156} In the case of a serious violation a fine will be imposed and MOFCOM will make a public announcement regarding the violation.

\textsuperscript{157} 4 years for international sales or technology transfer and 1 year for claims of mistake, fraud, coercion, undue influence or unconscionability.

\textsuperscript{158} Id.

\textsuperscript{159} Although there are no penalties under Indonesia’s Franchise Regulations remedies may be available under other laws in some instances. Further, although there are no regulatory sanctions for the failure to disclose to the franchisees, the franchise regulations provide sanction for failing to submit the annual reports, which is the revocation of the franchise certificate.
Country | Regulatory penalties | Rescission | Damages
---|---|---|---
Macau | No | Yes | Yes
Malaysia | Yes | Yes | No
Mexico | Yes | Yes | Yes
South Africa | Yes | Yes | Yes
South Korea | Yes | Yes | Yes
Spain | Yes | Yes | Yes
Sweden | No | Yes | Yes
Taiwan | Yes | Yes | Yes
Tunisia | No | Yes | Yes
Vietnam | Yes | Yes | Yes

The section below focuses on those countries with specific or unusual consequences or penalties specifically for breach of the disclosure obligations. Most if not all countries will have criminal penalties that apply in the case of fraud or serious misrepresentations. A detailed consideration of such penalties on a country by country basis is beyond the scope of this paper.\(^{162}\)

**Australia**

The changes to the Australian Franchising Code of Conduct that took effect 1 January 2015 not only impose a specific penalty of up to AUS$54,000 for breach of the key provisions of the Code, but allow the regulator to issue infringement notices of AUS$9,000 per breach.\(^{163}\) The infringement notices can be cumulative, so that for example conduct in respect of 10 franchisees could see a total fine of AUS$90,000.

Where a breach involves false or misleading conduct a civil pecuniary penalty of up to $1.1 million for companies and $220,000 for individuals applies.\(^{164}\) A civil penalty is a financial penalty or fine imposed by the court and may only be imposed by the court once it has found that the person has breached the law on the balance of probabilities.

The Australian Competition and Consumer Commission can issue an infringement notice (essentially a fine or administrative penalty) without the necessity of any court involvement if the ACCC has reasonable grounds to believe that a business has breached the Code or made a false or misleading representation. The infringement notice must explain the reasons for the notice and the ACCC must provide the business with an opportunity to make representations before the notice is issued.\(^{165}\)

\(^{160}\) Damages are not recognised under the Malaysia Franchise Act 1998, but may be available under general commercial law.

\(^{161}\) Local counsel advises that failure to provide the FDD could be a basis for a franchisee to unilaterally terminate the franchise agreement. It’s unclear whether such failure can be a basis for rescission per se.

\(^{162}\) For a country by country discussion of penalties refer to International Franchise Sales Laws Book, *supra* note 51. Each country chapter includes specific reference to applicable penalties in that country.


\(^{164}\) Australia Competition and Consumer Act 2010, Pt. IVB, Div. IV, Cl. 76.
area of law that the business is alleged to have breached and state the penalty amount that the business must pay. If the business does not pay the specified penalty amount, court proceedings can then be taken against it. In such case the ACCC will typically also seek a civil penalty.

Importantly, penalties can extend beyond the franchisor to any individuals directly or indirectly knowingly concerned in or party to a breach, which can clearly apply to in-house and external counsel.\footnote{Australia Competition and Consumer Act 2010, Pt. IVB, Div. IV, Cl. Section 75B.}

China

In China the Bureau of Commerce may impose a fine ranging from approximately US$2,000 – US$10,000 for breach of the disclosure requirements, or from US$10,000 – US$20,000 for more serious breaches. There are no criminal penalties.

Italy

Article 8 of the Italian franchise law (Law 129/2004) provides for the annulment of the franchise contract as a consequence of the provision of false information by one party to the other. Italian case law extends the application of such rule also to cases of lack of disclosure. Moreover, damages can be claimed (if proven).

Malaysia

Malaysia has quite strict penalties that can apply in the event of breach of the law. Non-compliance with the disclosure requirements can lead to fines or imprisonment, or both.\footnote{Malaysia Franchise Act 1998, supra note 54, at 15(3).} A first offense can yield a fine of between approximately US$1,500 – US$15,000, with a minimum approximately US$3,000 fine and potential terms of imprisonment of up to 5 years for a subsequent offense.\footnote{Malaysia Franchise Act 1998, supra note 54, at Section 39(1).}

Mexico

Mexico has quite powerful penalty provisions, with the Mexican Institute of Industrial Property having the discretion to determine the exact amount of fines based on factors such as the magnitude of the violation and past history of the franchisor or individual.\footnote{See generally International Franchise Sales Laws Book, supra note 51, at Mexico, p. 18.} Breach of the disclosure requirements constitute an administrative violation that can result in fines of up to US$70,000 and US$3,000 per day, temporary or indefinite closure of the franchisor’s business and administrative arrests. According to International Franchise Sales Laws the Institute will not initiate an administrative proceeding against a franchisor unless the specific information had
been expressly requested by the prospective franchisee prior to execution of the franchise agreement.\textsuperscript{169}

**South Korea**

South Korea has the most severe criminal penalties for breaches of franchise laws in the world. The provision of false or exaggerated information, or the omission of important disclosure information, carries a penalty of up to 5 year’s imprisonment, or a maximum fine of around US$3 million.\textsuperscript{170} Negligent failures will potentially attract a slightly lesser fine of up to 2 years’ imprisonment or US$500,000.\textsuperscript{171}

Until recently the penalties were regarded as more theoretical, but in August 2014 the South Korea Fair Trade Commission imposed the maximum possible penalty - approximately US$1.8 million - on a South Korean franchise for violating the franchise legislation. Caffe Bene, a major company with over 1,860 stores in fourteen countries incurred the fine for passing disallowed costs on to its franchisees, requiring franchisees to re-design stores and breaching its own franchise agreement. The penalty is the largest ever imposed by the SKFTC, and confirms that the SKFTC intends to actively pursue serious violations.

Interestingly the Korean legislation does not create any private rights of action, but rather is a statute establishing criminal penalties for enforcement by the state in response to complaints from franchisees.\textsuperscript{172}

**Spain**

Breaches of the disclosure laws in Spain can attract fines up to approximately US$4,000, US$20,000 for repeated breaches and US$800,000 if franchisor turnover is over US$800,000.\textsuperscript{173} The Ministry of Economics and Finance can take action seeking such fines. Franchisees would be entitled to seek the nullification of the agreement.

**Taiwan**

Failure to comply with Taiwan disclosure requirements to such an extent that affects the trade order will be a violation of Article 25 of the Fair Trade Act. The Fair Trade Commission may investigate the circumstances and order the franchisor to cure the violation within a

\textsuperscript{169} International Franchise Sales Laws Book, supra note 51, at Mexico, p. 18.

\textsuperscript{170} South Korea Franchise Act, supra note 58, at Art. 41(1).

\textsuperscript{171} South Korea Franchise Act, supra note 58, at Art. IX.

\textsuperscript{172} See generally International Franchise Sales Laws Book, supra note 51, at South Korea, pp. 20-22.

\textsuperscript{173} See Spain Franchise Law, supra note 67, at Ch. III, Art. 5(3); Spain Retail Trade Act, Law 7/1996 of 15 January 1996 at Art. 62.
specified time period and/or assess an administrative fine of NT$50,000 to NT$25 million (approximately US$1,500 to US$750,000) on franchisor.  

Vietnam

Under Vietnamese law administrative sanctions apply to any violation of the franchise regulations. Penalties apply for conducting a franchise without complying with all of the regulatory requirements, including without proper registration, and even to franchisees that continue to carry on a franchised business after termination. Penalties also apply to violations of laws associated with franchising, such as conducting a franchise involving prohibited goods, providing untruthful information and failing to pay taxes. However the quantum of the penalties is quite low, with the maximum penalty being less than US$5,000 for any breach. Additionally, in theory, the Vietnamese authorities are empowered to seize revenue gained from violations.

IV. PRACTICAL CONSIDERATIONS

As discussed above, many of these statutes are relatively new in their adoption. Many do not have regulations enacted that provide any detailed guidance as to the specifics of the disclosure documents. Further, in most of the jurisdictions, there is little to no reported case law providing any helpful interpretation of the requirements. Thus, much of the actual disclosure that is being prepared and utilized is based on the local law, plus (i) analogy from other regulatory schemes, (ii) the practitioners’ experience, (iii) the franchisor’s experience, (iv) the number of jurisdictions in which the franchisor is actively franchising, and (iv) a philosophical choice in the approach to disclosure.

The spectrum in approach ranges from one extreme to the other, depending on the practitioner’s view, the nature and complexity of the franchisor’s international franchising activities, and the franchisor’s perception of the value of disclosure and risk of not providing it. On the one hand, some practitioners and franchisors take the approach that disclosure should be limited to only providing the specific information identified in the statute (no more and no less), and providing no disclosure in jurisdictions that do not specifically require any. On the other extreme, some practitioners and franchisors (typically those based in a jurisdiction with a comprehensive disclosure regimen) take the approach of using a comprehensive international disclosure document based on the requirements of their principal jurisdiction (or commonalities in the jurisdictions in which it is actively franchising, discussed below), and then adding country specific addenda to address any requirements for the specific jurisdiction that are not already covered in the franchisor’s base disclosure document. Those franchisors generally provide their

174 See Taiwan Fair Trade Act, Article 42.
175 Vietnam Gov. Decree No. 35/2006/ND-CP, Article 24,.
177 Vietnam Gov. Decree No. 185/2013/ND-CP, Article 95.
178 Vietnam Gov. Decree No. 185/2013/ND-CP, Article 95.
“international disclosure document” even in jurisdictions where none is required. Each approach has its own risks and benefits.


The first question is, regardless of whether disclosure is required, is disclosure in some form necessary, in addition to the contract, to convey to the prospective franchisee the nature of the business and the terms of the arrangement to enforce the agreement (which may or may not be necessary depending on the complexity of the arrangements and the franchise business). Most US-based franchisors rely heavily on the disclosure documents to fill in the blanks in their contracts. It is not unusual for a US-based franchisor to have a franchise agreement that simply states the amount of royalty rate and the amount of the advertising fund contribution, and little else regarding what the franchisee will pay for the training it receives, the electronic systems it has access to, and for the mandatory and optional services the franchisor provides, other than it will be at the then-current rates the franchisor charges, with may change from time to time, in the discretion of the franchisor over the term of the agreement (which typically ranges from 10 to 20 years). Without some form of disclosure establishing a base line for those charges and training and services to be provided, in theory, there could be a question as to whether there was sufficient meeting of the minds for the formation of a contract. If no disclosure document is used, the contract should contain schedules of current costs and services to be provided.

Using a country specific disclosure document approach, depending on the jurisdiction, can have the beauty of being incredibly short and cost efficient, if the jurisdiction has limited substantive disclosure requirements. For example, in Mexico, the substantive disclosure requirements are relatively limited, when compared to those of its neighbors to the North, the US and Canada or its next nearest neighbor to the South that has a disclosure law, Brazil.

If a franchisor were based in a jurisdiction where it has no duty to prepare a disclosure document (and is comfortable that none is necessary), and its first foray into franchising in a jurisdiction that did was Mexico, it would make perfect sense to simply prepare a disclosure document to comply with Mexican law. Given that there is no duty to provide any disclosure in any Central or South American jurisdiction (other than Brazil), including the Caribbean Basin, it may make sense for the franchisor to only prepare the Mexico document and offer franchises in the entire region, other than in Brazil, and provide no disclosure other than in Mexico. The same could be true if it were a US-based company that simply thought its US based disclosure would be inaccurate or not that helpful, or even potentially misleading, to franchisees located South of

179 See, e.g., Mexico Franchise Law, supra note 56, at Ch. VI, Art. 142; Regulations Under te Law of Industrial Property, at Art. 65 (for purposes of disclosure in Mexico, a franchisor must provide at least the following technical, economic and financial information to a prospective franchisee: (i) name domicile and nationality of the franchisor; (ii) description of the franchise; (iii) business experience of franchisor (and, if applicable, master franchise); (iv) trademarks; (v) franchise fees; (vi) technical assistance and services that the franchisor is to provide; (vii) territory information; (viii) information about subfranchising; (ix) obligations of the franchisee regarding confidential information; and (x) generally, the obligations and rights of the franchisee derived from the franchise contract).


181 International Franchise Sales Laws Book, supra note 51, at Brazil.
its borders. Nonetheless, many US franchisors, once they have gathered the data to complete a US based disclosure find that some elements are helpful and deliver some form of international disclosure.

Utilizing a country specific disclosure has the benefit that it can be delivered to local counsel for review without additional costs for reviewing and considering additional information that is included in a generic international disclosure document that may or may not be relevant. One has to consider anytime the franchisor includes additional information that is not specifically required by the statute whether that information could be considered misleading under the circumstances in another jurisdiction or whether it makes the document cumbersome and confusing for the reader who may be receiving it in a language other than that person’s native language, sometimes referred to as over disclosure (discussed below). In addition, if the documents are going to be translated into another language, the longer the documents are and the more information they contain increases the cost and likelihood of errors in translation.

The decision of whether to use separate disclosure documents for each jurisdiction can become simply a matter of practicality, depending on the number of jurisdictions the franchisor is operating in and the complexity of its franchise program. Also, as noted in Section III.F above, there are a few jurisdictions that, in addition to requiring specific information to be disclosed, require such information be provided in a specific format, which makes a standard international franchise disclosure document impracticable for these jurisdictions.

There are commonalities in the information the franchisor is required to collect and to deliver to the prospective franchisees under most of the franchise disclosure laws, even setting aside the specific format requirements. If the franchisor is offering its franchises internationally, it will benefit from an annual update process of gathering its information worldwide to understand the consistency (or inconsistency) with which its franchises are being offered and operated (as much of the information for the disclosure is operational). This information once collected can form the basis of a general international disclosure document that the franchisor will use to prepare individual country disclosures or as a base international disclosure document from which to prepare wrap around or country specific addenda.

Depending on the number of jurisdictions the franchisor is offering in and how aggressively it is pursuing its franchising activities, there are opportunities to consolidate information and to use a common disclosure document with country specific addenda. For franchisors aggressively franchising multiple brands in multiple jurisdictions, the sheer weight of paper and the time necessary to maintain the disclosure documents and update them all on an annual basis so that the franchisor can continue its franchising activities uninterrupted, necessitates finding some mechanism to obtain economies of scale and to leverage the disclosure prepared and necessary for one jurisdiction for multiple jurisdictions.

A franchisor may choose to prepare a general international disclosure document that is used everywhere, or modify its international disclosure for use on a regional basis. For example, Belgium, Italy, France, Macau, and Spain, while each requiring its own country specific information, there are sufficient commonalities that make using a common document, with country specific addenda possible. Each either specifically or by implication, requires the disclosure of information concerning the franchisor, description of the business, the initial fees,
other fees, the initial investment, the trademarks, outlets, financial statements and so on. The descriptions of these requirements in the various statutes are by no means exactly the same and each of the statutes require some things that the others do not. For example, Belgium and France require disclosure of information concerning the business experience of management and Italy and Spain do not, but there is nothing in the statutes of Italy or Spain that would prohibit a franchisor from including it.

Each statute also requires certain country specific information that is slightly different concerning the units in the country and the trademarks in the country, so addenda will be necessary for country specific information. Also, France and Macau require the delivery of a market study and Belgium requires that the franchisor provide information concerning the history, status and forecast of the market and market share of the network both generally and locally. No other jurisdictions require similar information, so that information will need to be included as addenda. In addition, Belgium divides its disclosure into two parts one concerning the contractual obligations and the other concerning the franchisor franchise, so that will need modification, and Belgium requires delivery of a simplified disclosure document that describes any of the terms that have been negotiated with a new cooling off period, which is an additional requirement.

There are additional benefits for creating a base international disclosure document that contains most of the required information for the multiple jurisdictions in Europe. There are jurisdictions, such as Romania and Sweden, and a number of other jurisdictions not addressed in the paper, that have franchise disclosure laws with varying degree of specificity in terms of their disclosure requirements. The Romanian disclosure law requires that the prospective franchisee be furnished “information enabling it to take part in a franchise agreement in full awareness,” with little to no guidance what that entails. On the other hand, the Swedish law identifies 8 broad categories of information and then suggests that the Unidroit Model be considered and that that circumstances related to each franchise will be “considered when determining whether the franchisor has complied with the Act.” Having a broad based disclosure document that encompasses the majority of the requirements for multiple European jurisdictions will be a good place to start when considering what disclosure may be adequate in those jurisdictions.

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182 International Franchise Sales Laws Book, supra note 51, at Belgium, Italy, France and Spain chapters.

183 Spanish Royal Decree 201/2010 (article 3 d) just requires the franchisor to disclose “the business experience of the franchising entity”.

184 Id.

185 Id.

186 Id.

187 International Franchise Sales Laws Book, supra note 51, at Romania and Sweden chapters.

188 Romanian Government Ordinance No. 52/1997, Art. 2, Para. 3.

189 International Franchise Sales Laws Book, supra note 51, at
B. Over-disclosure vs. Under-disclosure and General Pre-contractual Duties in Civil Law Jurisdictions With No Franchise Disclosure Laws

The concern of over-disclosure is one shared by many practitioners relating to inclusion of information not specifically required by the statute or not specifically directed for the individual jurisdiction. For example, some practitioners consider cost information to be a particularly sensitive topic with high risk potential for over-disclosure issues. A US-based franchisor with significant data on its costs in the US may consider including such data in its international disclosure generally. The argument is that information may or may not be relevant or even potentially misleading to an individual franchisee in another jurisdiction, and that there is more risk including it in a jurisdiction that does not require the inclusion of such information than omitting it.

Construction cost data can vary drastically from country to country, even within a region. The costs for construction in Western Europe generally, may not be relevant or adequate disclosure for a franchisee in Romania. With that said, there are aspects of the costs that a franchisor can estimate within predictable ranges that is useful to franchisees (e.g., electronic systems, such as point of sale or property management systems, costs for pre-opening services or training provided by the franchisor, FF&E packages for fit out of units, etc.). Also, providing other data for initial costs for the franchisee to benchmark against, such as costs of materials, while it may not be exact, it is useful information, provided it is adequately caveated and its basis described.

Generally speaking, information that is of a factual nature and accurately disclosed, and adequately described and disclaimed, so that its relevance to the prospective franchisee is clear, should pose little risk to franchisors. That said, practitioners must be mindful of the relevance of the information to the prospective franchisees in each jurisdiction in which the disclosure document will be delivered and consider what, if any additional information, disclaimers or factors should be included to assist in the review or clarify the applicability of the information, and whether information, if not required, should be removed because of its potentially misleading nature.

Under-disclosure is a concept that relates to simply reporting only that information specified by a statute or not providing any disclosure in jurisdictions with general civil code duties of pre-contractual disclosure, when the franchisor is in possession of much broader information that may be materially relevant to the prospective franchisee’s investment decision. For example, in Belgium the parties are obligated to negotiate in good faith, which may impose an obligation to disclose material information that could substantially affect the future performance of the franchise. In Italy, the franchisor has an obligation to disclose that information which the franchisee would consider necessary or useful. In France, the commercial code R330-1 requires the franchisor to disclose all information necessary to assess the business experience of the franchisor. Similar requirements exist in Macau as well. Therefore, while these provisions may not require the franchisor to develop new information not required under the disclosure law, to the extent the franchisor has in its possession relevant information, the franchisor may have exposure for not sharing it.

This is true for numerous other jurisdictions without franchise disclosure laws that contain a good faith duty or other obligations of pre-contractual disclosure contained in their civil
code and case law. In Germany, under Section 311 of the German Civil Code, parties must negotiate honestly and openly with each other. As described above, Germany has long held that franchisors have a duty to provide information in its possession to its franchisees. Germany has long held that franchisors have a duty to provide information in its possession to its franchisees. 190
Norway for example has a general obligation under the Norwegian Marketing Act to not do anything that is contrary to good practice between businessmen, as well as a general duty to negotiate in good faith. 191 It the franchisor has prepared and delivered a disclosure document to a franchisee is Sweden and then entered into a franchise agreement in Norway choosing to deliver no disclosure even though the franchisor has in its possession disclosure that would be relevant to the Norwegian prospective franchisee that would have materially affected the franchisee’s decision to enter the franchise agreement, query whether the franchisor has exposure in that case. With respect to Germany, case law suggests that even if the franchisor did not have a disclosure document, the franchisor would need to prepare something to meet its requirements. Where as in Norway (and by analogy other similar jurisdictions), it is more that the franchisor would need to provide information that is consistent with local business practice generally and to the extent that the franchisor has in its possession information (e.g., a disclosure document that contains relevant information, that information should be shared), the franchisor may have exposure for failing to share it.

V. CONCLUSION

If there can be one overriding conclusion from an analysis of international disclosure laws, it is that despite the consistency of franchising activity internationally in a business sense there are significant variations in franchising law and practice between countries. There are often local laws, interpretations or practical nuances that can surprise even the experienced international practitioner. There is some conceptual consistency between countries, but the devil is very much in the detail of international franchise disclosure laws.

190 German civil Code Sections 311(2) and 241(2) supra at 18.

191 Supra at 19.
APPENDIX A

Map of Franchise Laws Around the World
(August 2015)

Does Not Include:

- Codes of conduct which do not provide for governmental or private enforcement, even if promulgated under governmental authority.
- Bodies of law (e.g., competition, intellectual property, etc.) which also cover franchising, unless explicitly mentioned.
- Registration requirements that exist in many countries under various laws (e.g., franchise, foreign exchange, intellectual property, competition, etc.).
# APPENDIX B

**Exemptions from Disclosure Obligations under Canadian Franchise Laws**

The following are summaries of the exemptions from the requirement to provide a disclosure document.¹⁹²

<table>
<thead>
<tr>
<th>Exemption</th>
<th>Ontario</th>
<th>Alberta</th>
<th>Prince Edward Island</th>
<th>New Brunswick</th>
<th>Manitoba</th>
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<tbody>
<tr>
<td>Grant for the franchisee's own account.</td>
<td>(a) The grant of a franchise by a franchisee if, among other things, the grant is for the franchisee's own account and the grant is not effected by or through the franchisor. A grant is not effected by or through the franchisor merely because the franchisor has a right, exercisable on reasonable grounds, to approve or disapprove the grant or a transfer fee must be paid in an amount set out in the franchise agreement or in an amount that does not exceed the reasonable actual costs incurred by the franchisor to process the grant.</td>
<td>(a) The sale of a franchise by a franchisee if (i) the franchisee is not the franchisor or an associate of the franchisor or a director, officer or employee of the franchisor or its associate, (ii) the sale is for the franchisee's own account, (iii) in the case of a master franchise, the entire franchise is sold, and (iv) the sale is not effected by or through the franchisor.</td>
<td>(a) The grant of a franchise by a franchisee if (i) the franchisee is not the franchisor, the franchisor's associate or a director, officer or employee of the franchisor or of the franchisor's associate, (ii) the grant of the franchise is for the franchisee's own account, (iii) in the case of a master franchise, the entire franchise is granted, and (iv) the grant of the franchise is not effected by or through the franchisor.</td>
<td>(a) The grant of a franchise by a franchisee if (i) the franchisee is not the franchisor, the franchisor's associate or a director, officer or employee of the franchisor or of the franchisor's associate, (ii) the grant of the franchise is for the franchisee's own account, (iii) in the case of a master franchise, the entire franchise is granted, and (iv) the grant of the franchise is not effected by or through the franchisor.</td>
<td>(a) The grant of a franchise by a franchisee if (i) the franchisee is not the franchisor, the franchisor's associate or a director, officer or employee of the franchisor or of the franchisor's associate, (ii) the grant of the franchise is for the franchisee's own account, (iii) in the case of a master franchise, the entire franchise is granted, and (iv) the grant of the franchise is not effected by or through the franchisor.</td>
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¹⁹² This chart is prepared by Dominic Mochrie, partner at Osler, Hoskin & Harcourt LLP’s Toronto office, and included here with his permission.
<table>
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<tr>
<th>Exemption</th>
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<tr>
<td>Sale of franchise to officer or director.</td>
<td>(b) The grant of a franchise to a person who has been an officer or director of the franchisor or the franchisor’s associate for at least six months for that person’s own account.</td>
<td>(b) The sale of a franchise to a person who has been an officer or director of the franchisor or its associate for at least 6 months for that person’s own account.</td>
<td>(b) The grant of a franchise to a person who has been an officer or director of the franchisor or of the franchisor’s associate for at least six months immediately before the grant of the franchise, for that person’s own account.</td>
<td>(b) The grant of a franchise to a person who has been an officer or director of the franchisor or of the franchisor’s associate for at least 6 months immediately before the grant of the franchise, for that person's own account.</td>
<td>(b) The grant of a franchise to a person who has been an officer or director of the franchisor or franchisor's associate for at least six months immediately before the grant of the franchise for that person's own account.</td>
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<td>Grant of additional franchisee to existing franchisee.</td>
<td>(c) The grant of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating and if there has been no &quot;material change&quot; since the existing franchise agreement or latest renewal of extension of the existing franchise agreement was entered into.</td>
<td>(c) The sale of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating.</td>
<td>(c) The grant of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating and if there has been no material change since the existing franchise agreement or latest renewal or extension of the existing franchise agreement was entered into.</td>
<td>(c) The grant of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating, and if there has been no material change since the existing franchise agreement or its latest renewal or extension was entered into.</td>
<td>(c) The grant of an additional franchise to an existing franchisee if (i) that additional franchise is substantially the same as the existing franchise that the franchisee is operating, and (ii) there has been no material change since the existing franchise agreement or its latest renewal or extension was entered into.</td>
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<td>Grant of franchise by an executor, receiver, trustee. -- or --</td>
<td>(d) The grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the estate of the franchisor.</td>
<td>(d) The sale of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the estate of the franchisor.</td>
<td>(d) The grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the estate of the franchisor.</td>
<td>(d) The grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the estate of the franchisor.</td>
<td>(d) The grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the franchisor's estate</td>
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<td>Fractional franchise.</td>
<td>(e) The grant of a franchise to a person to sell goods or services within a business in which that person has an interest if the sales arising from those goods or services as anticipated by the parties at the time the franchise agreement was entered into, do not exceed, in relation to the total sales of the business, a percentage (20%) prescribed in the Regulation (generally known as a &quot;fractional franchise&quot;).</td>
<td>(e) The sale of a fractional franchise, defined in terms equivalent to the other provinces, meaning with maximum sale percentage (20%). The sale of a right to a person to sell goods or services within or adjacent to a retail establishment as a department or division of the establishment, if the person is not required to purchase goods or services from the operator of the retail establishment.</td>
<td>(e) The grant of a franchise to a person to sell goods or services within a business in which that person has an interest, if the sales arising from those goods or services, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, will not exceed 20 per cent of the total sales of the business during the first year of operation of the franchise.</td>
<td>(e) The grant of a franchise to a person to sell goods or services within a business in which that person has an interest, if the sales arising from those goods or services — as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into — will not exceed 20% of the business's total sales during the first year of the franchise's operation.</td>
<td>(e) The grant of a franchise to a person to sell goods or services within a business in which that person has an interest if the sales arising from those goods or services — as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into — will not exceed 20% of the business's total sales during the first year of the franchise's operation.</td>
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<td>Renewal or extension</td>
<td>(f) The renewal or extension of a franchise agreement where there has been no interruption in the operation of the business and there has been no “material change” since the franchise agreement or latest renewal or extension of the agreement was entered into.</td>
<td>(f) A renewal or extension of an existing franchise agreement.</td>
<td>(f) The renewal or extension of a franchise agreement where there has been no interruption in the operation of the business operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into.</td>
<td>(f) The renewal or extension of a franchise agreement if there has been no interruption in the operation of the franchise operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or most recent renewal or extension of the franchise agreement was entered into.</td>
<td>(f) The renewal or extension of a franchise agreement if there has been (i) no interruption in the operation of the franchised business, and (ii) no material change since the franchise agreement or its latest renewal or extension was entered into.</td>
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<td>(f) The renewal or extension of a franchise agreement if there has been no interruption in the operation of the franchise operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or its latest renewal or extension was entered into.</td>
<td>(f) The grant of a franchise if the prospective franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed the prescribed amount ($5,000).</td>
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<td>Minimal total investment</td>
<td>(g) The sale of a franchise if the franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed the amount prescribed by the regulations ($5,000).</td>
<td>(g) The sale of a franchise if the franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed the prescribed amount ($5,000).</td>
<td>(g) The grant of a franchise if the prospective franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed the prescribed amount ($5,000).</td>
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<td>Sophisticated franchisee exemption.</td>
<td>(h) The grant of a franchise where the prospective franchisee is investing in the acquisition and operation of the franchise over a period (1 year) prescribed in the Regulation, in an amount greater than an amount ($5,000,000) prescribed in the Regulation.</td>
<td>N/A</td>
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<td>1-year franchise agreement.</td>
<td>The grant of a franchise if the franchise agreement is not valid for longer than 1 year and does not involve the payment of a non-refundable franchise fee.</td>
<td>(i) The grant of a franchise if the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable fee and if the franchisor or franchisor's associate provides location assistance to the franchisee, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee.</td>
<td>(h) The grant of a franchise if the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable fee and if the franchisor or franchisor's associate provides location assistance to the franchisee, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee.</td>
<td>(h) The grant of a franchise if (i) the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable fee, and (ii) the franchisor or franchisor's associate provides location assistance to the franchisee, including (A) securing retail outlets or customer accounts for the goods or services to be distributed, offered for sale or sold, or (B) securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee.</td>
<td>(i) The grant of a franchise if the franchisor is governed by section 55 of the Competition Act (Canada).</td>
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<td>(j) The grant of a franchise if the franchisor is governed by Section 55 of the Competition Act (Canada).</td>
<td>(i) The grant of a franchise if the franchisor is governed by Section 55 of the Competition Act (Canada).</td>
<td></td>
<td>(i) The grant of a franchise if the franchisor is governed by section 55 of the Competition Act (Canada).</td>
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APPENDIX C

List of Foreign Lawyers Who Reviewed the Paper

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<thead>
<tr>
<th>Country</th>
<th>Contact</th>
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<tbody>
<tr>
<td>Belgium</td>
<td>Koen De Maeyer</td>
</tr>
<tr>
<td></td>
<td>DLA Piper</td>
</tr>
<tr>
<td></td>
<td>106 Avenue Louise</td>
</tr>
<tr>
<td></td>
<td>1050 Brussels, Belgium</td>
</tr>
<tr>
<td></td>
<td>T +32 (0)2 500 1577</td>
</tr>
<tr>
<td></td>
<td>E <a href="mailto:koen.demaeyer@dlapiper.com">koen.demaeyer@dlapiper.com</a></td>
</tr>
<tr>
<td>Brazil</td>
<td>Valdir Rocha</td>
</tr>
<tr>
<td></td>
<td>Veirano</td>
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<td></td>
<td>Av. Presidente Wilson 231 25º andar 20030-021</td>
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<tr>
<td></td>
<td>Rio de Janeiro RJ – BRASIL</td>
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<tr>
<td></td>
<td>t +55 21 3824 4704 (RJ) / +55 11 2313 5813 (SP)</td>
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<td></td>
<td><a href="mailto:valdir.rocha@veirano.com.br">valdir.rocha@veirano.com.br</a></td>
</tr>
<tr>
<td>Canada</td>
<td>Robert A. Kozlov</td>
</tr>
<tr>
<td></td>
<td>Norton Rose Fulbright Canada LLP / S.E.N.C.R.L., s.r.l.</td>
</tr>
<tr>
<td></td>
<td>Royal Bank Plaza, South Tower, Suite 3800</td>
</tr>
<tr>
<td></td>
<td>200 Bay Street, P.O. Box 84, Toronto, ON M5J 2Z4, Canada</td>
</tr>
<tr>
<td></td>
<td>T: +1 416.216.4810</td>
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Mr. Forseth is a Vice President and Assistant General Counsel with Marriott International, Inc. Among other duties, Mr. Forseth is responsible for responding to legal issues involving the development and operation of franchised hotels and regulatory compliance in both domestic and international markets for the company’s multiple lodging brands. Mr. Forseth is currently working out of Marriott’s London, England office and charged with the development and structuring of the legal processes for Marriott’s European franchise development and operations. Before joining Marriott, Mr. Forseth was in private practice, focusing on representation of franchise and other licensing and distribution companies in both domestic and international markets, and related business structuring, regulatory and relationship issues. Prior to that, Mr. Forseth was the Senior Franchise Examiner for the Maryland Division of Securities, responsible for enforcement of the Maryland Franchise Registration and Disclosure Law. Mr. Forseth is currently the Chair of the International Franchise Association Legal Legislative Committee, and is a past advisor to the North American Securities Administrators Association Franchise Project Group, and a current member of: the American Bar Association - Forum on Franchising; and Maryland Bar Association - Franchise Law Committee (Past Chairman). He is a recognized speaker on the topic of franchising and related legal issues and has published numerous papers and articles on the subject.

Stephen Giles  
Partner  
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Stephen Giles is a corporate and commercial partner with Norton Rose Fulbright, and the Asian leader of the Norton Rose Fulbright Consumer Markets Group.

He services clients located in Australia, Asia, Europe and the US with a particular focus on Australian and Asian market entry, cross-border transactions, competition and consumer law and franchising strategy and documentation. He has extensive international experience gained during 30 years of legal practice, and is recognised by Chambers Legal Guide, Best Lawyers and The International Who’s Who of Business Lawyers as the leading practitioner in Asia in the field of retail, distribution and franchise law.

Stephen has been intimately involved in Australian franchise industry affairs, serving for over 17 years on the board of the peak industry body, the Franchise Council of Australia. In this role he has helped craft the regulatory framework for franchising in Australia and shape the development of the peak industry body, the Franchise Council of Australia. In 2009 he was inducted into the Australian Franchising Hall of Fame.

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Tao Xu devotes his practice to franchising and distribution matters, especially international franchising, licensing and distribution transactions. Tao counsels a broad range of clients in
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Tao is particularly active in food and beverage, hospitality and leisure, and retail industries, having acted for a number of high profile US brands in their international expansion efforts.

Tao is deeply involved in franchising activities in China, having both acted for a number of clients in entering the Chinese market and lobbied on behalf of the International Franchise Association in connection with the Chinese government's franchise regulations and their implementation rules.