International Expansion: The Toe in the Water Approach

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I. INTRODUCTION

Different franchisors approach international expansion of a franchise system in very different ways. Some franchisors are proactive, some are reactive. Some will plan on single unit expansion, and therefore expect to be very hands on in the business of franchising in the new country. Others plan to delegate all of their responsibilities as franchisor to a single master franchisee for that new market, and so intend to be entirely hands off in that country or region. Some have significant budgets with well planned strategies devised in advance, and some fall into international expansion when the “phone rings” and a prospect from another country presents itself, and so have no additional resources pre-allocated to devote to the exercise.

While no franchisor wants to incur expenses when it does not need to, there are certainly strategies that franchisors have used to undertake international expansion with a commitment of fewer resources, with less advance planning time, and with less of a long-term commitment to the entire international undertaking.

That may beg the question as to what factors are key to success. Some would argue that success is only really possible when the franchisor devotes appropriate resources and does not attempt to simply “dip their toe” in a foreign market. This argument would suggest that any consideration of a “dip the toe” approach is flawed from the outset as it more likely leads to failure than success.

Nevertheless, year in and year out, legal counsel are asked to assist some of their franchisor clients on an international expansion strategy that is meant to be simpler, cheaper, and with less commitment (which itself may mean any number of things) by the franchisor in that foreign market.

This paper will guide the reader through the various areas or issues of importance in any international expansion of a franchise system, discuss a typical robust approach in dealing with the issue, and then identify where and how a franchisor and their advisors often attempt to do less and not more, but ideally with the same resulting level of success.

II. THRESHOLD INTERNATIONAL LEGAL AND OTHER PRACTICAL COMPLIANCE CONSIDERATIONS

A. Intellectual Property Protection

1. The Robust Approach to Protection of IP

Franchising as a business model is built on the notion of a franchisor licensing their intellectual property (“IP”), which can consist in any one case of patents, trademarks and copyrighted materials, as well as other special “know-how” often classified as trade secrets, to an arms-length franchisee most often for a fixed period of time. While each of the types of IP can be important, it is most often the case that franchised businesses primarily rely for their success on their unique trademarks and “know-how,” often collectively referred to as the “franchise system.” IP is important both for franchisors and franchisees at home and abroad in foreign territories. A license for use of the IP may be the sole asset franchisors supply to franchisees, and that may be especially true in a new foreign market where the franchisor’s brand and business are not yet established or known.
The value in any form of IP is derived from the “exclusivity” of the trademarks, brand, proprietary technology, “know-how”, and confidential information. These intangible assets need to be protected through strategic management in order to maintain a competitive advantage during expansion. IP protection is subject to different regimes in foreign markets and franchisors must assess how and when to protect and/or register their IP in any of the foreign markets where they intend to expand, as well as what due diligence will be necessary to ensure and preserve the distinctiveness of the IP. Local laws may be significantly different from those in the franchisor’s home market, and so a franchisor and their home country counsel should retain local counsel to guide them on IP protection.

Ultimately, the value of a brand is at risk if a franchisor does not secure their IP, clearly define the grant of the license to it, and protect it from third party infringers. Furthermore, depending on the foreign territory, there may be cultural or linguistic differences that require some creative changes to a franchisor’s IP. A brand may need to adapt to the dictates of local law or custom in order to be successful and a franchisor should consider the costs associated with this ‘localization’.

The protection of the IP of any franchise system in any one target foreign market can be both time consuming and expensive. Most often the process for protection needs to be started as early as possible so as to have some assurance that the IP, and especially the trademarks, are capable of being used and protected in the various foreign markets where the brand plans to expand. In this modern electronic age, IP squatters in foreign markets are more active than ever. More and more franchisors are seeking to enter a country only to learn that their trademarks have already been applied for by some unrelated person with nefarious intentions of copying the franchisor’s system, or extorting payment from the rightful brand owner in order to give up a claim to the IP. So the more robust approach would be to counsel clients to seek protection of their IP, and trademarks in particular, in any number of foreign markets well before any other steps in international expansion are started, for the simple reason that if the trademarks cannot be used in a particular country, expansion to that market becomes less likely.

For trademarks and copyrights, the franchisor and home country counsel should work with local counsel in the target jurisdiction in order to file protective applications on the appropriate timeline. The time period from application to registration varies by market, so it is in a franchisor’s best interest to apply as early as possible. A business should consider whether a jurisdiction uses a “first to file” or “first to use” system, and may want to apply well in advance of entry, perhaps even in advance of securing a local partner. Even in jurisdictions where priority is granted to early applicants, such as the European Community and China, rights may be subject to cancellation upon challenge if use has not been established within a specific time frame. If one is unable to obtain protection of trademark rights, in some jurisdictions securing copyright may help to protect the brand. Additionally, local counsel can advise as to whether applications using stylized or local character formats can help secure a brand’s identity abroad.

As well, a more robust strategy would typically involve seeking protection in the new countries of all of the various trademarks registered in the franchisor’s home country, which can often include a long list of names and designs, of greater or lesser importance.
2. **Dipping Your Toe into IP Protection**

There are a number of ways that franchisors have sought to expand into a foreign country and adopted a less than robust strategy to IP protection.

Firstly, emphasis is very often placed on protection of only the brand’s trademarks, and not patents or copyright. This is driven by the fact that it is less common for franchise systems to rely on patents. As well, while there are significant limitations on the ability to enforce and obtain remedies for copyright infringement in the United States if the copyright is not registered, the same may not be true elsewhere, as copyright is automatically protected without the need for registration in any country of the world that is a member state to the Berne Convention and the Universal Copyright Convention.¹

Registration of copyright may increase protections and remedies available, but is not absolutely necessary in order to assert ownership rights. And while not all countries require that trademarks be registered to acquire rights and protection, it is well accepted that this key asset of the franchisor should be registered if an entire franchise system is to expand into a country. And, with the exception of being able to apply for one registration that covers the entire European Union, trademarks must be investigated, applied for and registered on a country by country basis.

Secondly, and relatively common, a franchisor may choose to investigate use of only the principal name and design of the franchise system at the outset. While a restaurant brand may have protected their principal name and design and any number of other unique product names in their home country, a way to save money would be to seek protection of only the principal brand name and perhaps associated design in the foreign markets. That can quickly reduce the time and expense by focusing on one or two trademarks and not a long list that includes ancillary marks of lesser importance.

Within the process of seeking trademark protection there are other ways to lessen time and cost. Sometimes a very costly part of trademark protection includes the local searches that are advisable. The more robust searches cover the state of various registries maintained by governments in the foreign country, but in addition, trademark lawyers will usually recommend that potential earlier users of a trademark in the marketplace be searched through what are called “common law” sources, including online use. The scope of the searches that are done, and local counsel’s time and charges in interpreting the results, dictate cost and can vary dramatically. It should always be recommended that full comprehensive searches be conducted, but it is often the case that clients will opt for the least costly ones and assume the risk.

In rare instances, the franchisor will permit or insist that the local master franchisee or developer seek protection of and/or pay for the trademark applications. But permitting the local master franchisee or developer to register the trademarks in their own name is almost never a recommended strategy. Relying on the resources of a local partner in order to register and maintain IP poses risks in the event of a market exit or transfer. The franchisee may not cooperate with a franchisor’s attempts to deregister or transfer the assets. Therefore, it is advisable that as owner of the IP, the franchisor be responsible for the process. However, if the franchisor can convince the local master franchisee or developer to pay for the franchisor’s

trademark protection efforts then that should not be discouraged. While it is an unusual term of a contract, it is not an unheard of business term.

3. Monitoring and Enforcement

A challenge of international franchising is that often franchisors do not maintain local personnel to police any misuse of the IP. Such misuse may include activities by the franchisee or unrelated third parties. So it is important to note that the acts of registering, defining and licensing a franchisor’s IP are not the end of the process. As the owner of the IP, a franchisor’s more robust approach would include investing the time and energy in monitoring infringement by third parties and maintaining registrations. Depending on the scope of the international system, a franchisor may find it worthwhile to invest in a third party “watch service” to assist in the monitoring process. These subscription-based services will monitor trademark applications in foreign markets and provide franchisor’s home country counsel with notification of any application that is believed to be confusingly similar. With that information in hand, the franchisor can decide to instruct local counsel to take appropriate steps to protect the IP.

Effective monitoring and enforcement can protect the part of a franchisor’s system that is composed of confidential and proprietary trade secrets. Like the United States, in most other countries “know-how,” or the particular formula of key methods and inputs that differentiate a brand, is not protectable under a formal registration regime. Therefore, a franchisor’s ability to protect such rights lies primarily in the franchise or ancillary agreements. A critical aspect of the franchise agreement is the confidentiality provision; franchisors should be able to share all information necessary for their local partner to operate the business without risk that the partner would share such information with others who may gain a competitive edge. It is important to establish confidentiality from the franchisor’s franchises from the outset of the relationship.

Another key aspect of the agreement are the noncompetition provisions. Franchisors are advised to require franchisees’ allegiance to the franchise brand by agreeing not to participate in any competing business during the term of the relationship and for a period of time thereafter. This noncompetition requirement should be extended in the agreement as far as reasonably possible in order to protect the “know-how” of the business. The enforceability of such provisions can vary greatly depending on the legal system in the foreign market as there is a certain amount of hostility to these provisions in almost every country. Common law lawyers are used to having to consider if these provisions meet a certain reasonableness standard as to the activity being restricted, the geographic area covered, and the restricted time period. Local counsel should be asked to give their views or opinion on the enforceability of the non-competition clauses, as otherwise how can a franchisor know if they are at all enforceable?

It would be common to include in multi-unit franchise agreements a requirement that the master franchisee or area developer seek similar downstream protections from their own management level employees. This may mean franchisees will be required to secure noncompetition covenants from key employees and executives in their business that may have access to such protected information, and be required to police their activities and report to the franchisor if any of those individuals attempts to work for a competitor. A more robust approach involves the franchisor bringing a certain amount of diligence to making sure these contracts are signed and copies delivered to the franchisor.

Finally, the franchise agreement should require the franchisee to notify the franchisor should the franchisee become aware of any IP infringers in the market and if any third-party litigation related to IP arises. While the agreement should establish that the franchisee will
cooperate with the franchisor, it is the franchisor that typically assumes control and responsibility over the steps to be taken, and any settlements that result, without the involvement and approval of the franchisee.

As the above discussion reveals, the more conservative legal advice to provide a franchisor is that they need to adopt a robust approach to the maintenance and protection of their IP in a foreign market, whether they want to or not.

Nevertheless, franchisors that adopt a less robust approach will often give little attention to the ongoing and on-the-ground events that may affect their IP, not wanting to devote time or money to that. So, one recommendation is to delegate the job of maintaining and enforcing IP rights by contract to the master franchisee or area developer. That is often actually a better approach than a franchisor reserving the right to enforce IP rights and not actually taking any steps to do so, because the local multi-unit franchisee will have greater motivation to actually invest the time and money that is needed in order to protect their investment in the market.

B. The Supply Chain

1. Crossing Borders

In addition to the laws which impact the franchise sales process and ongoing relationship, franchisors adopting a proactive approach to international expansion will examine the logistical feasibility of setting up a franchise system in a foreign jurisdiction and the associated costs. Establishing a supply chain is a key factor for almost every type of franchise system – franchisees will need a way to procure proprietary and other products utilized or sold by the franchised business (such as ingredients and other goods) as well as any required computer and POS systems and related hardware and software, uniforms, signage, and other components that meet the franchisor’s brand standards.

To avoid import/export issues, franchisors may be able to find local sources for the goods and services franchisees need to establish their franchised business; however, this may prove difficult depending on the type of goods and services used in the franchise system, currency fluctuation, and/or the current state of the local economy. Franchisors will likely need to invest considerable time and money investigating local resources and import restrictions if they wish to establish a possible supply chain in the territory, as well as sending personnel to the territory to explore the local resources (or engaging a local person with relevant experience).

A less robust approach often involves the franchisor leaving it entirely to the franchisee to determine if and how important products and services end up in the hands of the franchisee and their customers. In these instances, franchisors may very well go down the road and conclude a deal with the franchisee without ever investigating whether the franchisor’s concept will be accepted, let alone successful, in the target market. The franchisor will have no idea whether there are any legal or practical limitations on bringing their products and services into the market. Their view is that this is entirely for the franchisee to determine, and if they fail to do so early on, then it is the franchisee’s own fault and problem. The strategy of delegating a lot or all of this responsibility is most often used when a multi-unit franchise strategy is being adopted, as a multi-unit franchisee is often larger and more sophisticated, and more readily able to take on and successfully execute on such tasks. From a practical standpoint, the multi-unit franchisee in a new market is anyway often in a better position to locate and secure relationships with local vendors, subject to the franchisor’s approval. The use of a local supplier
may lower shipping and other logistical costs and avoid any restrictions placed on foreign imports.

2. **Experienced Vendors**

There is of course risk to leaving these issues to be determined by inexperienced local franchisees. A thoughtful approach would therefore be to decide how much responsibility to delegate based on the franchisee’s own experience in that field, as the reality is that in more and more instances the franchisee in a new market is already a franchisee of some other brand in the same industry. This appears to be particularly the case in the restaurant industry. Many would argue it is essential that a franchisor fully understand the domestic supply chain required for the local franchisee’s success. Customers are drawn to franchised outlets for the consistency in products and services offered. Holes in a partner's supply chain can create product shortages, an inability to provide necessary services, and ultimately, a failed business. Given the distance between a franchisor’s home office and the franchisee, a franchisor may not find out about supply chain issues until it is too late. Local franchisees may attempt to find solutions for missing components with unapproved or lower quality products without a franchisor’s knowledge. The result is potentially brand damaging, and with the rise of social media and travel, damage done to a brand in one country may impact the entire system, in the home market and elsewhere. If the franchisor is going to delegate much of this function to the franchisee, then these problems can in part be avoided by making the right choices when it comes to selection of a local franchisee.

C. **Corporate Structuring**

1. **Franchisor Entity Considerations**
   
   a. **Nature of Entity**

A franchisor will have to decide which corporate structure is best suited for its international expansion. This decision involves various quantitative and qualitative factors including local culture, proximity of the local market, financial and tax considerations and human resources. The corporate structure of the franchisor will determine what legal documentation and protection is required to ensure compliance in the local market. The analysis often begins with a very simple question often first posed by counsel, namely, “Who is the franchisor going to be in the new foreign market?” While a simple question, determining the answer is usually more complicated and could require a detailed analysis of the tax and corporate structuring issues that it raises.

The most robust approach to international expansion would involve the franchisor first opening and operating one or more of their own corporate units in the new market. While that approach is available, it is not usually what franchisors have in mind when they are contemplating international expansion, especially if they do not operate corporate units in their home market. So, apart from opening corporate units, the next most robust approach by franchisors is by putting other kinds of “boots on the ground” in the new market. That of course still means a whole level of activity and commitment that many franchisors simply cannot conceive of nor are they prepared to execute upon, at least at the outset. But many would say that the greatest possible chance for success arises when the franchisor is sufficiently active in
the new market with a local or regional office, staffed with sufficient personnel to replicate the functions that it performs in the home market to the same degree.

And like any first franchise start-up in the home market, an analysis needs to be conducted on what type of legal entity is recommended to be used in the new market. Most often this is driven by the tax ramifications under the laws of both the home market and foreign market.

All that being said, in many if not a majority of instances a less robust approach is taken, and the franchisor plans in fact to avoid at all costs being seen as a resident of the new market for tax purposes. And for the purposes of avoiding that situation they need to be careful to adopt a hands-off approach on their activities in the new market. As suggested above, while that itself may prove to be a detriment in achieving success for the brand in the market it is still quite a common approach.

b. **Tax Considerations**

It is beyond the scope of this paper to provide detailed analysis of the tax issues or the consequences of decisions made, and in any event, home and foreign market tax advice should be sought in each instance to ensure that the ultimate structure selected is as tax efficient as it can be in both countries. In every expansion to a new country the tax position of the franchisor will ultimately be impacted in both countries, if not more, depending on the situation. But for the purposes of this paper it is safe to assume that once a franchisor achieves a certain level of activity in a new country, then they will be deemed under that foreign country’s laws to be a resident of that country for tax purposes. The most obvious way to have that happen is often by opening a physical office or corporate unit in the new market, but there are other and perhaps less obvious ways in which a franchisor can subject themselves to the new market’s tax system.

If the goal is to be subject to the local tax system, the franchisor will often be advised to incorporate a local entity to act as franchisor in the market for both tax and liability reasons. So the answer to the question posed about the identity of the franchisor is that the franchisor in the new market is not the same legal entity as the one in the home market.

Even so, the franchisor should still undertake an analysis, and consult with their tax advisors, on who should be the franchisor. A number of choices may be available including perhaps the simplest one: using the existing home market franchisor entity as the franchisor in the new market. Otherwise a commonly chosen option is to incorporate a new home market entity and use that as the franchisor.

It is not uncommon for franchisors first embarking on international expansion to have little or no international business experience. So it will not be readily obvious to them that tax and corporate structuring advice are necessary issues to address in advance of embarking on such a venture. That may be especially true of those looking to do it as simply and cheaply as possible, and with the least amount of complications to their existing businesses. Nevertheless, even those franchisors should be strongly encouraged to obtain some basic tax and corporate structure advice.
2. Personnel Considerations

Associated with the decisions on corporate structure and the franchisor entity is a consideration of the franchisor’s personnel to be available or devoted to international franchise expansion.

In situations where a franchisor has decided to be proactive, and is determined to be “hands on,” it is inevitable that they will need to hire or retain a complement of staff who may be sought out for their prior experience in dealing with foreign franchise expansion.

On the other hand, franchisors not wanting to devote new resources will often give the task of international expansion to one or more of their existing employees, and not uncommonly, the task will be delegated regardless of whether they have any experience outside of their domestic market.

Once again, it would be appropriate to question whether the “dip the toe” approach will itself be a factor if there is a lack of success, as some would argue that such an approach is itself the reason for failure. Perhaps the most common way to ensure that there is proper staffing to oversee the system’s growth and operations in the new market is to impose the obligations of creating such an infrastructure on a multi-unit franchisee, such as master franchisee or area developer.

D. Tax Planning

1. Withholdings Taxes

In most instances tax planning will determine that, at least at the outset, the franchisor will be an entity created in their home market. That will not eliminate tax issues entirely. The international franchise agreement will still need to address issues of tax treatment and responsibility. Most foreign jurisdictions have a withholding tax that is imposed on royalty and similar payments made by the local party to the foreign franchisor. Typically, these laws would require that the foreign franchisee withhold from their payments to the non-resident franchisor a percentage of the amounts that would otherwise be payable under the contract, and to remit that amount to the foreign tax authorities as the non-resident franchisor’s income tax payable in the foreign market.

Once again this paper is not meant to provide an exhaustive analysis of tax issues. But for the purposes of this paper, the reader can assume that any payments by the new market franchisee to the home market franchisor in another country will be subject to some form of non-resident withholding tax under the laws of the foreign market, and which may be impacted by the franchisor’s decisions on the issue of their own corporate structure, and whether or not there is a tax treaty as between the franchisor’s home country and the new market country.

The payments affected can include initial franchise fees, ongoing royalties, and even advertising fund payments. All of this can drastically affect the economics of international franchise transactions depending on the rate of the withholding tax, and whether the application of the applicable tax treaty will provide the franchisor with some relief in the home market. For this reason, it is critical to consult with tax advisors on some minimal level at least, to determine the ramifications and whether there is any planning that can minimize this obligation. Even the least active franchisor should obtain tax advice on the ramifications of what is proposed, and
with a little effort they may find they can deal with this sufficiently, and certainly better than if they receive no advice at all.

But one way to minimize complications from the negative consequences of non-resident withholding tax, or from even having to consider any such negative consequences, is to impose on the franchisee a “gross up.” A “gross up” is a contractual provision that would require the franchisee to increase their payments by an amount equal to the withholding tax so that while the franchisee remits the tax payable to the tax authorities in the new market, the franchisor is not out of pocket. A simple example of the gross up is that if the franchisee owes $100, and needs to remit 10% to the tax authorities, a gross up provision would require the franchisee remit $110 so that the tax authorities get their 10% and the franchisor gets their entire $100. This is a simple enough proposition to include in a franchise agreement, except when it leads to complications from a franchisee who refuses to abide by the proposition of them having to pay 10% more than contracted for. So while this is often a strategy employed and meant to reduce complications, it can itself lead to the franchisor having to seek out tax advice when the franchisee refuses to accept such terms.

2. Imports, Duties and Customs and Exchange Controls

Certain countries may have restrictions on importing or exporting the products franchisees may need to establish and operate their franchised business, either based on the type of good, the destination country or quotas. Further, the cost of shipping goods to the territory, including import duties, must be borne by someone – either the franchisor or the franchisee – which could have a huge impact on the viability of the franchise system, if the majority of the goods used to establish a franchise cannot be locally sourced. Import duties can be significant, although there may be trade agreements in place that can reduce the amount of the import duty or waive it altogether.

Another piece of the import/export puzzle is currency, and the ability to be paid by the foreign market franchisee in the franchisor’s currency of choice, if at all. Some countries still have laws and/or bureaucracy that needs to be dealt with as these are restrictions on payments to non-residents.

A robust approach would necessarily reveal whether the country that is the target of expansion has such issues, and how to address them. The franchisor wanting to engage in a simpler foreign franchise expansion may not in fact discover this situation until it is too late. If they do discover it, and are not willing to invest up front on how to best deal with it, then the best advice would be to avoid expanding at all to such countries.

E. Franchise Structuring

1. Unit Franchise Model

The single unit franchise model in an international context is an extension of the typical single unit franchise model employed by the majority of franchisors in their home market for domestic development. The single unit franchise model involves a franchisor entering into a franchise agreement with a franchisee for the development and operation of a single franchised business. The franchisor remains obligated to perform the duties of the franchisor under the franchise agreement, such as training, support services, and inspections and quality control. A benefit of this model is the revenue structure in that there is no sharing of the royalty stream with an intermediary. In an international unit franchise model, the franchisor must either have a
local presence in the country or region of the unit franchise, or attempt to perform its duties long-distance. The single unit franchise model is most commonly used where the franchisor seeks to retain a high level of control over the process, timing, and expansion into the international market.

For these exact reasons, the single unit franchise expansion model is less suited to the franchisor who wants to only “dip their toe” in the foreign market. While not impossible to execute, success should require that the unit level franchisees receive a similar level of initial and ongoing support as the franchisor’s domestic franchisees. That is simply harder to do from a different country, and especially if the system has not been modified for the new market. If the first foreign unit franchisees are not provided that support, then the more likely and more quickly they will fail.

2. Area Development Model

Under an area development model, a franchisor enters into an area development agreement with a third-party franchisee (often referred to as a “developer” or “area developer”) whereby the franchisee commits to develop and operate (either itself or through a controlled affiliated entity) a specified number of outlets within a defined territory (which can be an entire country, or defined region within a country). An area development agreement often (but not always) grants the developer exclusive rights within the defined territory subject to any rights reserved by the franchisor under the agreement in exchange for the developer adhering to a specific development schedule. Area developers typically pay an area development fee under the area development agreement as consideration for the exclusive territory. Depending on the amount of the area development fee payable under the area development agreement, a portion of the fee is often times “credited” against the initial franchise fee for the individual outlets developed pursuant to the development schedule.

This expansion model allows the franchisor to retain control over its traditional pre-sale and post-sale support roles by maintaining a direct contractual relationship with the franchisee responsible for the development and operation of each outlet, while at the same time facilitates faster unit growth by not having to solicit a different franchisee for each outlet to be developed in the territory. Unlike the master franchise model (discussed further below), area developers do not have the right to subfranchise; the area developer must develop and operate all of the outlets set forth in the development schedule. However, it is common for area developers to delegate the actual development and operational duties for each outlet developed to an affiliate entity, that then must enter into a separate unit franchise agreement with the franchisor for the individual outlet. Thus, an area development model can at times appear to be a hybrid between the traditional unit franchise model and master franchise model, but in the case of the area development model, the franchisor always has a direct contractual relationship with all franchise entities.

The area development model is commonly used by franchisors that wish to maintain the maximum amount of control over their brand internationally. The area development model can also serve as a convenient way for a franchisor to take advantage of a local franchisee’s knowledge of real estate markets and key connections needed to enable the brand to effectively expand within a new target country or region, which can make the difference between aggressive growth and inconvenient road blocks. Although an area developer has the bulk of the development responsibility, as noted above, the franchisor can retain responsibility for providing the franchisor’s services under the area development agreement, such as site approval, initial and ongoing training and operational support, and inspections, as well as
ensuring the franchise offer is compliant with applicable franchise or other regulations within the territory.

The area development strategy is today quite commonly used by many franchisors looking to expand internationally, whether they plan on a robust proactive approach, or just want to dip their toe. That aligns with domestic franchise growth in the US, which more and more is turning to multi-unit owners and away from single unit owner operators. And if they want to dip their toe only, it is quite often a better approach than single unit franchising for the simple reason that if the franchisor can find a reasonably sophisticated area developer in the market then they can delegate to that area developer a whole host of functions that the franchisor would otherwise have to perform themselves.

3. Master Franchise Model

In a master franchise model, the franchisor grants a franchisee (referred to as a “master franchisee”) the right to open and operate franchised outlets within a defined territory as well as the right to grant franchises to other third-parties (often referred as “subfranchisees”) to open and operate franchised outlets in the territory. The distinguishing factor in the master franchise model from the rest of the international expansion models is that the franchisor has no direct contractual relationship with the subfranchisees. Rather, the subfranchisees enter into subfranchise agreements directly with the master franchisee. Short of retaining the right to ultimately approve or reject subfranchisee candidates proffered by the master franchisee, specifying the form of subfranchise agreement that the master franchisee must use with its subfranchisees, and reserving the ability to enforce the master franchisee’s rights under the subfranchise agreement should the master franchisee fail to do so, the franchisor delegates all franchise activities in the territory to the master franchisee who effectively acts as the franchisor in the territory.

A master franchise agreement typically grants the master franchisee exclusive rights within the defined territory subject to any rights reserved by the franchisor under the agreement in exchange for the master franchisee adhering to a specific development schedule. Master franchisees typically pay an initial master franchise fee under the master franchise agreement as consideration for the exclusive territory, as well as a portion of the initial franchise fees and royalties payable by subfranchisees in the territory. How much is to be kept by the master franchisee and the percentage to be paid to the franchisor is often subject to negotiation, but should often be dictated by which party is doing more or less of the franchisor's work in the market.

Often, the master franchisee is granted the right to adapt or modify the franchisor's brand standards or system requirements to the local laws, business practices, customs and tastes within the territory, subject to the franchisor’s approval.

Because of the franchisor’s ability to delegate virtually all responsibility as franchisor to the master franchisee, properly structured master franchise arrangements are especially popular in international expansion efforts where the franchisor either is unable or is unwilling to invest themselves the full resources needed to support franchise operations in an international market.
4. **Area Representative Model**

Under an area representative model, the franchisor, through an area representative agreement, delegates certain pre-sale and post-sale obligations to the area representative (also commonly referred to as a “development agent”). The area representative is usually retained to market franchises and screen prospective franchisees in a defined territory. In most cases when dealing with an international area representative arrangement, the area representative also assists with the franchisor’s post-sale obligations, such as site selection, construction supervision, training and on-going inspections and support.

To achieve this structure, the franchisor will enter into two separate contractual arrangements: an area representative agreement with the area representative, and a unit franchise agreement or area development agreement with the franchisee who plans to develop the franchised outlet(s). No direct contractual relationship exists between the area representative and the unit franchisees, which is a primary difference between the area representative model and the master franchise model.

An area representative acts similar to a franchise broker by soliciting, recruiting and screening prospective franchisees and providing other pre-sale services to the franchisor. In most cases, the area representative pays an initial fee to the franchisor for the area representative rights to the territory (especially if the rights are exclusive), but the area representative is then compensated by receiving as a commission a certain percentage of the initial franchise fees received by the franchisor from franchisees in the territory. For area representatives who continue to provide ongoing services to franchisees post-sale, the franchisor typically also compensates the area representative with a portion of the ongoing royalty fees collected from franchisees in the territory.

The area representative is essentially acting as the franchisor’s agent in the market, offering to the franchisees the services that a franchisor would otherwise need to perform for franchisees in the market. From this perspective, it should be an attractive model for franchisors who want less, not more, day to day involvement in the foreign market. However, it should also be remembered that the unit or other franchise agreements are signed as between the franchisor and franchisee, and so the franchisor can end up in the same position as any other single unit franchisor (see above), unless the area representative can in fact take over all of the franchisor’s responsibilities in the market.

5. **Joint Ventures**

The joint venture model is often used where two companies each have something of value to contribute to the relationship beyond money or where the franchisor wants to participate in the potential profits at the franchisee level. The most common structure for the joint venture model is where the brand owner/franchisor and local partner enter into a contractual relationship with one another, usually in the form of an operating agreement (or other form of partnership or shareholders agreement). The joint venture entity then serves as the local master franchisee with the right to develop outlets in a defined territory either directly by the joint venture entity or by granting subfranchises to third party subfranchisees.

Franchisors often require the joint venture franchisee to enter into a master franchise agreement with the franchisor under which the franchisor collects a share of initial franchise fees and royalties from the joint venture franchisee, similar to any other master franchise arrangement. The franchisor may also contribute capital to the joint venture entity in addition to
the licensed intellectual property rights; however, most often franchisors prefer to rely on the local partner for the necessary capital. Regardless, the license from franchisor to joint venture entity will likely qualify as a franchise (or master franchise) in those countries with franchise regulation.

On one level this model may be attractive to the franchisor who wants to expand to a particular country, but does not want to be any more active than they have to be. The key feature of the joint venture model is that the franchisor is no more active in the business as they are in the master franchise model, even though the franchisor may own an interest in the master franchisee. That being said, the reality of joint ventures can often be quite different as the franchisor finds itself called upon more often to provide day to day advice, as it is seen as an owner.

F. Franchise Documents

1. The Forms

Franchising around the world has become more complicated as a greater number of countries seek to regulate either the granting of franchise rights and/or the day to day relationship between franchisor and franchisee. That is not to mention the other broad range of laws that can affect franchised businesses in any one country. Franchise and other laws may be very similar to what the franchisor is used to dealing with in their home market, they may be entirely different, or something that would be seen as “in the middle.”

Any franchisor with a domestic home country franchise program will have forms of agreements they use in their home country, and if necessary, have addressed franchise law compliance in their home country.

A robust approach by a franchisor would often involve learning which countries are less or more complicated markets to enter based on these and other factors. So if a franchisor’s home market is the US, then perhaps a country like the UK may be selected as it is similar in many ways, but simpler as it lacks a franchise disclosure law. But that assumes that the franchisor is undertaking even enough of an analysis to determine a list of potential expansion markets.

A reactive approach leads to a franchisor being interested in a country for the simple reason that someone from that country has approached the franchisor for franchise rights. Then and only then will that franchisor ask any questions about the target market’s legal characteristics.

Inevitably, whether engaging in a robust entry, or just dipping their toe, a franchisor should learn if their form of franchise agreement is usable in the target market. In some cases a form of franchise agreement may not be usable because it contains provisions that are illegal or unenforceable in the target market, which could arise from a variety of reasons not known to the franchisor or their domestic home country lawyers. In other instances it may not be practically usable because it contains provisions that are unconventional in that market.

So local counsel can and are often asked to conduct a bare minimum review of the home country form of franchise agreement, and advise only on what must be revised to make the franchise agreement legally usable in the new market. That for instance could be limited to provisions relating to governing law, venue and mechanisms for dispute resolution. A more
fulsome review would reveal more about what can be made practically better about the form of agreement for use in the new market. This scope of review could address for instance, where relevant, the reality of leasing and construction practices in the new market, supply chain, advertising fund operations, and other day to day ways in which the business will function. Nevertheless, and even with a number of limited or robust review approaches available and recommended, there are instances where a franchisor has simply signed a franchise agreement with a party in a foreign country relying entirely on the domestic home country form of agreement. That will often become known and a problem arises when the franchisor tries to enforce a provision that it cannot in the new market.

Consultation with local counsel should also reveal if that country has a franchise law. How one achieves compliance is one matter, but whether adopting a robust approach or just dipping their toe, the franchisor should engage local counsel to try and ensure there is compliance with applicable laws.

Franchisors that already must comply with franchise disclosure and/or registration laws in their home country may be in a slightly better position to initiate a franchise program in an international jurisdiction with similar requirements because those franchisors should already have some familiarity with the process. That said, the differences from jurisdiction to jurisdiction often vary quite a bit, such that franchisors should expect to encounter additional hurdles.

In some instances, a franchisor is able to lessen their franchise law compliance obligations by imposing those obligations on others. For instance (and one reason to adopt a master franchise model), the franchisor should be able to delegate ongoing franchise law compliance in the foreign market to the master franchisee, as it is the master franchisee who is acting as sub-franchisor in the market. That may not avoid franchise law compliance requirements in regard to any master franchise agreement signed between the franchisor and master franchisee, but that limits franchise law compliance to a single sale.

2. **Local Counsel**

A franchisor engaging in a well thought out strategy will usually realize that they need trusted home country counsel assisting them, and then also local counsel in each country where they plan to expand so as to advise them on all of the many issues that may arise, including those discussed in this paper.

The goal of the exercise should be to find and determine how best to work with the right local counsel. The exercise always should be to find a way for the home counsel and local counsel to give the best and most cost-effective advice to a common client, and for both law firms to remember that they are “on the same team.” There are a myriad of ways that can be done, depending on the situation. Not every local counsel will be the right choice for each transaction, and not one approach will appeal to all franchisors and their respective home country counsel. In many instances, the franchisor wants their home country counsel to be intimately involved both in selecting the local counsel and in the local counsel’s activities. Once a local counsel is selected, in some situations the home country counsel backs away, for fear of duplicating the work that must in any event be done by counsel in the target market. In other situations, where the matter is not as efficiently managed, home country counsel and target market counsel do end up duplicating effort, resulting in escalated costs, and sometimes, the client’s expectations not being met. That is especially an issue for the franchisor looking to expand with a lesser investment of time, money, and effort. In reality, this duplication of efforts cannot always be avoided, especially where the home country counsel and local counsel are
working together for the first time, and/or where the franchisor is expanding into a country that is not as common as others (so new unforeseen issues are more likely to arise). One good idea is for home country counsel to educate their client that regardless of whether a more or less robust approach is adopted, there may be no way to avoid both home country and local counsel being involved, and that may in fact be the most efficient approach to getting the franchisor’s deal completed.

As already suggested, local counsel should be consulted as early as possible to deal with the trademark protection, and in any event, at the point in time when the franchisor is ready to discuss or negotiate a letter of intent, term sheet, or other preliminary document, if any. That is for two key reasons. The first is that the target market’s local laws may themselves interfere with the franchisor’s freedom to enter into a binding, or non-binding letter of intent or equivalent. In some cases, no binding agreement of any kind between a franchisor and prospective franchisee can be entered into until the local country’s franchise or similar laws are complied with. Likewise, sometimes a letter of intent may bind a franchisor to more than they intended, if not drafted as required by local law. Secondly, it is at this stage that the franchisor should be considering corporate and franchise structure, and any relevant tax issues.

With any method of international expansion, an efficient approach is to have a franchisor with plans to expand to more than one country create template forms of agreements that they are content with under the laws and practices of the home market, using their home market counsel. Those agreements and documents should also include the types of provisions that are standard in international franchise documents, addressing concerns such as the tax and payment issues raised above, and other provisions frequently addressed in international deals (e.g. language and translation issues and post-termination issues). But the franchisor should also recognize that for every country, those template forms will need to be sent to local counsel retained on behalf of the franchisor for review and customization. The franchisor should assume that some changes will always be needed to comply with the laws and practices of the target market, while local counsel should assume that the franchisor will be averse to such changes.

If the target market has a franchise or similar law mandating pre-sale disclosure through a franchise disclosure document or equivalent (FDD) then a closer analysis on process should be made. Whether or not home market counsel should prepare the FDD may depend on whether the home market itself has a requirement for an FDD, such that one already exists. If so, then it is likely most efficient to deliver the home market FDD to local counsel, so that local counsel can then use that to prepare an FDD that complies with the laws of the target market. This approach assumes that local counsel can and should be in a better position to advise on the correct content of a target market FDD in a less costly and time-consuming manner.

Another approach could be to have home market counsel prepare a draft target market FDD and then send it to local counsel for review. The efficiency of that approach may depend on what experience the home country counsel has on preparing a target market FDD. If it is their first time, if they do not have a lot of practical experience, or if the requirements can vary greatly by industry or due to ongoing case law developments, etc., then the home market counsel is likely learning as they are going, and being educated by local counsel. This is likely to require more time being spent, and lead to greater cost for the client.

Preparing agreements and target market FDDs without seeking input or advice from local counsel in the target market is high risk. While it may be apparent that a theme of this paper is that such activity should be avoided, it is certainly something that goes on despite the practical and legal risks for client and lawyer.
Once the documents (including an FDD) are in the hands of the candidates, there is then the issue of negotiation of the terms. In some cases, the division between home market and local counsel is not relevant, as the client takes the lead. In other cases, and for the sake of consistency with prior deals, the home market counsel will take the lead. In other cases, the deal will hinge on many local market issues, and local counsel will take the lead. In any one situation, the counsel taking the lead may rely on the other for strategic advice on necessary issues. At some point, one or both may have to be involved with the client in the negotiation process. Roles and responsibilities in the contract negotiation process should be clearly defined between home market and local counsel at the beginning of the transaction, if at all possible. That being said, the roles can change as the negotiations evolve. Good communication between all team members is key to ensuring a smooth process and an outcome that considers relevant aspects such as local law compliance and the franchisor’s financial and business goals.

One thing that can almost always be guaranteed is that the franchisor client will need to spend more time and more money than they originally anticipated, regardless of whether they adopted a more or less robust approach to international development.

G. Franchisee Recruiting

1. Qualifying Franchisees

It may be heresy to suggest in a paper written by and for lawyers, but deciding upon the characteristics of and selecting a qualified international franchisee is perhaps even more important than the quality of the legal documents used in the deal. That may even be more important where the franchisor wants to have minimal day to day involvement in the business of franchising or operating units in the new market.

Perhaps ironically, those who want to dip their toe in a new country, and devote minimal resources, also often want to devote minimal resources to finding the right fit of a candidate. Arguably that is the one area where less is not more, as finding the right and best candidate in the new country can perhaps overcome devoting fewer resources to the other important aspects of launching a franchise brand in a new country. As discussed above, the successful multi-unit franchisee is often a person or group that can be delegated many of the obligations that a franchisor would otherwise need to perform. So why not be as sure as possible that the candidate can do all that? Perhaps that is because that many of those who embark on a minimalist approach to international franchising are also likely those who never set out to franchise internationally with any sort of grand plan, and are instead pursuing international expansion simply because a potential candidate approached them in order to bring the franchisor’s brand to their own country.

A robust approach to qualifying candidates would involve investigating or becoming immersed in information regarding a candidate’s net worth, business acumen, business plans, communication skills and prospects for a high quality personal relationship with the franchisor. Add to that the often-recommended ways in which to conduct due diligence on a potential franchisee, such as retaining a firm to validate the franchisee’s financial qualifications and conduct a thorough background check on the candidate and any behind the scenes members of the ownership group. As one might gather, the above will consume time and money. Most people immersed in international franchising will advise that it is not something that should be rushed or done by cutting corners. And yet a minimalist approach often means a rushed approach, and less desire to spend money on these items.
In some systems, success in international franchising has come about because the franchisor finds international franchisees from a very small pool of potential candidates in other countries who are already franchisees of other brands in those countries. This seems especially true in the restaurant industry. So perhaps that is the best route for those who truly want to only dip their toes into the franchisee selection process in a new country; focus only on existing franchisees as potential franchisees for the franchisor’s brand in the new country. Perhaps a franchisor can then assume that someone at some point did the due diligence and otherwise undertook steps to qualify that candidate for those other brands they franchise.

2. **Prospecting for International Leads**

Those who adopt a planned approach to international franchising will often create a profile for an ideal candidate, and then set out to find them through some form of targeted marketing, including use of international franchise brokers, government sponsored programs and trade missions (i.e.: U.S. Commercial Service), international franchise trade shows, foreign franchise associations, traditional advertising and public relations activities, and even using the franchisor’s home market and new market legal counsel to solicit leads.

So like everything else described above, prospecting for international leads is an undertaking that can take a fair bit of resources in the form of time and money. Certainly there are ways to be less involved than others, such as turning over the entire selection process to an international franchise broker. But like the use of brokers domestically, turning over too much responsibility to a broker can lead to less than ideal candidates who will sign agreements and get the broker paid their commission, while leaving the franchisor with having to deal with their new problem franchisee long term. So franchisors should be careful in adopting this approach.

But none of the above may be of any concern to the franchisor who proposes to take a toe in the water and reactive approach, because the prospect of international expansion only arises when the candidate finds the franchisor. With that said, a franchisor opting to dip their toes may still want to take heed; to really succeed in a foreign market, sometimes you may need to get more than just the franchisor’s feet wet.

### III. THRESHOLD TARGET MARKET CONSIDERATIONS AND PRIORITIES

To execute a successful toe in the water approach to international expansion, a franchisor will need to choose the right new markets for its system. The right markets will likely feature some combination of convenience, ease of doing business, and limited legal regulations. This section looks at several important market considerations, such as proximity, socio-cultural differences, franchise laws, and other local laws. It also provides a snapshot of some jurisdictions popular with franchisors and some others that may raise warning flags.

#### A. Market Touchpoints

1. **Efficiency of Support for Franchisees**

   a. **Geographic Proximity**

    When franchisors ink their first international deals, many of them tend to do so in neighboring markets. For example, for a US franchisor, this would be either Mexico or Canada. (Sections III.D.1. and 2., respectively, set out snapshots of these jurisdictions.) There are surely many reasons for this, but one of the primary ones has to be geographic proximity. Sharing
b. **Language**

Easy and efficient communication is something that franchisors may take for granted when franchising domestically in their home markets. Assuming that a franchisor does not have foreign language capabilities, finding jurisdictions outside of the home market where the home language is commonly spoken or at least franchisees that are comfortable doing business in that language will help save time and money. While interpreters and translation services abound, these can add cost and delay to franchise transactions.

2. **Socio-Cultural Differences**

A franchisor looking abroad must consider socio-cultural differences between the home market and the new market. Factors like the new market's cultures, religions, languages, and tastes can make the difference between success and failure. It likely would not make much sense for the franchisor of a hot dog concept to dip its toe in the water of a market where a significant percentage of people are vegetarian, even if the market is geographically close and everyone speaks the franchisor's home language.

3. **Forecasting Potential Profitability**

Several factors go into a franchisor's ability to turn a profit, including its cost of doing business, the quality of its franchisee, and the market's appetite for the franchised concept. In the US and many other industrialized markets, data on these factors is relatively easy to find. For example, due diligence on the franchisee's corporate structure, owners and personnel, and financial performance can provide a window into its likelihood of being a good operator. Likewise, market studies can help build a case for whether a particular site or location is a good bet. In markets where this type of data is not readily available, it may be difficult for a franchisor to forecast whether it will be profitable.

4. **Power, Politics, and Economy**

As a general matter, political and economic stability are good for business. When considering a market for international expansion, a franchisor should certainly do its homework on the state of its government and economy. If the government is currently nationalizing businesses or highly corrupt (more on this topic in Section III.A.6. below), or the market is in an economic recession, it may not be a good time for a franchisor to test the waters.

5. **Legal Climate**

A market's legal climate is undoubtedly important. It would be difficult to sustain a successful franchise operation in a market where things like the rule of law were not respected. That said, for a franchisor looking to dip its toe in the water, too much regulation (franchise or otherwise) can increase the cost of compliance. Sections III.B. and C. below discuss compliance with franchise laws and other local laws.
6. **Anti-Corruption and Anti-Terrorism Considerations**

Franchisors exploring international expansion into new markets should be acutely aware of applicable anti-corruption, anti-terrorism, and similar compliance-related laws. For example, a franchisor based in the US that starts doing business abroad must comply with the US Foreign Corrupt Practices Act (“FCPA”). The FCPA broadly prohibits payments by US companies and their representatives to foreign government and quasi-government officials to obtain or retain business or secure any improper advantage.\(^2\) Violations of the FCPA are subject to both civil and criminal liability.\(^3\) Because the FCPA may extend to operations conducted by a franchisor’s developers, franchisees, agents, brokers, consultants, or other third parties deemed to be representing it, a franchisor must be mindful of the actions of its own personnel and the personnel of these types of third parties.

The risk of corrupt business practices exists worldwide, but is particularly high in certain regions and countries. The Corruption Perceptions Index (“CPI”) published by Transparency International measures perceived levels of public sector corruption around the world on a scale from zero (highly corrupt) to 100 (very clean), with a jurisdiction scoring below 50 being considered as having a serious corruption problem.\(^4\) As a point of reference, the United States scored a 71 in the most recent CPI.\(^5\)

To continue the example, a franchisor based in the US looking to explore new markets close to home (i.e., in the Americas) will find a mixed bag in terms of CPI scores. While countries like Canada (81), the US, and Uruguay (70) have reasonably clean scores, others like Mexico (28), Nicaragua (25), Haiti (20), and Venezuela (18) bring down the region’s average CPI score to 44.\(^6\) For comparison, the region that fared the best in terms of average CPI score was Western Europe / European Union with a score of 66.\(^7\) This region also boasts 14 of the top 20 scoring countries overall.\(^8\)

While the CPI measures perceived and not actual corruption, a franchisor looking to expand abroad should certainly take note of these figures when formulating its policy and approach to complying with its anti-corruption obligations, including the FCPA.

**B. Franchise Law Compliance Requirements**

Franchisors whose home market is the US must generally contend with disclosure under the Federal Trade Commission Franchise Rule (the “FTC Rule”), as well as registration and relationship issues under various state laws. Many jurisdictions outside the US similarly impose disclosure, registration, or relationship obligations, or some combination thereof, on franchisors.


\(^3\) Id.


\(^5\) Id.

\(^6\) Id.

\(^7\) Id.

\(^8\) Id.
offering franchises there. A franchisor looking to expand beyond its home market should consider whether it will need to comply with any of these laws.

1. Disclosure Laws

As with the FTC Rule, jurisdictions outside the US that impose disclosure obligations generally require franchisors to provide prospective franchisees with some type of disclosure document containing a certain prescribed level of information a certain period of time prior to entering into a franchise agreement or accepting any type of payment. The specifics (e.g., what the disclosure document is called, the specific disclosure items required to be in the document, the length of the disclosure period) differ from jurisdiction to jurisdiction, but the concept is largely the same. That said, those specifics determine how easy or difficult it will be for a franchisor to comply.

As of the date of this paper, approximately 20 jurisdictions outside of the US impose disclosure laws. While it is somewhat of a subjective measure, these disclosure laws span the continuum from imposing relatively easy obligations to difficult obligations.

For example, Romania currently sits towards the easier end of the continuum. Romanian law requires the disclosure document to include relatively straightforward disclosure items, many of which should already be covered in the underlying franchise agreement.9 These include the franchisor's experience, financial terms of the franchise arrangement, the franchisee's territory, and the general terms of the agreement. In addition, the required disclosure period is any time prior to execution of the franchise agreement.

On the other end of the continuum sit jurisdictions like South Korea, Canada, and Mexico. These jurisdictions are discussed in further detail below, but each of them presents its own unique disclosure complication. The South Korean and Canadian disclosure laws, for example, require a franchisor to disclose a comprehensive set of information and documentation in the disclosure document, including the franchisor's financial statements. The South Korean disclosure document is also somewhat notorious for its mandatory format and the Canadian disclosure document must be compiled with the utmost care so as to not inadvertently miss any required attachment or signature. The Mexican law, on the other hand, is unique for its long disclosure period of 30 business days, which has undoubtedly surprised many unsuspecting franchisors.10

2. Registration Laws

With respect to franchise registration laws, some jurisdictions require franchisors to register their disclosure documents with some type of government authority and other jurisdictions require franchisors to register themselves. Still other jurisdictions’ laws apply to typical features of a franchise arrangement like trademark licenses, transfers of technology, or payments remitted abroad, and thereby apply to franchisors indirectly.

As of the date of this paper, approximately 12 jurisdictions around the world impose some type of registration law. Jurisdictions like South Korea, Indonesia, Malaysia, Vietnam, and China impose direct franchise registration obligations. Each of these jurisdictions and its

9 International Franchise Sales Laws, American Bar Association Forum on Franchising, Ch. 5 Romania.

10 Id. at Mexico 8.
respective registration law is discussed in greater detail below. In general though, a franchisor considering entering any of these jurisdictions can reasonably expect the registration process to be involved, costly, and time-consuming.

Brazil, Russia, and the Philippines impose unique indirect registration obligations of which franchisors should take note. In Brazil, the local currency control law restricts the flow of foreign currency (e.g., US Dollars) from Brazil to payees outside of Brazil unless the underlying contract has been registered with the Brazilian Central Bank. In the case of franchise agreements and other trademark licenses, the Central Bank will not permit registration or the outbound remittance of payment in foreign currency unless the agreement has first been registered with Brazil’s National Industrial Property Institute.11 This latter registration requires a full translation of the agreement into Portuguese and legalization of the executed agreement. Russia similarly requires all franchise agreements and other trademark licenses to be filed with the Russian intellectual property authority in order for such agreements to be valid and enforceable.12 For purposes of registration, the full agreement must be legalized, translated into Russian, and such translation must be reviewed by a Russian attorney.

In the Philippines, franchise agreements are considered technology transfer arrangements, with technology defined broadly as intellectual property or know-how. As such, they are subject to the provisions on voluntary licensing under Philippine intellectual property law. Such law imposes certain mandatory requirements, such as the application of Philippine law, that dispute resolution must take place in the Philippines or a neutral country, and that Philippine taxes related to the technology transfer arrangement must be borne by the franchisor.13 As long as a franchise agreement complies with Philippine intellectual property law it should not need to be registered (though a no-names pre-clearance is a good idea to ensure the agreement actually complies), but the trademark license component will still need to be registered with the local trademark office. This latter filing may be accomplished through a short-form agreement.

### 3. Relationship/Agency Laws

Unlike disclosure or registration laws, relationship laws, as their name suggests, affect the contractual relationship between a franchisor and franchisee, and they typically apply extra-contractually. The subjects regulated by relationship laws include termination or non-renewal, the effect of such termination or non-renewal, transfer restrictions, and notice.

A particular type of relationship law of which franchisors should be aware when expanding outside of their home markets is the dealer protection or commercial agency law. This type of law is relatively common in Latin America (where it tends to go by dealer protection) and the Middle East (where it tends to go by commercial agency).

These laws aim to protect local dealers, agents, and representatives vis-à-vis foreign principals by making it difficult and costly to terminate them. They represent significant risk to franchisors because, if deemed to apply, they may (i) subject a franchise agreement to local law and courts, (ii) limit a franchisor’s ability to terminate the franchise agreement to statutorily-

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12 Grazhdanskii Kodeks RF [GK] [Civil Code] art. 1028 (Russ.).

defined “just causes,” and (iii) impose a termination indemnification for termination without just cause.

Because these laws tend to employ relatively broad definitions of who qualifies as a dealer or commercial agent, franchisees may attempt to argue that they are protected. Unfortunately for franchisors, this is still largely an open issue under most of these types of laws.

While there is still much uncertainty surrounding the application and impact of dealer protection laws to a franchise relationship, there are certain best practices a franchisor should implement to protect itself. One recommendation is to disclaim application of such laws in the franchise agreement and to include language prohibiting the dealer from registering itself or the franchise agreement under any such laws. This is because certain dealer protection laws, such as the Dominican Republic law,\textsuperscript{14} only apply if they are explicitly accepted. Other laws, such as those in the Dominican Republic,\textsuperscript{15} Haiti,\textsuperscript{16} and Honduras\textsuperscript{17} require the agreement or dealer to be registered in order to be protected.

Another best practice relates to governing law and dispute resolution. A franchisor should elect the governing law of its home jurisdiction and dispute resolution through arbitration in its home jurisdiction. Largely, application of a dealer protection law will depend on the forum hearing the dispute. If a local court assumes jurisdiction, it will likely apply the dealer protection law rather than the law governing the franchise agreement. However, because many jurisdictions are party to the New York Convention, they are obligated in principle to recognize and enforce a contractual international arbitration clause.\textsuperscript{18} As such, the arbitration clause in the franchise agreement should be enforceable and would likely wrest jurisdiction from the local court. An arbitral panel outside of the local jurisdiction is likely to enforce the choice of law in the franchise agreement in lieu of the dealer protection law. Although there is some risk that a local court may refuse to recognize the arbitration clause or enforce an arbitral award, a franchisor that has followed this suggestion will be in a far better position than one who has agreed to local law and local courts.

C. Other Local Law Compliance Considerations

When looking to expand abroad to new markets, franchisors must consider a host of local laws that extend beyond the franchise laws discussed in Section III.B. above. This section covers three such local laws: competition laws, local ownership requirements, and translation requirements.

1. **Competition Laws**

Many jurisdictions around the world have promulgated laws to address competition or antitrust issues that frequently arise in the context of franchise arrangements. These issues

\textsuperscript{14} Dominican Commercial Code, Law 173, art. 10 (1966).

\textsuperscript{15} Id.

\textsuperscript{16} Décret du 6 octobre, 1986 dotant les agents commerciaux d'un statut legal [Decree of October 6, 1986 regulating commercial agents], art. 1.

\textsuperscript{17} Honduras Dealer Regulation, Dec. No. 804, art. 12 (1979).

include exclusive territories, supplier restrictions, resale price maintenance, and non-compete covenants.

The European Union may be on the forefront of governing competition, or at least it may seem that way to anyone who has tried to navigate its complex laws. In addition to EU-level competition laws, of which Articles 101 and 102 of the Treaty on the Functioning of the European Union (the "TFEU") are the main ones, each EU member state also has its own competition laws (though these tend to track the TFEU).19

At a very basic level, the TFEU prohibits agreements that prevent, restrict, or distort competition between EU member states. This general prohibition would likely include provisions typically found in franchise agreements, such as those noted above. Any agreement found to be in breach of the TFEU is automatically void.

Because franchise agreements are vertical agreements (i.e., agreements between entities at different levels of production or trade), they may qualify for an exemption from the TFEU known as a block exemption. In order to qualify for the block exemption, the franchisor's and franchisee's respective market shares must not exceed 30 percent, and the franchise agreement may not contain certain "hardcore" restrictions.20 Hardcore restrictions include (i) setting fixed or minimum resale prices, and (ii) restricting the territory into which, or of the customers to whom, the franchisee may sell the relevant goods or services.

2. **Local Ownership Requirements**

The US is among a group of jurisdictions that allow for investment from foreign entities and individuals. Other jurisdictions, on the other hand, impose restrictions on investments from foreigners. The Middle East is famous (or perhaps notorious) for these types of restrictions, though they are not limited to that region. For example, in the United Arab Emirates, local companies must generally be majority-owned by nationals from the UAE (or other Gulf Cooperation Council countries) or UAE companies wholly-owned by UAE or GCC nationals. Companies established within a free zone in the UAE are exempt from this requirement and may be wholly-owned by non-UAE or GCC nationals, but are limited in terms of the scope of their operations.21

What impact do these laws have on franchisors? For those pursuing relatively simple direct franchise transactions, the impact is likely limited to confirming that the franchisee meets any applicable ownership criteria. (If the franchisee is a national of the jurisdiction where the franchise will be operated, local ownership requirements are unlikely to create any problems.) However, franchisors interested in exploring more complicated transactions, including those that involve a joint venture or other ownership component, should make sure that they do not exceed any foreign ownership thresholds.

Another potential area of concern for franchisors is post-termination rights. Many franchise agreements allow the franchisor to assume operations in the jurisdiction after the franchisee has been terminated. If the jurisdiction imposes local ownership requirements, the

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20 Id. at art. 101(1).

franchisor may not be able to do so itself and also may not be able to form a local subsidiary to do so on its behalf.

3. **Translation Requirements**

One of the practicalities of doing business across borders is encountering different languages. A franchisor that does not have local language competence may find it helpful and efficient to have an interpreter participate on calls or in meetings with the franchisee, or to translate certain communications. However, this "nice to have" can quickly morph into an expensive "must have" if the jurisdiction imposes a translation requirement.

Some jurisdictions like Indonesia\(^ {22}\) and Vietnam\(^ {23}\) require that the actual franchise agreement be signed in the local language in order to be valid and enforceable. Other jurisdictions may not expressly require translation in order for an agreement to be valid, but instead implicitly require it by means of a registration requirement. As a general rule, any documents filed with a governmental authority must be translated into the local language. Section III.B.2. above touched on the examples of Brazil and Russia, where full franchise agreements must be translated into Portuguese and Russian, respectively, in order to comply with registration requirements.

D. **The Usual Suspects**

Be it because of geographic proximity, shared language, ease of doing business, or fondness for foreign brands, certain jurisdictions tend to be common destinations for franchisors. This section describes some of those destinations and their respective legal landscapes.

1. **Mexico**

Along with Canada, Mexico is a top destination for franchisors based in the US. Its proximity and familiarity with US brands makes it attractive, although franchisors will have to navigate disclosure and registration laws.

Mexico's Industrial Property Law specifically regulates franchising. The law generally requires pre-sale disclosure of information to prospective franchisees and registration of the transmission of trademark rights with the Mexican Institute of Industrial Property ("IMPI").\(^ {24}\)

With respect to disclosure, franchisors must disclose information about the franchise arrangement that falls into 10 categories. These categories include a description of the franchisor and the franchise, intellectual property rights, amounts and types of payments to be made by the franchisee, and the franchisee's right and obligations under the franchise agreement. The franchisor must provide the disclosure document to the franchisee at least 30 business days prior to execution of the franchise agreement. If a franchisor fails to make the required disclosures or if any such disclosures are not truthful, a franchisee is entitled to an

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\(^ {22}\) Government Regulation on Franchise No. 16 of 1997 (Indon.).

\(^ {23}\) Decree Making Detailed Provisions for Implementation of the Commercial Law with Respect to Franchising Activities (Decree No. 35/2006), art. 12 (Viet.).

\(^ {24}\) Ley de la Propiedad Industrial [LPI] [Law on Industrial Property], as amended, art. 142, Diario Oficial de la Federación [DO], 27 de Junio de 1991 (Mex.).
action for annulment of the franchise agreement (including repayment of all amounts paid by the franchisee to the franchisor, and monies expended by the franchisee in their endeavors) and, in the first year after execution of such agreement, may claim any damages and lost profits caused by such default.

With respect to registration, the law requires that a franchise agreement be registered at IMPI to be enforceable against third parties. To satisfy this requirement, most franchisors choose to register a short-form franchise agreement in order to avoid disclosing confidential or deal-specific information.

In addition to disclosure and registration, the law requires that 12 mandatory terms be agreed upon by the parties and included in the written franchise agreement. These include the relevant geographic area, description of technical and operational training, grounds for termination, and grounds for reviewing or modifying the terms of the agreement.

2. Canada

The US’s neighbor to the north is certainly a usual suspect for franchisors. With the exception of Quebec, the countries share a common language and there is no shortage of cultural interchange. That said, six of Canada’s provinces (Alberta, British Columbia, Manitoba, New Brunswick, Ontario, and Prince Edward Island) require franchise disclosure, and Quebec imposes other requirements, including mandatory translation into French.

While each province’s franchise law has its own nuances, the obligations imposed are generally similar and Ontario’s franchise law is arguably the most onerous. The Ontario law requires a franchisor to provide a disclosure document not less than 14 days before executing a franchise agreement or any agreement relating to the franchise, or receiving any consideration from the franchisee. It also includes certain relationship provisions, such as an implied duty of good faith and fair dealing and certain reasonableness requirements.

The disclosure document is quite comprehensive and similar in scope to a disclosure document required under the FTC Rule. It must include information about the franchisor (including its officers and directors) and the franchise being offered, the franchise network, costs related to the franchise, a summary of the provisions of the franchise agreement, and the franchisor’s financial statements. A franchisee may rescind its franchise agreement without cause, obligation, or penalty within 60 days after receiving the disclosure document if the franchisor does not comply with relevant provincial franchise law, or within 2 years after entering into the franchise agreement if the franchisor never provided a disclosure document.

25 Id.
26 Id.
27 Id.
29 Arthur Wishart Act (Franchise Disclosure), S.O. 2000, ch. 3 (Can.).
30 Id.
3. **Middle East**

It is perhaps not as common as Mexico or Canada, but the Middle East is also a relatively common destination for franchisors looking to expand abroad to new markets. Of the jurisdictions in the region, only Tunisia has currently passed a franchise law (though both Saudi Arabia and Egypt are also considering doing so).\(^{31}\)

Tunisia’s law requires franchisors to provide franchisees with a disclosure document at least 20 days prior to executing a franchise agreement.\(^{32}\) The disclosure document must contain information such as the franchisor’s entity type and nature of its activity, the franchisor’s net worth, proof of ownership of the franchisor’s marks, opportunities for development of the industry in Tunisia, and the franchisor’s financial statements.\(^{33}\) The law also requires the franchisee to obtain an authorization to franchise from the Ministry of Trade, which can take several months.\(^{34}\) Though this is the franchisee’s obligation, the franchisee will need a certain level of support from the franchisor, including providing the franchise agreement and related documents.

While franchise laws are uncommon in the Middle East, commercial agency laws and local ownership requirements are quite common. These concepts are discussed in Sections III.B.3. and III.C.2. above, respectively. Franchisors should certainly ensure they understand the legal landscape in whichever Middle Eastern jurisdiction they plan to do business well in advance of signing any agreements.

4. **England**

England is viewed by many franchisors as a gateway to Europe (though that may change because of Brexit). The English language and relative ease of doing business are attractive factors for brands looking to expand globally.

England does not have any specific laws regulating franchising. Therefore, no pre-sale disclosure or registration is required. However, many reputable franchisors are members of the British Franchise Association ("BFA"), which provides principles for franchisors to follow during the sales process, franchise term, and dispute resolution. Among others, the BFA recommends that franchisors provide a disclosure document to franchisees.

The lack of a franchise law is counterbalanced by a complicated competition regime and onerous data protection obligations, both of which are based on EU law. The EU’s competition law is discussed in Section III.C.1. above. As far as data protection, the EU implemented the General Data Protection Regulation ("GDPR") in May 2018. GDPR imposes strict obligations around the collection, storage, use, and transfer of personal data. While GDPR may impact franchisees in England more directly, a franchisor that wants rights to customer data will likely also need to comply.


\(^{32}\) *Id.*

\(^{33}\) *Id.*

\(^{34}\) *Id.*
E. Franchisor Beware

1. Korea

Korea's franchise law, the Fair Franchise Transactions Act, may be one of the most complicated, time consuming, and costly with which to comply. It imposes registration, disclosure, and relationship obligations.\textsuperscript{35}

With respect to registration, the law requires franchisors to register a disclosure document with the Korean Fair Trade Commission ("KFTC").\textsuperscript{36} The disclosure document must specify certain information about the franchisor and the franchise, including the details of the franchisor's business activities, information on the franchisor's officers, and outlines of education and support programs to be provided to franchisees.\textsuperscript{37} In addition to the types of information common to many other disclosure documents, the Korean disclosure document must also include some unique information, such as sales revenue from the franchised business for the last three years, expenditure on advertising and promotion in the last fiscal year, a summary of the process from negotiation to opening the franchised business, and the percentage of remodeling costs to be borne by the franchisor.\textsuperscript{38} Registration must be updated at least annually and may be required more frequently based on the types of changes experienced by the franchisor.

Once the franchisor is registered, it must then provide franchisees with a disclosure document at least 14 days prior to the payment of any fee or execution of any agreement.\textsuperscript{39} The disclosure period may be reduced to seven days if the franchisees are advised by counsel or a franchise broker.\textsuperscript{40}

In addition to the registration and disclosure obligations noted above, the law also governs certain aspects of the franchisor-franchisee relationship, including termination and non-renewal. If a franchisee requests to renew a franchise agreement during the 90 to 180 day period prior to expiration of such agreement, a franchisor may not deny such request unless the franchisee has been in breach of a payment obligation or if the franchisee rejects common obligations and duties accepted by other franchisees.\textsuperscript{41} However, the franchisor's obligation to grant the renewal only applies if the term of the applicable franchise agreement, including the initial term and any subsequent renewal terms, does not exceed 10 years.\textsuperscript{42}


\textsuperscript{36} Id. at art. 6-2.


\textsuperscript{38} Id.

\textsuperscript{39} Fair Franchise Transactions Act, Law No. 6704, art. 7 (2002) (S. Korea).

\textsuperscript{40} Id.

\textsuperscript{41} Id. at art. 13.

\textsuperscript{42} Id.
2. **Indonesia/Malaysia/Vietnam**

This triumvirate of jurisdictions in Southeast Asia is noteworthy because it governs franchise transactions in a similar manner by requiring both registration and disclosure. While each jurisdiction's law is somewhat different, it would be instructive to analyze the Vietnamese law.

Vietnam's franchise law requires a franchisor to register its franchising activities with the Ministry of Industry and Trade ("MOIT") prior to offering any franchises.\(^{43}\) The registration application must include, among others, the disclosure document, a certified copy of the franchisor's business registration, and certified copies of the franchisor's trademark registrations.\(^{44}\) As previously noted, information and documentation submitted to the MOIT as part of the registration must be translated into Vietnamese. In addition, Vietnamese law also requires the parties to sign a Vietnamese-language version of the franchise agreement.

After completing the registration process, a franchisor must provide franchisees with a disclosure document at least 15 business days before signing the franchise agreement.\(^{45}\) The disclosure document requires a fairly standard set of information, including the franchisor's financial statements. However, since the disclosure document must be submitted as part of the registration application, the disclosure document and its attachments must be translated. Franchisors should take note of this added expense.

3. **Australia**

Australia's Franchising Code of Conduct governs disclosure and relationship issues, but does not require any government filing or registration of a franchise agreement or franchise system.\(^{46}\)

As far as disclosure, franchisors are required to provide a prescribed information statement to prospective franchisees as soon as practicable after the prospective franchisee formally applies for or expresses an interest in a franchise.\(^{47}\) This information statement is intended to be provided prior to the disclosure document, which franchisors must provide at least 14 clear days prior to signing the franchise agreement (or any renewal, extension, or extension of the scope of a franchise agreement), paying any non-refundable fees, or signing any document agreeing to enter into a franchise agreement.\(^{48}\) Information in the disclosure document must be current in all material respects and the disclosure document must attach and accurately reflect the form of franchise agreement the parties will sign. Re-disclosure, and a further 14 day period, will be required if changes are made to the form of the franchise agreement attached to the disclosure document, except to correct errors, fill in required

\(^{43}\) Vietnam Commercial Law, art. 291 (2005).

\(^{44}\) Decree Making Detailed Provisions for Implementation of the Commercial Law with Respect to Franchising Activities (Decree No. 35/2006), art. 12, sec. 3 (Viet.).

\(^{45}\) Id. at sec. 2.

\(^{46}\) Franchising Code of Conduct, 2015 (Austl.).

\(^{47}\) Id. at part 2.

\(^{48}\) Id.
particulars, or at the franchisee's request. Franchisors must update their disclosure documents annually unless they entered into only one franchise agreement during the previous year and do not intend to franchise in the following year.

In addition to disclosure, Australia's law also regulates the relationship between the franchisor and franchisee. A few notable obligations include the following:

- A franchisee has a seven-day cooling off period after signing the agreement (or an agreement to enter into a franchise agreement) during which to terminate the agreement and receive a refund of any fees paid to the franchisor.

- The franchise agreement may not contain a general release from liability or contain or require a franchisee to sign a waiver of any verbal or written representation made by the franchisor.

- The franchisor may not unreasonably withhold consent to a transfer of the franchise and must provide notice of whether such consent is given within 42 days of receiving all the information it has requested in relation to the prospective transferee, failing which consent will be deemed to have been provided.

- If the franchisee is required to contribute to a marketing fund, the franchisor must prepare and provide to the franchisee an annual report regarding the income and expenses of such fund within four months after the end of the fiscal year. The report must be audited unless 75% of the franchisor's franchisees in Australia agree otherwise within three months after the end of the relevant fiscal year.

- A franchise agreement may not require any action or proceedings in relation to the franchise agreement to be brought in any place other than the State or Territory in Australia in which the franchised business is based.

4. China

China's franchise law may be best known for its qualification requirement dubbed the Two Plus One Rule, which is discussed further below. In addition to that requirement though, it also mandates disclosure and post-signing registration.

In order to be qualified to engage in franchising activities in China, a franchisor must (i) possess a mature business model, (ii) be able to continuously provide business guidance, technical support, business training, and other services to the franchisee, and (iii) own at least two self-operated stores that have an operational history of more than one year each. (According to recent guidance from the Ministry of Commerce (“MOFCOM”), the stores may be owned by the franchisor or a direct subsidiary of the franchisor.) This last requirement is commonly known as the Two Plus One Rule.

49 Id.

50 Id. at parts 3 and 4.

51 Commercial Franchise Administration Regulation, Order of the State Council 485 of Jan. 31, 2007, art. 7 (P.R.C.).
Assuming it meets the qualification criteria, a franchisor must then provide franchisees a disclosure document at least 30 days before signing a franchise agreement. Among other things, the disclosure document must include information relating to the franchisor and its franchising activities, franchise fees, prices and conditions for the provision of products, services, or equipment to the franchisee, and an investment budget for the franchised business. Franchisors must also inform franchisees in a timely manner where any material changes occur to the information in the disclosure document.

Within 15 days after the execution of its first franchise agreement, a franchisor must register with MOFCOM or one of its provincial-level counterparts. As part of the registration, the franchisor must submit a host of information and documentation (all of which must be translated into Chinese), including its incorporation documents, trademark certificates, a copy of the first franchise agreement, and documents evidencing it meets the Two Plus One Rule.

IV. KEY TOE IN THE WATER APPROACHES

A. Corporate Test Units

The most obvious way to put the franchisor’s toe in the water, is to put the franchisor’s own toe in the water. If the franchisor is not sure its concept will work outside the US and doesn’t want to risk a franchise disaster, one option is to develop, open and operate a corporate test unit to prove up the franchisor’s concept and iron out the kinks before the franchisor attempts to franchise. There is of course capital, manpower and time involved with development of any corporate unit, and even if the franchisor has a grasp on development costs for a domestic unit and thinks it has a grasp on development costs for an international unit, the fact is that the franchisor could end up doubling or even tripling its anticipated investment budget to actually develop, open and operate a unit abroad. However, if the franchisor does it right, the corporate unit investment might not end up being too much more money than the estimate to implement a traditional franchise model in the specific country and, if the corporate unit and model prove out, the franchisor could have an open and operating unit to refranchise to a prospect and jump start the franchisee’s learning and operations.

A corporate test unit could come in many different shapes and sizes. Perhaps the core question is whether the franchisor’s product will sell in the market. The franchisor could decide to develop, open and operate a mini-location, kiosk or version of pop-up unit to sell the product on a smaller scale for testing purposes. If the question is whether the franchisor’s service will sell in the market, then the franchisor could directly provide the service to a smaller, targeted audience as a test. Perhaps the franchisor’s question is whether legal restrictions could preclude the franchisor’s success, and the franchisor would prefer risking the franchisor’s own capital versus a third party’s capital.

Of course, as noted above in Section II, there are minimum levels of diligence that would need to occur for even a corporate pop-up unit. While not exhaustive, the list of corporate unit diligence points would include the following:

52 Id. at ch. III.
53 Id.
54 Id. at art. 8.
55 Id.
• Foreign Investment/Local Ownership Restrictions or Limitations
  o Foreign company owning or leasing land?
  o Foreign company owning or operating a restaurant business?
  o Local owner, director or officer requirements?

• Tax and accounting issues
  o Corporate, dividend vs. withholding tax rates?
  o Transfer pricing issues?
  o Local accounting requirements vs. US GAAP?
  o Local company annual reporting and filing requirements?

• Entity or Branch Formation Options/Limitations
  o Options available?
  o Local officer or director issues?

• Immigration/Visa Issues
  o Travel restrictions or limitations?

• Language/Translation Issues
  o Mandatory use of local language in operations, signage, governmental filings?

• Government Registrations or Filings
  o Foreign investment approvals or filings?

• Unit operating permits or licenses?

• Employee Issues
  o Hours restrictions, annual leave or other mandatory benefits?
  o Mandatory severance or other liabilities?

• Real Estate Issues
  o Fee simple or leasehold restrictions on foreigners?
  o Key Money practices?
• Short term leases, seasonal leases?

  • Lending/Debt Transaction Issues
    o Foreign debtor rules or limitations?
    o Collateral issues?

  • Suppliers or Vendor Issues

  • Travel/Safety Issues

  • Customer/Data Protection Issues

  • Trademark, Website, Social Media Issues
    o Foreign ownership of websites and domain names
    o Language requirements

B. Franchise Test Units

1. Existing Franchisee from US Market?

Every first franchisee domestically or internationally is a guinea pig for the franchisor and brand – not that the term guinea pig will appear in the glossy brochure or disclosure document.

There are, however, some ways that franchisors can try to mitigate that experience. The authors have seen multiple occasions where a small or mid-size US based franchisor pursues a first international transaction because an existing US franchisee who is from (or has family in) an international jurisdiction urges the franchisor to allow them to purchase franchise rights and “go home” to start the brand in the franchisee’s home country. This can be a “low-hanging fruit” opportunity for the franchisor. The US franchisee already knows the brand, the franchisor already knows the US franchisee and presumably the US franchisee knows its home country. This scenario can be a win-win for the franchisor, but there are always logistics to cover.

For instance, will the US franchisee continue to operate the US locations or sell them? Will the key person(s) actually move to the other country, or does the franchisee intend for its children or a relative to move to the country and be the local operator? What are the business terms? Most franchisors have different fee structures internationally; is that feasible with an existing US franchisee used to the US fee structure? Does the franchisor want a successful franchisee taking on additional time and monetary commitments, and attempting to operate in two different countries at the same time? Does the franchisor cross default the relationships? While an existing franchisee is low hanging fruit, the franchisor and franchisee have to consider the risks of souring a good relationship with a riskier move abroad.

2. Experienced Local Franchisee Able to Convert Easily if Unsuccessful?

Franchisees come in all shapes and sizes. The traditional mom and pop franchisee or career change franchisee who does not have prior franchise or industry experience will almost
always require the most training and hand-holding, and will likely be allocating a larger percentage of its net worth and savings towards the business. These are the least likely franchisees to be ripe for a test program. However, especially internationally, there are many large franchise operators (for instance in the restaurant industry) who own and operate its own brands and also own and operate multiple franchised brands. These larger, multi-brand franchisees (pejoratively called “brand collectors” in some circles), tend to want the brand, but not necessarily all the training, oversight, supply chain and other aspects that go with a traditional franchise. To that end, these larger franchisees may be more open to a test unit arrangement that allows the franchisee to open and operate for a period of time before making a larger, long-term commitment, especially if real estate, personnel and other investment capital can be “reallocated” to a different brand or type of unit the franchisee concurrently owns and operates if the test is unsuccessful.

As further discussed below, the franchisor has to consider whether a multi-brand operator is right for its brand, and will be able to focus on and commit to its brand. It is a familiar Catch-22 for franchisors; does the franchisor go with the small franchisee who will put its heart and soul into the franchisor’s brand, or go with the large operator that has the wherewithal to grow the franchisor's brand but may be more numbers focused and easily distracted by other opportunities?

3. True Test Franchise

A true test franchise with a “traditional” international franchisee is the most unlikely scenario. As noted above, a mom and pop franchisee or career change franchisee who does not have prior franchise or industry experience will be the least likely to want to commit time and resources to “test” the franchisor's brand. These types of franchisees have the most to lose, and therefore are the least likely to want to be that guinea pig.

That said, the authors have seen instances where an international franchisee prospect who does not have franchisor or industry experience and/or does not have the capital or other qualifications of other potential franchisee candidates might be more open to a test franchise if that is the only way it can differentiate itself from the pack and be chosen for a transaction. Of course, from a risk perspective, the candidate who commits everything has everything to lose, and may be more apt to run hot and cold from the greatest brand ambassador to a litigant or bankrupt brand naysayer. Franchisors will need to consider the risks and whether the risks outweigh the potential upside in this type of true test transaction.

C. Non-Traditional Franchisee

The section above references large, experienced franchisees as potential candidates for test franchisees. The epitome of a large, experienced franchisee is a multi-national non-traditional operator who operates multiple brand units in airports, train stations, malls, stadiums, schools and other captive audience locations. In some ways, the types of franchise transactions entered into with these non-traditional operators are shorter-term, lower investment (and ideally lower risk) test transactions, especially since many non-traditional operators insist on unilateral termination rights if the operator decides to switch brands (or if its contractor/landlord demands a switch).

To the extent that a franchisor can find a large, non-traditional operator who wants to take the concept international, there is likely no faster, cheaper and most potentially risk adverse option than an experienced non-traditional operator. While no non-traditional operator
is likely to become a traditional franchisee and develop the entire market, its operations can be
the initial foray into the country to gain brand recognition and attract traditional franchisee
interest with less downside risk because these non-traditional operators are well-versed in
switching out concepts on a fairly regular basis without the types of legal commitments (loans,
leases, etc…) or emotions of more typical mom and pop or mid-size franchisees.

D. Single Unit Franchising

1. Smaller Transaction/Investment Size

Almost every franchisor going international wants to make a big splash. The goal is to
announce a large transaction with a high franchise unit count and large upfront fee to create
buzz and attract attention for the brand (to lure in the next big fish franchise candidate). Single
unit deals are not splashy, but they are definitely a quintessential “toe in the water” approach.

The authors are aware of at least one major US restaurant brand that only offered and
sold single unit franchise deals internationally for over 15 years, and ended up with franchisees
in over 20 countries. Some of those franchisees only ever opened one unit, but others opened
upwards of 100 units – one at a time. All without development rights or any formal commitment
that the franchisor would grant a second (or third, or fourth) franchise, or that the franchisor
would not sell some or all of the remaining country to a third party. At most, the franchisor
provided a form of comfort letter that in essence said that if the franchisee performed well and if
the franchisee wanted a second unit then the franchisor would give consideration to its interest.
It was touchy/feely in both nature and content, and was offered on a take it or leave it basis, but
it did the trick for a number of years.

Of course, this was never a popular approach with the bulk of franchisee candidates.
However, this particular franchisor had the brand strength back in the 1990s to have its pick of
candidates and largely dictate terms, but that would be much harder today, where mid-size to
large franchisee candidates many times start discussions focusing on master franchise rights,
multi-country grants, three figure unit counts and rights of first refusal for other large swatches of
territory.

Selling a single franchise deal internationally today, and being successful, takes a
particular type of prospect. Whether it is the mom and pop or career change prospect or even
the non-traditional operator discussed above, they do exist, and if both the franchisor and
franchisee prospect are aligned that they want to put their collective toe in the water before
making a full commitment, a single unit deal is the most appropriate option. This approach
requires a lot of trust, and by the very nature of the toe in the water approach, the franchisor is
unlikely to have a long track record of doing right by its franchisees within such a framework that
it can tout in discussions with candidates.

2. Agreed Standstill or Right of First Refusal

Single unit franchise deals can be a tough sale in part because the franchisee fears
losing out on the potential upside available after its blood, sweat and tears open the market.
Harkening back to the guinea pig analogy above, no franchisee wants to undertake the arduous
task of opening up a market only to have the franchisor sell the rest of the market to a third party
at a better price, or decide to develop the market themselves. International commercial agency
laws are in place because of historical practices by foreign manufacturers to enter into at-will
agreements with local agents, let then develop the market and then unilaterally terminate them
and take over the market for themselves or a third party willing to pay more. Today, franchisors continue to pay for the sins of their forefathers, and “trust me I will take care of you” is unlikely to be persuasive in most instances absent a viable course of performance bolstered by franchisees who have been successful with the particular franchisor.

The most logical compromise to allay this fear is for the franchisor to offer some form of agreed standstill period during which the franchisor will not seek to enter the market themselves or through a third party. The period could be anywhere from 6 months after the unit opening to upwards of 2 years after opening, and the agreed standstill can be coupled with a right of first refusal that could commence immediately after the agreed standstill period ends. Here, the franchisor is giving up flexibility, but if the one unit at a time approach is really implemented to dip the franchisor’s toe in the market, it would likely be perceived as disingenuous of the franchisor to insist on flexibility to potentially flood the market quickly after the franchisee opens its first unit.

Drafting standstills and rights of first offer/rights of first refusal are not difficult from a legal standpoint, but getting the right mix of time and flexibility is important, as is making sure the provisions are clear as to such things as alternative methods of distribution, communications with other prospects during the tail end of the periods and whether once a right of first offer/right of first refusal is rejected it can be resurrected for the same or other territories or deals.

3. **Earn-in on Second Unit**

The next step above a single unit franchise agreement deal with an agreed standstill or right of first refusal is an agreed “Earn-in” on a second unit. For instance, the Earn-in could be as simple as “if the franchisee develops and opens the first unit timely, and operates it in compliance with standards for 6 months,” the franchisee will have a right to purchase a second franchise at an agreed price and terms (or perhaps even the same price and terms as the first franchise).

This Earn-in approach provides the single unit franchisee with some degree of comfort that if it meets its contractual obligations it will have the opportunity to develop a second location. For the franchisor, the risk versus reward pendulum swings favorably since the franchisee has to meet its threshold commitments to earn the right to the second unit, and that can be an incentive for the franchisee to perform in and of itself.

E. **Progressive Territorial and Development Rights**

1. **Rights of First Refusal and Rights of First Offer**

As noted above, single unit deals do not make a big splash. Large deals with vast swaths of territory and obscene unit counts make big splashes, which as noted can be very important for the franchisor. But in many instances the key driver for the franchisee is the desire to maintain upside in the form of geography and territorial rights and protections. Rights of First Refusal and Rights of First Offer are a primary method to maintain upside for the franchisee, while retaining some degree of control and flexibility for the franchisor.

While used interchangeably in many instances, the two concepts are different and the authors (who primarily represent franchisors) prefer rights of first offer. Rights of first refusal generally require the franchisor to actually pin down a specific transaction or opportunity (normally in the form of a letter of intent), and then tell the third party that it must wait because
the franchisor has to go back and offer the deal that the third party just struck to the existing franchisee. This chills sales and wastes time. Rights of first offer would only require that the franchisor approach the franchisee with the idea of a potential transaction and gauge the franchisee’s interest before pursuing the transaction itself or with a third party. Of course, franchisees prefer rights of first refusal because the specific deal is “real” whereas there can be perception that the franchisor may trigger a right of first offer at an inopportune time for the franchisee in a predatory manner to foreclose on such right even though the franchisor does not really intend to move forward at such time.

Ultimately, at this point in the evolution of international franchising it has become almost standard for large to mid-size franchisees in certain areas of the world to commit to a country (or several countries) but then ask for rights of first refusal/rights of first offer to many other countries. In the Middle East, several large operators routinely want to purchase development rights to the United Arab Emirates, or perhaps one or more of the Gulf Cooperation (GCC) countries of Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Bahrain, and Oman, but then also want rights of first refusal/rights of first offer for all remaining Middle Eastern countries plus Northern Africa and in some instances the Balkan countries. For franchisors, there are definite pros and cons. Announcing a deal that could “potentially include up to 27 countries” creates a big splash, but these deals can be very limiting both financially (most of the time the franchisee believes its commitment and initial fees for the country(ies) purchased should be sufficient consideration for the rights of first refusal/rights of first offer) and strategically (the authors are aware of many of these 20 or more countries deals; the authors are not aware of any such deals that have led to actual units being opened and operating in more than a handful of the original country list).

2. **Earn-in on Territory**

In most franchise development deals, the size of the territory goes hand in hand with the number of required units to be developed, but in some instances the number of units may be limited for various reasons, but the size of the territory is ripe for expansion. The authors have seen “small” toe-in-the-water approach transactions for a small geographic territory and small number of units (for example, a three unit deal) that provide Earn-in rights to expand the territory without increasing the required unit count. This structure has been used most successfully in large city deals. For example, the franchisor agrees to a franchise development transaction for three units within the Central Business District in London, England, but if the franchisee opens the first unit timely then it could potentially place the second or third location in a larger territory (say Greater London). This could be done with or without granting exclusivity to Greater London, and would allow the franchisee some additional leeway to find the best sites for the units. From the franchisor’s point of view, if the franchisee performs to satisfy the Earn-in, the franchisor should have greater confidence that the franchisee is the right franchisee for the market and be able to consider a larger territory grant.

3. **Earn-in Development Rights/Development Schedule**

The counter to an Earn-in on Territory transaction is an Earn-in on Development Rights/Development Schedule. Using the same London example above, the franchisor could agree to an Earn-in structure by which the franchise development transaction for three units within the Central Business District in London can become a development transaction for five or even 10 units in the same geographic area if the franchisee opens the first unit (or perhaps first three units) timely and is operating in compliance with standards. Again, what was a three-unit
deal with a lower initial fee structure and commitment is capable of expansion by way of obtaining rights to develop more units.

Importantly, these types of Earn-In rights can be negotiated into the original agreements such that they can be unlocked fairly easily through a notice or short amendment. For the franchisor, if the franchisor ties the Earn-in and additional rights to being then in current compliance and a general release, the franchisor is providing an incentive with respect to continuing compliance and a backstop in terms of liability for the franchisor’s “toe in the water” approach transaction, which can be an important risk mitigation tool from a legal and psychological standpoint – it is only human nature that franchisors who have one eye towards the past and potential risk are not as likely to be able to focus on the future and take other risks that could prove beneficial to the franchisor and franchisee.

4. **Earn-in on Territory and Development Rights/Development Schedule**

The logical next step on Earn-in transactions is an Earn-in right that allows a franchisee to earn a greater geographic territory and expand the number of units required/permitted to be opened. The authors have seen this Earn-in structure most often used in mid- to large countries where the franchisor does not feel comfortable granting rights to the entire country, but does not intend to immediately pursue the other parts of the country. For example, if the franchisor and franchisee agree to a franchise development transaction for five units in the greater Mexico City area, the franchisor might be willing to agree to an Earn-in on Monterrey, Cancun or other Mexican states so long as the franchisee increases the number of units to be developed in the Earn-in territory. Ideally, as noted above, the Earn-in rights with the territory, number of units and pricing terms are all agreed in the original agreement, and the parties also agree that the Earn-in rights will be documented in an amendment as opposed to a new agreement or amended and restated agreement, but the franchisor will also want to make sure that payment of the new fees, then current compliance and execution of a general release are all additional conditions to the Earn-in.

5. **Earn-in on Master Rights**

The larger the toe in the water approach, the more likely the Earn-in will be related to the evolution of the direct franchise transaction into a master franchise transaction. The authors have increasingly encountered international transactions where the franchisee candidate believes it is essential that it receive master franchise rights, regardless of whether the franchisor has ever granted or even considered granting master franchise rights for its brand.

This is a very typical negotiation point at the letter of intent stage, and for most franchisors the thought of going straight to a master franchise is daunting. Instead, franchisors want the franchisee to first be the guinea pig to test the market, build one or more units, learn the system by trial and error and then earn the right to become a master franchisee. The authors have been in multiple long and intense negotiations where the thresholds for the Earn-in for master franchise rights is bandied back and forth and even used for horse trading on financial terms and other concessions in the agreement. For instance, does operating one unit successfully (does that mean profitably?) for six months unlock master rights, or does operating five units successfully and profitably for at least 18 months each unlock master rights, and then only after successfully attending and completing a separate “master franchisor” training conducted by the franchisor. The authors have seen back and forth in deals with the number of units and time of operations flip-flopping back and forth and horse traded to get through other negotiation points.

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6. **Tiered Initial Fee Schedules**

One of the key financial negotiation points raised by prospective franchisees is that every dollar the franchisee has to pay the franchisor as an initial development fee or initial franchise fee is money the franchisee is not using to develop units. Franchisors counter that if the franchisee is unable to afford the standard initial development fee and build units timely, then it might not be the right franchisee for the franchise. Franchisors and franchisees tip toe along this path careful not to portray, as to the franchisor, a money grabbing foreigner only interested in a short term, large payment, and as to franchisee, an undercapitalized prospect incapable of performing unless it receives financial concessions.

Particularly in higher unit count deals, the authors have seen initial fees carved up into tranches. For instance, while the standard initial development fee for a franchisor may be $25,000 per unit to be developed, in a 100 unit deal that amount ($2,500,000) could be prohibitive for many franchisees and outright distasteful for others. However, in a form of Earn-in approach, the franchisor and franchisee could agree that the franchisee must pay the initial development fees in tranches of 10 such that the initial development fee installment at execution of the agreement is $250,000 and then after the ninth unit is opened the franchisee must pay the next installment of $250,000 to unlock the rights for units 11 to 20, and so on.

Of course, the use of these tranches means that the franchisor is obviously not receiving the very large initial development fee it originally sought. From a practical view, this can be an issue if the franchisor is public and wants to announce (and perhaps book despite the prevailing winds in accounting circles) a large upfront fee, and in some ways the large deal is really several small deals because the franchisee has in essence an “out” by simply not making the next installment payment. That said, tiered initial fee schedules may be a necessary evil for some franchisors to set itself apart or dip its toes in the water, and ultimately the franchisor is gaining a bit more flexibility because if the franchisee fails to make that next installment payment then the franchisor has a more concrete event of default to terminate at least the development rights of the transaction.

F. **Trial or Short Initial Term/Franchisee Termination Rights**

1. **Trial Term/One to Three Year Initial Term**

Low investment franchises typically have a shorter initial term than high investment, real estate intensive franchises for the simple reasons that the return on investment is generally longer, and real estate commitments are typically longer. With that in mind, even if a low investment franchise has a five-year term in the United States, a franchisor and franchisee could agree to a one-year initial term as a trial term or test for the franchise in the foreign market. If the franchise involves use of non-fixed equipment, the franchisor could agree to the test with an equipment buyback feature if the parties decide not to proceed after the trial term or short-term ends. Alternatively, in some instances, the franchisor may have a lightly used equipment package or materials that it “donates” for the franchisee to use in the test, perhaps with obligations for the franchisee to purchase a new package at some point in the future if the test is a success and the parties move to a more typical longer-term transaction.

Even with higher investment or capital-intensive franchises, the use of a trial term or short term can be possible for the parties if the parties have agreed on the post-expiration rights and obligations. Although discussed more thoroughly below, a restaurant or hotel building that can be repurposed by a larger or multi-concept franchisee for a similar (possibly) business
might also be ripe for a trial term or short-term franchise. Also, as noted above, if a franchisor recently closed units in a nearby market or has surplus equipment, the franchisor may sell at a discounted price or even donate the equipment or other materials for the trial term or test.

2. **Franchisee Termination Right if Negative EBITDA**

Some franchisors want to use a toe in the water approach because the franchisor is just not sure that its concept will work in the international jurisdiction, and is wary of a potential dispute if the franchisee is unhappy because it is not making the return it expected or wants. With that in mind, a franchisor might be more amenable to the franchisee having a right to unilaterally terminate if the unit is losing money after a certain period of operating time. While a termination right is no cure-all with respect to an unhappy franchisee who has a significant investment in the business, it can serve as a natural break opportunity that potentially avoids the acrimony that arises in a default and termination scenario where the franchisee has no express out in the agreement and may feel that the best way to exit the franchise is to raise allegations of breach or other improper actions by the franchisor (i.e., going on the offensive as a defensive measure).

A franchisor providing a franchisee with a unilateral franchise termination right must consider the factors that determine what constitutes a “losing money” unit. Negative EBITDA is a natural break-even point, but it is negative EBITDA over an aggregated period (for example, 12 to 18 months) or perhaps a period of consecutive months (for example, six or nine straight months). The franchisor will want proof of the negative EBITDA and compliance with post-termination obligations, which brings up a set of considerations discussed later in this Section.

The authors are aware of one large restaurant franchise system that for a number of years had an informal policy that if the international franchisee was able to show that it was not “making money” on an aggregated basis over a period of time, it would not have to pay royalties until the franchisee got back into the black. While the authors do not recommend this approach, it bought this particular franchisor a lot of goodwill within the franchise system and there were only a couple instances where the franchisee balked at commencing repayment once its rough patch ended.

3. **Franchisee Unilateral Termination Right After Two Years**

Franchisors and franchisees generally crave stability and continuity with a focus on the long-term success of the franchise and the business so a franchisee having unilateral termination rights that can be exercised at any time or in connection with a losing unit can be counterproductive. Should a franchisee who has a unilateral termination right invest in the latest point of sale system or implement the latest material system change if it has other options?

With that in mind, another option that allows for long-term focus while keeping at least one eye towards the door at the start of a toe in the water approach transaction could be a one-time franchisee right to unilaterally terminate and exit the system. For instance, if the franchisee is willing to test the franchise in the market but does not want to be locked in for 20 years, and the franchisor is weary of always having to worry that the franchisee will exercise an unlimited franchisee termination right, the franchisor and franchisee could agree to a one-time right for the franchisee to terminate and exit the franchise after one or perhaps two years of operations. This gives the franchisee time to develop, operate and assess the franchise, and then make the decision to continue for the long-haul or exit without default, termination or dispute repercussions.
While the authors can envision a similar one-time right for the franchisor to terminate if it decides the franchisee or transaction is not working, the authors have never seen such a right implemented and cannot imagine it would be workable in a real negotiated deal absent being tied to a repurchase obligation on the franchisor at a premium price. This type of repurchase obligation would be akin to what some restaurant franchisors implemented in US agreements in the late 1990’s and early 2000's after the first wave of private equity buyouts.

4. **Agreed Termination Fee**

Test units and short-term transactions are definitely not the norm, and as noted above, even in a true toe in the water approach transaction, the franchisor’s and franchisee’s ability to find common ground on initial deal terms and post-expiration deal terms to make a test term or short-term transaction work takes a special set of parties and circumstances. More likely is an ability for the parties to reach agreement on a termination fee that would be acceptable to the parties to pave the way for a clean break after the test term or short-term expires without a new transaction. Similar to the franchisor buyout concept noted above, the franchisor may want a right to buyout the franchisee, and the franchisee may want the right to be able to make an informed business decision to terminate via the negotiation of its own buyout price.

Of course, the same post-expiration rights and obligations discussed below must be ironed out ahead of time whether or not there is a termination fee associated with a unilateral termination right, but when money is involved the parties can get creative. For instance, the parties could even pre-agree on a termination fee that applies if there will be no continuing operations or competitive unit at the former test unit and a (presumably) higher termination fee that applies if the franchisee will continue to operate a similar or competitive unit at the former test unit location.

5. **Franchisee Termination Right Considerations**

Each of the trial term, short term or unilateral franchisee termination right options discussed above come with very similar drafting and negotiation concerns, namely what happens after the expiration or exercise of the termination right? Franchisors generally include five to seven pages of post-expiration and post-termination rights and obligations in a franchise agreement, ranging from closure and de-identification, to rights and obligations regarding trade dress, fixtures, equipment, land and real estate leases (including repurchase rights) and to rights and obligations regarding customers, competition and confidentiality. If the franchisor and franchisee are agreeing upfront to a six-month trial term, then the agreement regarding the rights and obligations of the parties’ post-expiration is crucial.

a. **Franchisor Purchase Rights**

Franchisors who pursue a toe in the water approach are generally not candidates to want to purchase failed or expired franchise units and take on company operations, but perhaps the test shows that the added fees and costs associated with franchising are a reason the franchise model does not work, but the concept itself proves out.

From the franchisee’s standpoint, trade dress, fixtures, equipment are likely to not have been depreciated yet and have some value, but not nearly as much as if purchased new, and the franchisor is unlikely to want these items sold on the open market or used by a former franchisee assuming the franchisor does not have any interest in taking over the units or repurchasing some or all of the franchisee’s assets. Agreement on the disposition of these
items is therefore key, and that agreement goes part and parcel with the land and real estate, whether owned or leased.

The franchisor and franchisee could conceivably agree that the franchisor must repurchase the unit or some or all of the assets if the test or short initial term is not extended. This can be a large risk for a franchisor, but there are instances where it might make sense, particularly if as noted above the franchisor sold or donated the equipment in the first place. As to real estate, there are certain parts of the world where short term leases are the norm (think Hong Kong and other large cities in Asia). In these markets, the franchisor and franchisee could set up the test so that the real estate rights and obligations expire concurrently, and if the franchisor commits to buy assets it could do it exclusively or it could seek to extend the term.

Of course, short term real estate leases are not the norm elsewhere. Thus, having a plan to deal with real estate issues if the term expires without a new transaction is important. For instance, the counter to an agreement for a franchisor to purchase the assets of the unit is an upfront agreement that the franchisor will waive any right to purchase or take assignment of assets related to the unit. This is a much more likely scenario, but the waiver of franchisor repurchase rights issue dovetails with the larger elephant in the room when considering a test or short-term transaction, namely customers, competition and confidentiality.

b. Waiver or Modification of Post-Term Covenants Not to Compete

Maintaining confidentiality of trade secrets should be a given even in a test or short initial term transaction, but customers and competition are not so clear cut.

A franchisee who agrees to a six-month test term either has nothing to lose and is willing to take on the risk for the potential upside, or is doing so because it has a Plan B in place. That Plan B normally includes substituting a different brand into the unit location post-expiration. This might be acceptable to the franchisor, but the type of brand is ripe for discussion and conflict. The franchisee may want the franchisor's pizza concept for a test, but if it does not work perhaps it wants to add its own pizza concept or another branded pizza concept. Is this acceptable to a franchisor? How close is too close? If the franchisor and franchisee do not discuss and reach agreement on these exit strategies at the outset, then the supposed "clean break" will not occur and the franchisor is likely to have earned itself a dispute after only six months to a year or two of operations and royalties, which will be unlikely to pay even a fraction of the costs for any type of material disputed breakup.

The same goes for customers in a service business. Service-based businesses aggressively protect the customer lists. If the franchisor is exiting the market (forever or perhaps just for the time-being), might it be willing to cede the customer list to the franchisee and perhaps permit competition in some form or manner? It comes down to risk/reward and the authors have seen instances where attempts at toe in the water "test" approaches have failed because the parties could not agree on the post-test rights and obligations from the outset.

V. CONCLUSION

The Introduction for this paper raises the question of what is success in an international franchise transaction. For the biggest brands in the world, success may mean market share and hundreds of locations, but for younger or smaller franchises, success may be a couple of smaller size/lower risk transactions that do not jeopardize whatever momentum may exist in the
franchisor’s home market. Success may even be just finding a franchisee interested in bringing their brand to its country, and having that franchisee open a single unit and operate successfully creating a successful test of the market and proof of the brand's relevance in the area.

Every franchise system starts with one first unit, and while best practices for any franchisor would be to allocate time and resources to ensuring that the first franchisee in the market is successful (since that franchisee will ultimately be the franchisor’s best future international sales pitch or biggest obstacle to future growth), reality often gets in the way and the franchisor and franchisee attempt to do the best each of them can with the time and resources available.

As franchise counsel to franchisors and franchisees, while we cannot necessarily affect the unit economics of the business, we can help franchisors and franchisees consider the issues that each of them must at a minimum consider, we can guide them with respect to the markets that may or may not be "low hanging fruit", and we can help them structure transactions to provide both parties at least the potential win/win scenario each craves while mitigating risks and potential disputes as much as possible by planning ahead for the future, whether marked by success or failure. Ultimately, the goal with a toe in the water approach transaction is to do more with less, and that sometimes requires much more attention to detail and focus from the toe in the water approach franchisor as opposed to the franchisor that has a seemingly endless supply of personnel, resources and time to pursue the infrastructure and planning for a successful international franchise program launch.
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He is also the Immediate Past Chair of the International Bar Association’s International Franchising Committee and is a Past-Chair of the Ontario Bar Association’s Franchise Law Section. Larry was the founder of, and to date has organised and chaired four Ontario Bar Association annual franchise law conferences. He is a member of the American Bar Association’s Forum on Franchising, and in 2006, he was the first Canadian lawyer to be appointed Director of the ABA Forum’s International Division and to a leadership role on its
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In 2004 he acted as co-editor of the ABA Forum on Franchising’s book entitled Fundamentals of Franchising-Canada. In 2017, he again acted as co-editor of the 2nd edition of this publication. As well he was co-editor and co-author of the Canadian Franchise Association’s first and still only official book publication entitled, How To Franchise Your Business. He is a co-author of the chapter on Canada for the ABA Forum’s book entitled International Franchise Sales Laws. In 2004, 2005, and each year from 2009 to 2019 Larry was named by Franchise Times to their “Legal Eagles” list of the top franchise lawyers in the United States and Canada. He and Cassels Brock are each listed in the Lexpert® Canadian legal directory as being among the leaders in Canada in franchise law. In 2014, 2015 and 2016 Larry received Who’s Who Legal's one and only worldwide Lawyer of the Year award for Franchise law, and in 2014, the Lexpert® Zenith Award. Larry was called to the Bar of the Province of Ontario in 1989.