W-21: When Signing on the Dotted Line Is Not Enough:

Executing Binding and Enforceable Franchise Agreements in International Transactions
INTRODUCTION

• Speaker Introduction
  • Jeff Brimer – Alexius, LLC
  • Frank Robinson – Cassels Brock

• Overview and Disclaimers
  • Questionnaires sent to local counsel
    • Countries covered
    • Sample Questionnaire
  • Format of Paper
    • All topics covered for each Country
    • Summary Charts in Exhibits
  • Disclaimer
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DISCLAIMER

• We are not authorized to practice law in any jurisdictions other than our home countries

• We compiled the responses to the questionnaires we received from local counsels and did not independently verify the information provided to us

• Always consult with local counsel even if the law of another country is agreed upon by the parties
Execution Authority

• Requirements or restrictions on:
  • Foreign ownership;
  • The stated corporate purpose and signing authority of a contracting party;
  • A franchisor’s prior experience in the market; and
  • Any foreign trade sanctions or other political impediments restricting commercial relations.
Execution Authority - Non-Resident Party’s Ability to Contract

• Generally, no restrictions on non-residents
• Residency requirements for Directors of a local entity
• Prohibitions on foreign ownership of or involvement in certain types of businesses
Execution Authority - Non-Resident Party’s Ability to Contract

• **Australia:**
  - Private corporations must have at least one resident director.
  - Public corporations must have at least three directors, with at least two being residents

• **Canada:** 25 percent of the directors, or at least 1 if less than 4, must be a resident

• **Japan:** Foreign corporations and other business entities must register with the Legal Affairs Bureau prior to engaging in business activities
Execution Authority - Stated Corporate Purpose of a Contracting Party

• A corporation’s constating documents or bylaws may limit the business it may perform
• If the corporate purpose is restricted, the franchise agreement may not be enforced
Execution Authority - Stated Corporate Purpose of a Contracting Party

• China:
  • If a party’s business license does not contemplate entering into a franchise agreement, the party must seek administrative approval to amend or extend the stated purpose
  • Businesses that operate in the telecommunications, media, book publication, medical services and other specified industries may not enter into franchise agreements
Execution Authority - Signing Authority of a Contracting Party

- Signatories must have appropriate authority
- Authority granted in organizational documents or by resolution
- Agents given authority in power of attorney or agency agreement
Execution Authority - Signing Authority of a Contracting Party

- **China**: Foreign party contracting with a Chinese entity – require stamp with company seal and/or signed by its “legal representative”
- **Germany**: national Commercial Register lists who has actual authority to sign for a German corporation
- **Mexico**: actions taken by a Mexican company only legally binding if signed by a POA
- **UAE**: signatory must have specific authority to enter into an arbitration provision
- **UK**: limited liability company signed by the managing director or senior employee supported by a board minutes authorising the signature. All partners should sign in the absence of authority from all the partners.
Execution Authority - Franchisor’s Experience Prior to Signing

• Most jurisdictions regulate the franchisor/ee relationship through rights and duties
  • Examples: (1) duty of good faith, (2) disclosure, (3) termination restrictions, and (4) franchisor’s experience

• Jurisdictions may be subtle in how they impose such requirements
Execution Authority - Franchisor’s Experience Prior to Signing

- **China**: “Two + One” rule - Two direct units options for at least one year
- **Italy**: No formal requirement to have prior franchisor experience – but:
  - Franchisors must list current franchisees and company operated outlets in pre-sale disclosure; and
  - National franchise association may impose own requirements; such as
    - Example: must have tested franchise in the market successfully for 1+ years for Assofranchising membership
- **France**: No formal requirement to have prior franchisor experience – but:
  - Must prove that operated similar business to be an eligible franchisor
  - Rationale – a franchise is the “reiteration of commercial success.”
Execution Authority - Foreign Trade Sanctions and Other Political Trade Impediments

• Trade sanction and anti-terrorism laws prohibit entering into agreements or doing business with parties in certain designated countries
• Some counties prohibit or restrict importation of certain goods that may be needed by the franchisee
• European Union implements UN sanctions through regulations
• Seek advice from local counsel
Execution Authority - Foreign Trade Sanctions and Other Political Trade Impediments

• **Brazil**: Restrictions on importation of beef and pork products. All importers must register with the Secretariat of Foreign Trade

• **Japan**: High tariffs on the importation of beef, citrus, dairy, and processed food

• **USA**: Sanctioned countries - the Balkans, Belarus, Burma, Cote D'Ivoire (Ivory Coast), *Cuba*, Democratic Republic of Congo, *Iran*, Iraq, Liberia, North Korea, Sudan, Syria, and Zimbabwe
Execution Formalities

• Obligations to have agreements or documents notarized, legalized, or witnessed,
• Requirements surrounding the manner by which agreements are signed, and
• Legal or payment processing restrictions for initial or on-going fees.
  • The franchise agreement must comply with the jurisdiction’s laws
  • Jurisdictions impose technical requirements to act as gatekeepers and standardize processes
  • Helps to ensure that only franchises with the wherewithal to comply with the jurisdiction’s laws are created
Execution Formalities: Obligations for Documents to be Notarized, Legalized, or Witnessed

• Concerns include:
  • Fraud and duress
  • Assisting courts to determine what to enforce
• Jurisdictions may regulate formalities outside franchise law
• Alternatively, common practice may make such execution formalities a practical necessity
Execution Formalities: Obligations for Documents to be Notarized, Legalized, or Witnessed

- **Argentina**
  - No legal requirement to notarize, legalize or witness
  - But, a notary public typically certifies the identity of the signatory

- **Canada**: Guarantee certificate to be signed by lawyer of guarantor

- **UAE**: Notarizing enables franchisee to register franchise agreement under commercial agency laws
Execution Formalities - Signing Agreements Electronically, by Counterpart or by Fax

• To prove the authenticity of an agreement

• Legislation or regulations authorize the use and format for electronic signatures

• Electronic signatures facilitate international commerce
Execution Formalities - Signing Agreements Electronically, by Counterpart or by Fax

• **EU:** Documents may be signed electronically or by fax

• **Mexico:** Each contracting party initializes each page of each document

• **Russia:** The original counterpart of the agreement filed with the Rospatent

• **UK:** Signatory must make a statement that the electronic signature is a valid means of establishing the authenticity and integrity of the electronic communication.
Execution Formalities - Payment Processing Restrictions

- Jurisdictions may impose payment processing restrictions
- Payment processing restrictions may change the feasibility or cost of the franchise
- Early considerations avoid deal-changing surprises
Execution Formalities - Payment Processing Restrictions

• Colombia
  • No payment processing or legal restrictions
  • Like Argentina, Canada, France, Germany, Italy, Japan, Mexico, Russia, South Korea, UAE, the UK and the US

• Australia
  • No payment processing or legal restrictions
  • But, Australian franchisee must pay a withholding tax to the Australian Taxation Office if it transacts with a foreign franchisor
Registration and Recording

- The registration and recording requirements with government agencies of:
  - Franchise agreements
  - Trademark licenses and
  - Other documents
Registration and Recording - Registration of Franchise Agreements

• Requirement to register vary widely
• Registration may allow certain benefits, such as deductibility of royalties
Registration and Recording - Registration of Franchise Agreements

- **Argentina & Colombia**: Tax benefits
- **Brazil, China, Mexico and Russia**: Require registration after execution
- **South Korea and US**: Registration required prior to entering into the agreement (in US only 14 states)
Registration and Recording - Registration of Intellectual Property

• May be a condition of granting a license or using the intellectual property in the market
• Includes: trademarks, trade names, copyrights, trade secrets, patents, etc.
• Requirements may be imposed indirectly
Registration and Recording - Registration of Intellectual Property

• **Mexico:**
  • Must register intellectual property with IMPI before use or licensing

• **France:**
  • Must register relevant trademark before execute the franchise agreement
Registration and Recording - Registration of Other Agreements

• Other agreements may have to be recorded with a government agency to be effective
Registration and Recording - Registration of Other Agreements

• **Brazil**: technical assistance services and other transfer agreements require prior recordal at the BINPI and registration at the BACEN

• **China**:
  • MOFCOM may ask to examine the franchise agreements with any new franchisee when updating the MOFCOM franchisor online portal.
  • Agreements for the importation of technology, may also need to be registered or recorded with local authorities.

• **Colombia & UAE**: Commercial sales agency agreements must be registered

• **Germany**: Must register all private limited liability corporations and ownership of real estate
Enforcement Considerations

• Designation of governing law and jurisdiction,
• Use of dispute resolution mechanisms, and
• Currency exchange control restrictions
  • Need to consider jurisdictions’ differing approaches before problems arise
  • Various heads of law are relevant, including:
    • Franchise law (e.g., damages),
    • Criminal law (e.g., criminal penalty),
    • Administrative law (e.g., fine, revoke license), and
    • Contract law (e.g., rescission, damages)
Enforcement Considerations - Limitations over Governing Law and Jurisdictions

- Each party will typically have a preference as to the choice of law governing the contract based on factors, such as:
  - Whether a jurisdiction has more franchisee/or friendly laws,
  - Familiarity with the law, and
  - Location of the assets

- Typically, the choice is between the laws of the franchisor’s home country and the laws where the contract will be performed

- The jurisdiction where the contract is performed may have public policy reasons to not enforce the choice of law clause
Enforcement Considerations- Limitations over Governing Law and Jurisdictions

• Canada:
  • Cannot waive or relay franchise laws and cannot restrict application of law to a claim otherwise enforceable under franchise laws
Enforcement Considerations - Dispute Resolution Mechanisms in Franchise Agreements

• Arbitration is the most favored form of resolving disputes
• In some countries, litigation is still a commonly used format for resolving disputes
• A few countries have mandated dispute resolution procedures in their franchise codes
Enforcement Considerations - Dispute Resolution Mechanisms in Franchise Agreements

- **Argentina**: formal litigation in court is the primary way to resolve disputes
- **Australia**: Franchise agreements must have a complaint handling process; Mediation is specifically prescribed under the Franchising Code
- **Canada**: New Brunswick Franchises Act includes a mandatory mediation provision
- **Colombia**: Requires a conciliation process before filing a commercial dispute
- **Italy**: Assofranchising provides franchisors with a specific system of alternative dispute resolution
- **Japan**: Conciliation, a means of compromise between parties with the assistance of a judge, “judicial officer” or a conciliation committee
Enforcement Considerations - Currency Exchange Control Restrictions

• May restrict exchange of local currencies to foreign (home) currency

• Transitional economies and other jurisdictions may impose current control restrictions that may hinder the transfer of funds and make franchising less appropriate

• The potential franchise may be in an Article 14 country
Enforcement Considerations - Currency Exchange Control Restrictions

• Tunisia
  • Cannot import or export Tunisian currency
  • Non-residents are subject to an exit fee of 30 Tunisian Dinars

• Venezuela
  • Example of how history of currency controls may be correlated with economic struggles
  • USD 10,000 (or equivalent) or more must be declared
Other Requirements

• Translation requirements
• Stamp taxation, and
• Other fees
Other Requirements - Language Requirements

• Local language is mandatory in some countries
• In other countries, another language can be used if the parties understand the other language
• Use both the local language and another language in a dual column format
• In dispute resolution, courts often require that documents be translated into the local language
• Local Language translations are often used to avoid confusion
Other Requirements - Language Requirements

• **Australia**: The franchise disclosure documents must be in English

• **Brazil, China, Colombia, Mexico, Russia, South Korea, UAE**: All recorded or registered documents that must be in local language

• **Canada**: Quebec requires agreements to be in French, unless expressly agreed by both parties

• **Italy**: If requested of the franchisee, the franchisor must offer disclosure information (including the text of the franchise agreement) in Italian

• **UK**: The BFA Code provides that “franchisors should seek to ensure that they offer to franchisees contracts in a language in which the franchise is competent"
Other Requirements - Stamp Taxes or Other Signing Fees

• Some jurisdictions impose stamp taxes if the agreement has a nexus to their jurisdiction

• A stamp tax or other signing fee may increase the cost or undermine the feasibility of the transaction – especially because the tax is often calculated based on the economic value of the agreement
Other Requirements - Stamp Taxes or Other Signing Fees

- **Italy**
  - Stamp duty taxation fees are typically around 14.62 Euros for every four pages (or 100 lines of the document)

- **Japan, Argentina, India:**
  - All require some form of stamp tax
Summary and Conclusion

• Local franchise laws often do not include other requirements for enforceable agreements

• Consult with local counsel before signing any agreement between parties from different countries to understand the requirements for executing binding agreements
QUESTIONS?