

**American Bar Association
42nd Annual Forum on Franchising**

A GUIDED TOUR OF FRANCHISING IN THE ASIA-PACIFIC

**Srijoy Das
Archer & Angel
New Delhi, India**

**Abhishek Dube
DLA Piper
Reston, Virginia, USA**

and

**Andrew Loewinger
Nixon Peabody
Washington, DC, USA**

October 16 – 18, 2019
Denver, CO

© 2019 American Bar Association

Table of Contents

I.	INTRODUCTION	1
II.	AUSTRALIA	2
	A. Regulation of Offers and Sales of Franchises.....	2
	1. Franchise Sales Laws	2
	2. Government Agency Regulation.....	5
	B. Foreign Exchange Controls	5
	1. Limits on Currency Conversion.....	5
	2. Government Filing Requirements	6
	C. Taxes	6
	1. Royalties	6
	2. Service Fees	6
	3. Double Taxation Treaties	7
	4. Gross-Up Provisions	7
	D. Franchise Relationship Laws.....	7
	1. Transfers, Defaults, Termination, and Nonrenewal.....	7
	2. Laws Regulating Unfair Contract Terms	8
	E. Trademark Requirements and Licensing Considerations.....	9
	1. Trademark Registration	9
	2. Trademark License Registration.....	10
	F. Competition Laws.....	10
	1. Prohibition on Common Franchisor Practices	10
	2. Restrictive Covenants	11
	G. Employment Laws	11
	1. Applicable Employment Laws.....	11
	2. Effect on Franchising.....	11
	H. Privacy Laws.....	13
	1. Applicable Privacy Laws.....	13
	2. Effect on Franchising.....	13
	I. Governing Law and Dispute Resolution.....	13
	1. Governing Law	13
	2. Arbitration.....	14
	3. Foreign Judgments.....	14
	4. Injunctive Relief.....	14
III.	CHINA.....	15
	A. Regulation of Offers and Sales of Franchises.....	15
	1. Franchise Sales Laws	15
	2. Government Agency Regulation.....	17
	B. Foreign Exchange Controls	18
	1. Limits on Currency Conversion.....	18
	2. Government Filing Requirements	18
	C. Taxes	18
	1. Royalties	18
	2. Service Fees	19
	3. Double Tax Treaties	19
	4. Gross-Up Provisions	19
	D. Franchise Relationship Laws.....	19
	1. Defaults, Termination, and Nonrenewal.....	19

	2.	Laws Regulating Unfair Contract Terms	19
E.		Trademark Requirements and Licensing Considerations.....	21
	1.	Trademark Registration	21
	2.	Trademark Registration	22
F.		Competition Laws	22
	1.	Prohibition on Common Franchisor Practices	22
	2.	Restrictive Covenants	23
G.		Employment Laws	23
	1.	Applicable Employment Laws.....	23
	2.	Effect on Franchising.....	23
H.		Privacy Laws	23
	1.	Applicable Privacy Laws.....	23
	2.	Effect on Franchising.....	24
I.		Governing Law and Dispute Resolution.....	24
	1.	Governing Law	24
	2.	Arbitration.....	25
	3.	Foreign Judgments.....	25
	4.	Injunctive Reliefs	26
IV.		HONG KONG	26
A.		Regulation of Offers and Sales of Franchises.....	26
	1.	Franchise Sales Laws	26
	2.	Government Agency Regulation.....	26
B.		Foreign Exchange Controls	26
C.		Taxes	27
	1.	Royalties	27
	2.	Service Fees	27
	3.	Double Taxation Treaties	27
	4.	Gross-Up Provisions	27
D.		Franchise Relationship Laws.....	27
	1.	Default, Termination, and Nonrenewal	27
	2.	Laws Regulating Unfair Contract Terms	28
E.		Trademark Requirements and Licensing Considerations.....	28
	1.	Trademark Registration	28
	2.	Trademark License Registration	28
F.		Competition Laws.....	28
	1.	Prohibition on Common Franchisor Practices.....	28
	2.	Restrictive Covenants	29
G.		Employment Laws	29
	1.	Applicable Employment Laws.....	29
	2.	Effect on Franchising.....	29
H.		Privacy Laws	29
	1.	Applicable Privacy Laws.....	29
	2.	Effect on Franchising.....	30
I.		Governing Law and Dispute Resolution.....	30
	1.	Governing Law	30
	2.	Arbitration.....	30
	3.	Foreign Judgments.....	30
	4.	Injunctive Relief.....	31
V.		INDIA.....	31

A.	Regulation of Offers and Sales of Franchises.....	31
1.	Franchise Sales Laws	31
2.	Government Agency Regulation.....	31
B.	Foreign Exchange Controls	31
1.	Limits on Currency Conversion.....	31
2.	Government Filing Requirements	32
C.	Taxes	32
1.	Royalties	32
2.	Service Fees	32
3.	Double Taxation Treaties	32
4.	Gross-Up Provisions	33
D.	Franchise Relationship Laws.....	33
1.	Defaults, Termination, and Nonrenewal.....	33
2.	Laws Regulating Unfair Contract Terms	33
E.	Trademark Requirements and Licensing Considerations.....	33
1.	Trademark Registration	33
2.	Trademark License Registration.....	34
F.	Competition Laws.....	34
1.	Prohibition on Common Franchisor Practices	34
2.	Restrictive Covenants	34
G.	Employment Laws	35
1.	Applicable Employment Laws.....	35
2.	Effect on Franchising.....	35
H.	Privacy Laws.....	35
1.	Applicable Privacy Laws.....	35
2.	Effect on Franchising.....	36
I.	Governing Law and Dispute Resolution.....	36
1.	Governing Law	36
2.	Arbitration.....	36
3.	Foreign Judgments.....	38
4.	Interim Relief.....	39
VI.	INDONESIA.....	39
A.	Regulation of Offers and Sales of Franchises.....	39
1.	Franchise Sales Laws	39
2.	Government Agency Regulation.....	41
B.	Foreign Exchange Controls	43
1.	Limits on Currency Conversion.....	43
2.	Government Filing Requirements	43
C.	Taxes	44
1.	Royalties	44
2.	Service Fees	44
3.	Double Taxation Treaties	44
4.	Gross-Up Provisions	44
D.	Franchise Relationship Laws.....	44
1.	Defaults, Termination, and Nonrenewal.....	44
2.	Laws Regulating Unfair Contract Terms	45
E.	Trademark Requirements and Licensing Considerations.....	45
1.	Trademark Registration	45
2.	Trademark License Registration.....	45
F.	Competition Laws.....	45

	1.	Prohibition on Common Franchisor Practices	45
	2.	Restrictive Covenants	46
G.		Employment Laws	46
	1.	Applicable Employment Laws.....	46
	2.	Effect on Franchising.....	47
H.		Privacy Laws.....	47
	1.	Applicable Privacy Laws.....	47
	2.	Effect on Franchising.....	47
I.		Governing Law and Dispute Resolution.....	47
	1.	Governing Law	47
	2.	Arbitration.....	48
	3.	Foreign Judgments.....	48
	4.	Injunctive Relief.....	48
J.		Other	49
	1.	Other Laws or Requirements.....	49
	2.	Recent or Forthcoming Changes.....	49
	3.	Judicial or Enforcement Trends.....	49
VII.		JAPAN.....	50
A.		Regulation of Offers and Sales of Franchises.....	50
	1.	Franchise Sales Laws	50
	2.	Government Agency Regulation.....	52
B.		Foreign Exchange Controls	52
	1.	Limits on Currency Conversion.....	52
	2.	Government Filing Requirements	52
C.		Taxes	52
	1.	Royalties	53
	2.	Service Fees	53
	3.	Double Taxation Treaties	53
	4.	Gross-Up Provisions	53
D.		Franchise Relationship Laws.....	53
	1.	Defaults, Termination, and Nonrenewal.....	54
	2.	Laws Regulating Unfair Contract Terms	54
E.		Trademark Requirements and Licensing Considerations.....	55
	1.	Trademark Registration	55
	2.	Trademark License Registration	55
F.		Competition Laws.....	55
	1.	Prohibition on Common Franchisor Practices.....	55
	2.	Restrictive Covenants	56
G.		Employment Laws	56
	1.	Applicable Employment Laws and the Effect on Franchising.....	56
H.		Privacy Laws.....	57
	1.	Applicable Privacy Laws.....	57
	2.	Effect on Franchising.....	58
I.		Governing Law and Dispute Resolution.....	58
	1.	Governing Law	58
	2.	Arbitration.....	58
	3.	Foreign Judgments.....	59
	4.	Injunctive Relief.....	59

VIII.	MALAYSIA	59
	A. Regulation of Offers and Sales of Franchises.....	59
	1. Franchise Sales Laws	59
	2. Government Agency Regulation.....	61
	B. Foreign Exchange Controls	63
	1. Limits on Currency Conversion.....	63
	2. Government Filing Requirements	63
	C. Taxes	64
	1. Royalties	64
	2. Service Fees	64
	2. Stamp duty.....	65
	3. Double Taxation Treaties	65
	4. Gross-Up Provisions	65
	D. Franchise Relationship Laws.....	65
	1. Defaults, Termination, and Nonrenewal.....	67
	2. Laws Regulating Unfair Contract Terms	68
	E. Trademark Requirements and Licensing Considerations.....	68
	F. Competition Laws.....	69
	1. Prohibition on Common Franchisor Practices	69
	2. Restrictive Covenants	70
	G. Employment Laws	70
	1. Applicable Employment Laws.....	70
	2. Effect on Franchising.....	70
	H. Privacy Laws.....	71
	1. Applicable Privacy Laws.....	71
	2. Effect on Franchising.....	71
	I. Governing Law and Dispute Resolution.....	72
	1. Governing Law	72
	2. Arbitration.....	72
	3. Foreign Judgments.....	73
	4. Injunctive Relief.....	74
IX.	PAKISTAN	74
	A. Regulation of Offers and Sales of Franchises.....	74
	1. Franchise Sales Laws	74
	2. Government Agency Regulation.....	74
	B. Foreign Exchange Controls	74
	1. Limits on Currency Conversion.....	74
	2. Government Filing Requirements	75
	C. Taxes	76
	1. Royalties	76
	2. Service Fees	76
	3. Double Taxation Treaties	76
	4. Gross-Up Provisions	76
	D. Franchise Relationship Laws.....	76
	1. Defaults, Termination, and Nonrenewal.....	76
	2. Laws Regulating Unfair Contract Terms	77
	E. Trademark Requirements and Licensing Considerations.....	77
	1. Trademark Registration	77
	2. Registration of Licenses of Trademarks	77
	F. Competition Laws.....	77

	1.	Prohibition on Common Franchisor Practices	77
	2.	Restrictive Covenants	78
G.		Employment Laws	78
	1.	Applicable Employment Laws.....	78
	2.	Effect on Franchising.....	79
H.		Privacy Laws.....	79
	1.	Applicable Privacy Laws.....	79
	2.	Effect on Franchising.....	79
I.		Governing Law and Dispute Resolution.....	79
	1.	Governing Law	79
	2.	Arbitration.....	79
	3.	Foreign Judgments.....	80
	4.	Injunctive Relief.....	81
X.		SOUTH KOREA	81
	A.	Regulations Of Offers And Sales Of Franchises	81
		1. Franchise Sales Laws	81
		2. Enforcement Decree of the Franchise Act	83
		3. Amendments to the Franchise Act.....	83
		4. Government Agency Regulation.....	83
	B.	Foreign Exchange Controls	86
		1. Limits on Currency Conversion.....	86
		2. Government Filing Requirements	86
	C.	Taxes	86
		1. Royalties	86
		2. Service Fees	86
		3. Double Taxation Treaties	87
	D.	Franchise Relationship Laws.....	87
		1. Defaults, Termination, and Nonrenewal.....	87
		2. Laws Regulating Unfair Contract Terms	89
	E.	Trademark Requirements And Licensing Considerations	90
		1. Trademark Registration	90
		2. Trademark License Registration.....	91
	F.	Competition Laws.....	91
		1. Prohibition on Common Franchisor Practices	91
		2. Restrictive Covenants	91
	G.	Employment Laws	91
		1. Applicable Employment Laws.....	91
		2. Effect on Franchising.....	92
	H.	Privacy Laws.....	92
		1. Applicable Privacy Laws.....	92
		2. Effect on Franchising.....	92
	I.	Governing Law And Dispute Resolution	92
		1. Governing Law	92
		2. Injunctive Relief.....	93
		3. Foreign Judgment	93
		4. Arbitration.....	93
XI.		TAIWAN	94
	A.	Regulation of Offers and Sales of Franchises.....	94
		1. Franchise Sales Laws	94

	2.	Government Agency Regulation.....	94
	3.	Disclosure Requirements	94
B.		Foreign Exchange Controls	96
	1.	Limits on Currency Conversion.....	96
	2.	Government Filing Requirements	96
C.		Taxes	96
	1.	Royalties	96
	2.	Service Fees	96
	3.	Double Taxation Treaties	97
	4.	Gross-Up Provisions	97
D.		Franchise Relationship Laws.....	97
	1.	Defaults, Termination, and Nonrenewal.....	97
E.		Trademark Requirements and Licensing Considerations.....	97
	1.	Trademark Registration	97
	2.	Trademark License Registration	98
F.		Competition Laws.....	98
	1.	Prohibition on Common Franchisor Practices.....	98
	2.	Restrictive Covenants	98
G.		Employment Laws	98
	1.	Applicable Employment Laws.....	98
	2.	Effect on Franchising.....	99
H.		Privacy Laws.....	99
	1.	Applicable Privacy Laws.....	99
	2.	Effect on Franchising.....	99
I.		Governing Law and Dispute Resolution.....	100
	1.	Governing Law	100
	2.	Arbitration.....	100
	3.	Foreign Judgments.....	101
	4.	Injunctive Relief.....	101
XII.		THAILAND	102
A.		Regulation of Offers and Sales of Franchises.....	102
	1.	Franchises Sales Law	102
	2.	Government Agency Regulation.....	102
B.		Foreign Exchange Controls	103
C.		Taxes	103
	1.	Royalties	103
	2.	Service Fees	103
	3.	Double Taxation Treaties	104
	4.	Gross-Up Provisions	104
D.		Franchise Relationship Laws.....	104
	1.	Defaults, Termination and Nonrenewal.....	104
	2.	Laws Regulating Unfair Contract Term.....	105
E.		Trademark Requirement and Licensing Considerations	106
	1.	Trademark Registration	106
	2.	Trademark License Registration.....	106
F.		Competition Laws.....	107
	1.	Prohibition on Common Franchisor Practice.....	107
	2.	Restrictive Covenants	107
G.		Employment Laws	107
	1.	Applicable Employment Laws.....	107

	2.	Effect on Franchising.....	108
H.		Privacy Law.....	108
	1.	Applicable Privacy Law.....	108
	2.	Effect on Franchising.....	109
I.		Governing Law and Dispute Resolution.....	109
	1.	Governing Law.....	109
	2.	Arbitration.....	109
	3.	Foreign Judgements.....	109
	4.	Injunction Relief.....	110
XIII.		VIETNAM.....	110
	A.	Regulation of Offers and Sales of Franchises.....	110
		1. Franchise Laws.....	110
		2. Government Agency Regulation.....	111
		3. Pre-conditions for carrying out franchise business in Vietnam.....	111
		4. Registration Process.....	111
		5. Disclosure requirements.....	112
		6. Franchise Agreement.....	112
		7. Violations of franchise regulations.....	113
	B.	Foreign Exchange Controls.....	114
		1. Limits on Currency Conversion.....	114
	C.	Taxes.....	114
		1. Royalties.....	114
		2. Service Fees.....	114
		3. Withholding of taxes.....	114
		4. Double Taxation Treaties.....	115
		5. Gross-Up Provisions.....	115
	D.	Franchise Relationship Laws.....	115
		1. Defaults, Termination, and Nonrenewal.....	115
		2. Laws Regulating Unfair Contract Terms.....	116
	E.	Trademark Requirements and Licensing Considerations.....	116
		1. Trademark Registration.....	116
		2. Trademark License Registration.....	117
	F.	Competition Laws.....	117
		1. Prohibition on Common Franchisor Practices.....	117
		2. Restrictive Covenants.....	118
	G.	Employment Laws.....	118
	H.	Privacy Laws.....	118
		1. Applicable Privacy Laws.....	118
		2. Effect on Franchising.....	119
	I.	Governing Law and Dispute Resolution.....	120
		1. Governing Laws.....	120
		2. Foreign Judgements.....	120
		3. Arbitration.....	121
		4. Injunctions and temporary relief.....	122
XIV.		CONCLUSION.....	122
		BIOGRAPHIES.....	123

FRANCHISING IN ASIA-PACIFIC

I. INTRODUCTION

Franchising in the Asia-Pacific region – in its infancy 30 years ago – has now reached full maturity, with a full complement of franchise laws to show for it. Quite simply, outside of North America, no region has more franchise-specific regulation than the Asia-Pacific region. In the past 30 years, most of the Asia-Pacific countries discussed below have adopted regulatory regimes specifically recognizing and regulating franchise activities.

Given the rapid growth of franchising, it has become increasingly important for franchisors, franchisees and their respective advisors to become familiar with the varied legal and regulatory frameworks affecting franchising in the Asia-Pacific region. This paper provides a “guided tour” through the Asia-Pacific region’s regulatory and legal thicket. Although there is no consensus on what countries fall in the “Asia-Pacific” region, the authors of this paper have included the following twelve countries in this paper:

Australia	Indonesia	South Korea
China	Japan	Taiwan
Hong Kong	Malaysia	Thailand
India	Pakistan	Vietnam

The regulation of franchising in the Asia-Pacific region has – in most countries and in many respects – followed a regulatory pattern familiar to that adopted in North America – i.e., pre-sale disclosure with some regulation of the contractual terms of the franchisor-franchisee relationship. Countries with some form of pre-sale disclosure requirements include Australia, China, Indonesia, Japan, Malaysia, South Korea, Taiwan, and Vietnam. All that being said, there are many subtle and not-so-subtle differences. China, for example, has its infamous “2 + 1 rule”, and South Korea has some very strict franchise relationship requirements. And Indonesia, Malaysia, and Vietnam have their own very distinctive and challenging regulatory and approval regimes.

This paper provides country-by-country analyses covering a uniform set of topics of particular relevance to franchising in the Asia-Pacific region. Specifically, each country-specific section of this paper discusses the same nine topics for each country: (i) regulation of offers and sales of franchises (including discussions of any applicable franchise disclosure and filing requirements); (ii) foreign exchange controls; (iii) taxes; (iv) franchise relationship laws; (v) trademark requirements and licensing considerations; (vi) competition laws; (vii) employment laws; (viii) privacy laws; and (ix) governing law and dispute resolution. The authors are grateful for the valuable assistance provided by the many lawyers around the world who contributed to various sections of this paper.*

* A paper such as this one requires the efforts and specific knowledge of many people. The authors wish to gratefully acknowledge the assistance of the many individuals who assisted in the preparation of portions of this paper. A particular note of thanks to the lawyers in the following countries who, in many cases, made very significant contributions to the country portion of the paper where they regularly practice law: **Australia** (Philip Colman, MST lawyers); **China** (Reking Chen and Fangfang Song, DLA Piper UK LLP Beijing Representative Office); **Hong Kong** (Kenneth Choy, Nixon Peabody CWL); **India** (Anup Kumar and Aishwarya Kumar, Archer & Angel);

As the reader will see, even in Asia-Pacific countries that have franchise-specific laws, there is much lack of uniformity in requirements across all countries, and each must be considered on a country-by-country basis. While the involvement of local lawyers in the Asia-Pacific is imperative due to the constant evolution of these laws, an initial grasp of high-level issues with franchising in the Asia-Pacific may help as franchisors expand into the region. We are hopeful that franchisors, franchisees and their respective advisors will find this paper valuable in answering some of the high-level and fundamental questions in their franchise expansion into the Asia-Pacific region.

II. AUSTRALIA

A. Regulation of Offers and Sales of Franchises

1. Franchise Sales Laws

In Australia, pre-sale disclosure laws are contained in the Franchising Code of Conduct¹ (the “Code”). As a general rule, there are no requirements for a franchisor to have been operating company-owned or franchised outlets for any period of time prior to offering franchises.

There are two types of pre-sale disclosures. First, a franchisor must give a copy of a prescribed 2-page information statement set out in Annexure 2 of the Code to a prospective franchisee as soon as practicable once the prospective franchisee formally applies or expresses an interest in acquiring a franchised business. This is more likely to occur before a binding or non-binding letter of intent (“LOI”) is signed and before any money is paid. This obligation does not exist in relation to the renewal of a franchise agreement or the extension of the term or scope of a franchise agreement.

Second and, more importantly, a franchisor must give to a prospective franchisee its current disclosure document that complies with Annexure 1 of the Code, at least 14 days before the prospective franchisee enters into a franchise agreement or an agreement to enter into a franchise agreement (which could include a binding LOI) or makes a nonrefundable payment (whether of money or of other valuable consideration) to the franchisor or an associate of the franchisor in connection with the proposed franchise agreement.

The stated purpose of a disclosure document is to give a prospective franchisee information from the franchisor to help the prospective franchisee to make a reasonably informed decision about the franchise and give a franchisee current information that is material to the running of the franchised business. This stated purpose should always be kept in mind if a franchisor is unsure whether something needs to be disclosed.

The Code requires a franchisor provide a disclosure document to a prospective franchisee before the prospect enters into a preliminary agreement (e.g., a LOI) or before the prospect makes a non-refundable payment to the franchisor. Accordingly, if the parties wish to enter into

Indonesia (Norma Mutalib, Mira Lestari, Lia Alizia, and Golden Mandala, Makarim & Taira S.); **Malaysia** (Sharon Suyin Tan, Nadarashnaraj Sargunaraj, and Nurul Azman, Zaid Ibrahim & Co.); **Pakistan** (Salim Hasan, Meer & Hasan); **South Korea** (Terry Kim, Lee & Ko); **Thailand** (Nuttaphol Arammuang, Threenuch Bunruangthaworn, Jomjai Jintasuwon, and Rujaporn Paritsantik, ZICOLaw (Thailand) Ltd.); **Taiwan** (Eugenia Chuang, Tsar & Tsai Law Firm); and **Vietnam** (Luu Tien Dzung, YKVN). Finally, the authors wish to acknowledge the assistance of Wesley Gangi (**Japan**) and Lizl Leonardo of Nixon Peabody LLP, and Ashley King of DLA Piper LLP, who assisted the authors with this paper.

¹ Competition and Consumer (Industry Codes – Franchising) Regulation 2014, S.L.I. No. 168, 2014, Oct. 30, 2014, amended March 1, 2017 (Austl.) (the “Franchising Code of Conduct”).

a binding LOI or the franchisor wishes to receive a non-refundable deposit, a franchisor must provide a disclosure document.²

The disclosure document requires franchisors to make disclosure under a number of key topics and subtopics. The key topics cover:

- a. background and relevant business experience of the franchisor, its associates and key personnel;
- b. details of relevant past and current litigation, convictions for serious offences or insolvency relating to or involving the franchisor or its directors;
- c. payments to agents for the introduction or recruitment of franchisees;
- d. details of existing franchisees and key events (i.e., franchise transfers, businesses closing down, terminations, non-renewals and franchisor buy-backs) that have occurred in the past three years;
- e. certain prescribed information as to the relationship between the franchisor (if the franchisor is a sub-franchisor) and the master franchisor;
- f. relevant information regarding intellectual property, including how and on what basis the franchisor can pass on rights to use the intellectual property to franchisees;
- g. details of exclusivity or otherwise of sites or any territory;
- h. details of franchisor's requirements for supply of goods or services to a franchisee;
- i. details of franchisor's requirements for supply of goods or services by a franchisee;
- j. rights, if any, of the franchisee to sell goods or services online;
- k. rights, if any, of the franchisor to sell goods or services online;
- l. any profit-sharing arrangement between the franchisor and franchisee in respect of online sales of goods or services;
- m. the franchisor's site or territory selection policy;
- n. circumstances surrounding past franchise businesses ceasing to operate in the territory to be franchised;

² INTERNATIONAL FRANCHISE SALES LAWS 10 (Andrew P. Loewinger & Michael K. Lindsey eds., 2nd ed., 1995).

- o. payments to be made by a franchisee, including prepayments, establishment costs and other recurring or isolated payments;
- p. details relating to contributions to, expenditure from, administration and auditing, a marketing or other cooperative fund;
- q. details of any financing offered by the franchisor;
- r. details of unilateral variations to the franchise agreement in the past three years and circumstances where the franchise agreement may be unilaterally varied in the future;
- s. details of arrangements to apply at the end of the franchise agreement;
- t. details of whether the franchise agreement will be amended on a transfer or novation;
- u. any earnings information that a franchisor wishes to give and the basis for the information;
- v. a statement of solvency signed by a director of the franchisor;
- w. either financial reports of the franchisor for the past two financial years or an audit report supporting the franchisor's director's statement of solvency; and
- x. any other relevant updates pertaining to key changes that may have occurred since the disclosure document was created.

The disclosure document must have attached to it a copy of the Code and the franchise agreement in the form in which it is to be executed by the franchisee. If, after the date the disclosure document is given, the franchise agreement is amended to give effect to a request by the franchisee or otherwise by filling in required particulars or correcting mistakes or to clarify minor matters, there is no need to re-disclose.³

A franchisor must update the disclosure document within four months after the end of each financial year. However, a franchisor need not update the disclosure document after the end of a financial year if the franchisor did not enter into a franchise agreement, or only entered into one franchise agreement, during the year and the franchisor does not intend, or if the franchisor is a company, its directors do not intend, to enter into another franchise agreement in the following financial year. Despite this, if a request is made for an updated disclosure document by a franchisee, the franchisor must update the disclosure document so that it reflects the position of the franchise as of the end of the financial year before the financial year in which the request is made.⁴

The Code also imposes a continuous disclosure obligation on franchisors if “materially relevant facts” arise. Examples include changes to the majority ownership or control of the

³ Franchising Code of Conduct, *supra* note 1, at cl. 9(3).

⁴ *Id.* at cls. 8(6)-(8).

franchisor or the franchise system, legal proceedings and judgments, insolvency proceedings, and a change on the ownership or control of intellectual property that is material to the franchise system. In this case, the franchisor must provide information to the franchisees within a reasonable time (but no later than fourteen days) of the franchisor becoming aware of the situation.

There is currently no government approval, registration, or filing requirement in Australia. However, it is important to note that, due to recent adverse events and press surrounding the franchising sector in Australia, there have been two relatively recent public inquiries into franchising in Australia that have had, and may continue to have, broad ranging effects on franchising in Australia. The first relates to the significant and widely publicized 7-Eleven franchisees' workplace law violations in Australia and the subsequent 2016 Fair Work Ombudsman report, both of which we discuss in further detail in Section C of this paper below. The second inquiry was a more recent 325-page report entitled "Fairness in Franchising" prepared by the Australian Parliamentary Joint Committee on Corporation and Financial Services, which provides a wide variety of significant recommendations for legal changes in the franchising sector in Australia. This includes a governmental franchise disclosure document filing requirement.⁵ As of the date of this writing, it is unclear what, if any, additional requirements will be adopted by the Australian Government from these recommendations.

2. Government Agency Regulation

The Code is the only Australian law that deals directly with franchising in Australia. The Australian Competition and Consumer Commission ("ACCC") is the federal agency that administers and enforces the Code.

If there is a failure to comply with any of the disclosure requirements, rescission or cancellation of the franchise is not a matter of right. The affected franchisee would have to report to the ACCC. If the ACCC investigates and finds a breach of the Code, it may seek administrative resolution, issue an infringement notice, commence proceedings in the Federal Court, seek enforceable undertakings, or instigate court proceedings seeking civil remedies. A court can impose a pecuniary penalty (maximum AUD63,000) for each instance there has been a violation of the disclosure laws.

B. Foreign Exchange Controls

1. Limits on Currency Conversion

In Australia, foreign investment is governed by the Foreign Investment Review Board ("FIRB"). Whether foreign investment approval is required depends upon the type of investment and whether the investment is above a monetary threshold. Most residential real estate acquisitions require prior FIRB approval, as do certain acquisitions of commercial real estate. Acquisitions of shares in or assets of businesses valued at more than the applicable monetary threshold (which as of January 1, 2019 is AUD266 million for non-U.S. investors) require FIRB approval. The free trade agreement between Australia and the United States has established different criteria and threshold values depending on whether the investment is within a "prescribed

⁵ See Parliamentary Joint Committee on Corporations and Financial Services Fairness in Franchising (March 2019), available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising/~media/Committees/corporations_ctte/Franchising/report.pdf.

sensitive sector” of industry. In most instances, these scenarios will not apply to a prospective foreign franchisor, unless it proposes to enter the Australian market via an acquisition. Further information can be obtained from the FIRB website.⁶

There are no laws or regulations restricting a franchisee’s ability to make payments to a foreign franchisor in the franchisor’s domestic currency, other than compliance with relevant withholding tax obligations.

2. Government Filing Requirements

Banks and financial institutions must comply with the Australian money laundering rules. Under these rules, transfer of AUD10,000 or more are reported to the government. There are no restrictions on the transfer of funds, just a reporting obligation.

C. Taxes

1. Royalties

In Australia, the franchisor must file tax returns with the local tax authority and pay the local corporate income tax. The country’s taxation legislation does not distinguish between franchising and other forms of business. The typical taxes payable in relation to the franchise relationship are income tax, capital gains tax, goods and services tax, and all depend upon the legal structure chosen by the franchisor.

If the franchisor is a U.S. resident and they do not have a permanent establishment in Australia, then there will be no Australian tax other than if payments are involved. If that is the case, the U.S. resident must pay 5% withholding tax. If there is a permanent establishment in Australia, then the profits attributable to that permanent establishment will be subject to Australian tax.

If the non-resident franchisor is a corporate tax entity, the tax rate is 27.5% for small businesses (turnover less than AUD50M and at least 20% of its income is active), otherwise 30%. Transfer pricing rules would apply to ensure the Australian profit was not artificially depressed.

Advertising fees are unlikely to be treated in the same way as royalties, that is, there would be no Australian tax unless the source of the income was Australia and the U.S. resident recipient derived that income from a business it carried on through a permanent establishment situated in Australia.

2. Service Fees

A Goods and Services Tax (“GST”) applies to all supplies of goods and services at a rate of 10%. The tax will be imposed if the taxpayer makes the supply for consideration; the supply has a connection with Australia; the supply is for the furtherance of an enterprise that the taxpayer carries on; and the supplier is registered or required to be registered. Liability for the tax lies with the supplier unless the recipient takes on the responsibility and agrees that the non-resident can reverse the charge, in effect invoice itself for the GST. It is also common for franchise agreements

⁶ Australia Government Foreign Investment Review Board, <http://firb.gov.au/>.

to include provisions allowing the franchisor to recover GST payable from the franchisee.

Goods imported into Australia may also be subject to customs duty. The amount is generally calculated by multiplying the duty rate (usually a percentage) by the customs value of the imported goods. The rates are typically between 0% and 5%, but some goods may be subject to higher rates. However, Australia has a wide range of Free Trade Agreements that offer concessionary custom duty rates. Exemptions from customs duty are also possible under a Tariff Concession Order.

3. Double Taxation Treaties

Royalties paid to non-residents are generally subject to a final withholding tax in Australia. Where the recipient is not a resident of a tax treaty country, the rate of withholding is 30%. For U.S. residents, the tax treaty reduces the rate to 5%. Under the Australia-USA treaty, there is no royalty withholding tax for industrial, commercial, or scientific equipment payments that might otherwise be treated as royalties.

4. Gross-Up Provisions

In Australia, gross-up provisions are common practice and are upheld by Australian courts. Usually, it all depends on the parties' negotiations as to whether or not they are included.

D. Franchise Relationship Laws

1. Transfers, Defaults, Termination, and Nonrenewal

For transfers, the Code provides that:

- a. A franchisor must advise, in writing, a person who has made a request for consent to the transfer of a franchise agreement:
 - i. whether consent is given, and if not, give reasons why not; and
 - ii. if consent is given, whether the franchisor's consent is subject to one or more conditions being satisfied.
- b. A franchisor must not unreasonably withhold consent to the transfer of a franchise agreement.
- c. A franchisor may reasonably withhold consent in the following circumstances:
 - i. the proposed transferee is unlikely to be able to meet the financial obligations that the proposed transferee would have under the franchise agreement;
 - ii. the proposed transferee does not meet a reasonable requirement of the franchise agreement for the transfer of the franchise agreement;
 - iii. the proposed transferee does not meet the selection

- criteria of the franchisor;
 - iv. the proposed transferee does not agree, in writing, to comply with the obligations of the franchisee under the franchise agreement;
 - v. the franchisee has not paid or made reasonable provision to pay an amount owing to the franchisor;
 - vi. the franchisee has not remedied a breach of the franchise agreement; and
 - vii. the franchisor has not received from the proposed transferee a written statement that the transferee has received, read and had a reasonable opportunity to understand the disclosure document and this code.
- d. If the franchisor does not advise the person, in writing, that the franchisor does not consent to the transfer of the franchise agreement within 42 days of the later of the date the request is made or if the franchisor seeks further information, the date the last of the information is provided to the franchisor, then the franchisor is deemed to have given consent.

For terminations, where a contractual right exists, the Code provides that:

- a. Other than in exceptional circumstances the franchisor cannot terminate a franchise agreement because of a breach unless it has served a breach notice on the franchisee setting out the breach a giving the franchisee a reasonable time to remedy the breach (which need not exceed 30 days) and the franchisee does not remedy the breach⁷; and
- b. In cases of loss of license to run the business, insolvency, fraud, abandonment, serious. criminal conviction and operating business in a manner that endangers public health and safety, a breach notice is not required and the franchisor can terminate immediately if a contractual right to do so exists.⁸

The Code also allows for a “cooling off” period, which enables a franchisee to terminate the franchise agreement within seven days after the earlier of the making of any payment under the agreement or entering into the agreement. In this case, the franchisor must, within fourteen days repay all payments made by the franchisee to the franchisor under the franchise agreement (excluding franchisor’s reasonable expenses).

2. Laws Regulating Unfair Contract Terms

In Australia, a court or a tribunal determines whether or not a term is “unfair.” A term is

⁷ Franchising Code of Conduct, *supra* note 1, at cl. 27.

⁸ *Id.* at cl. 29.

deemed “unfair” (1) if it would cause a significant imbalance in any of the parties’ rights and obligations; (2) if it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and (3) if it would cause detriment to a party, if it were to be relied on or applied.

If a court or tribunal finds that the term is “unfair,” the term will be void and will not be binding on the parties. The rest of the contract, however, will continue to bind the parties to the extent it is capable of operating without the unfair term.

The Competition and Consumer Act prohibits provisions that provide for certain anti-competitive conduct, such as price collusion, third-line forcing, resale price maintenance and other forms of exclusive dealing. Further information regarding the restrictions on the provisions in franchise contracts can be found on the ACCC website and are discussed in Section F below.

The Australian Consumer Law⁹ also prohibits unconscionable conduct.¹⁰ In a recent case¹¹, unconscionability was described as “not the mere breach of accepted standards of commercial behavior Nor is it the case that any conduct that involves an element of hardship or unfairness to the other party is unconscionable. Rather, unconscionable conduct is characterized by a substantial departure from that which is generally acceptable commercial behavior. It is a departure which is so plainly or obviously contrary to the behavior to be expected of those acting in good commercial conscience that it is offensive. This is because unconscionability is a term that is reserved for more extreme cases of breach of a moral or normative standard. It is conduct that would be understood to be clearly wrong by a person of good business conscience. It is not necessary that, in addition, it be conduct of a kind that would lead to disgrace and eternal damnation unless absolved.”

It follows from these statements that unconscionable conduct is conduct that goes well beyond a breach of accepted standards of commercial behavior. It must be a substantial departure that is obvious and offensive. In Australia, however, rarely would enforcing a contractual right constitute unconscionable conduct.

There are no commercial agency or distributorship laws that generally apply to franchise relationships in Australia. However, there are some laws that apply to certain sectors – e.g., the petroleum sector.

E. Trademark Requirements and Licensing Considerations

1. Trademark Registration

In Australia, application for trademark protection can be made through IP Australia’s website.¹² This site also provides detailed information about intellectual property and the registration process.

Once the trademark application has been filed, it takes IP Australia three to four months

⁹ Competition and Consumer Act 2010 (Cth) s.2 (Austl.).

¹⁰ Id. at 21.

¹¹ *ACCC v. Geowash Pty Ltd* (Subject to a Deed of Company Arrangement) (No 3) [2019] FCA 72 (February 8, 2019) (Austl.).

¹² Australia Government IP Australia, www.ipaustralia.gov.au.

to examine it. The examination process of a trademark simply means that IP Australia's examiners check the application to make sure it contains all the correct information and meets legislative requirements. If the trademark application does not meet legislative requirements, the applicant will be sent a report outlining the grounds for the examiner's finding and may provide options for overcoming them. If the trademark application meets all requirements, it will be advertised for a two-month period when third parties may oppose registration. If it is not opposed, the trademark will be registered, and the applicant will be notified in writing.

Other commercial factors may mean that sometimes the timing of an application approval is vital. An applicant can ask for an expedited examination, if it will be seriously disadvantaged because of the time taken to process the applications.

2. Trademark License Registration

There are no laws in Australia requiring the registration of the license of the trademark from the franchisor to the franchisee.

F. Competition Laws

1. Prohibition on Common Franchisor Practices

Australian competition laws set forth in the *Competition and Consumer Act 2010 (Cth)* provides for a long list of restrictive trade practices. A few examples that affect franchising are:

- a. Price-fixing, restricting outputs in the production and supply chains, allocating customers, suppliers or territories or bid-rigging;
- b. Prohibitions of resale price maintenance; and
- c. Prohibitions of third line forcing.

In addition, Australian law generally considers post-term covenants against competition to be unenforceable, unless the post-term covenant seeks only to protect the legitimate business interests of the franchisor (assessed at the time the parties agreed to the post-term covenant against competition).

It is to be noted, however, that the Code¹³ provides that a restraint of trade clause in a franchise agreement (or associated document) will have no effect after the agreement expires, if all of the below circumstances exist:

- a. the franchisee had given written notice to the franchisor seeking to extend the agreement on substantially the same terms as those:
 - i. contained in the franchisor's current franchise agreement; and
 - ii. that apply to other franchisees or would apply to a prospective franchisee; and

¹³ Franchising Code of Conduct, *supra* note 1, cl. 23.

- b. the franchisee was not in breach of the agreement or any related agreement; and
- c. the franchisee had not infringed the intellectual property of, or a confidentiality agreement with, the franchisor during the term of the agreement; and
- d. the franchisor does not extend the agreement; and
- e. either:
 - i. the franchisee claimed compensation for goodwill because the agreement was not extended, but the compensation given was merely a nominal amount and did not provide genuine compensation for goodwill; or
 - ii. the agreement did not allow the franchisee to claim compensation for goodwill in the event that it was not extended.

2. Restrictive Covenants

Restrictive covenants during the term of the franchise agreement, after termination or expiration are generally permissible as long as they do not have the purpose or effect of substantially lessening competition in Australia. Post-termination restrictions will be enforceable if it is reasonably necessary to protect the franchisor's interest, for example with regard to confidential information or intellectual property.

G. Employment Laws

1. Applicable Employment Laws

At the federal and state level, workplace relations laws exist to regulate the employment of staff by franchisors and franchisees. The Fair Work Act 2009 (Cth) contains a set of employment standards that apply to all workers in Australia. Franchisees will not be treated as employees of the franchisor, unless the relationship is actually an employer-employee relationship disguised under a franchise agreement or independent contractor arrangement.

2. Effect on Franchising

On September 14, 2017, the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth) ("Fair Work Amendment") was enacted. The Fair Work Amendment amended the Fair Work Act in a number of respects, but it is the following critical amendments that have an impact on franchising.¹⁴

The Fair Work Amendment imposes civil penalty liability for franchisors. A franchisor will be liable if (1) there is a "franchise" relationship as defined by the Code; (2) the franchisor is a "responsible franchisor entity"; and (3) if the franchisor knew or could reasonably be expected to

¹⁴ Australian Government Fair Work Ombudsman, *Changes to Help Protect Vulnerable Workers* (September 15, 2017), <https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/changes-to-help-protect-vulnerable-workers#what-are-the-changes>.

have known that the contravention by the franchisee would occur. A “responsible franchisor” is a franchisor that has a significant degree of influence or control over the franchisees’ affairs. In other words, the Fair Work Amendment *shifts the burden to franchisors* to require that they demonstrate they have taken “reasonable steps” to prevent a franchisee from contravening Australian workplace laws, if the franchisor knew or could have reasonably known of the contravention and could have prevented it.¹⁵

A franchisor will not be liable under these laws if at the time of, or prior to, the franchisee’s contravention, the franchisor had taken “reasonable steps” to prevent the contravention. In determining whether a franchisor took “reasonable steps” to prevent a contravention, a court may have regard to all relevant matters, including: the size and resources of the franchise; the extent to which the franchisor had the ability to influence or control the contravening franchisees’ conduct in relation to the contravention; any action the franchisor took to ensure the franchisee had reasonable knowledge and understanding of the requirements of the law; the franchisor’s arrangements for assessing the franchisee’s compliance with the applicable provisions act; the franchisor’s arrangements for receiving and addressing complaints about alleged contraventions within the franchise; and the extent to which the franchisor’s arrangements with the franchisee encourage or require the franchisee to comply with the *Fair Work Act* or other workplace law.

The Fair Work Amendment law also provides that where a franchisor has paid to, or on behalf of, an employee, an amount pursuant to an order relating to a contravention by a franchisee, and the franchisor has not been able to recover that amount from the franchisee, the franchisor may commence proceedings against the franchisee.

It is important to recognize that the seeds of the Fair Work Amendment originated from Australia’s 7-Eleven wage scandal. In June 2014 an industrial relations tribunal created by the Fair Work Act 2009 (“FWA 2009”) called the Fair Work Ombudsman (FWO”) commenced an inquiry into alleged widespread underpayment of staff and violations of the Fair Work Act at 7-Eleven’s 620 franchised convenience stores in Australia.¹⁶ Moreover, in August 2015 there was an extensive investigation and story that reviewed systematic wage fraud across the 7-Eleven chain in Australia that included falsification of payroll records, understating wage bills, doctoring of time sheets and other records, as well as other illegal practices.¹⁷ These unsavory practices originated as early as 2009. As a result of the FWO inquiry and the above media report, the FWO took legal action against 9 7-Eleven franchisees.¹⁸

¹⁵ See Andrew Loewinger, Stéphane Teasdale & Richard White, *A World of Trouble: How to Limit Liability Exposure in International Franchise Expansion*, International Franchise Association 51st Annual Legal Symposium, at 1, 34-36 (May 2016), available at <https://www.franchise.org/sites/default/files/HowtoLimitLiabilityExposureinInternationalFranchiseExpansion.pdf> (“A World of Trouble”).

¹⁶ Fair Work Ombudsman, Commonwealth of Australia, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network* (April 2016), <https://www.fairwork.gov.au/ArticleDocuments/763/7-eleven-inquiry-report.pdf.aspx>.

¹⁷ Adele Ferguson, Sarah Danckert & Klaus Toft, *7-Eleven: A Sweatshop on Every Corner*, *The Age* (August 28, 2015), <https://www.theage.com.au/business/workplace/7eleven-a-sweatshop-on-every-corner-20150827-gj8vzn.html>.

¹⁸ *A World of Trouble*, *supra* note 15, at 4-8.

H. Privacy Laws

1. Applicable Privacy Laws

There are no industry specific privacy laws applicable to a franchise relationship.

2. Effect on Franchising

However, the *Privacy Act 1988 (Cth)* (“Privacy Act”) and the Australian Privacy Principles (“APPs”) significantly affect the way organizations collect, store, use, disclose, and dispose of personal information about individuals. For example, organizations may be held accountable for sending personal information offshore if the recipient subsequently breaches the APPs. Additionally, the APPs limit the right to use personal information for direct marketing purposes in certain circumstances.¹⁹ There is a higher standard of protection afforded to sensitive information, which includes information about a person’s racial or ethnic origin, religious, or philosophical beliefs, political opinions or membership of a political party or trade association or trade union, sexual practices or preferences, criminal record, health information (including predictive data) and biometric data.

Beginning in February 2018, all entities regulated under the Privacy Act are required to notify affected individuals and the Privacy Commissioner when a data breach is likely to result in serious harm to individuals whose personal information is involved in the breach. In the event of a data breach, entities must conduct an expeditious assessment (within 30 days) to determine the likelihood of serious harm being caused to individuals. Serious harm to an individual may include serious physical, psychological, emotional, financial, or reputational harm. If serious harm is found to be likely, entities must notify both the individuals affected and the Privacy Commissioner.

The Privacy Commissioner’s powers include additional investigation and audit powers and the power to make enforceable undertakings, develop and register binding privacy codes, and commence proceedings in the Federal Court or the Federal Circuit Court. Penalties of up to AUD2.1 million can be ordered for serious or repeated breaches of the APPs by corporations and up to AUD420,000 for individuals. E-commerce has become a vital component of most businesses in Australia and as a result, cybercrime has become a pertinent issue. The APPs require organizations to take reasonable steps to protect data from theft, misuse, interference, loss, unauthorized access, modification or disclosure.

I. Governing Law and Dispute Resolution

1. Governing Law

In Australia, the most common form of dispute resolution in franchising is mediation. The Code requires dispute resolution provisions to be included in all franchise agreements. Typically, franchise agreements require mediation prior to litigation.

There is no accepted norm relating to choice of governing law. Foreign franchisors adopt varying approaches. The Code, however, will not allow a provision in a franchise agreement for

¹⁹ In March 2019, the Australian Government announced that it will legislate the increase of penalties that can be levied under the Privacy Act to 10% of a company’s turnover, AUD10 million, or three times the value of the benefit from the misuse of information, whichever is greater, up from a cap of AUD2.1 million for serious or repeated breaches.

an action or proceeding to commence in an Australian State outside that in which the franchise business is based, or in any jurisdiction outside Australia.

To date, no foreign franchisor wishing to apply foreign laws to the franchise documents has sought to argue that the Code has no application to franchise documents that state that the governing law is that of a country other than Australia.

2. Arbitration

In Australia, adjudication of disputes via arbitration is not common unless an international party is involved. The relevant legislation for international arbitrations is the *International Arbitration Act 1974 (Cth)* (“IAA”). On the other hand, the relevant legislation for domestic arbitrations is the various uniform State and Territory Commercial Arbitration Acts.

Properly drafted exclusive forum provisions in franchise agreements entered into prior to January 1, 2015 will generally be upheld by Australian courts. It is wise to highlight the disadvantages the franchisee might face if it is required to litigate or arbitrate overseas in a disclosure document or some other document provided to the franchisee before it signs the franchise agreement.

In respect to franchise agreements entered into on or after January 1, 2015, the Code prohibits and renders unenforceable clauses requiring a party to bring an action or proceeding or conduct mediation or arbitration in any state or territory of Australia or any other country other than the state or territory of Australia where the relevant franchised business is located.

As a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), a foreign arbitral award may be enforced in the federal, state, and territory courts²⁰ as if the award were a judgment or order of that court. Courts can refuse to enforce the foreign award in certain circumstances.²¹

3. Foreign Judgments

No local court in Australia, to date, has adjudicated any dispute arising under a franchise agreement governed by laws of a foreign country. However, in non-franchising litigation, it is not uncommon for Australian courts to apply foreign law in circumstances where the contract provides that foreign law applies

It is generally accepted by foreign franchisors that they are bound by Australian laws despite any contrary governing law provision in franchise documents.

The enforcement of foreign judgments in Australia is covered by the Foreign Judgments Act 1991 (Cth), which in essence provides that final judgments and orders from certain foreign superior courts (as set out in the *Foreign Judgments Regulations 1992 (Cth)*) can be registered in the Australian courts and then enforced.

4. Injunctive Relief

To obtain interlocutory relief, a franchisor needs to show that there is a serious question

²⁰ International Arbitration Act 1974 (Cth) ss. 8(2)-(3) (Austl.).

²¹ Id. at ss. (7)-(7A), 8(5).

to be tried and that the balance of convenience favors granting such interlocutory relief. If a franchisor does so, it will need to provide an undertaking to the court to compensate the franchisee for losses sustained by reason of the interlocutory order being in place if at trial the franchisor is unsuccessful.

III. CHINA

A. Regulation of Offers and Sales of Franchises

1. Franchise Sales Laws

There have been numerous attempts over the years to regulate franchise activities in China.²²

The Administrative Regulations of Commercial Franchise²³ (the “Franchise Regulation”), which were passed in February 2007 by the State Council (the highest executive agency), regulate franchise activities. The Ministry of Commerce (“MOFCOM”), the agency in charge of enforcing the Franchise Regulation, issued two implementation guidelines in order to provide a uniform interpretation of the Franchise Regulation and to clarify certain subjects: (1) in December 2011, the Administrative Rules on Commercial Franchise Filing²⁴ (the “Filing Rule”) which govern the franchisor filing process, and (2) the Administrative Rules on Commercial Franchise--Information Disclosure²⁵ (the “Disclosure Rule”, and with the Filing Rule, the “Rules”) which govern the franchise disclosure document requirements. The Rules replaced the Filing Rule and Disclosure Rule that MOFCOM originally issued in April 2007 in connection with the State Council’s initial adoption of the Franchise Regulation.

a. Pre-Sale Disclosures

The Franchise Regulation imposes disclosure obligations on the franchisor prior to franchise sales. The purpose of the franchise disclosure scheme is to ensure the prospective franchisee obtains adequate information from the franchisor can make an informed decision in whether to invest in the franchise business.

Under the Franchise Regulation²⁶ and the Disclosure Rule²⁷, a franchisor must disclose

²² See *generally* 商业特许经营管理办法（试行）Shang ye te xu jing ying guan li ban fa (shi xing) [Interim Measures on Administration of Commercial Franchise Operations] (promulgated by Ministry of Domestic Trade on Nov. 14, 1997) Order No. 124 (China); and 商业特许经营管理办法Shang ye te xu jing ying guan li ban fa [Measures for the Administration of Commercial Franchises] (promulgated by the Ministry of Commerce of the People’s Republic of China on Dec. 30, 2004) Order No. 25 [2004].

²³ 商业特许经营管理条例Shang ye te xu jing ying guan li tiao li [Administrative Regulation on Commercial Franchise] (promulgated by the State Council, Feb. 6, 2007, eff. May 1, 2007), *available at* http://www.gov.cn/zwqk/2007-02/14/content_527207.htm (the “Franchise Regulation”).

²⁴ 商业特许经营备案管理办法 Shang ye te xu jing ying bei an guan li ban fa [Administrative Rules on Commercial Franchise Filings] (promulgated by the Ministry of Commerce, Dec. 12, 2011, eff. Feb. 1, 2012), *available at* http://www.gov.cn/flfg/2011-12/21/content_2025612.htm (the “Filing Rule”).

²⁵ 商业特许经营信息披露管理办法 Shang ye te xu jing ying xin xi pi lu guan li ban fa [Administrative Rules on Commercial Franchise Information Disclosure] (promulgated by the Ministry of Commerce, Feb. 23, 2011, eff. Apr. 1, 2012), *available at* http://www.gov.cn/flfg/2012-03/06/content_2084101.htm (the “Disclosure Rule”).

²⁶ Franchise Regulation, *supra* note 23, at arts. 21, 22.

²⁷ Disclosure Rule, *supra* note 25, at art. 5.

the following information to the franchisee in writing at least thirty (30) days before the execution of a franchise agreement:

- i. Basic information concerning the franchisor and its commercial franchise business;
- ii. Basic information concerning the franchisor's business resources;
- iii. Information about franchise fees, including the prices and conditions of the products, services and equipment provided for the franchisee;
- iv. Franchisor's continuous provision of services to the franchisee;
- v. Method and content of guidance and supervision over the business operations of the franchisee;
- vi. Investment budget for the franchise business;
- vii. Information on the franchisee network in China;
- viii. Audited financial statements for the most recent 2 fiscal years²⁸;
- ix. Franchise-related litigation and arbitration history for the most recent 5 years;
- x. Records of unlawful business operation by the franchisor or its legal representative; and
- xi. The franchise agreement.

Upon receiving the disclosure document, the prospective franchisee must execute a receipt and send the same back to the franchisor.

b. **Franchisor Qualification**

The pre-qualifications for a franchisor to franchise in China are set forth in Article 7 of the Franchise Regulation, which requires that all franchisors must first operate at least two company-owned units for at least one year (the "2+1 rule").²⁹ When the rule was initially proposed, the two units had to be located within China. However, in 2007, the "within China" limitation was removed before the formal promulgation of the Franchise Regulation.

²⁸ Local counsel notes that the Franchise Regulation does not specifically allow or prohibit the use of the parent/guarantor's financial statements. As for new franchisors, the Chinese regulators have requested the new franchisor to have been incorporated for more than 1 year, so that the new franchisor would be able to produce its financial statements. The regulators have not settled on a uniform approach. Because franchise disclosure documents are not required to be reviewed or approved by the regulators, franchisors must consider these issues as they arise.

²⁹ Franchise Regulation, *supra* note 23, at art. 7.

Based on administrative practices over the years, the 2+1 rule requirement may be fulfilled by having units either directly owned by the franchisor or by an affiliate, provided that the affiliate is: (1) a direct subsidiary of the franchisor and the franchisor holds a majority equity interest in the subsidiary; (2) a parent company of the franchisor and the parent holds a majority equity interest in the franchisor; or (3) a sister company of the franchisor and the parent company holds a majority equity interest in both the franchisor and the sister company.

Further, while not reflected in the Rules, the franchisor may rely upon written statements issued by trade organizations (e.g., the International Franchise Association) in lieu of providing evidencing documents to satisfy the 2+1 rule for the number of units located outside of China.

c. **Franchise Filings**

The Franchise Regulation requires that franchisors need to “register”³⁰ with the MOFCOM, or its local counterpart. This registration must be completed within 15 days after signing the first franchise agreement in China.³¹ As such, MOFCOM is not approving the franchise offering, but rather, wants to receive certain information regarding the franchisor for its regulatory purposes.

Within 10 days after submitting the required registration documents (e.g., certificate of incorporation or business license, certificates of licensed intellectual property, form franchise agreement, operations manual, market plan, and evidence of satisfying the 2+1 rule, etc.), the government agency is required to register a franchisor, but based on experience, it can take longer than 10 days. Note that the franchisor's disclosure document and audited financial statements are not needed for the registration (but, of course, must be given to the prospective franchisee as noted in Section 1.a. above).

In the first quarter of each year after the filing is completed, the franchisor should file with MOFCOM or its counterparts an annual report that notes the following: the number of franchise agreements contained in the preceding annual report filed with MOFCOM that were signed and/or terminated after the previous annual report; the number of total franchise agreements in performance; the number of franchised units and turnover of such units; and the number of directly owned units and turnover of such units.³²

If the original documents for the registration filing are not executed in China, a notarized and legalized copy must be submitted. In addition, if the original documents are not prepared in Chinese, a Chinese translation must be filed.

2. **Government Agency Regulation**

The MOFCOM and its local counterparts are the regulating agencies of franchises in China. In addition, anti-trust issues and unfair-competition are regulated by the State Market Supervision and Administration and its local counterparts.

Articles 24 to 30 of the Franchise Regulation set out a series of penalties for non-

³⁰ In prior years, it was seldom that MOFCOM would review the submitted “registration” documents. Recently, MOFCOM staff has commented on substantive issues. Non-Chinese franchisors must make the filing with MOFCOM, while Chinese franchisors should file with the MOFCOM's provincial-level counterpart in the province where the Chinese franchisor is established.

³¹ Franchise Regulation, *supra* note 23, at art. 7.

³² Filing Rule, *supra* note 24, at art. 9.

compliance, including publication by the regulatory agency of the violation, and imposition of fines.

B. Foreign Exchange Controls

1. Limits on Currency Conversion

Under the PRC Foreign Exchange Administration Regulation³³, receipts and disbursements of foreign currency (foreign exchange) in China, either by individuals or entities are governed by the State Administration of Foreign Exchange (“SAFE”). In July 2013, SAFE and the State Administration of Taxation adopted rules related to the remittance of payments abroad. Essentially, for payments under USD50,000, the banks are given the discretion to determine the authenticity of the underlying transaction, without the involvement of either agency. More importantly, the “franchise fee” is clearly included in the Chinese foreign exchange regulations.

Chinese individual residents are generally subject to an annual quota of USD50,000 on purchasing of foreign currency. Excessive purchase and use of foreign currency will be subject to the review and approval of the bank and SAFE based on required supporting legal documents, including agreements that support the source of income and tax payment certificates.

Chinese entities are not subject to an annual quota in terms of purchase and use of foreign currency. However, supporting documents to the authenticity and substance of the underlying transactions are generally required for receipt and payment of foreign exchange. In addition, any non-trade foreign exchange payment above USD50,000 will require production of a corresponding tax clearance certificate issued by the tax authority.

2. Government Filing Requirements

In a typical cross-border franchise arrangement, the Chinese franchisee will need to make tax filings with the Chinese tax authority, and go through the foreign exchange payment procedure with the bank. Where the bank raises concerns or in other special circumstances, the Chinese franchisee may also need to go through an additional application-approval process with SAFE.

C. Taxes

For each royalty and service fee payment to a non-resident franchisor, a resident franchisee must withhold, report and pay off the corresponding taxes, if any. For any royalty or service fee payment more than USD50,000, the tax withholding and payment must be made, and a corresponding tax clearance/exemption certificate be obtained, before the actual payment of foreign exchange.

1. Royalties

For royalties, a non-resident franchisor usually will be subject to:

- a. Value-added Tax (“VAT”) and local surcharges together at about 6.72%; and
- b. Corporate Income Tax (“CIT”) at 10% (based on the net royalty amount exclusive of VAT), unless there is a more favorable tax

³³ PRC Foreign Exchange Administration Regulation (issued by the State Council, eff. Aug. 5, 2008) (China).

treaty rate under an applicable tax treaty.

2. Service Fees

For service fees derived from services, a non-resident franchisor usually will be subject to VAT and local surcharges together at about 6.72%. If the service is rendered inside (or partially inside) China and triggers a China permanent establishment, the service fee may also be subject to China CIT at 25% based on a deemed profit rate that ranges from 15% to 45%.

3. Double Tax Treaties

There is a tax treaty in place between the United States and China (U.S.-China Tax Treaty). However, the CIT rate is also 10% under the U.S.-China Tax Treaty, and the treaty does not cover VAT and local surcharges.

4. Gross-Up Provisions

Generally, gross-up provision are enforceable in China. The franchisor and franchisee can agree in the franchise agreement specifically to pass the franchisor's tax liabilities to the franchisee.

D. Franchise Relationship Laws

1. Defaults, Termination, and Nonrenewal

Generally, termination of the franchise relationship is negotiated in the franchise agreement. Nevertheless, the Franchise Regulation provides for a "cooling-off period" – which is a special termination right for the franchisee to unilaterally terminate the franchise agreement within a certain period of time after signing the franchise agreement.³⁴ But, unlike other jurisdictions that have similar requirements (e.g., Australia and Malaysia), the Franchise Regulation does not state the duration of the cooling-off period. Practically speaking, the cooling-off period could range from one week to one month, and the agreed-upon cooling-off period should be honored.³⁵ In the absence of a chosen cooling-off period, the Beijing High People's Court says that the cooling-off period should not extend beyond the time at which the franchisee has "started using the operational resources" provided by the franchisor.³⁶

There is no requirement under the Franchise Regulation that franchise agreements must be renewable.

2. Laws Regulating Unfair Contract Terms

The Franchise Regulation requires the following³⁷:

- a. The term of the franchise agreement must be at least three (3)

³⁴ Franchise Regulation, *supra* note 23, at art. 12.

³⁵ See *generally*, Guiding Opinions on Some Issues Concerning Application of Law in Deciding Cases of Commercial Franchise Contractual Disputes promulgated by Beijing High People's Court on Feb. 24, 2011 ("Guiding Opinions"), art. 18.

³⁶ *Id.*

³⁷ Franchise Regulation, *supra* note 23, at arts. 13 - 18.

years, unless the franchisee otherwise consents.

- b. The franchisor must provide the franchisee with an operational manual, as well as services including operational guidance, technical support and business training.
- c. The quality and standards of the products or services offered by the franchised business shall comply with applicable laws, regulations and guidelines, etc., in China.
- d. The franchisor shall explain to the franchisees in writing about the purpose and conditions of refund about the fees payable before the execution of the franchise agreement.
- e. The franchisor shall use the promotion and advertisement fees collected from the franchisee for the purposes as agreed upon in the agreement, and disclose to the franchisee of the use of such fees.
- f. The advertisement and promotions about the franchised business shall not 1) be false or misleading; or 2) contain information publicizing the profits of the franchisees from their franchising activities.
- g. Without the consent of the franchisor, the franchisee may not transfer its franchise to others.
- h. The franchisee may not divulge or permit others to use the trade secrets of the franchisor of which it becomes aware.
- i. Where the franchisee is required to make payments prior to the execution of the franchise agreement, the franchisor must disclose to the franchisee about the purpose of such payment, conditions and means for refunding.

In practice, violation of such rules do not necessarily result in the invalidation of the franchise agreement.

There is also an open-ended requirement from a franchisee relationship perspective contained within Article 4 of the Franchise Regulation. It provides that the “franchising activities shall be conducted in compliance with the principles of free will, fair dealing, honesty and good faith.”³⁸ Article 11 of the Franchise Regulation also contains a list of issues that it requires every franchise agreement to address (e.g., information about the franchisor and franchisee, content and duration of the franchise, types, amounts, and payment methods of the franchise fees, methods of the operational guidance, technical support, business training, quality and standards requirements, promotion and advertisement of the products or services offered by the franchised business, and amendments, rescission, and termination of the franchise contract, liability for breach, dispute resolution, and other items as agreed upon by the franchisor and the

³⁸ Franchise Regulation, *supra* note 23, at art. 4.

franchisee).³⁹

In addition, the Contract Law⁴⁰ regulates the “unfair contract terms” in China. Pursuant to the Contract Law, the drafting party of the standard terms, i.e., usually the franchisor, must take reasonable measures to remind the franchisee of the articles that relieve or eliminate the liabilities of the franchisor.⁴¹ In addition, standard terms that exclude the main rights of the franchisee should be rendered invalid.⁴²

E. Trademark Requirements and Licensing Considerations

1. Trademark Registration

The trademark registration requirements in China are as follows:

- a. Once a trademark application is filed with the China National Intellectual Property Administration (“CNIPA”), the CNIPA will conduct two rounds of examinations, i.e., a formality examination (to identify if there is any formality issue with the application) and a substantive examination.

The substantive examination will focus on two issues relating to registrability of the mark. The first issue is whether the mark is inherently unregistrable as a trademark (e.g. if the mark is a generic term, descriptive, deceptive, or otherwise convey a negative/improper meaning/connotation). The second issue is whether the mark conflicts with any prior identical or similar marks in connection with identical or similar goods/services.

The two rounds of examinations usually take around 6-9 months.

- b. If no reason of rejection is found, the CNIPA will arrange publication of the mark. The period of publication is 3 months. If no opposition is filed by any interested third party during this period, the mark will proceed to registration, and a registration certificate will be issued within the next 1-2 months. A smooth registration usually takes about 10-14 months.
- c. On the other hand, if a rejection is issued (either because the mark is inherently not registrable or there is a prior conflicting mark), a review on refusal can be filed with the CNIPA. The review will take around 9-12 months. The review decision can be appealed to the Beijing IP Court, and if necessary, further to the Beijing High People’s Court. The judgment issued by the Beijing High People’s Court (as the 2nd instance appeal court) is final. Following the issuance of the 2nd instance appeal judgment, a re-trial can also

³⁹ Id. at art. 11.

⁴⁰ The Contract Law of the PRC (issued by the National People’s Congress, eff. Oct. 1, 1999) (China).

⁴¹ Id. at art. 39.

⁴² Id. at art. 40.

be requested with the Supreme People's Court, if there is sufficient justification for a re-trial.

2. Trademark Registration

The license of the trademark by the franchisor to the franchisee is not required to be registered. However, registration is recommended to mitigate potential risks.

The trademark license should be filed with the CNIPA. The required documents for the trademark license filing are:

- a. ID/business license/good standing of the licensor and the licensee;
- b. An executed power of attorney; and
- c. The executed filing form.

F. Competition Laws

1. Prohibition on Common Franchisor Practices

The Anti-Trust Law⁴³ applies to franchise relationships. In particular, the Anti-Trust Law forbids

- a. Fixing the re-sale price to a third party;
- b. Limiting the minimum re-sale price to a third party;
- c. Abusing the market dominating position, such as requiring that the other party may only make purchases from a designated entity without probable cause. A franchisor will not be considered to be in violation of the Anti-Unfair Competition Law⁴⁴ and the Anti-Monopoly Law⁴⁵ unless there is an abuse of market position, impairment of public interest and interference of a franchisee's lawful business activities. Conversely, if a franchising transaction's purpose is to create market barriers, sell unmarketable goods or abuse a position of power, then it will be construed as a violation of unfair competition legislation. The offending franchisor can be punished by fines or other penalties, as set out in the legislation.

The Anti-Unfair Competition Law prevents the following activities:

⁴³ The Anti-Trust Law of the PRC (issued by the Standing Committee of the National People's Congress, eff. Aug. 1, 2008) (China).

⁴⁴ The Anti-Unfair Competition Law of the PRC (issued by the Standing Committee of the National People's Congress, eff., Apr. 23, 2019) (China).

⁴⁵ The Antimonopoly Law of the PRC (issued by the Standing Committee of the National People's Congress, eff., Aug. 30, 2008) (China) (Article 1 of the Antimonopoly Law provides that it was "enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole, and promoting the healthy development of socialist market economy.")

- a. using another party's registered trademark without authorization;
- d. inducing confusion by using the same or a similar name, packaging or distinctive characteristics of a well-known product;
- e. using the name of another business to confuse consumers; and
- f. using the certificate of another business on merchandise.

2. Restrictive Covenants

Under the current practice, the post-term covenants against competition must be within a reasonable time and a reasonable geographic area.

G. Employment Laws

1. Applicable Employment Laws

The Employment Contract Law⁴⁶ is the primary legislation governing employment conditions in the PRC. However, the Employment Contract Law and other employment laws and regulations in the PRC only govern the employment relationship between a PRC registered entity (e.g., local subsidiary of a foreign franchisor in the PRC, local franchisee registered in the PRC) and a natural person.

2. Effect on Franchising

If the foreign franchisor does not have a local subsidiary in the PRC, then it would not be deemed to be the employer of the workers in the franchisees' units under the Employment Contract Law. However, if it does have a local subsidiary in the PRC, then there is a possibility that such local subsidiary would be deemed to be the employer of the workers in the franchisees' units if the local court determines that there is a de facto employment relationship between the two parties. Factors such as control over work procedure and hours, whether the person is carrying on the business of the alleged employer, etc., will be considered by the local labor court to determine if an employer / employee relationship exists.

H. Privacy Laws

1. Applicable Privacy Laws

The Cyber Security Law of the PRC⁴⁷ ("CSL") and Personal Information Security Specification⁴⁸ ("Specification") regulate privacy in China. The definition of personal information contained in Article 3.1 of the Specification is "any information, recorded by electronic or other means, that can be used, alone or combined with other information, to identify a specific natural

⁴⁶ Employment Contract Law of the PRC (issued by the Standing Committee of the National People's Congress, eff. Jul. 1, 2013) (China).

⁴⁷ Cyber Security Law of the PRC (issued by the Standing Committee of the National People's Congress, eff. Jun. 1, 2017) (China).

⁴⁸ National Standard of Information Security Technology – Personal Information Security Specification, eff. May 1, 2018 (China).

person or reflect activities of a specific natural person.”

Consent must be obtained from the data subjects for processing their personal information. Explicit consent (given in writing or by affirmative actions) must be obtained for processing of sensitive personal information (i.e., a non-exhaustive example includes email addresses, phone numbers, ID, bank account, etc.). Before collection, data subjects must be informed of the related information of the collection (including the purpose, transfer of the personal information, etc.). Only such personal information as is necessary should be collected. Collected personal information may only be used for the stated purpose for which the personal information is collected unless voluntary and explicit consent for the new purpose is obtained from the data subject.

The data controller is required to implement technical and organizational measures to ensure the security of personal information it collects and prevent breach, damages or losses of the personal information.

2. Effect on Franchising

Franchisors and franchisees must comply with the requirements provided by the CSL and the Specification. In addition, cross-border data transfers are strictly regulated under the Chinese data protection laws. Pursuant to the CSL, information collected or generated within the PRC by Critical Information Infrastructure Operators (“CIIO”) should be stored within the borders of the PRC. As a general rule, cross-border data transfer is not allowed, unless there is a business need and a security assessment against such transfer is carried out.

That said, the landscape of Chinese data protection is undergoing rapid changes. Recently the newly released Draft Guidelines on Personal Information Cross Border Transfer Security Assessment⁴⁹ (“Draft Guidelines”) require security assessment to be conducted for any cross border transfer of personal information collected by any network operators, regardless whether they are CIIO or not. The Draft Guidelines are not finalized yet. Companies should closely monitor the relevant updates.

I. Governing Law and Dispute Resolution

1. Governing Law

Whether the contracting parties are allowed to choose foreign law as the governing law for dispute in relation to the contract depends on whether “foreign elements” are involved in the underlying contract. Foreign elements can be established by any of the following circumstances⁵⁰:

- a. where at least one party is a foreign citizen, foreign legal person or other organization or stateless person;
- b. where the domicile of at least one party is located outside the territory of the PRC;

⁴⁹ Draft Guidelines on Personal Information Cross Border Transfer Security Assessment, issued for public consultation by the Cyber Administration of China on June 13, 2019 (China).

⁵⁰ Interpretation on Several Issues Concerning the Application of the Law of the People’s Republic of China on Foreign-Related Civil Disputes I (issued by the Supreme People’s Court, eff. Jan. 7, 2013), art. 1 (China).

- c. where the subject matter is outside the territory of the PRC;
- d. where the legal fact that leads to establishment, change or termination of the civil relation takes place outside the territory of the PRC; and
- e. other circumstances that may establish foreign elements.

The parties to a contract that involves foreign elements are allowed to choose the governing laws, either being Chinese laws or foreign laws.⁵¹ The contracting parties may even choose governing law that does not have substantial connection with the dispute.⁵² In the event the contracting parties do not choose a governing law, the default governing law should be either 1) the law of the domicile of the party whose performance of contractual obligations can most reflect the characteristics of the contract; or 2) the law most closely associated with the contract.⁵³

In contrast, where no foreign element is established in a contract, the contracting parties may only choose Chinese law as the governing law.

2. Arbitration

The Arbitration Law of the PRC⁵⁴ provides the legal framework for arbitration in China. Chinese arbitral awards are enforceable in all state parties to the New York Convention. The PRC and Hong Kong Special Administrative Region also have an arrangement for reciprocal enforcement of arbitral awards. Similarly, the PRC has an arrangement with Macao Special Administrative Region for reciprocal recognition and enforcement of arbitral awards.

3. Foreign Judgments

Whether a local court in China will enforce judgments issued by foreign courts depends on whether 1) China has any treaties with the country where the judgment is rendered, or 2) the principle of reciprocity requires so. Foreign judgments that violate the basic principle of Chinese law, or damage state sovereignty, security and public interest, will be denied enforcement in China.

A separate arrangement, "Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region," was signed to recognize final judgments of specified Chinese courts in litigation between Hong Kong and mainland Chinese companies. Similarly, the PRC has signed agreements with the Macao Special Administrative Region and Taiwan on recognition and enforcement of judgments in civil and commercial matters.

⁵¹ Law of the Governing Law in Foreign-related Civil Dispute of the PRC (issued by the Standing Committee of the National People's Congress, eff. Apr. 1, 2011), art. 3 (China).

⁵² Interpretation on Several Issues Concerning the Application of the Law of the People's Republic of China on Foreign-Related Civil Disputes I (issued by the Supreme People's Court, eff. Jan. 7, 2013), art. 7 (China).

⁵³ Law of the Governing Law in Foreign-related Civil Dispute of the PRC (issued by the Standing Committee of the National People's Congress, eff. April 1, 2011), art. 41 (China).

⁵⁴ Arbitration Law of the PRC (issued by the Standing Committee of the National People's Congress, eff. Aug. 1, 2018)(China).

4. Injunctive Reliefs

Chinese courts may grant interlocutory relief against a franchisee to prevent brand damage or misuse of critical confidential information. Under the Civil Procedure Law of the PRC,⁵⁵ the local court may order injunctions either on its own discretion or upon application of the parties. In cases where the interest of the franchisor will be undermined if no injunction is ordered, such as the trade secret is under threat of unlawful disclosure, or the intellectual property is under the threat of unlawful disposal, etc., the court must make a decision within 48 hours upon application.⁵⁶

IV. HONG KONG

A. Regulation of Offers and Sales of Franchises

1. Franchise Sales Laws

There is currently no law specifically regulating franchising in Hong Kong. In responding to questions about franchising from a legislator, Edward Yau, Hong Kong's Secretary for Commerce & Economic Development, replied on March 27, 2019 that the government has no plan to introduce a law specifically for regulating franchising. He noted that franchising agreements are governed by contract law which has been functioning effectively for franchising in Hong Kong. Secretary Yau explained: "Under the principle of respect for freedom of contract, it is not appropriate for the Government to intervene into the commercial operations and disputes between franchisors and franchisees by restricting the substance or format of contracts between parties or imposing specific arrangements for co-operation."

2. Government Agency Regulation

There is no government agency specifically regulating franchising activities. However, the Customs and Excise Department, responsible for enforcing criminal sanctions against copyright and trademark infringements in Hong Kong, has authority to investigate and prosecute copyright offenses and to take enforcement action against commercial goods with forged trademark or false trade descriptions under the Trade Descriptions Ordinance, the Copyright Ordinance, and the Prevention of Copyright Piracy Ordinance.⁵⁷

B. Foreign Exchange Controls

a. Limits on Currency Conversion

There is no limit on currency conversion in Hong Kong. Article 112 of The Basic Law, Hong Kong's 'mini-constitution' provides: "No foreign exchange control policies shall be applied in the Hong Kong Special Administrative Region. The Hong Kong dollar shall be freely convertible."⁵⁸

⁵⁵ The Civil Procedure Law of the PRC (issued by the National People's Congress, eff., Jul. 1, 2017), art. 100 (China).

⁵⁶ Id. at arts. 100-101; Measures on Reviewing Injunctions in relation to Intellectual Property Disputes (issued by the Supreme People's Court, eff. Jan. 1, 2019) (China).

⁵⁷ Trade Descriptions Ordinance (Cap. 362), No. 69 of 1980; Copyright Ordinance (Cap. 528), No. 92 of 1997 (H.K.); Prevention of Copyright Piracy Ordinance (Cap. 544), No. 22 of 1998 (H.K.).

⁵⁸ Hong Kong: Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, July 1, 1997, at art. 112 (H.K.).

b. **Government Filing Requirements**

There is no filing requirement relating to currency conversion in Hong Kong. However, the Cross-boundary Movement of Physical Currency and Bearer Negotiable Instruments Ordinance requires any person entering Hong Kong and carrying currency or bearer negotiable instruments with total value of more than HK\$120,000 (slightly more than USD15,000) to make a written declaration to a Customs officer.⁵⁹

C. Taxes

1. **Royalties**

Royalties on the use of intellectual property rights received by a business are taxable income if the license or right of use is acquired and granted in Hong Kong. A withholding tax of about 4.95% is imposed on royalty income paid to non-Hong Kong residents not associated with a Hong Kong resident.

2. **Service Fees**

Service fees are taxable income in Hong Kong if the services which give rise to the payment of the fees are performed in Hong Kong.

3. **Double Taxation Treaties**

Although Hong Kong is under the sovereignty of The People's Republic of China, Hong Kong has its own separate and independent tax system. Hong Kong has the authority to enter into Double Taxation Avoidance Agreements (each, a "DTAA") with other jurisdictions. As of May 2019, Hong Kong had comprehensive DTAA's with about forty jurisdictions, including the PRC, which limit the maximum tax rates those jurisdictions can charge a Hong Kong resident on payments of dividends, interest, royalties and technical fees to their jurisdictions.

4. **Gross-Up Provisions**

Hong Kong has no sales or value added tax on goods and services. There is also no withholding tax for payment of salary or employment compensation in Hong Kong. Hong Kong does not limit the use of gross-up provisions.

D. Franchise Relationship Laws

1. **Default, Termination, and Nonrenewal**

When a party defaults under a franchise agreement, the non-defaulting party may seek damages for breach of contract in Hong Kong. The non-defaulting party may also seek injunctive relief to maintain the status quo where monetary damages prove inadequate.

Termination of the relationship is typically specified in the franchise agreement. Under common law, non-breaching parties may also terminate in the event of anticipatory breach by the other party. There is no requirement under Hong Kong law that contracts must be renewable.

⁵⁹ Cross-boundary Movement of Physical Currency and Bearer Negotiable Instruments Ordinance (Cap. 629), No. 7 of 2017 at §4, Schedule 4 (H.K.).

There are no statutes that require specific notice or good cause for termination or non-renewal of a franchise agreement.

2. Laws Regulating Unfair Contract Terms

Hong Kong follows English common law, which unlike its American counterpart, does not impose a requirement that parties must negotiate in good faith. Under Hong Kong law, a party has the free will to contract however he sees fit. Where fraud is suspected, civil and criminal remedies are available to the victim.

E. Trademark Requirements and Licensing Considerations

1. Trademark Registration

The trademark application process in Hong Kong is open and efficient. Assuming no third party objection is received after publication and no deficiency is found, a properly completed trademark application may be granted in about six months from application.

Applicants who filed in a Paris Convention country or WTO member jurisdiction may claim a right of priority for up to six months of the original application date in their Hong Kong applications.

2. Trademark License Registration

While not mandatory, exclusive and non-exclusive trademark licenses and sub-licenses may be registered with the Trade Mark Registry of the Intellectual Property Department.

F. Competition Laws

1. Prohibition on Common Franchisor Practices

The Competition Ordinance prohibits certain anti-competitive practices in Hong Kong. This Ordinance contains three competition rules which prohibit agreements and concerted practices which harm competition in Hong Kong.⁶⁰

The First Conduct Rule covers exclusive distribution arrangements. In determining if an exclusive distribution arrangement violates the First Conduct Rule, the Competition Commission, the agency charged with investigating complaints and enforcing the Ordinance, will determine the effects or likely effects on competition in the relevant market.⁶¹

This includes the issues as to whether an intra-brand restriction in a franchise agreement affects inter-brand competition in the marketplace. If inter-brand competition of different brands remains strong and if the restrictions placed on a distributor or franchisee serve to incentivize the promotion of the franchised brand, it may nonetheless be justifiable as enhancing overall economic efficiency. This is notwithstanding that such exclusive distribution agreement may have some adverse impact on competition. Accordingly, exclusive distribution arrangements found in franchise arrangement may not run afoul of the Ordinance.

⁶⁰ Competition Ordinance (Cap. 619), No. 14 of 2012, §§6, 21 (H.K.).

⁶¹ Id. at §11.

2. Restrictive Covenants

Hong Kong law does not generally favor covenants against competition. However, its courts will enforce a restrictive covenant where there is a legitimate need to protect an interest, such as prevention of disclosure of trade secrets, so long as restrictions are sufficiently limited in scope to reasonably protect such interest.

G. Employment Laws

1. Applicable Employment Laws

The Employment Ordinance is the primary legislation governing employment conditions in Hong Kong. In the typical franchising arrangement, the franchisee will be a limited company (corporation). While the Employment Ordinance itself does not specify that an “employee” must be a natural person, section 3 of the related Occupational Safety and Health Ordinance defines an employee as “a natural person who works under a contract of employment or apprenticeship.”⁶² Thus, if the franchisee is a corporation, it will not be considered as an “employee” of the franchisor under Hong Kong law.

In the unlikely situation where the franchisee is a natural person, there is no single conclusive test to determine if the franchisee is an employee under the Employment Ordinance. An analysis similar to one used in U.S. practice is made. Factors such as control over work procedure and hours; provision of equipment, tools and materials; whether the person is carrying on business on his own account; investment and management responsibilities; the bearer of financial risk over the business; and other traditional tests will be applied to determine if an employer / employee relationship exists.

2. Effect on Franchising

Applying the factors discussed in Section G.1 above, it is unlikely that the franchisee will be considered an employee of the franchisor.

H. Privacy Laws

1. Applicable Privacy Laws

The primary legislation relating to privacy is the Personal Data (Privacy) Ordinance.⁶³ Its objective is to protect the privacy rights to personal data of a living person. “Personal data” is defined as information which may be accessed and processed about a living person that can be used to identify that person.

Before collection, a data subject must give consent and be notified of the purpose and to whom the data may be transferred. Only such personal data as is necessary should be collected. Collected personal data may only be used for the stated purpose for which the personal data is collected unless voluntary and explicit consent for the new purpose is obtained from the data subject.

⁶² Occupational Safety and Health Ordinance (Cap. 509), No. 39 of 1997, §3 (H.K.).

⁶³ Personal Data (Privacy) Ordinance (Cap. 486), No. 81 of 1995 (H.K.).

2. Effect on Franchising

Franchisors and franchisees need the consent of data subjects for the purpose of collecting the personal data and type of personal data collected, along with notifying the data subjects before collecting their personal data. Collected data may only be used for the purpose for which it is collected and steps must be taken to safeguard personal data from unauthorized or accidental access, processing, erasure, loss or use. They must ensure personal data is accurate and not kept longer than is necessary to fulfill the purpose for which it is used. A data subject has the right to access collected personal data and be able to correct any inaccuracies in the collected personal data.

I. Governing Law and Dispute Resolution

1. Governing Law

Contracting parties have freedom of contract to decide the law governing their relationship in the event of a dispute. Hong Kong courts will apply the stated governing law as agreed by the contracting parties. Where the parties' choice of applicable law is unclear, the Hong Kong courts would apply the law of the jurisdiction with which the transaction has its closest and most real connection. If the franchising activities are in Hong Kong, it is likely Hong Kong law will be applied.

2. Arbitration

The Arbitration Ordinance provides the legal framework for arbitration in Hong Kong⁶⁴. It is based on the "UNCITRAL Model Law on International Commercial Arbitration." The Hong Kong International Arbitration Centre is the local arbitration body designated as the appointing body for appointing arbitrators and determining the number of arbitrators where parties cannot agree.

Several major international arbitration institutions have a physical presence in Hong Kong. The International Court of Arbitration of the International Chamber of Commerce has a branch of its Secretariat in Hong Kong which serves ICC arbitration in the Asia-Pacific Region. The China International Economic and Trade Arbitration Commission established the CIETAC Hong Kong Arbitration Centre as its first office outside mainland China. The Permanent Court of Arbitration ("PCA") has signed a memorandum of administrative arrangements with the Government of Hong Kong to facilitate the conduct of PCA-administered arbitration in Hong Kong.

Hong Kong arbitral awards are enforceable in all State parties to the New York Convention. Hong Kong and the PRC have an arrangement for reciprocal enforcement of arbitral awards. Similarly, Hong Kong has an arrangement with Macao for reciprocal recognition and enforcement of arbitral awards.

3. Foreign Judgments

Under the Foreign Judgments (Reciprocal Enforcement) Ordinance, Hong Kong has reciprocal recognition and enforcement of judgments in civil and commercial matters with about fifteen jurisdictions.⁶⁵ A separate arrangement, "Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong

⁶⁴ Arbitration Ordinance (Cap. 609), No. 17 of 2010 (H.K.).

⁶⁵ Foreign Judgments (Reciprocal Enforcement) Order (Cap. 319A), L.N. 101 of 1968 at First Schedule and Second Schedule (H.K.).

Special Administrative Region,” was signed to recognize final judgments of specified Chinese courts in litigation between Hong Kong and mainland Chinese companies.⁶⁶

Foreign money judgments not covered by agreements are also enforceable under common law. A judgment creditor may bring an action to enforce the foreign judgment if the foreign judgment is a final judgment granted on its merits for a fixed sum by a “competent” court.

4. Injunctive Relief

Hong Kong courts may grant permanent and interlocutory injunctions. Interlocutory injunctions may also be given by ex parte application. In considering an application for an interlocutory injunction, a Hong Kong court will consider if there is a serious question to be tried and if the “balance of convenience” lies in favor of granting the injunction. Balance of convenience differs from “probability of success” in American law. Balance of convenience is a weighing of factors such as maintaining the status quo, strength of the parties’ respective cases, whether damages are an adequate remedy, and if the defendant is able to pay damages.

In granting an application for interlocutory injunction, a court may require the movant to give a monetary undertaking to protect the defendant in the event the defendant prevails. Unlike U.S. practice, Hong Kong law awards the prevailing party its legal fees in addition to compensation for damages so in setting the amount of undertaking, the court takes both potential damages and legal fees into account.

V. INDIA

A. Regulation of Offers and Sales of Franchises

1. Franchise Sales Laws

India does not have a franchise-specific law. The franchisor-franchisee relationships are governed by franchise agreement and various other laws, such as foreign exchange control regulations, anti-trust laws, intellectual property statutes, tax laws, data privacy laws, and anti-corruption laws.

The franchisor is not required to make any disclosures to the franchisee or register the offering with any government authority with respect to any grant sale, transfer, and renewal of a franchise business.

2. Government Agency Regulation

In absence of any franchise-specific law, India does not have a specific government agency to regulate franchise businesses.

B. Foreign Exchange Controls

1. Limits on Currency Conversion

The Foreign Exchange Management Act, 1999 (“FEMA”) and the rules and regulations framed under the FEMA, regulate financial transactions dealing with foreign exchange. The FEMA

⁶⁶ Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597), No. 9 of 2008 at §5 (H.K.).

and accompanying rules will be generally referred to below as foreign exchange control regulations. The foreign exchange control regulations are administered and enforced by the Reserve Bank of India (RBI), which is India's central bank.

Foreign exchange control regulations prescribe permissible and prohibited foreign exchange transactions, and certain conditions subject to which permissible transactions can be undertaken. As per prevailing foreign exchange control regulations, royalty, fee for technical services, management fee, administrative fee, service fee and other similar fees can be remitted to foreign franchisors without prior permission of the RBI. However, in certain special transactions, prior permission of the RBI may be required. For example, RBI approval may be required for remittances of money that are due beyond the maximum time prescribed for settlement of such payments; or for setting-off of payments due between parties.

2. Government Filing Requirements

Remitting foreign exchange from India is a comprehensive and time-consuming process. Before remitting money to foreign franchisors, Indian franchisees will have to comply with applicable tax regulations. The Indian franchisee must obtain a certificate from a qualified chartered accountant in India stating the amount of withholding taxes to be withheld on the payment to be made to the foreign franchisor. The Indian franchisee is also required to submit a declaration with the Indian Income Tax Department for all proposed remittances and taxes withheld. Only after the completion of aforesaid formalities, can the Indian franchisee make an application to its bank to remit payment to the foreign franchisor.⁶⁷

C. Taxes

1. Royalties

The Income-tax Act, 1961 ("IT Act") is the primary legislation governing income taxes. Under the IT Act, the Indian franchisees are required to deduct appropriate withholding tax on royalties to be paid to a foreign franchisor. Withholding tax should be deducted and deposited with the Income Tax department as soon the sum payable to the franchisor becomes due or at the time of actual payment, whichever is earlier.⁶⁸

2. Service Fees

Withholding tax will have to be deducted prior to remittance of technical service fees, advertising fees, business support fees, administrative fees and similar service fees that are generally payable under franchise agreements. The IT Act provides different withholding tax rates for different categories of services, such as such as fees for technical services, advertising fees, business support fees and administrative fees.

3. Double Taxation Treaties

India has entered into double taxation avoidance agreements with various countries, including the United States of America. The IT Act provides that withholding tax could be deducted at the rate prescribed in the IT Act, or the DTAA between India and the home country

⁶⁷ Income-Tax Rules, 1962, § 37BB (India).

⁶⁸ The Income Tax Act, 1961 (Act no. 43 of 1961) § 195 (India).

of the foreign resident, whichever is more beneficial to the foreign resident.⁶⁹

As the IT Act and DTAA prescribe different withholding tax rates for different categories of services, parties must analyze both the IT Act and the DTAA to determine the actual rate of withholding tax for each type of services.

4. Gross-Up Provisions

Indian laws do not prohibit grossing up. The foreign franchisor may contractually agree with the franchisees to increase the payments to offset the withholding taxes that are to be deducted by the franchisees on royalty, technical fee, advertisement fee, management fee and other similar fees.

D. Franchise Relationship Laws

1. Defaults, Termination, and Nonrenewal

In absence of franchise specific laws in India, the conditions relating to termination, renewal and defaults will be governed by the contract as well as the substantive law of the contract.

If an agreement is governed by Indian law, the Indian Contract Act, 1872 (“ICA”) may apply. The ICA recognizes the rights of parties to decide the tenure of an agreement; and terms and conditions relating to renewal, termination and default of a contract. The ICA does not prescribe any maximum or minimum tenure for a valid agreement.

2. Laws Regulating Unfair Contract Terms

The ICA, which deals with general principals of a valid agreement, requires that a contract should be entered between legally competent parties out of their free consent for lawful objects and considerations.⁷⁰ Agreements that are based on coercion, misrepresentation, fraud and undue influence are voidable at the option of parties, which is subject to coercion, misrepresentation, fraud and undue influence.⁷¹

The ICA also provides that a contract which takes away the right of a party to (a) carry out lawful trade or profession; (b) marry a person of choice; or (c) enforce its legal rights in a court of law, shall be void to that extent.⁷²

E. Trademark Requirements and Licensing Considerations

1. Trademark Registration

Trademarks Act 1999 (“Trademarks Act”) regulates registrations of trademarks in India. The registration of trademarks is administered by the Trademark Registry set-up under the Trademarks Act in the cities of Ahmedabad, Chennai, Delhi, Kolkata, and Mumbai. Foreign

⁶⁹ Id. at § 90 (2)1.

⁷⁰ Indian Contract Act, No. 9 of 1872, § 10 (India).

⁷¹ Id. at §§ 15–18.

⁷² Id. at §§ 26–28.

individuals and organization can file applications for registration of trademarks through their lawful representatives in India.

On registration of a trademark, the Trademark Registry will issue a certificate of registration with a validity of 10 years from the date of grant of the certificate. The certificate of registration may be renewed for multiple terms for 10 years each.⁷³

It is not mandatory in India to register a tradename forming part of a franchise business. However, it is advisable that a foreign franchisor registers a tradename to avoid any ownership claim from its franchises or any third party.

2. Trademark License Registration

The Trademarks Act does not make it mandatory to have a separate agreement for licensing of a tradename or to have the same registered with the Trademark Registry. The conditions for licensing of a tradename could form a part of the franchise agreement.⁷⁴

F. Competition Laws

1. Prohibition on Common Franchisor Practices

The Competition Act, 2002 (“Competition Act”) is the primary anti-trust legislation in India. As per the Competition Act, enterprises or persons at different stages or levels of the production chain should not enter into agreement for production, supply, distribution, storage, acquisition or control of goods or provision of services if such agreement will cause appreciable adverse effect on competition. Specifically, exclusive supply agreements; exclusive distribution agreements; agreements for refusal to deal; or agreements for resale price maintenance between enterprises or persons at different stages or levels of the production chain, will be declared void if they cause appreciable adverse effect on competition.⁷⁵

The restrictions that are commonly imposed on franchisees under a franchise arrangement are not per se deemed as anti-competitive if such restrictions are reasonable and are intended to promote the quality standard, efficiency and uniformity of a franchise system. However, in cases where a complaint is filed before the Competition Commission of India alleging that a franchise arrangement is anti-competitive, the reasonableness of the restrictions contained in that franchise agreement and its net effect on the competition, will be decided by the Competition Commission on case-by-case basis.

2. Restrictive Covenants

Restrictive covenants relating to non-disclosure of confidential information, non-compete provisions, and non-solicitation restrictions are common in franchisee agreements. These restrictions are aimed at protecting the franchisor’s trade secrets and goodwill in the franchise business.

Under Indian law, non-compete restrictions on the franchisee and its owners during the

⁷³ Id. at § 57.

⁷⁴ Id. at § 49.

⁷⁵ The Competition Act, 2002, No. 12 of 2003, § 4.

term of the franchise agreement are generally considered enforceable.⁷⁶ However, the enforcement of non-compete restrictions extending beyond the term of the franchise agreement could be a challenge where such restraint imposes undue restriction on the personal freedom of the Indian franchisees and their owners.⁷⁷

The reasonable restrictions relating to non-disclosure of confidential information, and non-solicitation restrictions are enforceable in India both during the term of a franchise agreement and after its termination. Such restrictions could also be extended to employees of franchisees.⁷⁸

G. Employment Laws

1. Applicable Employment Laws

Employment laws of India are contained in various legislation enacted by the central and various state governments. Some of the major labor legislation include the Industrial Deputes Act, 1947, Maternity Benefits Act 1961, the Payment of Gratuity Act, 1972, the Payment of Wages Act, 1936 and the Employees' Provident Funds and Miscellaneous Provident Act, 1952.

2. Effect on Franchising

Under the applicable employment laws of India, generally the Indian franchisees will be solely responsible to their employees, and the foreign franchisors will not have any liability towards the employees of the Indian franchisee.

H. Privacy Laws

1. Applicable Privacy Laws

The Information Technology Act, 2000 and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("India Privacy Rules") regulate the collection, storage, processing and transfer of sensitive personal information of natural persons. Sensitive and personal information includes:

- a. password(s);
- b. financial information, such as bank account or credit card or debit card or other payment instrument details;
- c. physical, physiological and mental health condition;
- d. sexual orientation;
- e. medical records and history; and

⁷⁶ *M/S Gujarat Bottling Co. Ltd. & Ors. v. The Coca Cola Co. & Ors.*, AIR (1955) SC 2372 (India).

⁷⁷ Indian Contract Act, *supra* note 70, at § 27.

⁷⁸ *Wipro Ltd. v. Beckman Coulter Int'l*, 131 D.L.T. 681 (Jul. 11, 2006) (India); see also *Titus v. Adebare*, 130 D.L.T. 330 (May 8, 2006) (India).

f. biometric information.⁷⁹

The India Privacy Rules apply to Indian body corporates and individuals collecting, storing and processing or otherwise handling sensitive and personal information of natural persons. Foreign entities located outside India and involved in collection of such information are not covered under the India Privacy Rules.

The India Privacy Rules require that the Indian body corporate should (i) collect, process and use personal and sensitive information with prior consent of the owner of the information; (ii) use sensitive and personal information only for purpose for which the such information was collected; (iii) consent from an owner of personal and sensitive information should be obtained before disclosure of such information to a third party; (iv) an owner of personal and sensitive information has the right to check, modify and delete the personal information; (v) sensitive personal information should not be retained for longer than the purpose it is required; (vi) put in place adequate security practices and procedures notified by the Ministry of Electronics and Technology, namely the International Standard IS/ISO/IEC 27001 on Information Technology - Security Techniques - Information Security Management System – Requirements (ISO Standards).⁸⁰

2. Effect on Franchising

The India Privacy Rules apply to an Indian franchisee where the franchisee collects, stores, processes or transfers any personal and sensitive information in India. Although the India Privacy Rules do not apply to foreign entities, a foreign franchisor will have to comply with the security standards prescribed under the India Privacy Rules in order to receive any personal and sensitive information from its Indian franchisee.

I. Governing Law and Dispute Resolution

1. Governing Law

Indian law does not prohibit parties to a contract to incorporate foreign law as the governing law of the contract. Although there is no prohibition on Indian courts to adjudicate disputes arising under a contract governed by foreign laws, Indian courts are not typically comfortable exercising jurisdiction in cases calling for the application of foreign law, due to their unfamiliarity with foreign laws.

On average, it takes about three to seven years in disposal of a suit by the court of original jurisdiction and another one to three years in appeal cases.

2. Arbitration

The Indian Arbitration & Conciliation Act, 1996 (“Arbitration Act”) governs arbitration in India and enforcement of foreign arbitration awards. As per the Arbitration Act, the Indian courts would not interfere in matters where the parties have agreed in writing to refer their disputes to

⁷⁹ The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, § 3 (India).

⁸⁰ Id. at §§ 5 - 7.

arbitration pursuant to an arbitration agreement.⁸¹

The parties to an international franchise transaction may select a venue for resolution of disputes either in India or outside India. For foreign seated arbitration, the venue should be situated in any country that is a signatory to (i) the New York Convention, or (ii) the Geneva Convention on the Execution of Foreign Arbitral Awards (“Geneva Convention”), provided such country is also notified by the Indian Central Government. Currently, the Indian Government has notified fifty countries that are signatories to the New York Convention and the Geneva Convention.

Parties are also free to choose and incorporate the substantive law of any country that would govern the agreement.⁸²

A foreign arbitration award will be enforceable in India only if the arbitration tribunal is situated in a country which is a signatory to the New York Convention or the Geneva Convention and also notified as a reciprocating territory by the Government of India. The enforcement of a final and binding foreign arbitration award could be challenged in India on certain limited grounds, namely⁸³:

- a. the parties to the agreement were under some incapacity under the laws applicable to them;
- b. the parties against whom the award is to be invoked were not given proper notice of the appointment of arbitration, or of the arbitration proceedings, or were unable to present their case;
- c. the award deal with matters that were not submitted to arbitration or outside the scope of the arbitration agreement;
- d. the composition of the arbitral tribunal, or the arbitral procedure, is not in accordance with the agreement or the law of the country where the arbitration took place;
- e. the award has not become binding or has been set aside by competent authority of the country in which, or under the law of which, the award was made;
- f. the subject matter of the dispute is not capable of settlement by arbitration under Indian law; or
- g. enforcement of the award would be contrary to the public policy of India, which is very narrowly interpreted.

For arbitrations seated in India, both the arbitrator and the jurisdictional court have the power to grant appropriate interim relief to a party. A party can seek interim relief in the form of a

⁸¹ The Arbitration and Conciliation Act, No. 26 of 1996, §§ 8, 45, 54.

⁸² Id. at § 28(1)(b).

⁸³ Id. at § 48.

temporary injunction, or an order for detention, inspection, and preservation of any property that is the subject matter of a dispute.⁸⁴ In respect of a foreign venue for international commercial arbitration, Indian courts can provide appropriate interim relief pending the arbitration proceedings, provided the arbitration agreement expressly provides that the parties will have the right to approach Indian courts to seek interim relief.⁸⁵

3. Foreign Judgments

A judgement passed by a foreign court can be enforced in India only if the judgement is 'conclusive' and is passed by a 'superior court' situated in 'reciprocating territory'.⁸⁶ A 'reciprocating territory' means a foreign country which is notified as a reciprocating territory by the Government of India for the purpose of enforcement of foreign judgments. At present, only 13 countries have been notified by the Indian government as reciprocating territories for this purpose.⁸⁷ The term 'Superior Courts' means courts situated in the reciprocating territory, which are notified as superior courts by the Government of India.⁸⁸ A foreign judgment will be considered "inconclusive" by Indian courts if⁸⁹:

- a. it is not pronounced by a court of competent jurisdiction;
- b. it is not given on the merits of the case;
- c. it is based on an incorrect view of international law or the law of India;
- d. it is granted in a proceeding that was against the natural justice;
- e. it is obtained by fraud;
- f. it is founded on a breach of any law in force in India; or
- g. if any appeal is pending against it in a foreign court.

Unlike judgments from a reciprocating territory, a foreign judgment passed by a court situated in a non-reciprocating territory cannot be enforced in India directly. A party desiring to enforce a foreign judgment passed by a court situated in a non-reciprocating territory will have to file a fresh civil suit in India with the foreign judgments as a supporting evidence.

⁸⁴ Id. at §§ 9, 17.

⁸⁵ Id. at § 2(2).

⁸⁶ The Code of Civil Procedure, No. 05 of 1908, CODE CIV. PROC. (1908), § 44A (India).

⁸⁷ See Naresh Thacker & Rhia Marshall, *Litigation: Enforcement of foreign judgments in India*, Lexology, (July 2, 2018), <https://www.lexology.com/library/detail.aspx?g=681612a7-f920-4ad5-8fbb-c37912bb8644> (providing that reciprocating territories include the following nations: United Kingdom, Aden, Fiji, Singapore, the United Arab Emirates, Malaysia, Trinidad and Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua and New Guinea and Bangladesh).

⁸⁸ The Code of Civil Procedure, *supra* note 86, at § 44A, Explanation II.

⁸⁹ Id. at § 13.

4. Interim Relief

Indian courts award interim relief in the form of an injunction, attachment of property, and award of security deposit where it is crucial to prevent the right of plaintiff.⁹⁰ The plaintiff seeking a temporary injunction will have to prove that (i) the disputes between the parties are bona fide; (ii) there is a prima facie case and balance of convenience in the plaintiff's favor; and (iii) the plaintiff would suffer an irreparable injury if interim injunction is not granted.⁹¹ A perpetual injunction is granted to a plaintiff to prevent breach of an obligation existing in the plaintiff's favor.⁹² A perpetual injunction is granted only after final hearing of a case on the merits.⁹³

VI. INDONESIA

A. Regulation of Offers and Sales of Franchises

1. Franchise Sales Laws

The Indonesia franchise law consists of the Indonesia Government Regulation No. 42 of 2007, and its implementation regulation, Regulation of the Minister of Trade No. 53/M-DAG/PER/8/2012 on the Implementation of Franchising ("Regulation 53") as amended by Regulation of the Minister of Trade No. 57/M-DAG/PER/9/2014 ("Regulation 57") (collectively, the "Indonesia Franchise Regulations"). Also, specific related regulations have been issued by the Minister of Trade: (i) Minister of Trade Regulation No. 68/M-DAG/PER/10/2012 concerning Franchising for Modern Store; (ii) d Minister of Trade Regulation No. 60/M-DAG/PER/9/2013 concerning Obligations on the Use of a Franchise Logo; (iii) Minister of Trade Regulation No. 58/M-DAG/PER/9/2014 concerning Partnership Development in Franchising for Food and Beverage Services; and (iv) Decision of the Director General of Domestic Trade No. 16/PDN/KEP/3/2014 concerning Technical Guidelines for Franchise Implementation and Monitoring.

Regulation 53 provides that a "franchise" must fulfill the following criteria:

- a. have specific business characteristics;
- b. prove to be a profitable business by showing over five years of franchise experience;
- c. have a system that is easy to learn and apply;
- d. be easy to teach and apply;
- e. provide continuous support to the franchisee; and
- f. have a registered trademark or other registered intellectual property

⁹⁰ Id. at § 94.

⁹¹ *Law of Injunctions: Temporary Injunction including ex-parte temporary injunction, Perpetual Injunction and mandatory injunction*, MAHARASHTRA JUDICIAL ACADEMY AND INDIAN MEDIATION CENTRE AND TRAINING INSTITUTE (2015), [http://mja.gov.in/Site/Upload/GR/Summary%20-%20%20workshop%20dt.%2018.01.2015.\(Civil\).pdf](http://mja.gov.in/Site/Upload/GR/Summary%20-%20%20workshop%20dt.%2018.01.2015.(Civil).pdf)

⁹²The Specific Relief Act, No. 9 of 1963, INDIA CODE (1963) § 38 (1) (India).

⁹³Id. at § 37 (2).

right.⁹⁴

Under the Indonesia Franchise Regulations, a franchisor must provide a pre-sale disclosure document disclosing its business data and other information to a prospective franchisee at least two weeks before execution of the franchise agreement.⁹⁵ This is to give the franchisee sufficient time to review the information to decide whether or not to engage in the franchise arrangement, to consider the reputation and goodwill of the franchisor and to ensure that the prospect fully understands the franchisor's rights and obligations.

The Indonesia Franchise Regulations require that a franchisor obtain a Franchise Registration Certificate (called a "Surat Tanda Pendaftaran Waralaba – Pemberi Waralaba" or "STPW") from the Ministry of Trade of the Republic of Indonesia ("MOT") before providing the disclosure document to a prospective franchisee. The requirements for obtaining the STPW (including, registering the franchise agreement and disclosure document with the MOT) are discussed in Section 2 below.

The disclosure document must include the following information:

- a. the identity of the franchisor, covering information provided in the identity cards or passports of shareholders, commissioners and board of directors (if the franchisor is a business entity);
- b. the business legality of the franchisor, covering information on the franchisor's business license;
- c. the business history of the franchisor, covering information regarding the establishment of the franchisor, business activities and the development of the franchisor's business;
- d. the organizational structure of the franchisor, covering the management hierarchy, from commissioners, shareholders and board of directors to the organizational structure of the operating division and its franchisees;
- e. the audited financial statements for the past two years;
- f. the number of franchise businesses, covering the number of outlets owned by the franchisor;
- g. the list of franchisees; and
- h. the rights and obligations of:
 - i. the franchisor, such as the right to receive royalties and the obligation to provide continuous assistance to the franchisee; and
 - ii. the franchisee, such as the right to use the franchisor's

⁹⁴ Regulation 53, at art. 2(1).

⁹⁵ Id. at art. 4(1).

intellectual property rights or business characteristics and the obligation to keep confidential the intellectual property rights and business characteristics.⁹⁶

2. Government Agency Regulation

In order to engage in franchise transactions in Indonesia, both the franchisor and franchisee must each hold their own business licenses (i.e. franchisor's STPW and franchisee's STPW). Pursuant to Government Regulation No. 24 of 2018 on Electronic Integrated Business Licensing Services, passed on June 21, 2018, prior to applying for the STPW, franchisors (both foreign and domestic) need first apply for a Business Identification Number ("Nomor Izin Berusaha" or "NIB") through an Online Single Submission ("OSS") system.

The NIB includes information about the business, such as the authorized representative's name, passport number, address, country of origin, telephone number and e-mail address. The OSS system is also utilized to obtain STPWs. The STPW issued by the OSS system will state that it will be effective upon verification of the requirements under the Indonesia Franchise Regulations. As such, since the authority in charge for the franchise business is the MOT, the applicant must also submit certain documents to the MOT for verification. If the documents are in order, the MOT will send a notification to the OSS system to validate the STPW to become effective.

The following are the required documents to be verified by the MOT.

No.	Document	English Version	Indonesian Version	Indonesian Sworn Translation	Remarks
1.	STPW Application Form	-	√	-	-
2.	Disclosure Document	√	-	√	Must be legalized by a notary public and authenticated by the Indonesian Embassy in the home country of the franchisor.
3.	Statement Letter/Reference Letter Issued by the Relevant Trade Attaché or Indonesian Consulate in Franchisor's Home Country	√	-	-	-
4.	Audited Financial Reports for the Last 2 Years	√	-	√	-
5.	Business License and/or Technical License of Franchisor	√	-	√	Applicable only if required in the home jurisdiction of the franchisor.

⁹⁶ Regulation 53, Attachment I.

No.	Document	English Version	Indonesian Version	Indonesian Sworn Translation	Remarks
6.	Deed of Establishment/ Certificate of Incorporation of Franchisor	√	-	√	-
7.	Company Group Chart or Organizational Structure	√	-	√	-
8.	Indonesian Trademark Certificates/Application Forms	-	√	-	Copies of the trademark certificates attached to the application must match the trademarks listed in the franchise agreement and the business under franchise.
9.	Power of Attorney	√	√	-	<p>A Power of Attorney is required if the application is submitted by a local counsel.</p> <p>The Power of Attorney must be signed by a person authorized to represent the franchisor under its by-laws, legalized by a notary public and further authenticated by the Indonesian Embassy in the home jurisdiction of the franchisor.</p>
10.	Passport of Franchisor's Representative	√	-	-	-
11.	Information on the Personnel to be Employed	√	-	√	No specific format is required by the MOT. Should provide an understanding of the positions required to be filled for the franchise business to operate.

No.	Document	English Version	Indonesian Version	Indonesian Sworn Translation	Remarks
12.	Information on the Composition of the Franchised Goods/Raw Material	√	-	√	No specific format is required by the MOT. Should provide an understanding of the elements used in the franchise business to meet the 80% requirement for the use of locally produced goods/services for raw materials, business equipment and sales.
14.	A Copy of the Franchise Agreement	√	-	√	A draft of the Franchise Agreement must be included in the STPW Application.

As noted in the above chart, among other things to file for registration with the MOT, the disclosure document needs to be notarized and legalized. Indonesian Franchise Regulations also require that certified translation of the disclosure document be prepared; a sworn Indonesian translation of the franchise agreement may also be provided although an unofficial version is sufficient in practice.

Under the Indonesia Franchise Regulations, a franchisor will be served with up to 3 written warnings for not complying with the disclosure and franchise registration requirements. Further, the franchisor will be fined up to IDR100,000,000 if it fails to respond to the registration requirements warnings within 2 weeks of the expiration of the third warning.⁹⁷

B. Foreign Exchange Controls

1. Limits on Currency Conversion

Indonesia has limited foreign exchange controls. Any movement of foreign currency worth USD10,000 or more must be reported to Bank Indonesia, which is Indonesia's central bank, by the facilitating bank in Indonesia. In addition, Bank Indonesia must obtain the supporting documents for the transaction underlying the outgoing transfer in foreign currency from its customer or the foreign party if they wish to purchase foreign currency against the Indonesian rupiah, if the total amount exceeds USD100,000 (or its equivalent in other currencies) per month per customer.

2. Government Filing Requirements

There are no other franchise filing requirements other than stated above in Section A.

⁹⁷ Regulation 53, at art. 32.

C. Taxes

1. Royalties

Indonesian income tax is collected primarily through a system of withholding taxes. If a particular item of income is subject to withholding tax, the payor is generally held responsible for withholding or collecting the tax on that item. Indonesian franchisees must withhold tax from payments to foreign franchisors at a basic rate of 20%. If the recipient is resident in a country that has a tax treaty with Indonesia, the withholding tax rate may be reduced or exempted.

2. Service Fees

VAT is levied on supplies of goods and services within the Indonesian customs area and those imported into the customs area. VAT also applies to services performed abroad but consumed in Indonesia. Therefore, VAT is payable on the provision of services by the franchisor to the franchisee, regardless of the place of performance. The general VAT rate is 10%.

3. Double Taxation Treaties

Indonesia has a double tax treaty with the United States of America.⁹⁸ According to the agreement, the basic rate for royalties is maximum at 10%. To enjoy such facility under the treaty, a US company must have a Certificate of Domicile, which the Indonesian company (the franchisee) must then submit to the Indonesian Tax Authority. The franchisor is not required to submit their tax residency certificates.

4. Gross-Up Provisions

Gross-up provisions are possible but whether they are included will depend on the agreement between the parties.

D. Franchise Relationship Laws

1. Defaults, Termination, and Nonrenewal

Regulation 53 regulates early termination of the franchise agreement by the franchisor. Specifically, a franchisor may not appoint a new franchisee within the same territory before the franchisor and the franchisee reach a "clean break" or there is a final and binding court ruling to solve the dispute between the franchisor and the franchisee.⁹⁹ Regulation 53 also regulates that the franchisor cannot appoint one of its subsidiaries or affiliates as its franchisee either directly or indirectly in Indonesia.

Other than the above, the Indonesia Franchise Regulations are silent on the procedure regarding transfers, terminations and non-renewals of the franchise agreement. Therefore, these matters are contractually regulated under the franchise agreement between the parties.

⁹⁸ Convention Between the Government of the Republic of Indonesia and the Government of the United States of America (as amended by 1996 Protocol) for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, at art. 13(2) (Note that according to the Double Tax Treaty between Indonesia and the U.S.A, the rate of tax imposed by a contracting state on royalties derived from sources within that contracting state and beneficially owned by a resident of the other contracting state shall not exceed 10% of the gross amount of royalties.)

⁹⁹ Regulation 53, at art. 8.

2. Laws Regulating Unfair Contract Terms

Regulation of the Business Competition Supervisory Commission No. 6 of 2009 of 7 December 2009 on the Guidelines on Exclusions from the Implementation of Law No. 5 of 1999 on the Prohibition of Monopolies and Unfair Business Practices in Relation to Agreements Related to Franchising indicates areas of concern to be observed when drafting franchise agreements. These requirements are further discussed in Section F below.

E. Trademark Requirements and Licensing Considerations

1. Trademark Registration

The trademarks to be used in the franchised business must be registered (or an application for their registration must be submitted) with the Indonesia Trademark Office. For each trademark application per class, the Indonesia Trademark Office requires the following:

- a. a Power of Attorney from the applicant if the application submitted by a proxy. The Power of Attorney must be signed by a person authorized to represent the entity in accordance with its by-laws.
- b. a written statement from the applicant that it is the rightful owner of the trademark and that the trademark is not a copy of a third party's trademark. The statement must be signed by a person authorized to represent the entity in accordance with its by-laws.
- c. a sample of the trademark without using the logo ® or ™. The logo ® or ™ is deemed public property and will be rejected by the Indonesia Trademark Office.

In theory, the procedure for the trademark registration until the certificate is issued will not take more than 1 year from the filing date of the application. However, in practice the process may take longer. Once the certificate is issued, the trademark will be legally protected for 10 years as of the filing date and may be renewed for the same period.

2. Trademark License Registration

Assuming that the trademark under franchise has been registered with the Indonesian Trademark Office, the license of the trademark should be registered with the Indonesian Trademark Office. A simple trademark license agreement to accommodate the registration is recommended, but not required.

F. Competition Laws

1. Prohibition on Common Franchisor Practices

According to the Business Competition Supervisory Commission Regulation No. 6 of 2009 on Guidelines on the Exemption from the Implementation of Law No. 5/1999 for Franchise Related Agreements (the "Anti-Monopoly Law"), a franchise is exempted from the competition

law.¹⁰⁰ Other laws or regulations may affect the franchise relationship (e.g., regulations on import activities, food and drink-related regulations such as food registration and halal certification, consumer protection laws, zoning rules, advertising restrictions, etc.). The following are several matters or areas that should be taken into account by the franchisor in order not create or result in monopolistic practices or unfair business competition:

a. **Resale Price**

A franchisor may not fix the sale prices to be charged to customers by its franchisee. From the Anti-Monopoly Law perspective, fixing sale prices may lead to price uniformity among franchisees, which results in customers having no choice. A franchise agreement containing a fixed sales price may be deemed to violate the Anti-Monopoly Law. However, the franchisor is allowed to recommend sale prices to its franchisee as long as the recommendation is not binding and mandatory.

b. **Procurement of Goods or Services from the Franchisor or its Appointed Supplier**

A franchisor may not require the franchisee to only procure goods or services from the franchisor or its appointed supplier.¹⁰¹ An exemption from the Anti-Monopoly Law may apply if the purpose of the restrictions is to protect the franchisor's reputation and to maintain the franchise. However, the franchisor may not prevent the franchisee from purchasing similar goods or services from other sources as long as they meet the standards set by the franchisor.

c. **Purchasing Other Goods and Services**

A franchise agreement that requires the franchisee to purchase goods and services that are not related to the franchise from the franchisor is not exempt from the Anti-Monopoly Law.

2. Restrictive Covenants

Following the termination or expiration of a franchise agreement, a franchisor may prohibit the franchisee from engaging in the same business as the franchisor. This restriction is acceptable under the Anti-Monopoly Law as long as the purpose is to protect the intellectual property rights of the franchisor or to maintain the reputation of the franchise, in particular, if the franchisor has transferred its know-how or knowledge or experience, expertise, or skill to the franchisee. Under the Anti-Monopoly Law, if the technology has entered the public domain and the investment made so far has not been significant, the noncompete period would normally be 1 year.¹⁰²

G. Employment Laws

1. Applicable Employment Laws

There are no special requirements under the employment laws that apply to a franchise relationship.

¹⁰⁰ Business Competition Supervisory Commission Regulation No. 6 of 2009 on Guidelines on the Exemption from the Implementation of Law No. 5/1999 for Franchise Related Agreements, at ch. I, s. A.

¹⁰¹ Id. at ch. III, s. 1(3).

¹⁰² Id. at ch. III, s. 1(8).

2. Effect on Franchising

Under Indonesia Law No. 13 of 2003 on Manpower, an employer is an individual, entrepreneur, legal entity, or other body which employs employees and pays them a salary or reward in some other form. Therefore, if an individual's salary is paid by the franchisee, that individual is considered to be an employee of the franchisee.

In addition, to minimize the risk of a franchisee's employee being deemed an employee of the franchisor, the franchisor must make sure that the relationship with the franchisee is that of an independent contractor, which is normally provided for in the franchise agreement. If the franchisee requires assistance from the franchisor's employees on a more permanent basis, the employees should ideally be employed by the franchisee.

H. Privacy Laws

1. Applicable Privacy Laws

There is no specific privacy law that applies to a franchise relationship. Minister of Communications & Informatics Regulation No. 20 of 2016 regarding the Protection of Personal Data in an Electronic System ("Regulation 20/2016") generally provides that consent of a data owner must be obtained in order to acquire, collect, display, publish, transmit, distribute, and/or access opening of, its personal data.

2. Effect on Franchising

Regulation 20/2016 provides that any party intends to conduct a cross-border transmission of personal data must coordinate with the authorized ministerial institution and comply with the prevailing laws and regulations. Further, the coordination with the ministerial institution must be conducted by way of:

- a. providing a personal data transmission plan to the authorized ministry containing, at minimum, the clear name of the receiving country, the recipient, the transmission date, and the purpose of the personal data transmission;
- b. requesting advice from the authorized minister or official, if necessary; and
- c. submitting the cross-border personal data transmission report.¹⁰³

I. Governing Law and Dispute Resolution

1. Governing Law

The Indonesia Franchise Regulations require that a franchise agreement must be governed by Indonesian law.¹⁰⁴ As a consequence, e.g., the Indonesian Civil Code will apply to the franchise agreement, including its principle of good faith. It also means that, while conducting

¹⁰³ Minister of Communications & Informatics Regulation No. 20 of 2016 regarding the Protection of Personal Data in an Electronic System ("Regulation 20/2016"), at art. 22.

¹⁰⁴ Regulation 53. at art. 5.

arbitration out of Indonesia is permissible for a cross-border franchise agreement with a foreign franchisor, such overseas arbitration will be more expensive and time-consuming because the agreement is governed by Indonesian law. Local courts will not adjudicate on disputes arising under a franchise agreement governed by laws of a foreign country.

2. Arbitration

Law No. 30 of 1999 on Arbitration and Alternative Disputes Resolutions (“Arbitration Law”) governs Indonesian Arbitration. Pursuant to New York Convention, offshore (outside of Indonesia) arbitration is permitted. The most popular international forum is the Singapore International Arbitration Centre, followed by the International Chamber of Commerce and the United Nations Commission on International Trade Law.

The Arbitration Law provides that the courts must refuse to be involved in the resolution of a dispute if the contracting parties have chosen arbitration for the settlement of disputes. Therefore, the choice of foreign arbitration in the agreement should not be challenged by an Indonesian court.

Indonesia is party to the New York Convention. The Central Jakarta District Court can enforce a foreign arbitration award if it is awarded by an arbitrator or a board of arbitrators in a country with which Indonesia is bound by a bilateral or multilateral agreement on the confirmation and implementation of foreign arbitration awards (e.g., the New York Convention). Enforcement is limited to awards related to commercial matters. However, in practice, the actual enforcement of an international arbitration award can be a difficult process and some foreign arbitral awards have failed due to uncertainties in the Indonesian judicial system. The failure rate has been reduced in recent years.

3. Foreign Judgments

In principle, Indonesian courts are not bound to enforce order or rulings handed down by foreign courts. A new lawsuit must be submitted to an Indonesian court, and such foreign court ruling may only be submitted as a reference in the lawsuit.

Nevertheless, a foreign arbitral award can be enforceable if it is registered in the Central Jakarta District Court.¹⁰⁵ Certain requirements and procedures should be complied with for enforcement of the foreign arbitral award.¹⁰⁶

4. Injunctive Relief

Indonesian courts may provide a provisional ruling instructing the disputing party to cease carrying out a certain act. However, generally, the request for such provisional ruling must be submitted by a plaintiff along with its lawsuit (or the defendant if the defendant files a counter-lawsuit) except for obtaining a provisional ruling due to the trademark infringement. Under the Supreme Court’s Regulation, certain procedures will apply for filing an application for a provisional ruling.

¹⁰⁵ Law No. 30 of 1999 on Arbitration and Alternative Disputes Resolutions, at art 66.

¹⁰⁶ Id. at arts. 66 – 69.

J. Other

1. Other Laws or Requirements

a. Local Content Requirements

Perhaps the most onerous requirement of the Indonesian franchise law is that franchisors and franchisees must use domestically produced goods and/or services for at least 80% of their raw materials, business equipment and sales. A statement confirming this must be attached to the disclosure document and franchise agreement registration form.¹⁰⁷

b. Cooperation with Local Enterprises

Franchisors must co-operate with small-scale and medium-scale enterprises as franchisees or suppliers if they are able to satisfy the franchisor's requirements.¹⁰⁸

c. Commercial Agency

Indonesia has a commercial agency or distributorship law is mainly regulated under the following ministerial regulation:

- i. Minister of Trade Regulation No. 11/M-DAG/PER/2006 on the Provisions and Procedures for Issuance of Agency Certificates of Registration or Distributors of Goods and/or Services; and
- ii. Minister of Trade Regulation No. 22/M-DAG/PER/3/2016 on the on General Provisions on the Distribution of Goods

However, according to Minister of Trade Regulation No. 22/M-DAG/PER/3/2016, Distribution Business Actors distributing Goods through a Franchising distribution chain must "comply with the laws and regulation in the field of Franchise." Given this, franchise arrangement does not subject to commercial agency or distributorship law.

2. Recent or Forthcoming Changes

According to recent unofficial discussions with the MOT, the Indonesia Franchise Regulation discussed above may be amended in the near future, although it is still unclear when the new regulation will be issued or what the changes will be. It is anticipated that the contemplated amendments to the Indonesia Franchise Regulation would be to simplify the franchise approval and registration process in order to attract foreign franchises by lifting some of the more onerous requirements (e.g., removal of the local sourcing requirement and shareholder restrictions).

3. Judicial or Enforcement Trends

Currently, many franchisees including a large number of well-known international brands (in particular, retail stores), have tried to circumvent the Indonesia Franchise Regulation

¹⁰⁷ Regulation 53, at art. 19.

¹⁰⁸ Regulation 53, at art. 20.

requirements in various ways. The most prominent of these methods is to state that the arrangement is a license or distribution/sales arrangement (a license arrangement does not fall under the franchise regime) and not a franchise. Nevertheless, a “disguised” franchise arrangement will still have regulatory implications which must be considered by the parties. For a retail business, the alternative arrangement may be feasible depending on how the agreement is drafted. However, it may be difficult to use such an arrangement in the food brand industry where stricter “do’s and don’ts” apply.

In practice, there is very little active enforcement of the Indonesia Franchise Regulation by the MOT. Normally, the enforcement would be in the form of written request from the authorities to the franchisor/franchisee to fix any violations and comply with the Indonesia Franchise Regulation, in particular the mandatory registration if this has not been done.

VII. JAPAN

A. Regulation of Offers and Sales of Franchises

1. Franchise Sales Laws

There is no uniform definition of a franchise in Japan, and therefore several overlapping regimes work to regulate the offer and sale of franchises in the country. First, the Medium and Small Retail Commerce Promotion Act (the “MSRCPA”) regulates franchises that fall within the definition of a “chain-store business”¹⁰⁹ or a “qualified chain-store business.”¹¹⁰ The MSRCPA is supplemented by the Ministerial Order to Implement the MSRCPA (the “Ministerial Order”). Under the MSRCPA, franchisors are required to disclose certain information to prospective franchisees prior to entering into an agreement governed by the MSRCPA.¹¹¹

Section 11 of the MSRCPA requires owners of a “chain-store business” or “qualified chain-store business” to provide a disclosure document to any prospective franchisee prior to executing a contract with that franchisee that falls into the category of a “chain-store business” or “qualified chain-store business”. Although the MSRCPA does not specifically mention whether disclosure is required prior to entering into a LOI with a prospective franchisee, the Japan Franchise Association¹¹² (the “JFA”) recommends that franchisors provide franchisees with required disclosure documents seven (7) days before entering into a franchise agreement. As such, franchisors are encouraged to adhere to this disclosure schedule with respect to documents relating to the franchise in order to avoid “fraudulent customer solicitation” as that term is defined

¹⁰⁹ Medium and Small Retail Commerce Promotion Act, Law No. 110 of 1973, art. 4, para. 5 (Japan) (the “MSRCPA”). The MSRCPA defines a chain-store business as “a business in which, according to standard contract, goods are continually sold, directly or by a designated third party, and assistance over the operation is continually given, principally to medium or small-sized retailers.” The MSRCPA and regulations promulgated thereunder apply only to medium or small-sized retailers, which are defined as retailers with one or all of the following characteristics “(a) its amount of the stated capital is 50 million yen or less, (b) the number of its permanent employees is 50 or less, or (c) it is an individual or a cooperative.” *Id.* at art. 2, para. 1.

¹¹⁰ *Id.* at art. 2A “qualified chain-store business” is defined as “any chain business the agreement for which includes clauses which permit its members to use certain trademarks, trade names or any other signs, and collects joining fees, deposits or any other money from the member when becoming a member.” .

¹¹¹ *Id.* at art. 11, para. 1.

¹¹² See *About JFA*, Japanese Franchise Association, <http://www.jfa-fc.or.jp/particle/110.html> (last visited May 13, 2019). The JFA is certified by the Ministry of Economy, Trade and Industry.

in the Antimonopoly Guidelines (as hereinafter defined).

MSRCPA disclosures include:

- a. the name and address of the franchisor;
- b. the amount of capital held by the franchisor;
- c. principal shareholders and officers of the franchisor;
- d. financial statements for the past three fiscal years;
- e. material litigation; and
- f. provisions relating to a franchisee's exclusive territory, royalties, post-term non-competition, confidentiality, other periodic payments, etc.¹¹³

Generally, the pre-signing disclosures mandated by the MSRCPA and the Ministerial Order provide background information on the franchisor and highlight the terms of the franchise agreement. Neither the MSRCPA nor the Ministerial Order impose any continuing disclosure obligations on franchisors with respect to current franchisees.

Second, franchisors may be required to comply with the Guidelines Concerning the Franchise System (the "Antimonopoly Guidelines") under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the "Antimonopoly Act").¹¹⁴ Paragraph 1(1) of the Antimonopoly Guidelines define a franchise as "a form of business in which the head office provides the member with the right to use a specific trademark and trade name, and provides coordinated control, guidance, and support for the member's business and its management . . . ; [i]n return, the member pays the head office." The Antimonopoly Guidelines require franchisors to disclose information concerning the franchise system similar to the disclosure required by the MSRCPA. Unlike the MSRCPA, though, the Antimonopoly Guidelines also provide general rules regarding the ongoing relationship between a franchisor and franchisee, such as provisions relating to selecting suppliers, amendments to the franchise agreement, and restrictions on pricing.¹¹⁵

Finally, as noted above, the JFA prescribes a set of voluntary principles and rules for franchisors. The JFA is a trade association comprised of major companies operating franchises. Although franchisors are not required to join the JFA under the MSRCPA, many franchisors choose to submit disclosure documents required by various laws to the JFA for review and adhere to the seven-day disclosure schedule recommended by the JFA.

Franchisors must also be sure to comply with any industry-specific laws or regulations if the industry in which the franchised business operates is so regulated.

¹¹³ INTERNATIONAL FRANCHISE SALES LAWS, *supra* note 2, at 271.

¹¹⁴ Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 1947, available in English at https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/franchise.pdf (last visited August 5, 2019) (Japan) (the "Antimonopoly Act").

¹¹⁵ *Id.* at para. 3.

2. Government Agency Regulation

The agency or agencies regulating a particular franchise relationship depends upon the regulatory regime under which the franchised business falls. For example, if a franchised business falls within the definition of a “chain-store business” or “qualified chain-store business,” then the MSRCPA applies and the Ministry of Economy, Trade and Industry regulates along with any other ministries that may regulate specific products sold by the franchised business. If a franchisor fails to comply with the MSRCPA, the Ministry of Economy, Trade and Industry may issue a recommendation to comply.¹¹⁶ If the franchisor fails to comply with the recommendation, then the Minister may disclose that fact to the public.¹¹⁷

The Japanese Fair Trade Commission (the “JFTC”) regulates with respect to the Antimonopoly Act and thus the Antimonopoly Guidelines issued thereunder. Finally, JFA may enforce voluntary rules such as the Japan Franchise Association Code of Ethics¹¹⁸ and the Voluntary Standard Regarding Disclosure and Explanation of Information to Prospective Franchisees.

B. Foreign Exchange Controls

1. Limits on Currency Conversion

There is no restriction on payments under a franchise agreement being made in United States Dollars. However, the Foreign Exchange and Foreign Trade Control Act¹¹⁹ (the “Foreign Exchange Act”) provides may require disclosure of certain inbound or outbound payments.¹²⁰ If the payments are required to be disclosed, then the franchisor must report the payments to the Bank of Japan prior to making or receiving those payments.¹²¹

2. Government Filing Requirements

Aside from the certain disclosure requirements set forth in the Foreign Exchange Act, franchisors are not required to make other governmental filings with respect to currency exchange.

C. Taxes

Many franchisors in Japan are organized as joint-stock companies. Joint-stock companies

¹¹⁶ MSRCPA, *supra* note 109, at art. 12, para. 1.

¹¹⁷ Antimonopoly Act, *supra* note 114, at para. 2. Note that franchisees may claim damages by alleging violations of the Antimonopoly Act or the Antimonopoly Guidelines and may obtain injunctions to stop violations. Franchisees may also bring claims with respect to general contract principles under the Civil Code. See *generally* Civil Code, Act No. 89 of 1896, arts. 95 - 96, 415, 709, <http://www.cas.go.jp/jp/seisaku/hourei/data/CC1.pdf> (last visited May 13, 2019) (Japan).

¹¹⁸ See Japan Franchise Association Code of Ethics, <http://www.jfa-fc.or.jp/particle/114.html> (last visited May 11, 2019).

¹¹⁹ Foreign Exchange and Foreign Trade Control Act, Act No. 228 of 1949, available in English at <https://www.stepto.com/images/content/2/4/v1/2444/4066.pdf> (last visited August 5, 2019) (Japan).

¹²⁰ *Id.* at art. 16, para. 1 (Providing that the “competent minister” with the power to determine whether payments from Japan to a foreign resident must be disclosed by examining “treaties and other international agreements which Japan has signed or when he/she finds it particularly necessary for making Japan’s contribution to international efforts for achieving international peace.”)

¹²¹ *Id.* at art. 16, para. 5.

are organized pursuant to the *Companies Act*¹²² and are required to pay corporate tax, corporate enterprise tax, corporation inhabitant tax, and consumption tax. Moreover, depending on the assets held by such an entity, franchisors may also be required to pay property and automobile taxes.

1. **Royalties**

While royalties paid to non-residents or foreign entities pursuant to a franchise agreement would generally be subject to a 20% withholding tax¹²³ in Japan, Japan and the United States are parties to a double taxation treaty, which is discussed below in Section C.3. Certain fees may also run afoul of the Antimonopoly Act or Civil Code as discussed below in Section F.1.

2. **Service Fees**

There is no restriction regarding the nature and extent of fees in Japan. Under the Income Tax Act and the Corporate Tax Act¹²⁴, withholding rates for the provision of training, manuals, or other “know-how” appear to be the same as those applicable to royalties as discussed above in Section C.1.

3. **Double Taxation Treaties**

Japan and the United States are parties to a double taxation treaty.¹²⁵ Pursuant to the terms of that treaty, non-residents or foreign entities may, upon application to the competent Japanese tax authority, obtain an exemption to the withholding tax mandated by the *Income Tax Act* or a reduction of that tax.

4. **Gross-Up Provisions**

As a general rule, gross-up provisions are enforceable in Japan. However, franchisors must be certain that such provisions comply with the Civil Code, MSRPCA and Ministerial Order, and the Antimonopoly Guidelines. For any franchises subject to the MSRPCA and the Ministerial Order, franchisors must disclose any gross-up provisions in the disclosure document and must explain to prospective franchisees the impact that such provision may have on the franchisee’s overall payment obligations during the term of the franchise relationship.¹²⁶ Gross-up provisions must also not be deemed unfair trade practices¹²⁷ under the Antimonopoly Guidelines.

D. **Franchise Relationship Laws**

The Antimonopoly Guidelines generally regulate the ongoing relationship between franchisors and franchisees. In addition, the Antimonopoly Act, the *Guidelines Concerning*

¹²² Companies Act, Act No. 86 of 2005 (Japan).

¹²³ Income Tax Act, Act No. 33 of 1965 (Japan).

¹²⁴ Corporate Tax Act, Act No. 34 of 1965 (Japan).

¹²⁵ Income Tax Convention, Japan–U.S., art. 28, July 9, 1972.

¹²⁶ MSRPCA, *supra* note 109, at art. 11. Failure to comply with this disclosure obligation may result in a Japanese court declaring the provision invalid.

¹²⁷ The Designation of Unfair Trade Practice, item 14, Anti-Monopoly Act, art. 19, provides a list containing general descriptions of activities that may be deemed unfair trade practices for which violators may be subject to punishment by the JFTC.

Distribution Systems and Business Practices under the Antimonopoly Act, the *Trademark Act*¹²⁸, the *Unfair Competition Prevention Act*¹²⁹, the *Act on Specified Commercial Transactions*¹³⁰, and general provisions of the Civil Code may apply. If the franchisor is a member of the JFA, then the voluntary rules promulgated by the JFA are also applicable.

1. Defaults, Termination, and Nonrenewal

Pursuant to the MSRPCA and Ministerial Order, the disclosure document provided to a franchisee must discuss the term, termination, and renewal requirements set forth in the franchise agreement.¹³¹ If the franchise agreement does not address termination, then the franchisor and franchisee may agree to terminate the agreement prior to the expiration of the term. Further, the franchisor may also terminate the franchise agreement if the franchisee breaches the terms of the agreement or otherwise defaults.¹³² Japanese courts have also elaborated a doctrine known as “the doctrine of the destruction of a mutual trust relationship.” Although originally created with respect to lease arrangements, this doctrine has been applied in the franchising context to restrict a franchisor’s ability to unilaterally terminate a franchise agreement where a violation of the agreement by the franchisee is not deemed sufficiently material to destroy the relationship of mutual trust.¹³³ The same general principles apply to termination by the franchisee, although Japanese courts generally err on the side of franchisee protection.

Franchisors may generally refuse to renew franchise agreements that are silent with respect to renewal. The franchisor’s ability to refuse renewal is less clear where the franchise agreement provides for automatic renewal. In such a case, the franchisor may be required to show “compelling circumstances which make it difficult to continue the agreement.”¹³⁴

2. Laws Regulating Unfair Contract Terms

As previously noted, the Antimonopoly Act and the Antimonopoly Guidelines regulate the franchise relationship, with other regimes coming into play depending on the nature of the allegedly unfair provision. If no other law applies, franchisees may bring general contract claims under the Civil Code.

Among other things, the Antimonopoly Act proscribes acts that fall within the definition of an unfair trade practice. To that end, the Antimonopoly Guidelines provide that franchise agreements, or individual provisions therein, may be deemed an “abuse of a dominant position” if: (a) the agreement or provision is more restrictive than is reasonably necessary for the operation of the franchised business; and (b) the franchisor holds a dominant position over the franchisee, i.e., that the franchisee is likely to accept the request, despite the fact that it may be extremely

¹²⁸ Trademark Act, Act No. 127 of 1959 (Japan).

¹²⁹ Unfair Competition Prevention Act, Act No. 47 of 1993 (Japan).

¹³⁰ Act on Specified Commercial Transactions, Act No. 57 of 1976 (Japan).

¹³¹ See Ministerial Order, s. 11 (Japan).

¹³² See *generally* Civil Code, arts. 541–543 (Japan). Note that liquidated damages provisions triggered by a breach or default are subject to scrutiny under at least the Antimonopoly Act and the Civil Code.

¹³³ If a franchisor has properly disclosed the termination provision by complying with the disclosure obligations of the MSRPCA and Ministerial Order, as well as the disclosure schedule recommended by the JFA, then Japanese courts may be less likely to apply the doctrine of the destruction of a mutual trust relationship.

¹³⁴ See *Hokka Tei case* (Nagoya District Court, Aug. 31, 1998). Please note that, as discussed in Section I below, the franchise agreement may also provide for arbitration.

disadvantageous, because the franchisee would face difficulties if the franchise agreement were to be terminated. The determination of whether a franchisor is in a dominant position with respect to the franchisee requires an analysis of factors including the disparity in business size between franchisor and franchisee; the level of the franchisee's dependence on the franchisor; the franchisor's status in the market; and the franchisee's ability to change to another trade partner (considering the term of the franchise agreement, liquidated damages, if any, and the amount of the initial investment). Examples of unfair trade practices may be unreasonably high fees or unreasonably restrictive supply covenants.

Franchisees may seek an injunction to stop an unfair trade practice. The Antimonopoly Guidelines allow the JFTC to issue a cease and desist order and mandate that the JFTC impose a surcharge on the franchisor if the practice continues.¹³⁵ The surcharge is calculated based on 1% of the franchisee's gross sales over the previous three years.

The Antimonopoly Act and the Antimonopoly Guidelines regulate the relationship between franchisor and franchisee. However, the Civil Code may serve as an avenue by which franchisees can bring general contract claims. Under the Civil Code, there is a general legal obligation to deal in good faith, which can affect the franchise relationship. Japanese courts are generally inclined to protect franchisees and may find agreements or particular provisions to be void as a matter of public policy.¹³⁶

E. Trademark Requirements and Licensing Considerations

1. Trademark Registration

Registered trademarks are afforded broad protection in Japan under the Trademark Act. Japan has adopted the first-to-file rule and, as such, it is important that prospective franchisors register trademarks prior to entering the Japanese market. Trademarks are registered upon application to the Japan Patent Office (the "JPO") and are effective for 10 years¹³⁷ from the date of registration.

2. Trademark License Registration

Once a trademark has been registered with the JPO, a franchisor can exercise its trademark rights and grant a license to use the trademarks (typically under the franchise agreement. Assuming the license to use the trademarks is not exclusive, the franchise agreement or separate trademark license agreement does not need to be registered with the JPO.

F. Competition Laws

1. Prohibition on Common Franchisor Practices

As previously noted, the Antimonopoly Act and, in some instances, the Unfair Competition Prevention Act, apply to franchise agreements. These laws prohibit restrictions on competition and prevents franchisors from abusing their potentially dominant bargaining position. Specifically,

¹³⁵ See Antimonopoly Act, *supra* note 114, at art. 20-5.

¹³⁶ See *Honke Kamadoya* (Kobe Dist. Ct., July 20, 1992). In the *Honke Kamadoya* case, the Kobe District Court found a liquidated damages provision to be contrary to public policy under Article 90 of the Civil Code.

¹³⁷ See *generally Trademarks*, JAPAN PATENT OFFICE, <https://www.jpo.go.jp/e/system/trademark/> (last visited May 14, 2019). Noting that the term may be renewed by making an applicable for renewal to the JPO.

the following clauses may be considered illegal: (a) unreasonably high or excessively unilateral fees; (b) requiring the franchisee to purchase products or raw materials only from the franchisor or a designated supplier without proper justification, such as quality control or protection of a trademark or trade secrets; (c) compelling a franchisee to offer discounts to customers; or (d) other unreasonable restrictions on the franchisee's business¹³⁸ Violations can result in damages, injunctions, fines (such as the surcharge discussed above in Section D.2.), or other penalties.

2. Restrictive Covenants

Non-competition provisions are generally permitted in Japan provided such provisions do not unreasonably restrict the franchisee's business (as noted above). Post-term non-competition covenants, however, are less likely to be deemed legal. Specifically, unless required to preserve trade secrets or otherwise to protect a franchisor's business, the Antimonopoly Guidelines stipulate that post-term non-competition provisions that last longer than 12 months may be considered illegal under the Antimonopoly Act. If a franchisee breaches a permissible non-competition provision, a franchisor may receive compensatory damages or obtain an injunction.

G. Employment Laws

1. Applicable Employment Laws and the Effect on Franchising

The *Labor Standards Act*¹³⁹ and *Labor Union Act*¹⁴⁰ generally apply to labor and employment considerations in the franchising context. The Labor Standards Act defines a "worker" as "one who is employed at an enterprise or office and receives wages therefrom, without regard to the kind of occupation."¹⁴¹ Individuals falling within the definition of "worker" receive protection under the Labor Standards Act. Courts generally analyze various factors in making the worker determination, including, but not limited to: (a) the level of freedom in choosing to accept or reject work or instructions on the same; (b) the level of oversight employed; (c) whether the individual bears expenses for equipment, facilities, etc.; and (d) whether the individual may employ another person to perform the services on his or her behalf.

In the franchising context, franchisors should be certain to structure the relationship such that the franchisee is an independent entity with the freedom to direct and employ individuals to conduct business with a relatively minimal level of oversight on the part of the franchisor. Although the franchisor provides guidance, know-how, and training to the franchisee, these aspects of the franchise relationship are fundamentally different from supervising in an employment relationship.¹⁴² In addition to ensuring that the franchisee or the employees of the franchisee are not defined as "workers" under the Labor Standards Act, franchisors should make clear to the franchisee and franchisee's employees that neither is an employee of the franchisor.

¹³⁸ See Antimonopoly Act, *supra* note 114, at arts. 2, 19 (Japan); see also Civil Code, art. 90 (Japan). One such example of an abuse of dominant bargaining position set forth in the Antimonopoly Guidelines is a situation in which a franchisor, without proper justification, forces a franchisee to trade only with the franchisor or related companies for products and raw materials.

¹³⁹ Labor Standards Act, Law No. 49 of 1947 (Japan).

¹⁴⁰ Labor Union Act, Law No. 174 of 1949 (Japan).

¹⁴¹ Labor Standards Act, *supra* note 139, at art. 9.

¹⁴² Yoshihiko Fuchibe & Kentaro Tanaka, *Japan*, THE FRANCHISE LAW REVIEW, Ed. 5, February 2018, <https://thelawreviews.co.uk/edition/the-franchise-law-review-edition-5/1159228/japan> (last visiting June 4, 2019).

Generally, franchisees are not considered to be workers under the Labor Standards Act.¹⁴³

The Labor Union Act defines a “worker” as “those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation.”¹⁴⁴ Workers under the Labor Union Act are granted protection by the right to collective bargaining. Notably, the analysis for making the worker determination under the Labor Union Act does not give as much weight to the fact that franchisees are independent entities. On March 13, 2014, the Okayama Labor Committee issued an order to Seven-Eleven Japan requiring it to comply with the labor union and to engage in collective bargaining. The Tokyo Labor Committee issued a similar order to FamilyMart on April 16, 2015. In both instances, the Central Labor Relations Commission, which is an independent agency supervised by the Ministry of Health, Labor and Welfare, later denied the franchisees the right to collective bargaining,¹⁴⁵ dismissing the former rulings by the labor relations commissions in Okayama and Tokyo. The Commission noted the discrepancy in bargaining power between franchisors and franchisees and called on the parties to seek a compromise, but ultimately found that the franchisees were independent operators and did not qualify as “workers” under the Labor Union Act.¹⁴⁶

Thus, it is important that franchisors entering the Japanese market are aware of both the Labor Standards Act and Labor Union Act and structure the franchise relationship so as to avoid franchisees falling under the definition of worker under both of those laws.

More generally, in a typical franchising arrangement, franchisees and employees of franchisees are not deemed to be employees of a franchisor. To ensure that franchisees and employees of franchisees are not considered to be employees of the franchisor, the franchisor should structure the franchising arrangement such that the franchisee is an independent entity. If the franchisor wishes to oversee the hiring process of employees of the franchisee, then the franchisor should ensure that candidates are aware that the franchisee, and not the franchisor, will be the employer.

H. Privacy Laws

1. Applicable Privacy Laws

The *Act on the Protection of Personal Information*¹⁴⁷ (the “APPI”) regulates privacy protection issues in Japan and the Personal Information Protection Commission (the “PPC”) acts as a supervisory governmental organization on issues of privacy protection. The APPI applies to the processing of personal information for business purposes and holds business operators responsible for any breaches or misuses of data. The APPI generally defines personal information as any piece of information that can be used, either alone or in combination with other pieces of information, to identify an individual. Personal information then becomes personal data

¹⁴³ Id.

¹⁴⁴ Labor Union Act, *supra* note 140, at art. 12.

¹⁴⁵ As of the date of writing, the franchisees plan to file an administrative suit with the Tokyo District Court challenging the decision. See *Commission Rules Convenience Store Owners Can’t Bargain Collectively with Chain Operators*, THE MAINICHI (March 16, 2019), <https://mainichi.jp/english/articles/20190316/p2a/00m/0na/009000c> (last visited June 4, 2019).

¹⁴⁶ Id.

¹⁴⁷ Act on the Protection of Personal Information, Act No. 57 of 2003 (Japan). Note that the APPI was amended effective as of May 30, 2017; see *generally Topics*, PERSONAL INFORMATION PROTECTION COMMISSION JAPAN <https://www.ppc.go.jp/en/> (last visited May 14, 2019).

once it has been stored in a database. The PPC directly contacts business operators violating the APPI and may issue administrative orders requiring operators to comply.¹⁴⁸

2. Effect on Franchising

As defined in the APPI, the term “business operators” includes companies offering goods and services in Japan, regardless of whether the company’s offices are outside of Japan.¹⁴⁹ Moreover, the APPI applies to any business operators maintaining a database of personal information despite the size of the database. To comply with the APPI, franchisors looking to operate in Japan should ensure that they have a privacy policy in place that provides for the specific uses of collected personal information as set forth in the APPI. Franchisors may wish to adopt a privacy policy as part of the franchise system to safeguard against franchisees that may have more lenient policies with respect to data privacy.

I. Governing Law and Dispute Resolution

1. Governing Law

Parties to a franchise agreement are generally free to stipulate the law governing the agreement.¹⁵⁰

2. Arbitration

Arbitration is generally recognized in Japan as a legitimate and viable means of dispute resolution. Furthermore, under the Arbitration Law¹⁵¹, Japanese courts are generally required to dismiss lawsuits brought under agreements that contain arbitration provisions.¹⁵² In 1961, Japan signed on to the New York Convention, which ensures that Japan will enforce the arbitral awards of tribunals in other signatory countries. Notably, though, the New York Convention contains an exception to enforcement of a foreign arbitral award under which a jurisdiction may refuse to enforce an award for reasons of public policy.¹⁵³ The term “public policy” was not defined in the New York Convention and therefore the manifestation of that term may vary from jurisdiction to jurisdiction.¹⁵⁴ The Japanese Supreme Court has not yet defined public policy under the Arbitration Law, however lower courts have applied a definition of “public policy or good morals”

¹⁴⁸ Id. at art. 34.

¹⁴⁹ Id. at art. 2.

¹⁵⁰ See Act on General Rules for Application of Laws, Act No. 78 of 2006, art. 7 (Japan).

¹⁵¹ Arbitration Law, Law No. 138 of 2003 (Japan).

¹⁵² Id. at art. 14. Note that Japanese courts need not adhere to this principle if: (i) when the arbitration agreement is null and void, cancelled, or for other reasons invalid; (ii) when arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement; or (iii) when the request is made by the defendant subsequent to the presentation of its statement in the oral hearing or in the preparations for argument proceedings on the substance of the dispute.

¹⁵³ “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country.” New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2)(b).

¹⁵⁴ See International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, *Report on the Public Policy Exception in the New York Convention*, October 2015, https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recognntn_Enfrcemnt_Arbitl_Awrdr/publicpolicy15.aspx (last visited June 4, 2019).

as a ground for setting aside arbitral awards. As of October 2015, Japanese court have used this exception on only three occasions, two of which were for procedural reasons and in one instance the award was not set aside.¹⁵⁵

3. Foreign Judgments

The Code of Civil Procedure¹⁵⁶ and the Civil Execution Act¹⁵⁷ require a foreign judgment to be “final and binding”¹⁵⁸ if it is to be recognized in Japan. As such, foreign orders for temporary injunctive relief, which are not final and binding, are not enforceable. As defined in the Civil Execution Act, a final judgment is a judgment rendered by a foreign court under a guarantee of procedural due process, regardless of the name, procedure, or format adopted by that foreign court.¹⁵⁹

4. Injunctive Relief

Under the Civil Provisional Remedies Act¹⁶⁰, franchisors are generally able to obtain injunctions from Japanese courts to stop franchisees from engaging in certain activity. As noted above, though, temporary injunctions issued by foreign tribunals are generally unenforceable per se in Japan.

VIII. MALAYSIA

A. Regulation of Offers and Sales of Franchises

1. Franchise Sales Laws

Franchises in Malaysia are regulated by the Malaysia Franchise Act 1998, which came into force in October 1999, and amended by the Franchise (Amendment) Act 2012, which came into force in January 2013 (collectively, the “Malaysia Franchise Act”). Also, the Malaysia Franchise (Forms and Fees) Regulations 1999 (amended by the Franchise (Forms and Fees)(Amendment) Regulations 2007). (the “Malaysia Franchise Regulations”), applies to all franchises operating in Malaysia.¹⁶¹

The Malaysia Franchise Act provides for the registration and regulation of franchises in Malaysia and applies to the sale and operation of any franchise in Malaysia. The sale and operation of a franchise is deemed to be in Malaysia where:

¹⁵⁵ Id.

¹⁵⁶ Code of Civil Procedure, Act No. 109 of 1998 (Japan).

¹⁵⁷ Civil Execution Act, Act No. 4 of 1979 (Japan).

¹⁵⁸ See Code of Civil Procedure, *supra* note 86, at art. 118; see also Civil Execution Act, *supra* note 157, at art. 24 (Japan).

¹⁵⁹ See Civil Execution Act, *supra* note 157, at art. 24.

¹⁶⁰ Civil Provisional Remedies Act, Act No. 91 of 1989 (Japan).

¹⁶¹ Malaysia exempts franchise transactions entered into prior to October 8, 1999 (when the Malaysia Franchise Act came into effect). See Malaysia Franchise (Exemption) Order 2004. In addition, under Section 58 of the Malaysia Franchise Act, the regulators may prescribe exemptions from the requirements under the Malaysia Franchise Act. To date, the only exemption on the application of the Malaysia Franchise Act that has been prescribed applies to the gas stations. See Malaysia Franchise (Exemption) Order 2001 (PU(A) 27/2001).

- a. an offer to sell or buy a franchise -
 - i. is made in Malaysia and accepted within or outside Malaysia; or
 - ii. is made outside Malaysia and accepted within or outside Malaysia; and
- b. the franchised business is operated or will be operating in Malaysia¹⁶².

The Malaysia Franchise Act requires that a franchisor provide a disclosure document and copy of the franchise agreement to a franchisee at least 10 days before the franchisee signs the franchise agreement¹⁶³. There is no requirement to provide a disclosure document prior to the signing of a LOI unless the definition of a “franchise” under Section 4 of the Malaysia Franchise Act is satisfied. There is no guidance as to the manner in which the disclosure document is to be provided to the franchisee (e.g., printed versus electronic form, or both).

The requirements for what must be included in the disclosure document are contained in Form 1 of the Second Schedule of the Malaysia Franchise Regulations. The form of disclosure document requires the franchisor to provide the following information:

- a. Background of the franchisor including business experience;
- c. Organizational chart of the franchisor;
- d. Whether or not there are any past or pending legal action in court, either criminal or civil, against the franchisor or any member of its board of directors;
- e. Types and amount of fees imposed on the franchisee, when such fees need to be paid;
- f. Initial investment of the franchisee for the operation of the franchised units;
- g. Obligations of the franchisee to purchase items or lease certain equipment from the franchisor and/or sources designated by franchisor, or in accordance with specifications provided by the franchisor;
- h. Financing arrangements and financial facilities;
- i. Obligations of the franchisor;
- j. Territorial rights;

¹⁶² Franchise Act 1998, as amended by the Franchise (Amendment) Act 2012 (“Franchise Act 1998”), § 3 (Malay.).

¹⁶³ Id. at § 15.

- k. Details as to trademarks and intellectual property;
- l. Whether the franchisee has to operate the franchised business full-time;
- m. Restriction on the sale of certain services and goods by the franchisee;
- n. Term, renewal, termination and modification of the franchise agreement;
- o. Information about the worldwide franchisee network of the franchisor;
- p. Audited financial statements for the past 3 financial years; and
- q. Awards or recognitions received by the franchisor, or organizations joined by the franchisor.

The franchisor's failure to timely provide the prospective franchisee with a copy of the disclosure document and franchise agreement at least 10 days before the franchise agreement is executed is punishable as criminal with a fine of not less than MYR10,000 (USD2,400) and not more than MYR50,000 (USD12,000), and for a second or subsequent offence, to a fine of not less than RM20,000 (USD4,800) and not more than MYR100,000 (USD24,000).¹⁶⁴

2. Government Agency Regulation

The Registrar of Franchises ("ROF"), under the Ministry of Domestic Trade and Consumer Affairs, is the regulatory authority that administers and enforces the Malaysia Franchise Act and Malaysia Franchise Regulations. Under the Malaysia Franchise Act:

- a. a local franchisor (and master franchisee of a foreign franchisor) must register its franchise with the ROF before it can operate a franchise business or make an offer to sell the franchise to any person¹⁶⁵; and
- b. a foreign franchisor who intends to sell a franchise in Malaysia or to any Malaysian citizen must first obtain the approval of the ROF¹⁶⁶.

In practice, the ROF requires that a foreign franchisor have at least 3 years' experience in the franchise business before it is permitted to grant a franchise in Malaysia.

The Malaysia Franchise Act requires both local and foreign franchisors to submit an application to the ROF for approval before franchising in Malaysia (i.e., before operating a franchised business or making an offer for sale of a franchise). The application is made *via* the ROF's online application portal and documents required include the following:

- a. Information disclosed in the section 54 application including:

¹⁶⁴ Id. at § 39(1).

¹⁶⁵ Id. at § 6(1).

¹⁶⁶ Id. at § 54.

- (i) company information;
 - (ii) infrastructure/technology used for business operations;
 - (iii) franchise business obligation (obligations of franchisor and franchisee);
 - (iv) territorial rights of franchise business; and
 - (v) franchise initial investment costs
- b. Documents submitted with the section 54 application, include:
- (i) the sample franchise agreement;
 - (ii) franchisor's audited financial statements for the past 3 financial years;
 - (iii) trademark certificates;
 - (iv) franchise brochures;
 - (v) pictures of prototype outlet;
 - (vi) a prototype outlet's management account that has been operating for at least 6 months to show that the outlet is financially viable; and
 - (vii) other supporting documents (e.g. the ROF has asked applicants provide their certificate of incorporation).

The ROF accepts English language documents, however, if the original documents are in any other language besides English and Malay, such documents would need to be translated for submission to the ROF.

Failure to comply with the registration requirements imposed on a local franchisor under section 6 of the Malaysia Franchise Act is punishable as a criminal offence with a fine not exceeding MYR250,000, and for a second or subsequent offence, to a fine not exceeding MYR500,000 (USD120,000).¹⁶⁷

Separately, failure to comply with registration requirements imposed on a foreign franchisor under section 54 of the Malaysia Franchise Act may result in the franchise agreement between the foreign franchisor and local franchisee rendered unenforceable and void for illegality. For actions founded on contract or common law tort, the action must be brought after the expiration of 6 years from the date on which the cause of action accrued.

Also, it is worth noting that before commencing the franchised business, franchisees of foreign franchisors must register the franchise with the ROF.¹⁶⁸ Franchisees of local franchisors

¹⁶⁷ Id. at § 6(2)

¹⁶⁸ Id. at § 6A.

(or local master franchisees) must register the franchise with the ROF within 14 days from the date of signing the franchise agreement.¹⁶⁹

B. Foreign Exchange Controls

1. Limits on Currency Conversion

Under the Foreign Exchange Administration Notice (Notice 4 – Payments)¹⁷⁰ published by the Central Bank of Malaysia, Malaysian residents are allowed to make payments in foreign currency to a non-resident for the purpose of payments under a franchise agreement. However, a resident is only permitted to make any payment in Malaysian Ringgit, in Malaysia, to a non-resident in certain prescribed circumstances:

- a. The settlement of a ringgit asset including any income and profit due from the ringgit asset;
- b. the settlement of trade in goods;
- c. the settlement of services, in any manner;
- d. income earned or expense incurred, in Malaysia;
- e. the settlement of a commodity murabahah transaction (i.e., sales contract with a markup) between a resident and non-resident participant undertaken through a resident commodity trading service provider;
- f. the settlement of reinsurance for domestic insurance business or retakaful for domestic (alternative to a reinsurance transaction) takaful business (insurance transaction similar to a guarantee) between a resident and a person licensed to undertake Labuan (a federal territory of Malaysia) insurance or takaful business;
- g. the settlement of a non-financial guarantee denominated in ringgit issued by a person licensed to undertake Labuan banking business in favor of a resident; or
- h. for any purpose between immediate family members.

2. Government Filing Requirements

Apart from the registrations required under the Malaysia Franchise Act, there are no other filing requirements specific to franchise businesses.

¹⁶⁹ Id. at § 6B.

¹⁷⁰ *Investment in Foreign Currency Assets*, Foreign Exchange Administration Notice (Notice 4 – Payments), http://www.bnm.gov.my/files/notices/Notice_4.pdf.

C. Taxes

1. Royalties

Under section 109 of the Income Tax Act 1967, where a resident franchisee makes certain prescribed payments to a non-resident franchisor, the franchisee must deduct withholding tax (currently 10% for royalties and 3% or 10% for contract payments) from such payment and pay that tax to the Director General of Inland Revenue Board Malaysia within 1 month after such payment has been paid to the non-resident franchisor.

2. Service Fees

The Service Tax Act 2018 ("Service Tax Act") provides for the charging, levying and collecting of service tax. Service tax shall be charged and levied on¹⁷¹:

- a. any taxable service provided in Malaysia by a registered person in carrying on his business; or
- b. any imported taxable service.

Taxable person, taxable service and total value of taxable service are prescribed in the First Schedule of the Service Tax Regulations 2018. The rate of service tax is 6% of the price, value, premium or takaful contribution of the taxable service determined in accordance with section 9 of the Service Tax Act (other than taxable service relating to credit card or charge card services)¹⁷².

Separately, under the Sales Tax Act, sales tax shall be charged and levied on all taxable goods imported into Malaysia by any person. Sales tax on any importation of taxable goods into Malaysia shall be levied and payable as if it were a customs duty or an excise duty and as if the imported taxable goods are dutiable and liable to customs duty or excise duty; and the Sales Tax Act shall be construed as one with the Customs Act 1967 and the Excise Act 1976 with regards to the import or export of goods including goods in transit and the movement of goods under customs control or excise control¹⁷³.

The rate of sales tax to be charged and levied shall be 10% on all goods except¹⁷⁴:

- a. goods which are included in any exemption order made under section 35 of the Sales Tax Act; and
- b. goods imported on or with any person entering Malaysia or in the baggage of such person and the goods are not for commercial use, excluding motor vehicles, alcoholic beverages, spirits, tobacco, cigarettes, tires and tube.

¹⁷¹ Service Tax Act 2018, §7 (Malay.).

¹⁷² Service Tax (Rate of Tax) Order 2018, Order 3 (Malay.).

¹⁷³ Sales Tax Act 2018, § 8 (Malay.).

¹⁷⁴ Sales Tax (Rates of Tax) Order 2018, para. 2(1) (Malay.).

2. Stamp duty

Under the Stamp Act 1949 (“Stamp Act”), stamp duty is payable on certain prescribed instruments as set out in the First Schedule to the Stamp Act¹⁷⁵. The amount of duty payable is calculated based on the nature of the instrument (e.g., the franchise agreement). For example, stamp duty for agreements not otherwise specifically charged with any duty under the First Schedule is currently MYR10; and stamp duty for service agreements is currently 0.1% of any sums of money relating to the service agreement¹⁷⁶.

3. Double Taxation Treaties

The Malaysia and United States governments have signed a limited double taxation treaty with respect to taxes on income of shipping and air transport enterprises between the two countries. As such, this treaty would not apply to taxes on royalties and services¹⁷⁷.

4. Gross-Up Provisions

In Malaysia, gross-up provisions are permissible.

D. Franchise Relationship Laws

The Malaysia Franchise Act regulates the relationship between franchisor and franchisee, key provisions in this regard include (among other matters):

- a. The franchisor must submit to franchisee a copy of the franchise agreement and disclosure documents at least 10 days before the franchisee signs the agreement with the franchisor¹⁷⁸.
- b. Prescribed matters to be included in a franchise agreement (which must be in writing) include but are not limited to¹⁷⁹:
 - (i) the name and description of the product and business under the franchise;
 - (ii) the territorial rights granted to the franchisee;
 - (iii) the franchise fee, promotion fee, royalty or any related type of payment which may be imposed on the franchisee, if any;
 - (iv) the obligations of the franchisor;

¹⁷⁵ Stamp Act 1949, § 4(1) (Malay.).

¹⁷⁶ Stamp Duty (Remission) (No. 4) Order 2010, Order 2(1) (Malay.).

¹⁷⁷ Agreement between the Government of Malaysia and the Government of the United States of America for Reciprocal Exemption with Respect to Taxes on Income of Shipping and Air Transport Enterprises between the Two Countries, available at <http://lampiran2.hasil.gov.my/pdf/pdfam/Usa.pdf>.

¹⁷⁸ Franchise Act 1998, *supra* note 162, at § 15(1).

¹⁷⁹ *Id.* at § 18(2).

- (v) the obligations of the franchisee;
 - (vi) the franchisee's rights to use the mark or any other intellectual property, pending the registration or after the registration of the franchise;
 - (vii) the conditions under which the franchisee may assign the rights under the franchise;
 - (viii) a statement on the cooling off period to be mutually agreed but shall not be less than 7 working days, during which the franchisee has the option to terminate the agreement¹⁸⁰;
 - (ix) a description of the mark or any other intellectual property owned or related to the franchisor which is used in the franchise;
 - (x) if the agreement is related to a master franchisee, the franchisor's identity and the rights obtained by the master franchisee from the franchisor;
 - (xi) the type and extent of assistance provided by the franchisor;
 - (xii) the duration of the franchise and the terms of renewal; and
 - (xiii) the effect of termination or expiration of the franchise agreement.
- c. A franchisor cannot unreasonably and materially discriminate between franchisees operating a franchise in the charges offered or made for franchise fees, royalties, goods, services, equipment, rentals or advertising services if such discrimination will cause competitive harm between the franchisees¹⁸¹.
- d. A franchise term cannot be less than 5 years¹⁸².
- e. A franchisee is required to provide a written guarantee to a franchisor that the franchisee, including its directors, the spouses and immediate family of the directors, and his employees¹⁸³:
- (i) cannot disclose to any person any information contained in the operation manual or obtained while undergoing training organized by the franchisor during the franchise term and for 2 years after the expiration or earlier termination of the

¹⁸⁰ Id. at § 18(4).

¹⁸¹ Id. at § 20.

¹⁸² Id. at § 25.

¹⁸³ Id. at §§ 26 – 27.

- franchise agreement;
 - (ii) cannot carry on any other business similar to the franchise business during the franchise term and for 2 years after the expiration or earlier termination of the franchise agreement;
- f. Obligations of the franchisor and franchisee:
- (i) A franchisor must give written notice about a breach of contract by a franchisee and allow the franchisee time to remedy the breach;
 - (ii) A franchisee must pay the franchise fees, royalty, promotion fees or any other payment as provided in the franchise agreement;
 - (iii) A franchisor must provide assistance to a franchisee to operate his business, such as the provision or supply of materials and services, training, marketing, and business or technical assistance; and
 - (iv) A franchisor and a franchisee must protect the consumer's interests at all times¹⁸⁴.

1. **Defaults, Termination, and Nonrenewal**

Under the Malaysia Franchise Act, no franchisor or franchisee may terminate a franchise agreement before the expiration date except for 'good cause'¹⁸⁵. 'Good cause' includes, but is not limited to-

- a. the failure of a franchisor or a franchisee to comply with any terms of the franchise agreement or any other relevant agreement entered into between the franchisor and franchisee; and
- b. the failure of a franchisor or the franchisee to remedy a breach within the period stated in a written notice for the breach to be remedied, which cannot be less than 14 days¹⁸⁶.

A franchisor or franchisee may terminate a franchise agreement for 'good cause' without the requirement of a notice and an opportunity to remedy the breach in the circumstances in which the franchisor or franchisee:

- a. makes an assignment of the franchise rights for the benefit of creditors or a similar disposition of the assets of the franchise to any other person;

¹⁸⁴ Id. at § 30.

¹⁸⁵ Id. at § 31(1).

¹⁸⁶ Id. at § 31(2).

- c. becomes bankrupt or insolvent;
- d. voluntarily abandons the franchised business;
- e. is convicted of a criminal offence which substantially impairs the goodwill associated with the franchisor's mark or other intellectual property; or
- f. repeatedly fails to comply with the terms of the franchise agreement¹⁸⁷.

A franchisee may, at his option, apply for an extension of the franchise term by giving a written notice to the franchisor not less than 6 months prior to the expiration of the franchise term. If the franchisee has applied for an extension, the franchisor must extend the franchise term unless the franchisee has breached the terms of the franchise agreement. A franchise agreement with the franchise term extended must contain conditions which are similar or not less favorable than the conditions in the previous franchise agreement.¹⁸⁸

2. Laws Regulating Unfair Contract Terms

The Consumer Protection Act 1999 (“CPA”) sets out provisions prohibiting unfair contract terms in a consumer contract¹⁸⁹. ‘Unfair term’ means a term in a consumer contract which, with regard to all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer¹⁹⁰.

The CPA applies to relationships between businesses and consumers and would not apply to a business-to-business (“B2B”) relationship such as that of a franchisor and franchisee.

E. Trademark Requirements and Licensing Considerations

1. Trademark Registration

Registration of a trademark gives the registered proprietor the exclusive right to the use of the trademark in relation to those goods or services, under Trade Marks Act 1976. For a trademark (other than a certification trademark) to be registrable, it must contain or consist of at least one of the following particulars:

- a. the name of an individual, company or firm represented in a special or particular manner;
- b. the signature of the applicant for registration or of some predecessor in his business;

¹⁸⁷ Id. at § 31(3).

¹⁸⁸ Id. at § 34.

¹⁸⁹ Consumer Protection Act 1999, Part IIIA (Malay.).

¹⁹⁰ Id. at § 24A(c).

- c. invented word or words;
- d. a word having no direct reference to the character or quality of the goods or services not being, according to its ordinary meaning, a geographical name or surname; or
- e. any other distinctive mark¹⁹¹.

Further, a name, signature or word which is not described in paragraph (a), (b), (c) or (d) above is not registrable unless it is shown to be distinctive¹⁹².

To register a trademark in Malaysia, an application may be made to the Intellectual Property Corporation of Malaysia (“MyIPO”). Registrations can be submitted online via MyIPO’s IP Online Portal¹⁹³. The application documents to MyIPO include:

- f. five copies of a completed TM5 (Application for Registration of a Mark) Form with the trademark affixed to each copy;
- g. one original copy of the statutory declaration by the officer of the applicant with the trademark affixed to it (the trademark size must not exceed 10 cm x 10 cm);
- h. if the registration is made by a company, one copy of the Notification of change in the Register of Directors, Managers and Secretaries from Companies Commission of Malaysia;
- i. one copy of priority date claim document (if necessary); and
- j. one copy of certified transliteration and translation if the trademark is in other than roman character form (if necessary)¹⁹⁴.

2. Trademark License Registration

There is no mandatory requirement to register the trademark license from the franchisor to the franchisee.

F. Competition Laws

1. Prohibition on Common Franchisor Practices

The Competition Act 2010 (“Competition Act”) prohibits:

- a. horizontal or vertical agreements between enterprises insofar as

¹⁹¹ Trade Marks Act 1976, § 10(1).

¹⁹² Id. at § 10(2)

¹⁹³ The MyIPO process flow chart can be found at: <http://www.myipo.gov.my/en/trade-marks-application-process-flowchart/?lang=en>

¹⁹⁴ *Applying for Trade Marks*, INTELLECTUAL PROPERTY CORPORATION OF MALAYSIA, <http://www.myipo.gov.my/en/apply-for-trade-marks/?lang=en>.

the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services¹⁹⁵; and

- b. an enterprise from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services¹⁹⁶.

The Competition Act applies to any commercial activity transacted outside Malaysia which has an effect on competition in any market in Malaysia¹⁹⁷. As such, where a franchise agreement has an effect on competition in any market in Malaysia, such agreement would be subject to the Competition Act.

2. Restrictive Covenants

The Malaysia Franchise Act contains provisions requiring the franchisee to provide a written guarantee to a franchisor that the franchisee, including its directors, the spouses and immediate family of the directors, and his employees cannot carry on any other business similar to the franchised business operated by the franchisee during the franchise term and for two years after the expiration or earlier termination of the franchise agreement¹⁹⁸.

The Malaysia Competition Commission (“MyCC”) has published a “Guide for Business”¹⁹⁹ which states: “Franchise agreements commonly contain provisions that prevent, restrict or distort competition such as exclusive or selective distribution provisions, non-compete clauses and restrictions on the use of intellectual property that is licensed under the franchise agreement. Usually, these provisions are designed to protect the brand reputation that has been built by the franchisor so that it can be justified, provided they are proportionate. That is, they do not go further than is required to protect the brand reputation.”²⁰⁰ As such, franchisors must ensure that it avoids provisions (such as post-term covenants) preventing, restricting or distorting competition that are disproportionate to protect the brand reputation.

G. Employment Laws

1. Applicable Employment Laws

The Employment Act 1955 and the Industrial Relations Act 1967 govern the relationship between employers and employees in Malaysia.

2. Effect on Franchising

Franchisees will not be treated as employees of the franchisor, unless the relationship is actually an employer-employee relationship disguised under a franchise agreement or

¹⁹⁵ Competition Act 2010, § 4(1) (Malay.).

¹⁹⁶ *Id.* at § 10(1).

¹⁹⁷ *Id.* at § 3(2).

¹⁹⁸ Franchise Act 1998, *supra* note 162, at § 27.

¹⁹⁹ Competition Act Guide for Business, MALAYSIA COMPETITION COMMISSION (September 2013), https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Competition-Act-2010-A-Guide-For-Business_0_1.pdf

²⁰⁰ *Id.* at 33.

independent contractor arrangement. Further, unless the worker or independent contractor arrangement amounts to an employer-employee relationship between the franchisor and workers in the franchisees' unit, the franchisor would not be considered a 'joint employer' with the franchisees.

H. Privacy Laws

1. Applicable Privacy Laws

There are no industry specific privacy laws applicable to a franchise relationship.

2. Effect on Franchising

The Personal Data Protection Act 2010 ("PDPA"), which is the personal data protection legislation of general application, would also apply to a franchise relationship. The PDPA regulates the processing of personal data of data subjects by data users (or 'data controller' under the EU GDPR) in commercial transactions. The PDPA applies to any person who processes; and any person who has control over or authorizes the processing of, any personal data in respect of commercial transactions. The PDPA applies to a person in respect of personal data if:

- a. the person is established in Malaysia and the personal data is processed, whether or not in the context of that establishment, by that person or any other person employed or engaged by that establishment; or
- b. the person is not established in Malaysia, but uses equipment in Malaysia for processing the personal data otherwise than for the purposes of transit through Malaysia²⁰¹.

The PDPA would apply to foreign franchisors not established in Malaysia if they use equipment in Malaysia for processing the personal data otherwise than for the purposes of transit through Malaysia.

The PDPA imposes obligations on data users and requires the processing of personal data to be in compliance with the Personal Data Protection Principles, namely:

- b. the General Principle;
- c. the Notice and Choice Principle;
- d. the Disclosure Principle;
- e. the Security Principle;
- f. the Retention Principle;
- g. the Data Integrity Principle; and

²⁰¹ Personal Data Protection Act 2010, § 2 (Malay.).

h. the Access Principle²⁰².

Further, the transfer of personal data outside Malaysia is prohibited unless to a jurisdiction approved by the Minister of Communications and Multimedia. As of September 2019, the Minister has yet to approve any such foreign jurisdiction. Personal data can be transferred outside of Malaysia where the data user has obtained the data subject's consent or where any other exceptions apply, including if the data user has taken all reasonable precautions and exercised all due diligence to ensure that the personal data will not be processed in any manner which, , would be a contravention of the PDPA²⁰³. This exception may be considered if there are standard operating procedures in the foreign jurisdiction on the processing of personal data which comply with the PDPA.

I. Governing Law and Dispute Resolution

1. Governing Law

There is no requirement for franchise agreements to be governed by local laws. Parties are free to select their own choice of governing law, and in practice this is usually the governing law of the franchisors' home country. Malaysian courts may adjudicate disputes arising under a franchise agreement governed by foreign law. However, the court would have to take cognizance of the foreign law. For this purpose, expert opinion of the foreign law may be sought to assist the court.

2. Arbitration

The Arbitration Act 2005 ("Arbitration Act") governs both domestic and international arbitration in Malaysia. International arbitral awards granted outside Malaysia are enforceable if they are issued from states that are parties to the New York Convention.

An arbitration award can be recognized as binding and be enforced by entry as a judgment in terms of the award or by action²⁰⁴. This is done by applying to the Malaysian High Court to register the award. Section 39 of the Arbitration Act prescribes grounds for refusing recognition of enforcement at the request of the party against whom it is invoked. These include:

- a. where that party proves to the High Court that:
 - (i) a party to the arbitration agreement was under any incapacity;
 - (ii) the arbitration agreement is invalid under applicable laws or under the laws of the State where the award was made;
 - (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

²⁰² Id. at § 5.

²⁰³ Id. at § 129.

²⁰⁴ Arbitration Act 2005, §38(1) (Malay.)

- (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
 - (v) the award contains decisions on matters beyond the scope of the submission to arbitration;
 - (vi) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- b. if the High Court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
 - (ii) the award is in conflict with Malaysian public policy.

3. **Foreign Judgments**

Foreign monetary judgments can be enforced in Malaysia under the Reciprocal Enforcement of Judgments Act 1958 (“REJA”) where:

- a. it is a judgment of a superior court, other than a judgment of such a court given on appeal from a court which is not a superior court;
- b. it is final and conclusive as between parties;
- c. there is payable a sum of money, not being tax or other charges of a like nature or in respect of a fine or other penalty; and
- d. being a judgment from a country or territory added to the First Schedule of the REJA²⁰⁵.

The countries in the First Schedule of REJA are:

- e. United Kingdom
- f. Singapore
- g. Hong Kong
- h. New Zealand
- i. Republic of Sri Lanka (Ceylon)
- j. India (excluding the State of Jammu and Kashmir, the State of Manipur, tribal areas of State of Assam, and scheduled areas of the States of Madras and Andhra) and

²⁰⁵ Reciprocal Enforcement of Judgments Act 1958, § 3(3) (Malay.).

k. Brunei Darussalam

The procedure to enforce a foreign judgment under REJA is provided under the Rules of Court 2012. The judgment creditor must apply by way of an originating summons supported by an affidavit to have the foreign judgment registered.

For judgments from countries not listed under REJA, the judgment creditor must enforce the foreign judgment under common law, i.e., by initiating fresh proceedings to first secure a judgment. The judgment creditor must file an originating summons supported by an affidavit exhibiting the foreign judgment in order to apply for a summary judgment from the Malaysian Courts.

4. Injunctive Relief

The Malaysian courts have the discretion to grant parties injunctions. In determining whether to grant an injunction, the judge must decide:

- a. is there a bona fide serious issue to be tried;
- b. where does the balance of convenience lie; and
- c. whether the plaintiff has given an undertaking in damages.

IX. PAKISTAN

A. Regulation of Offers and Sales of Franchises

1. Franchise Sales Laws

There is no franchise law in Pakistan. The franchisor-franchisee relationship is governed by contractual agreements and various other laws, such as foreign exchange control regulations, anti-trust laws, intellectual property laws and tax regulations.

2. Government Agency Regulation

There is no government agency that regulates the grant or sale of a franchise in Pakistan. There is also no requirement for the franchisors to make prior disclosures to prospective franchisees or any regulatory authority.

B. Foreign Exchange Controls

1. Limits on Currency Conversion

The State Bank of Pakistan (“SBP”) is the central bank of Pakistan, which regulates foreign exchange control transactions under the Foreign Exchange Regulation Act, 1947.

The SBP has imposed certain restrictions on the remittances of royalties, and franchise fees. The SBP has defined “royalty” as a fee paid by a local firm to the foreign collaborator in consideration of license to use the foreign manufactures’ patent or brand name for marketing

products.²⁰⁶

Pakistani franchisees are permitted to remit royalty, franchise fees and service charges to foreign franchisors in respect of agriculture, social, infrastructure and service sector projects including international food chains, subject to the following restrictions:²⁰⁷

- a. No remittance of the initial lump sum fee to the foreign franchisor in excess of USD100,000 is permitted, irrespective of numbers of outlets being operated in Pakistan.
- b. No remittance of the franchise fee in excess of 5% of net sales (excluding sales tax) is permitted in respect of non-manufacturing franchise business, including food franchise business. The payment of franchise fees will be allowed on monthly basis.
- c. In respect of international food franchises, the payment of royalty and franchise fee is not permitted for those items (i) whose franchise is not held by the franchisees (i.e., core products of the franchise), or (ii) which are sold under some other brand name (e.g., soft drinks under other brand names).
- d. Remittance of royalties and the franchise fee is permitted for an initial period of five years and subsequent extension may be allowed by SBP, subject to fulfillment of certain conditions.

2. Government Filing Requirements

Pakistani franchisees are required to (i) designate an authorized dealer bank in Pakistan through whom payments under the agreement will be made; and (ii) submit a copy of the franchise agreement to the SBP within thirty days from the date of execution of the agreement. The SBP will record the franchise agreement if it conforms to the conditions that are permitted for payment of royalties and the franchise fee.²⁰⁸

Franchisees should file an application for remittance for the franchise fee and royalty to the foreign franchisors in the prescribed format. The correctness of information that are provided in the application must be certified by the auditors of the franchisees.²⁰⁹

The royalties and franchise fee must be remitted after payment of applicable taxes in Pakistan and this should be supported by a certificate from the franchisee's auditor. If any tax exemption is to be claimed on any remittances to be made to a foreign franchisor, the franchisee will have to submit a certificate from the competent tax authority.²¹⁰

²⁰⁶ Foreign Exchange Manual of the State Bank of Pakistan, C.14, § 12(1) (March 14, 2019), *available at* http://www.sbp.org.pk/fe_manual/pdf/2018/Chapter-14.pdf (the "SBP Foreign Exchange Manual").

²⁰⁷ Id. at § 12(ii).

²⁰⁸ Id. at § 12(iv).

²⁰⁹ Id. at § 12(v).

²¹⁰ Id.

C. Taxes

1. Royalties

Payments of royalties and fees for technical services by Pakistani franchisees to the foreign franchisors, which do not have a place of business in Pakistan, will be subject to deductions of income withholding tax in Pakistan.²¹¹ The present withholding tax rate for royalties and the franchise fee is 15%.

2. Service Fees

Any other service fees, in addition to royalties and the franchise fee, may be subject to a withholding tax. The Income Tax Ordinance, 2001 prescribes different withholding tax rates for different categories of services.²¹²

3. Double Taxation Treaties

The Income Tax Ordinance provides that the Government of Pakistan may enter into a tax treaty, a tax information exchange agreement, a multilateral convention, or an inter-governmental agreement for the avoidance of double taxation with various countries.²¹³ The Government of Pakistan has entered to DTAA's with about sixty five countries.²¹⁴ The DTAA may provide for relief from the tax payable under the Income Tax Ordinance and the foreign franchisors may seek benefit of the DTAA, if any between Pakistan and home country of the foreign franchisor.²¹⁵

4. Gross-Up Provisions

The law of Pakistan does not prohibit grossing up. Although the foreign franchisors may contractually agree with the franchisees to increase the payments to offset the withholding taxes that are to be deducted by the franchisees. Provided, however, the total amount of royalties and the franchise fee to be paid after including the withholding tax amount, should not exceed the maximum royalties or franchise fee that the Pakistani franchisees are permitted to pay to the foreign franchisors. In other words, the maximum royalty or franchise fee, inclusive of all withholding taxes, should not exceed 5% of net sales.

D. Franchise Relationship Laws

1. Defaults, Termination, and Nonrenewal

The conditions relating to termination, renewal and defaults will be governed by the contract as well as the substantive law of the contract.

The Contract Act, 1872 ("Contract Act") recognizes the rights of parties to decide the

²¹¹ Income Tax Ordinance, No. 2(1) of 2001, § 152(1) (Pak.).

²¹² Id.

²¹³ Id. at § 107(1).

²¹⁴ *Pakistan Individual- Foreign Tax Relief and Tax Treaties*, PwC, <http://taxsummaries.pwc.com/ID/Pakistan-Individual-Foreign-tax-relief-and-tax-treaties>.

²¹⁵ The Income Tax Ordinance, *supra* note 211, at § 107(2).

tenure of an agreement; and terms and conditions relating to renewal, termination and default of a contract. The Contract Act does not prescribe any maximum or minimum tenure for a valid agreement.

2. Laws Regulating Unfair Contract Terms

The Contract Act, which deals with general principals of a valid agreement, requires that a contract should be entered between legally competent parties out of their free consent for lawful objects and considerations.²¹⁶ Agreements that are based on coercion, misrepresentation, fraud and undue influence are voidable at the option of the party that is subject to coercion, misrepresentation, fraud and undue influence.²¹⁷

The Contract Act also provides that an agreement which takes away the right of a party to (a) carry out lawful trade or profession; (b) marry a person of choice; or (c) enforce its legal rights in a court of law, shall be void to that extent²¹⁸.

E. Trademark Requirements and Licensing Considerations

1. Trademark Registration

The Trademarks Ordinance 2001 (“Trademark Ordinance”) regulates registration of trademarks in Pakistan. The registration of trademarks is administered by the Trademark Registry established under the Trademarks Ordinance.²¹⁹ The Trademark Registry is presently in Karachi with a branch office in Lahore.

Presently, trademark registration is optional, and a person of any nation may apply for registration of trademark. On registration of a trademark, the Trademark Registrar will issue a certificate of registration with a validity of 10 years from the date of grant of the certificate. The certificate of registration may be renewed for multiple terms for 10 years each.²²⁰

2. Registration of Licenses of Trademarks

The Trademark Ordinance requires that an agreement for license of a registered trademark should be made in writing and signed by the owner of the trademark.²²¹ However, it is not mandatory to (i) have a separate agreement for license of a trademark, or (ii) register a trademark license agreement with the Trademark Registry.

F. Competition Laws

1. Prohibition on Common Franchisor Practices

The anti-trust laws of Pakistan are contained in the Competition Act 2010 (“Competition Act”). The Competition Act prohibits an undertaking in Pakistan from entering into any agreement

²¹⁶ The Contract Act, 1872, §§ 11-13 (Pak.).

²¹⁷ Id. at §§ 14-18.

²¹⁸ Id. at §§ 26-28.

²¹⁹ The Trade Marks Ordinance, No. 19 of 2001, § 9 (2) (Pak.).

²²⁰ Id. at § 35.

²²¹ Id. at § 75.

("Prohibited Agreement") for production, distribution or supply of goods or services with the object of restricting competition. The Prohibited Agreements include agreements that:

- a. fixes purchase or sale price of goods or services;
- b. imposes restrictive conditions for trading of goods or services;
- c. divides the market on the basis of location, volume, or types of goods or services;
- d. limits production or distribution of goods or services;
- e. limits technical development or investment with regard to any goods or services; and
- f. imposes different conditions for different trading partner in a similar transaction.²²²

However, parties may enter into agreements that fall under the category of the Prohibited Agreement after seeking an exemption from the Competition Commission of Pakistan. Such exemption is generally granted for an individual agreement or in respect of a particular category of agreement, where restrictions mentioned in such agreement will (a) result in improvement of productions or distributions or goods or services; or (b) promote technical and economic progress that will benefit the consumers; or (c) result in benefits that will outweigh the adverse effect of prohibited practices.²²³

As the franchise agreements have certain elements of a Prohibited Agreement, the foreign franchisors seek exemption from the Competition Commission of Pakistan prior to signing a franchise agreement with Pakistani franchisees.²²⁴

2. Restrictive Covenants

Restrictive covenants relating to non-compete, non-solicitation and non-disclosure of confidential information is enforceable in Pakistan, provided that the restrictions are reasonable and do not amount to restraint on the right of a person to carry out his or her trade and profession. The question if a negative covenant is reasonable or not is determined by the court on case-by-case basis after analyzing the contract and facts of the case.²²⁵

G. Employment Laws

1. Applicable Employment Laws

Number of state-specific legislations regulate employer-employee relationships and social security schemes in Pakistan.

²²² The Competition Act, No. 19 of 2010, § 4.

²²³ Id. at §§ 5, 7.

²²⁴ *Voluntary Peer Review of Competition Law and Policy: Pakistan*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2013), https://unctad.org/en/PublicationsLibrary/ditccclp2013d4_overview_en.pdf.

²²⁵ *Colgate Palmolive (Pakistan) Limited v. Rai Tahir Iqbal & another* (2017), Suit No. 1788 of 2017 on CMA 10760/2017.

2. Effect on Franchising

The applicable employment laws of Pakistan do not impact franchisor-franchise relationships. A franchisee or its employees would not be deemed to be the employees of the franchisor.

H. Privacy Laws

1. Applicable Privacy Laws

Currently, Pakistan does not have any legislation on data protection and privacy. The Ministry of Information Technology and Telecommunications has framed the draft Personal Data Protection Bill, 2018 (“Privacy Bill”) which is yet to be passed by the Parliament of Pakistan.²²⁶ Various provisions of the Privacy Bill are similar to the European Union’s General Data Protection Regulation.²²⁷

2. Effect on Franchising

The Privacy Bill at the moment does not have any effect on franchising because it has not yet been enacted as a law of Pakistan.

I. Governing Law and Dispute Resolution

1. Governing Law

There is no express restriction on parties to a contract to apply foreign law as a governing law of the contract. However, courts of Pakistan may not be comfortable in adjudication of disputes that are governed by foreign laws.

2. Arbitration

Pakistan has separate legislation to govern domestic arbitrations and foreign seated arbitration. The Arbitration Act 1940 (“Arbitration Act”) governs and regulates domestic arbitration in Pakistan.

Parties to a contract may refer their disputes to arbitration in Pakistan pursuant to an arbitration agreement.²²⁸ The Arbitration Act contains, inter alia, detailed provisions on rights of the parties to arbitrate and decide on procedures for arbitrations; conditions for enforcement of arbitration awards; and rights of court to appoint and remove arbitrators, grant interim relief; modify the arbitration award; and call for witnesses to appear before the arbitrators. The Arbitration Act confers powers on the arbitrators as well as the courts to grant interim relief.²²⁹

Pakistan is a signatory to the New York Convention. In order to give effect to the New York Convention, it has enacted the Recognition and Enforcement (Arbitration Agreements and

²²⁶ Personal Data Protection Bill 2018, <https://moitt.gov.pk/userfiles1/file/PERSONAL-DATA-PROTECTION-BILL-July-18-Draft.pdf> (Pak.).

²²⁷ *What is the Pakistan Data Protection Bill 2018?*, ONETRUST (Oct 2, 2018), [html.https://www.onetrust.com/what-is-the-pakistan-data-protection-bill-2018](http://www.onetrust.com/what-is-the-pakistan-data-protection-bill-2018).

²²⁸ The Arbitration Act, No. 10 of 1940, (1940), § 3 (Pak.).

²²⁹ *Id.* at § 27, 41.

Foreign Arbitral Awards) Act 2011 (“NYC Act”).

As per the NYC Act, a local court in Pakistan cannot assume jurisdiction over a matter where the parties have agreed to resolve disputes through arbitration with a seat in a country signatory to the New York Convention.²³⁰ The NYC Act also requires a jurisdictional High Court in Pakistan to recognize and enforce the foreign arbitration award passed in the country signatory to the New York Convention. The enforcement of an award can be denied only if there are valid grounds for non-enforcement as prescribed in the New York Convention, namely (a) where the parties to arbitration agreement were under some incapacity to contract; (b) where the arbitration agreement is invalid; (c) the party against whom award is passed was not given proper notice about the arbitration proceedings, or opportunity to present its case; (d) award deals with subject matter that was not submitted to arbitration; (e) the composition of arbitration tribunal was not in accordance with the arbitration agreement; and (f) the award is not final.²³¹

Pakistan is also a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (“Washington Convention”). In order to enforce the Washington Convention, Pakistan has enacted the Arbitration (International Investment Disputes) Act 2011 (“AIID Act”).

As per the AIID Act, a person can seek recognition or enforcement of an arbitral award passed by the International Centre for Settlement of Investment Disputes by getting the same registered in a local high court.²³² Once such award is registered by the high court, the pecuniary obligations contained in the award can be enforced in the same manner in which a judgement from a high court is enforced.

The NYC Act and AIID Act do not have any specific provisions on the issue of interim relief by arbitrators or local courts.

3. Foreign Judgments

A final and conclusive judgement passed by foreign courts can be enforced in Pakistan if the judgement is issued by a superior court from a reciprocating territory notified by the Government of Pakistan.²³³ Only those foreign judgements where a sum of money is payable, but not taxes, fines or other penalties can be enforced.²³⁴

A foreign judgment should meet certain conditions in order to be enforceable in Pakistan. A foreign judgment will not be enforceable in Pakistan where: (a) the judgement is not pronounced by a court of competent jurisdiction; (b) the judgement is not given on the merits of the case; (c) the proceedings in which the judgement was obtained is based on an incorrect view of international law or the law of Pakistan, if applicable; (d) the proceedings in which the judgment was obtained are opposed to natural justice; (e) the judgement is obtained by fraud; or, (f) it

²³⁰ The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, No. 17 of 2011, PAK. CODE (2011), § 4.

²³¹ Id. at §7.

²³² The Arbitration (International Investment Disputes) Act, No. 9 of 2011, § 3.

²³³ The Code of Civil Procedure, No. 05 of 1908, §§ 13, 44A (Pak.).

²³⁴ Id. at §44A, Explanation I.

sustains a claim founded on a breach of any law in force in Pakistan.²³⁵

4. Injunctive Relief

Pakistani courts grant both temporary and permanent injunction as may be necessary to protect the right of the plaintiff.²³⁶ A perpetual injunction is granted to restrict a defendant to assert a right, or commit an act, or breach an obligation which would invade the plaintiff's right.²³⁷ A perpetual injunction is granted only after final hearing of a case on merits.

A Court may grant a temporary injunction to prevent the wastage, damage, alienation, sale, removal, or disposition of a property, or where the defendant threatens to remove or dispose of a property with a view to defraud his creditors. A temporary injunction is also granted to restraint a defendant from committing the breach of a contract.²³⁸

X. SOUTH KOREA

A. Regulations Of Offers And Sales Of Franchises

1. Franchise Sales Laws

In, Korea, a franchisor may be a foreign or domestic entity and there are no requirements that the franchisor must meet prior to offering franchises. The franchisor is not required to have operated any units (company-owned or franchised units) inside or outside of Korea to offer franchises. Stated simply, there are no "pre-conditions," other than the preparation and registration of a franchise disclosure document ("FDD") that the franchisor must satisfy to engage in the sale of its franchises in Korea.

The franchise pre-sale disclosure laws primarily governing the franchisor-franchisee relationship in Korea is the Fair Transactions in Franchise Business Act ("Franchise Act").²³⁹ This statute requires a franchisor to register and provide the registered FDD to its prospective franchisees. This must be provided to all prospective franchisees, including master franchisees and area developers, who are granted the right to operate franchised units. The following broad categories of information must be disclosed:

- a. Description of the franchisor's general status;
- b. Description of the current status of the franchisor's franchise – e.g., the total number of company-owned and franchised units in operation as of the most recent fiscal year's end;
- c. Description of any legal violations of the franchisor and/or its executives;

²³⁵ Id. at § 13

²³⁶ The Specific Relief Act, No. 01 of 1877, § 53.

²³⁷ Id. at §§ 53-54.

²³⁸ The Code of Civil Procedure, *supra* note 86, at § 94.

²³⁹ Fair Transactions in Franchise Business Act, Act No. 6704, May 13, 2002, *amended by* Act. No. 16176, Dec. 31, 2018 (S. Kor.) ("Franchise Act").

- d. Description of the franchisee's obligations;
- e. Description of the conditions of and restrictions on the franchised business operations;
- f. Detailed description of the procedure and period required to commence the franchised business; and
- g. Description of the franchisor's support, education, and training with respect to management and operation of the franchised business.²⁴⁰

The Franchise Act prohibits the franchisor from accepting any franchise fees or executing the franchise agreement unless and until the franchisor has provided to the prospective franchisee the registered FDD and allowed 14 days (7 days if the prospective franchisee is advised by a franchise counsel or broker) for the prospective franchisee to review the contents of the FDD.

The franchisor may deliver the FDD to the prospective franchisee by providing:

- a. the FDD (hard copy) directly or sending it by content-certified mail to the prospective franchisee;
- b. the FDD via access to the internet; or
- c. the FDD in an electronic file to the prospective franchisee by email that is capable of a "read-receipt" confirmation.

In addition to delivering the FDD, the franchisor must also prepare these two additional documents to satisfy its pre-contractual disclosure obligation under the Franchise Act.

The Franchise Act requires the franchisor to provide information on ten franchised units proximate to the prospective franchisee's contemplated franchised unit. This "Information on the Proximate Franchised Unit" must contain information on the ten proximate franchised units, including the name of the franchisees, their addresses, and their contact information. The franchisor must provide this information concurrently with delivery of the FDD.

The Franchise Act also mandates that the franchisor calculate the minimum and maximum sales revenue projections for one year subsequent to the commencement of operations of the prospective franchisee's franchised unit. In this "Information on the Sales Revenue Projections," among other information, the franchisor must lay out the methodology used to calculate the minimum/maximum sales revenue projections. Moreover, the maximum sales projection may not be more than 1.7 times the minimum sales projection.

As for timing of delivery, the franchisor may deliver this document to the prospective franchisee at any time before executing the franchise agreement. Thus, it is possible to deliver this document separately from the FDD and the information on the proximate franchised unit. In practice, however, the franchisor delivers this document to the prospective franchisee

²⁴⁰ INTERNATIONAL FRANCHISE SALES LAWS, *supra* note 2, at 296.

concurrently with the FDD and the information on the proximate franchised unit.

In 2017 and 2018, the Korea Fair Trade Commission (“KFTC”) spearheaded several amendments to the Franchise Act and its subordinate statute – the Enforcement Decree²⁴¹ - that further shifted the bargaining power in favor of the franchisees. Below is a brief overview of the main changes:

2. Enforcement Decree of the Franchise Act

A significant number of franchisors in Korea receive franchise fees in the form of mark-ups on the sales of “must-have” or “essential” items to their franchisees rather than in royalties calculated as a function of sales revenue earned by the franchisee. Many franchisors, therefore, adopted business structures that compelled their franchisees to deal exclusively with franchisors themselves, “specially-related” entities (e.g., affiliates or family members of franchisors), or preferred third party vendors to the detriment of franchisees.

To address the abusive practices that could, and often do, arise from such business practices, the Enforcement Decree of the Franchise Act was amended in 2018. Among other changes, the amendments require franchisors to disclose detailed information on any mark-ups on mandatory purchase items, economic benefits conferred to any “specially-related” entities, economic benefits that franchisors receive from their designated suppliers and distributors, and sales activities of franchisors through other distribution channels of the same or similar goods and services sold by franchisees. The new disclosure requirements took effect starting on January 1, 2019, and therefore, any new FDD registrations and updates to registered FDDs filed after this date must include the new disclosures.

3. Amendments to the Franchise Act

In addition to the amendments to the Enforcement Decree requiring expanded disclosure in the FDDs, there are several amendments to the Franchise Act itself that came into force in 2018 and 2019. The majority of these amendments implement the proposed measures announced by the KFTC in July of 2017 that aim to address the unfair franchising practices of the franchisors and promote the protection of the franchisees’ interests.

Specifically, a set of amendments came into force on July 17, 2018 that (1) proscribes unilateral changes to the franchisees’ business territories by the franchisors, and (2) more importantly, a set of whistle-blower protections. These whistle-blower provisions prohibit retaliatory actions against franchisees who (a) apply for dispute mediation through the KFTC, (b) cooperate with the KFTC in any investigation of franchisors, or (c) report violations committed by franchisors.²⁴² To further promote investigation of franchisors’ wrongdoing, the amendments also establish a reward system that rewards those franchisees who report franchisors’ violations, and also, impose punitive damages on franchisors that retaliate against franchisees for filing such reports to the KFTC.

4. Government Agency Regulation

All franchisors – foreign and domestic – must register their FDD with KFTC before signing

²⁴¹ Enforcement Decree of the Fair Transactions in Franchise Business Act, Presidential Decree No. 29392, Dec. 18, 2018, as amended (S. Kor.).

²⁴² Franchise Act, *supra* note 239, at art. 12.

a franchise agreement or receiving any franchise fees from the franchisee. Aside from this requirement, there are no other approvals or registrations that the franchisor must obtain in Korea to offer its franchised business to Korean franchisees.

As part of the registration process, the KFTC requires the franchisor to submit the following broad categories of information:

- a. Information regarding the general status of the franchisor;
- b. Information regarding the current status of the franchisor's franchises (e.g., the total number of company-owned and franchised units in operation as of the of most recent fiscal year end);
- c. Information regarding any legal violation by the franchisor and its executives;
- d. Information regarding the obligations of the franchisee;
- e. Information regarding conditions of and restrictions on the business activities of the franchisee;
- f. Information regarding detailed procedures and the period required in respect of the commencement of the franchised business; and
- g. Information regarding support for business activities and education and training programs (it must be specified if there is no plan for education and training).

In support of this disclosure, the franchisor must also submit the following documents during the process of registering the FDD:

- a. Certificate of good standing (or equivalent) of the franchisor;
- b. Financial statements of the franchisor for the last three years;
- c. Data regarding the sales revenue of the franchisor that is attributable to the franchised business (in case the franchisor has multiple lines of businesses);
- d. Trademark license agreements (in case the franchisor is not the trademark owner but a licensee); and
- e. Template form franchise agreement.

As to the form of the FDD, the KFTC issues a standard template for the FDD. All franchisors are obligated to prepare their FDDs in accordance with this prescribed template. Although there is no express provision in the Franchise Act requiring the FDD be drafted in a certain language, the KFTC only accepts for registration Korean-language version of the FDD. Thus, the franchisor must prepare the FDD in Korean and translate all ancillary documents into

Korean when filing for registration.

The Franchise Act contains specific provisions relating to the franchisor's failure to register the FDD (and thereby failing to disclose it to the prospective franchisee). Below is a brief description of the measures provided under the Franchise Act:

- a. The franchisor must refund any franchise fees collected if the franchisee makes a request for refund within four months from the date of executing the franchise agreement. If a refund is due, the franchisor must make the refund within one month from the date of the franchisee's request.
- b. The KFTC may order a corrective measure, which would include ordering the franchisor to register or carry out the disclosure of the FDD. The four possible corrective measures include: 1) administrative warning, 2) recommendation to correct, 3) corrective order; and 4) administrative fine. The administrative warning is the least severe corrective measure, and the administrative fine is the most severe.
- c. With respect to the administrative fine, the KFTC may impose a fine of up to 2% (between 0.1% and 2%) of the total sales of the franchisor to the specific franchisee in Korea for the duration in which the franchisor was not in compliance. In determining the amount of the administrative fine, the Franchise Act stipulates that the KFTC should consider the nature, severity, duration, and frequency of the infraction, and also profits that the franchisor derived as a result of its non-compliance. Alternatively, in case the franchisor's total sales during the period of non-compliance is difficult to calculate, the Franchise Act provides that an administrative fine of up to KRW 500 million (approx. USD480,000) may be imposed.

The penal provisions of the Franchise Act provide for imprisonment of no more than two years or a criminal fine not exceeding KRW 50 million (approx. USD47,000) for failure to provide a registered FDD.

Failure to comply with any of these three does not lead to rescission or cancellation of the franchise agreement. However, it is possible for the franchisee to bring a lawsuit for damages and cancel or rescind the franchise agreement under general principles of tort or contract law in accordance with the Korean Civil Code. If there remain damages that are not recovered by cancelling or rescinding the franchise agreement, the franchisee may additionally be entitled to such remaining damages, apart from such cancellation or rescission.

There is no associated statute of limitations. Accordingly, the franchisee can bring the franchisor's non-compliance to light at any time.

Prior to his inauguration, Sang-Jo Kim, the current Chairman of the KFTC, expressed his intent, among others, to address various unfair trade practices carried out by franchisors against franchisees that have come to light in recent years, especially in the food services industry, and have made headlines in Korea. Thus, the KFTC has been looking closely at the franchising

industry in recent years, but it is notable that, at least thus far, most of the enforcement activities have been directed at large, domestic Korean franchisors.

Moreover, given the KFTC's limited resources, the KFTC does not actively look at franchise relationships to determine if the franchisor has violated any requirements under the Franchise Act. These circumstances remain the case despite Chairman Kim's proclamation. In majority of the cases of enforcement actions, the KFTC is first informed of the potential noncompliance by the disgruntled franchisees who file a complaint with the KFTC. Upon review of the complaint, the KFTC will then decide whether to conduct an investigation or not.

B. Foreign Exchange Controls

1. Limits on Currency Conversion

Korea does regulate foreign exchange. However, Korea has liberalized foreign exchange controls, and thus, there are generally no currency control restrictions that would limit the flow of funds into or out of Korea. A franchisee is not required to make any filings with any government agencies, including the Bank of Korea, before making remitting payments to the foreign franchisor.

However, under exigent circumstances, foreign exchange transactions could be temporarily suspended or restricted if such measures are deemed necessary on account of natural calamities, war, conflicts of arms, grave and sudden changes in domestic and foreign economic conditions, or other similar situations.

2. Government Filing Requirements

Aside from those discussed above, there are no other franchise filing requirements in Korea that must be satisfied before the franchisee is permitted to make payments to a foreign franchisor.

C. Taxes

1. Royalties

Under the applicable tax treaty between South Korea and the United States, the remittance of franchise fees and royalties by a Korean company is subject to a 15% withholding tax and a 10% surcharge on the withholding tax bringing the total withholding tax rate to 16.5%. There are no alternative fee structures in common use that would reduce or eliminate withholding taxes on payments from South Korea to the United States.

The current minimum withholding tax rates based on the Korea-US treaty are: 10% or 15% for dividends; 12% for interest; and 15% for royalties (10% for copyright royalties). In addition, a 10% surcharge will apply to the withholding tax rates.

2. Service Fees

There is no stamp tax that must be paid to execute the franchise agreement (or any other types of agreement) in Korea.

3. Double Taxation Treaties

Corporate income tax is progressive and can be broken down as follows:

Taxable Income	Tax Rate (Including Local Surtax)
~ KRW 200 Million (approx. USD180,000)	11%
KRW 200 Million ~ KRW 20 Billion (approx. USD180,000 ~ USD18,000,000)	22%
KRW 20 Billion ~ KRW 300 Billion (approx. USD18,000,000 ~ USD270,000,000)	24.2%
KRW 300 Billion or Higher (approx. USD270,000,00 or higher)	27.5%

Corporations that are residents for tax purposes are taxed on their worldwide income. Non-resident corporations with a permanent establishment in Korea are taxed only to the extent of their Korea-sourced income. Non-resident corporations without a permanent establishment in Korea are generally taxed through a withholding tax on each separate item of income that is subject to withholding.

Thus, for a non-resident franchisor without a local presence – that is, a franchisor that has or is deemed to have no “permanent establishment” in Korea – the only tax that would apply would be the withholding tax described above.

D. Franchise Relationship Laws

1. Defaults, Termination, and Nonrenewal

The Franchise Act governs the relationship between a franchisor and franchisee. The Franchise Act regulates not only pre-sale disclosure, but also the relationship between the franchisor and the franchisee. In addition to the registration and disclosure requirements described in Section A.1 above, the key requirements of the Franchise Act are:

- a. Expiration and Non-Renewal – The Franchise Act regulates termination and non-renewal of franchise agreements. Under the Franchise Act, if a franchisee requests to renew a franchise agreement during the 90 – 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. However, the franchisee’s right to request renewal of the franchise agreement exists for a period of ten years, which includes both the initial term and any renewal terms thereafter of the franchise agreement.
- b. Contribution Towards Remodeling Costs – Franchisors are prohibited from forcing franchisees to remodel without just cause. If a franchisor either recommends or demands remodeling, the franchisor may be required to bear up to 20% of the remodeling costs and up to 40% of the remodeling costs if the franchisee is

required to relocate or expand.

- c. Restriction on Operating Hours – Franchisors are prohibited from unfairly restricting franchisees’ business hours. Franchisors will also be prohibited from requiring franchisees to engage in late-night operations (1:00 am to 6:00 am) if the revenue from such operations – for any 6-month period – is significantly lower than the cost of operating in the extended hours.
- d. Protected Territory and Non-Compete – Franchisors must explicitly state the franchise territory in their franchise agreements and are prohibited from establishing the “same type of business” as the franchisees within such protected franchise territory. Specifically, during the term of the franchise agreement, a franchisor cannot establish a company-owned (including affiliate-owned) franchise of the “same type of business” within the protected franchise territory. The “same type of business” is determined on a case-by-case basis, taking into account, for instance, the target class, territorial boundary, population boundary, types of products sold, and business manner and method.

In Korea, the Commercial Act governs commercial agency, and the Fair Agency Transactions Act is the principal statute regulating distribution relationships. Neither of these two statutes specially governs franchise arrangements directly.

However, it is important to note that the Commercial Act could be relevant. Under the Commercial Act, if an agency agreement terminates or expires, the agent may seek compensation from the principal under certain limited circumstances. Specifically, Article 92-2 of the Commercial Act provides that an agent may claim “reasonable” compensation from the principal if the principal (i) obtains new customers or (ii) its business transactions increased substantially through the agent’s activities during the term of the agency agreement, and thereby, the principal gains profits even after the agency agreement comes to an end.

The right of an agent to seek compensation only exists if the agency agreement is terminated through no fault attributable to the agent. If the agency agreement naturally expires (or terminates without any breach by the agent), then the agent may have a right to claim for compensation. Meanwhile, the agent must make the claim for compensation within six months from the date of termination/expiration of the agency agreement. In the event that any compensation is due, the compensation amount may not exceed the average annual remuneration of the agent for a period of five years before the end of the agency agreement.

In general, Article 92-2 is interpreted as a mandatory provision. Therefore, an agent's waiver of this right (or the agreement to waive this right between the parties) before termination or expiry of the agreement is invalid. But, according to Korean court precedents, if the governing law of the agreement is foreign law under which such waiver or agreement is permissible, then such waiver or agreement is enforceable in Korea, and thus, the agent cannot seek compensation from the principal.

So far, there has yet to be any case precedents (or KFTC rulings) in which the Korean courts have expanded the application of Article 92-2 to a franchise arrangement. Given that some legal commentators are arguing for its application to franchising, however, it would be important

to flag this issue so that appropriate measures could be taken to preclude the application of Article 92-2 of the Commercial Act, and, thus, avoid compensating the franchisee upon expiration or earlier termination of the franchise agreement.

2. Laws Regulating Unfair Contract Terms

The Franchise Act is a *lex specialis* for franchising and is derived from the Korean unfair trade law, the Monopoly Regulation and Fair Trade Act (“MRFTA”). The Franchise Act outlines certain franchisor conduct that could be deemed and “unfair trade practice,” which is prohibited because it would undermine the fair trade in carrying out the franchised business. Such conduct is as follows:

- a. “Unfair” refusal to deal:
 - i. Refusal to provide support (e.g., products, services, etc.);
 - ii. Refusal to renew the franchise agreement without just cause; or
 - iii. Unjust termination of the franchise agreement.
- b. “Unfair” restraint or restriction:
 - i. Restrictions on pricing;
 - ii. Restrictions on the parties with whom the franchisee may commercially transact;
 - iii. Restrictions on the sale of products or services by the franchisee;
 - iv. Coercion of observance of business territory; or
 - v. Other “unfair” restrictions on business activities.
- c. Abuse of bargaining power:
 - i. Requiring the franchisee to purchase products, services, or other goods in excess of what is necessary to engage in the franchised business;
 - ii. Unfairly demanding the franchisee to provide economic profit or placing a burden on the franchisee for certain expenses;
 - iii. Establishing or amending provisions of the franchise agreement having the effect of placing the franchisee in an “unfair” position;
 - iv. Interfering with the management of the franchisee’s operations;

- v. Establishing mandatory sales targets; or
- vi. Imposing other similar disadvantages on the franchisee
- d. “Unfair” imposition of compensation for damages:
 - i. Imposing or stipulating an excessive amount of liquidated damages; or
 - ii. Transferring to the franchisee the franchisor’s liability to the customers.
- e. Any other activity which may seem to obstruct fair trade, such as causing harm to the franchisee by unfairly inducing the franchisee of a competing franchisor to transact with the franchisor.

Any contract term that would result in any of the above conduct would be deemed “unfair.” However, the determination of whether a practice is deemed “unfair” will be determined based on a rule of reason, and, thus, would be heavily fact-dependent.

Meanwhile, the general provisions of the MRFTA would apply to regulate the franchise arrangement (e.g., prohibition against tying products, imposing minimum sales targets, and establishing resale price maintenance)

E. Trademark Requirements And Licensing Considerations

1. Trademark Registration

Korea is a “first-to-file” jurisdiction. Any of the following marks can be registered as a trademark when used on goods or services related to the business of a person who conducts business activities, such as producing, processing, distributing, certifying or selling such goods, to distinguish them from the goods of others:

- a. a sign, character, figure, sound, smell, three-dimensional shape, color, hologram, motion, emblem or any combination of these; or
- b. things that can be visually recognized other than the above-mentioned things.

A trademark, collective mark, business emblem or geographical indication and certification mark can be registered and protected in Korea as well. However, a trademark cannot be registered if it is deemed to be identical or confusingly similar to a national flag, titles or marks of well-known international organizations, such as the International Olympic Committee.

In addition, when filing a trademark application, the trademark applicant is required to designate goods or services according to the NICE Classification (34 classes of goods and 11 classes of services under the 11th Edition of the NICE Classification).

In principle, only a registered trademark can be protected in Korea, and thus, it is highly advisable for franchisors to register their trademarks when seeking to enter into franchise

arrangements in Korea.

2. Trademark License Registration

It is not mandatory for the trademark license to be registered (*i.e.*, recorded) with the Korean trademark office – the Korean Intellectual Property Office (“KIPO”). However, if recorded, the trademark license becomes effective against any third party who subsequently acquires the trademark right or an exclusive license.

To record the license (exclusive or non-exclusive), the trademark licensee must prepare a short-form license agreement in the format prescribed by KIPO that requires the following information:

- a. Geographic scope of the trademark license;
- b. Duration of the trademark license; and
- c. Scope of the trademark license (*e.g.*, license to make, use, transfer, lease, offer for sale).

It is not necessary (and usually not advisable) for the exclusive licensee to submit the actual license agreement to KIPO for purposes of recordation.

F. Competition Laws

1. Prohibition on Common Franchisor Practices

The MRFTA is the primary competition (antitrust) statute in Korea, and it applies to govern franchise relationships. Please see Section D.2 above for details.

2. Restrictive Covenants

Post-term covenants against competition are enforceable in Korea. If challenged, however, the Korean courts employ a totality of the circumstances approach to determine the reasonableness of such post-term covenants. In this analysis, the Korean courts consider various factors: (1) whether there is legitimate business interest to protect; (2) whether there is consideration exchanged for the non-competition obligations; (3) whether the scope of competing business is narrowly tailored; and (4) whether the geographic and temporal scope is reasonable given the underlying facts. Based upon these factors, the Korean courts may enforce, modify, or invalidate the non-compete agreements (or covenants within agreements).

It is common practice for franchisors in Korea to include post-term covenants against competition that covers a period of one year following termination/expiration of the franchise relationship.

G. Employment Laws

1. Applicable Employment Laws

There are no special employment requirements that would apply to franchise relationships.

2. Effect on Franchising

At present, there is no legal basis by which a franchisor could be deemed as a “joint employer” with its franchisees for the workers in the franchisees’ units. However, a KFTC precedent on this issue was close that could have had the potential for paving the way for the development of “joint employer” jurisprudence in Korea.

Specifically, in 2017, the Ministry of Employment and Labor (“MEL”) issued an order to a large bakery chain to hire all 5,500 bakers that were, at the time, working at 3,300 of the franchisees’ units. Although the bakers did, from time to time, receive guidance from the franchisor, they were hired by the franchisees themselves with little or no input from the franchisor.

The MEL ruled that these bakers worked not for the franchisee but for the franchisor, and thus, the franchisor must hire all 5,500 bakers. If the franchisor had refused, the KFTC threatened the franchisor with an administrative fine of KRW 10 million (approximately USD10,000) per baker. In response, the franchisor decided to hire all 5,500 bakers, and this resolved the situation without setting any precedents at the Korean courts or the KFTC.

There have not been any further development in “joint employer” jurisprudence in Korea. At this time, it is safe to say that franchisors are not seen as “joint employers” of the franchisees’ workers.

H. Privacy Laws

1. Applicable Privacy Laws

There are no industry-specific privacy laws that apply specifically to a franchise relationship. The general law of privacy, the Personal Information Protection Act (“PIPA”), would apply.

2. Effect on Franchising

Under PIPA, information that is categorized as “personal information” is regulated. “Personal information” is any information that is related to a living person, including information that can be used to identify the living person by itself or through combination with other information, notwithstanding that such other information may not be “personal information.”

In principle, PIPA requires the data subjects to be informed of certain information regarding the data collector and processor (e.g., information regarding the franchisor or franchisee and the purpose of acquisition/collection/use of “personal information”) and provide their consent. In the case of a franchisee collecting data in a franchise system, the franchisee will be the data collector and processor of the “personal information,” and thus, the franchisee must comply with the data privacy requirements under PIPA. Moreover, to transmit the “personal information” to the franchisor, a third party, the franchisee must obtain a separate consent from the customers.

I. Governing Law And Dispute Resolution

1. Governing Law

There is no requirement for franchise documents to be governed by local laws. In fact, Korean courts readily enforce foreign governing laws. However, certain provisions of the

Franchise Act are deemed compulsory, and, thus, even if the franchise documents are governed by foreign laws, these documents must comply with the compulsory provisions of the Franchise Act. These compulsory provisions relate to requirements, for example, on renewal, termination, cost-contribution on remodeling or renovation, and business territory.

2. Injunctive Relief

A preliminary injunction would be available to the franchisor upon showing that there is (a) an actual or threatened harm or dispute, (b) a likelihood of success, and (c) a possibility of significant damages if the injunctive remedy were not granted. Here, the grounds for seeking such preliminary injunctive relief would include, among others, the need to protect the brand from damage or to prevent the misuse of critical confidential information. Here, the franchisor must also be prepared to post bond to enforce the preliminary injunction order, if granted by the Korean courts.

3. Foreign Judgment

A foreign judgment is subject to judicial review in Korea. It is acknowledged as valid and enforceable in Korea, if it satisfies the following requirements:

- a. Jurisdiction: The foreign court that rendered the judgment, of which recognition and enforcement is sought, had proper jurisdiction over the case according to the principle of international jurisdiction under the Korean Civil Procedure Act or international treaties;
- b. Service of Process: The party against whom the foreign judgment is sought has received, pursuant to a lawful method, a service of summons with sufficient time to defend the lawsuit, or alternatively, has responded to the lawsuit voluntarily;
- c. Final and Conclusive: The foreign judgment is final and conclusive;
- d. Public Policy: The recognition and enforcement of the foreign judgment is not contrary to the public policy of Korea; and
- e. Reciprocity: The foreign country where recognition and enforcement of the judgment is sought reciprocally recognizes and enforces Korean courts' judgment in the equivalent manner as Korean courts.

Please note here that one of the requirements must be that the foreign judgment is final and conclusive. Accordingly, interim relief obtained in a foreign court will not be enforceable in Korea.

4. Arbitration

The Arbitration Act and its subordinate statutes govern arbitration in Korea. Moreover, the Korean Commercial Arbitration Board ("KCAB") is the principal arbitration forum for arbitrating disputes (located in Seoul and Busan), and the arbitration proceeds in accordance with the International Arbitration Rules of the KCAB (2016).

Parties can refer their disputes to arbitration at a venue situated outside the country, and the Korean courts readily enforce foreign arbitral awards.

Enforcement of foreign arbitral awards is not difficult. Korea is a signatory to the New York Convention, subject to two reservations:

- a. that Korea will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State; and
- b. that Korea will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

In contrast to a foreign judgment, foreign arbitral awards coming from a member state of the New York Convention and satisfying the reservation requirements are recognized and enforced by Korean courts without further review.

XI. TAIWAN

A. Regulation of Offers and Sales of Franchises

1. Franchise Sales Laws

Taiwan does not have a franchise specific law, except the laws on disclosures that the franchisors are required to make to the franchisees.²⁴³ The franchisor-franchisee relationships are governed by franchise agreement and several other laws, such as foreign exchange control, anti-trust, intellectual property, income tax, intellectual property, and data privacy laws.

2. Government Agency Regulation

Presently, Taiwan does not have a government agency that specifically regulate franchise business. There is no requirement to register a franchise system or a franchise agreement with a government agency prior to sale or grant of franchise in Taiwan.

3. Disclosure Requirements

The Fair Trade Commission of Taiwan has issued guidelines to prevent franchisors from concealing crucial information relating to the franchise business when recruiting the franchisees. These guidelines are known as Fair Trade Commission Disposal Directions (Guidelines) on the Business Practices of Franchisors (“Disclosure Guidelines”).²⁴⁴

The Disclosure Guidelines defines the terms ‘franchisor’, ‘franchisee’ and ‘franchise relationships’.

²⁴³ Fair Trade Commission Disposal Directions (Guidelines) on the Business Practices of Franchisors, FAIR TRADE COMMISSION, (last updated Sep. 03, 2018), <https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=750&docid=10264>.

²⁴⁴ Id.

The term “franchisor” means an enterprise in a franchise relationship that licenses the trademark or operational techniques, assists or counsels the management of franchisee business, and collects the corresponding charges for such services from the franchisee.²⁴⁵

The term “franchisee” is defined to mean an enterprise in the franchise relationship that uses the trademark or operational techniques licensed by the franchisor, receives assistance or counsel from the franchisor, and pays the franchisor the corresponding charges for such services.²⁴⁶

The term “franchise relationship” means an ongoing relationship in which a franchisor licenses a franchisee through a contract to use its trademark or operational techniques, and assists the franchisee to manage the business, while the franchisee pays the corresponding charges for such services. However, the activities relating to purchase of products or services at wholesale or lower rates for resale or leasing is not included in franchise relationships.²⁴⁷

The Disclosure Guidelines requires a franchisor to disclose the following information to its proposed franchisee at least ten days prior to signing of a franchise agreement²⁴⁸:

- a. Start-up cost of the franchise business, such as estimated franchise fees, training charges, expenses for product purchases, raw material, or capital equipment and other related expenses;
- b. Operating expenses, such as ongoing licensing fees, management fees, marketing and promotion fees, and cost of purchase of merchandise or raw materials;
- c. The extent of trademarks, patent and copy rights to be granted by the franchisor to the franchisee, including a detail of the validity of such rights and any other restrictive conditions with regard to use of such intellectual property;
- d. Details of the operational assistance and training to be provided by the franchisor to the franchisee;
- e. Plans for setting up other similar franchise in the area of the franchisee’s business;
- f. Conditions for terminations, alterations and cancellation of franchise contracts; and
- g. Details of the restrictions that apply in relation to (a) supply of raw material or merchandise or any capital equipment by the franchisor or its designated supplier; (b) the minimum quantity of raw material or merchandise to be purchased by the franchisee; (c) interior decorations for the franchise business; and (e) any other

²⁴⁵ Id. at § 2(1).

²⁴⁶ Id. at § 2(2).

²⁴⁷ Id. at § 2(3).

²⁴⁸ Id. at § 3.

restrictions that may apply in a given franchise relationships.

B. Foreign Exchange Controls

1. Limits on Currency Conversion

The Regulations Governing the Declaration of Foreign Exchange Receipts and Disbursements or Transactions (“Foreign Exchange Declaration Regulations”) permits a company or firm to make outward remittance up to (i) 50 million USD in aggregate in a calendar year²⁴⁹; and (ii) 1 million USD in a single transaction.²⁵⁰

In cases where transactions involve outward remittance by a company or firm exceeding (i) 50 million USD in aggregate in a calendar year; or (ii) 1 million USD in a single transaction, remittances for such transactions will be permitted after prior verification of such transaction by the Central Bank of China.²⁵¹

2. Government Filing Requirements

In case of a single remittance of over 1 million NT\$ (USD32,000), the local franchisee will have to submit a ‘declaration statement’ providing details of the remittances to be made to the foreign franchisor. The declaration statement should be in accordance with the format prescribed under the Foreign Exchange Declaration Regulations.²⁵²

In case a transaction involves outward remittance by a company or firm exceeding (i) 50 million USD in aggregate in a calendar year; or (ii) 1 million USD in a single transaction, a prior verification of the transaction will be undertaken to ensure that the remittances are in accordance with the respective contracts pursuant to which the remittances is to be made. This requires submission of contract and other documents to support declaration statement through banking enterprises.²⁵³

C. Taxes

1. Royalties

In general, royalties earned by foreign franchisors from Taiwan will be subject to deduction of withholding tax at 20%.²⁵⁴

2. Service Fees

Withholding tax of 20% will be deducted on service fees that are payable under a franchise

²⁴⁹ The Regulations Governing the Declaration of Foreign Exchange Receipts and Disbursements or Transactions (1949), §5.

²⁵⁰ Id. at § 4.

²⁵¹ Id. at § 5.

²⁵² Id. at § 4-5

²⁵³ Id. at § 5

²⁵⁴ *Taiwan Corporate - Withholding Taxes*, PwC (Jan. 31 2018), <http://taxsummaries.pwc.com/ID/Taiwan-Corporate-Withholding-taxes>.

arrangement, as such fees will be deemed as Taiwan sourced income.²⁵⁵

3. Double Taxation Treaties

Taiwan has entered into the DTAA with 32 countries. The foreign franchisors may avail the benefit of DTAA and claim deduction of taxes at lesser rates.²⁵⁶

4. Gross-Up Provisions

Taiwan laws do not prohibit grossing up. The foreign franchisor may contractually agree with the franchisees to increase the payments to offset the withholding taxes that are to be deducted by the franchisees on the royalty fee, technical fee, advertisement fee, management fee and other similar fees.

D. Franchise Relationship Laws

1. Defaults, Termination, and Nonrenewal

Taiwanese law recognizes the right of parties to determine provisions relating to defaults, termination, renewal and non-renewal of an agreement.

Laws Regulating Unfair Contract Terms

A franchisor is required to provide at least five days or a reasonable time to the franchisees to review the franchise contract prior to its execution. It is also mandatory that the signed franchise contract should be provided to the counterparty within thirty days from the date of its execution.

As per Article 247-1 of the Taiwan Civil Code, the party preparing the contract should ensure that (i) it does not reduce its responsibility, (ii) increase the responsibility of the other party to the contract; (iii) the other party is not made to waive or restrict its right which may be deemed unfair; and (iv) the contract does not incorporate any provision that is gravely disadvantageous to the other party. A violation of the above may result in rescission of the franchise agreement in whole or in part depending on the circumstances.

E. Trademark Requirements and Licensing Considerations

1. Trademark Registration

The Trademarks Act (“Trademarks Act”) regulates registration of trademarks in Taiwan. The registration of trademarks is administered by the Registrar Office set-up by the Ministry of Economic Affairs.²⁵⁷

A foreign national can register a trademark in Taiwan only if the home country of the foreign applicant has (i) acceded to any international treaty for protection of trademarks to which the Taiwan is a signatory, or (ii) a bilateral agreement for protection of trademark for trademarks,

²⁵⁵ *Taiwan Tax Profile*, KPMG (June 2018), <https://home.kpmg/content/dam/kpmg/xx/pdf/2018/08/taiwan-2018.pdf>.

²⁵⁶ *Guide to Going Global Tax*, DLA PIPER, <https://www.dlapiperintelligence.com/goingglobal/tax/index.html?t=17-withholding-tax>.

²⁵⁷ The Trade Marks Act, 2016, art. 3 (Taiwan).

or (iii) admitted the application for registration of trademarks from the Taiwanese applicants.²⁵⁸

On registration of a trademark, the Registrar Office will issue a certificate of registration with a validity of 10 years from the date of registration.²⁵⁹ The registration may be renewed for multiple terms of 10 years each.²⁶⁰

Although it is not it is not mandatory to register a tradename forming part of a franchise business, it is advisable that a foreign franchisor registers a tradename to avoid any ownership claim from its franchisees or any third party.

2. Trademark License Registration

Although the Trademarks Act does not make it mandatory to have a trademark license agreement registered with Registrar Office, in absence of such registration, the licensee shall not have any right or locus standi against a third party with regard to the licensed tradename.²⁶¹

F. Competition Laws

1. Prohibition on Common Franchisor Practices

As per the Fair Trade Act of 2015, no enterprise should impose restrictions on business activities of its trading counterparts to limit competition. In Taiwan, “exclusive dealing” and “tie-in” agreements may be prohibited under the fair-trade law. Generally, whether an exclusive or tie-in arrangement is permissible hinges on whether such arrangement would impose undue or unreasonable restrictions that have an effect to preclude the restricted party from engaging in the business. In determining whether the restrictions are reasonable, the court will consider various factors, such as the intent, purposes, and market position of the parties, the structure of the market to which they belong, the characteristics of the goods and services, and the impact such restrictions would have on market competition.

2. Restrictive Covenants

Post-term enforceability of restrictive covenants against competition are subject to review by a competent court on a case-by-case basis. In determining whether port-term restrictive covenants are valid, the court will consider several factors-- if the restrictions are reasonable (in time and geographic area) to protect the trade secrets and confidential information; if the trade secret and confidential information are worthy of protection, and if adequate compensation is made in return of such restriction.

G. Employment Laws

1. Applicable Employment Laws

The Labor Standard Act (“LSA”) regulates employer-employee relationships and provides

²⁵⁸ Id. at art. 4.

²⁵⁹ Id. at art. 32-33.

²⁶⁰ Id. at art. 34.

²⁶¹ Id. at arts. 39-40.

for minimum standards for working conditions.

2. Effect on Franchising

The LSA does not apply to a franchisee arrangement. The franchisee or their employees will not generally be deemed as employees of the franchisors.

H. Privacy Laws

1. Applicable Privacy Laws

Personal Information Protection Act (“PIP Act”) is the general legislation that regulate the collection, processing and use of personal information of natural persons. The personal information includes information which may be used to identify a natural person, both directly and indirectly, such as name, date of birth, passport number, fingerprints, family records, education records, occupation records, medical record, medical treatment records, genetic information records, contact information, and financial records.²⁶²

The PIP Act requires that the provider of personal information should have the right to check, review modify and delete the personal information. The provider of information also has the right to make request for (i) duplication of personal information; and discontinue collection, processing or use of personal information.²⁶³ The aforesaid rights cannot be waived by the provider of information under a contract.

Generally, prior to collection of any personal information, the person collecting the same should inform the provider of information about (a) the name of the person collecting or processing the personal information; (b) the purpose of collection of personal information; (c) classification of the personal information; (d) the time period, area, target and way of the use of personal information; (e) the rights of the provider of personal information and the ways to exercise such rights; and (f) the consequences of on not providing the personal information.²⁶⁴

The use of personal information is permitted only for the purpose for which it is collected, except where such use is (a) in accordance with law; (b) necessary to promote the public interest; (c) necessary to prevent harm on the life, body, freedom or property of the provider of information; or (d) necessary to prevent harm on the rights and interests of other people.²⁶⁵ The personal information may be used for public interest on statistics, or for academic research by a research institute, provided that it does not result in identification of any provider of personal information.

The provider of the information should be informed when his personal information is stolen, disclosed, altered or infringed in violation of the PIP Act.²⁶⁶

2. Effect on Franchising

The PIP Act is applicable to all industries, including franchising businesses, if it involves

²⁶² Personal Information Protection Act, 1995 (last amended December 30, 2015), § 2.1 (Taiwan).

²⁶³ Id. at § 3.

²⁶⁴ Id. at § 8.

²⁶⁵ Id. at § 19.

²⁶⁶ Id. at § 12.

collection, processing or use of personal information of any living person of Taiwan. There is no provision under the PIP Act that specifically addresses the relationship between franchisors and franchisees. The issues regarding the franchisor or the franchisee's liability under the PIP Act with regard to customers' personal information will depend on the entity (franchisor- franchisee) collecting the data as well as consent given by the provider of information.

I. Governing Law and Dispute Resolution

1. Governing Law

Taiwan laws recognize the parties' autonomy to decide the governing law for their contract. It is not mandatory that a contract executed with a Taiwan national or to be performed in Taiwan should be governed by Taiwan law, and parties to a contract may incorporate the law of other jurisdictions.

2. Arbitration

The Arbitration Act, 1961 ("Arbitration Act") governs arbitration proceedings in Taiwan and provides framework for enforcement of the foreign arbitration awards. The Arbitration Act requires the parties willing to settle their disputes through arbitration to enter into a written arbitration agreement.²⁶⁷ The arbitration agreement can form a part of the principal agreement or could be a separate agreement. The courts in Taiwan would not interfere in matters where the parties have agreed in writing to refer their disputes to arbitration pursuant to an arbitration agreement.²⁶⁸ The Arbitration Act also permits parties to decide the place of arbitration and the rules that will govern the arbitration proceedings.²⁶⁹

The arbitration Act defines foreign arbitration award as the award issued (i) outside Taiwan, or (ii) within Taiwan pursuant to foreign laws.²⁷⁰ A foreign arbitration award should be recognized by the competent court in Taiwan in order to be enforceable in Taiwan. The recognition of a foreign arbitration award could be denied in Taiwan on the following grounds²⁷¹:

- a. where recognition of foreign award will be contrary to the public order or good moral of Taiwan;
- b. where a dispute is not arbitrable as per the laws of Taiwan;
- c. the country where the arbitral award is made or whose laws does not recognize arbitral awards of Taiwan;
- d. the parties to the agreement were under some incapacity under the laws applicable to them;
- e. the arbitration agreement is void;

²⁶⁷ The Arbitration Act, 1961 (last amended December 2, 2015), art. 1 (Taiwan).

²⁶⁸ Id. at art. 4.

²⁶⁹ Id. at arts. 19-20.

²⁷⁰ Id. at art. 47.

²⁷¹ Id. at arts. 49-50.

- f. the parties against whom the award is to be invoked were (i) not given proper notice of the appointment of arbitrator, or (ii) were unable to present their case;
- g. the award deal with matters that were not submitted to arbitration or were outside the scope of the arbitration agreement;
- h. the composition of the arbitral tribunal, or the arbitral procedure, is not in accordance with the arbitration agreement; or
- i. the award has not become binding or has been set aside by competent authority of the country in which, or under the law of which, the award was made.

Although Taiwan is not a signatory to the New York Convention, Taiwan voluntarily complies with said convention.

3. Foreign Judgments

A judgement passed by a foreign court can be enforced in Taiwan only if the judgement is “final” and recognized by the competent court in Taiwan.²⁷²

A foreign judgment will not be recognized by Taiwan courts if:²⁷³

- a. it is not pronounced by a court of competent jurisdiction pursuant to the laws of Taiwan;
- b. it is granted in a proceeding that was against the natural justice;
- c. the performance of such judgment is contrary to Taiwan public policy or morals; or
- d. there exists no mutual recognition between Taiwan and the foreign country where judgement was passed.

4. Injunctive Relief

Courts in Taiwan may enforce injunctions granted by foreign courts or under foreign arbitration awards under certain circumstances.

As per the Taiwan Civil Code, an injunction can be sought by an aggrieved party for non-monetary claims. Such injunctions are generally granted where the courts are satisfied that extreme difficulty would be caused to the party seeking injunctions if such relief is not granted.

²⁷² Taiwan Code of Civil Procedure § 402 (1935).

²⁷³ Id.

XII. THAILAND

A. Regulation of Offers and Sales of Franchises

1. Franchises Sales Law

Currently, Thailand has no specific law governing the sale of franchises or franchise relationships. In 2011, the Ministry of Commerce proposed a Franchising Act to the public and the Cabinet, but currently it remains uncertain when, or if, the law will be passed and enacted.²⁷⁴

In the absence of a specific franchise laws, the following contract and business operations laws are interpreted broadly to govern franchise relationships:

- a. Civil and Commercial Code (CCC) B.E. 2558 (2015);
- b. Unfair Contract Terms Act B.E. 2540 (1997);
- c. Trade Mark Act B.E. 2559 (2016);
- d. Patent Act B.E. 2542 (1999);
- e. Copyright Act B.E. 2561 (2018);
- f. Trade Secrets Act B.E. 2558 (2015);
- g. Trade Competition Act B.E. 2560 (2017);
- h. Direct Sales and Direct Marketing Act B.E. 2560 (2017);
- i. Consumer Protection Act B.E. 2562 (2019);
- j. Product Liability Act B.E. 2551 (2008);
- k. Revenue Code B.E. 2562 (2019); and
- l. Personal Data Protection Act B.E. 2562 (2019).

The various amendments and Ministerial Regulations that implement and further expand upon these Acts are also relevant when reviewing and drafting franchise agreements. These include regulatory approval requirements for food, beverages, pharmaceuticals, nutrition, and cosmetics.

2. Government Agency Regulation

No governmental agency specifically regulates franchise activities. However, the Thai Ministry of Commerce (the "MOC") regulates the formation of business entities. If an entity is formed as a public limited liability company, the Public Company Act of B.E. 2535 (1992) applies. For foreign investors, the Foreign Business Act of B.E. 2542 (1999) provides legislation concerning foreign-owned business in Thailand.

²⁷⁴ Draft *Franchising Business Act* (2011) (Thai.).

Several government bodies may be involved in enforcement actions in Thailand depending on the products or services under franchise activities, such as:

- a. the Department of Special Investigation;
- b. the Economic Crime Investigation Division;
- c. the Metropolitan Police Bureau;
- d. the Provincial Police Bureau;
- e. the Food and Drug Administration; and
- f. the Custom Officer.

B. Foreign Exchange Controls

a. Limits on Currency Conversion

Under the Foreign Exchange Act B.E. 2485 (1942), as amended, and its subordinated regulations (the “FX Law”), no currency conversion limits exist.

b. Government Filing Requirement

The FX law generally prohibits the remittance of money abroad except as permitted by law. The franchise arrangement is considered a servicing transaction whereby remittance is generally permitted. However, certain supporting documents must be provided to a bank or licensed person that has a license to remit funds overseas when ordering such payment overseas.

C. Taxes

1. Royalties

Under the Thai Revenue Code, royalty fees are considered as taxable income.²⁷⁵ Subject to a double tax treaty between Thailand and certain countries, where the franchisor is a non-resident person, the franchisee in Thailand is obligated to withhold tax at the rate of 15% and file a tax return of such withholding.²⁷⁶

If a franchisor has an employee, agent or go-between for business in Thailand, such person will have to file a tax return and pay taxes on behalf of the franchisor.²⁷⁷

2. Service Fees

Service fees are subject to VAT for the performance of the services in Thailand. Services are “performed in Thailand” when services by an overseas service provider (i.e., franchisor) to client located in Thailand. Although a franchisor who occasionally provides its service in Thailand is not required to apply for the VAT registration, the franchisee as its client in Thailand has the

²⁷⁵ Thai Revenue Code §40.

²⁷⁶ Thai Revenue Code §70.

²⁷⁷ Thai Revenue Code §76.

duty to pay the VAT in place of the franchisor.²⁷⁸

In general, the VAT rate is 10%.²⁷⁹ However, there is a Royal Decree deducting the VAT rate to 7% from 1 October 2018 to 30 September 2019.²⁸⁰ The rate is subjected to review by the Cabinet from time to time depending on the economy, financial status, and government policy.

In addition, service fees are also deemed income of the franchisor, and as such, a franchisor might have an obligation to withhold tax. However, in some cases (e.g., the income generating from service involving the high value of investment from the non-resident franchisor) the franchisee can remit the services fee in full without withholding such tax.

On the other hand, like the royalties, if the franchisor has an employee, agent or go-between for business in Thailand, such person will have a tax returning filling and tax payment obligation on behalf of the franchisor.

3. Double Taxation Treaties

Thailand has a double taxation treaty with the United States.²⁸¹ This allows United States citizens to have income tax paid to Thailand, whether directly, by or on behalf of such persons as a tax credit.

If a franchise agreement is entered into in the United States and the agreement provides services to Thai resident(s) or citizens, the franchisor may choose to pay the tax incurred from such royalty fee in the United States at the rate of 15%. In such an event, the franchisee in Thailand will remit the royalty fee in full without withholding tax.

4. Gross-Up Provisions

Under the Thai Revenue Code, taxable income includes any benefit that can be calculated into the monetary form.²⁸² Gross-up provisions rendering tax responsibility in Thailand in favor of the franchisor are considered a benefit to the franchisor, and therefore, are subject to income tax. Therefore, the gross-up tax paid by the franchisee still contributes to the franchisor's tax duty in Thailand.

D. Franchise Relationship Laws

1. Defaults, Termination and Nonrenewal

Thailand is generally a "freedom of contract" jurisdiction, and therefore, traditional contract principals apply to a franchise contract. For example, when a party defaults under a franchise agreement, the non-defaulting party may seek compensation or damages for breach of

²⁷⁸ Thai Revenue Code §80.

²⁷⁹ Thai Revenue Code §§83/6, 85/3.

²⁸⁰ The Royal Decree issued under the Revenue Code regarding Value Added Tax rate reduction (No. 669) B.E. 2561.

²⁸¹ The Convention Between the Government of The Kingdom of Thailand and The Government of The United States of America for the Avoidance of Double Taxation and the Prevention Of Fiscal Evasion with respect to Taxes on Income entered into force on 15 December 1997.

²⁸² Thai Revenue Code §39.

agreement according to the Thai Civil and Commercial Code.²⁸³ The non-defaulting party may also file an ex parte application requesting the court to issue a temporary injunction restraining the defendant from repeating or continuing any wrongful act or breach of agreement, or an order stopping or preventing the waste, damage, transfer, sale, removal or disposal of any property in dispute until the case is final or until the court orders otherwise. In practice, temporary injunctions are difficult to obtain.

Termination rights (including compensation for early termination) are also governed by the terms of the franchise agreement.

There is no statutory provision providing the right to renew to the franchisee. The renewal right is governed by the terms of the franchise agreement. A franchisee's sole recourse if a franchisor fails to comply with the contractual right or renewal is to file a lawsuit against the franchisor for breach of the agreement.

2. Laws Regulating Unfair Contract Term

Although Thailand does not have a specific franchise law and regulation, the Unfair Contract Term B.E. 2540 (1970) provides examples terms that may be unenforceable:

- a. A term that exempts or restricts liability arising from breach of contract;
- b. A term that allows contract termination without reasonable grounds or without any material breach by the other party;
- c. A term that allows one party to delay or not to comply with its contractual obligations without reasonable grounds;
- d. A term that allows one party to enforce further obligations upon the other party than those agreed to on the date of contract execution;
- e. A term that allows for the confiscation of deposits (or liquidated damages) that are excessively high in relation to the damages arising or resulting from a contract under which the deposit was placed; and
- f. Any provision that constitutes terms, notices, or statements made in advance that restrict or exempt liability or breach of contract with respect to injury to life, body, or health of a third person, caused by a deliberate or negligent act committed by the party who sought to restrict or be exempted from such liability, or by other persons to whom that party also must be liable.

The Unfair Contract Terms Act B.E. 2540 (1997) also provides criteria for determining whether contract terms are generally unfair, unreasonable and unenforceable, as follows:

- a. The time and place of making the contractor compliance therewith;

²⁸³ Thai Civil and Commercial Code §420.

- g. Whether one party shoulders a much heavier burden than the other;
- h. The normal practice within the industry concerned; and
- i. The integrity, bargaining power, economic positions, and adeptness of the parties.

For example, a term requiring a franchisee to purchase materials for use in the production of a particular item from the franchisor (or its agent) may be seen as anti-competitive and maybe non-enforceable.

E. Trademark Requirement and Licensing Considerations

1. Trademark Registration

Thailand has a first-to-file system.²⁸⁴ As such, it is important for the prospective franchisors to ensure that their marks are registered prior to entering the market. The owner of the registered mark enjoys the exclusive right to use the mark and can prevent a third party from using the identical or confusingly similar marks.

Thailand joined the Madrid Protocol for the International Registration of Marks with the World Intellectual Property Organization (WIPO). Therefore, a brand owner can file a trademark application via the international trademark system (Madrid System) and designate Thailand as a designation country. Alternatively, the trademark owner can appoint a local agent to file a trademark application directly with the Trademark Office under the Department of Intellectual Property (“DIP”).

In order to successfully register the trademark in Thailand, the mark to be filed must meet three requirements under the Trademark Act B.E. 2534 (1991) as amended and its subordinated regulations (the “Trademark Act”) which are;

- a. Be distinctive;
- b. Not contrary to the laws; and
- c. Not identical or confusingly similar to the prior-filed or registered mark.

The average period for completing the trademark registration process is fifteen to twenty months. There are four main procedural stages for registration of a trademark application in Thailand: filing, examination, publication, and registration. Once the mark is registered, it is effective for ten (10) years counting from the filing date. The trademark application is renewable every ten (10) years.

2. Trademark License Registration

The Trademark Act provides that a trademark license agreement must in writing and registered at the Department of Intellectual Property. If the trademark license agreement is not registered, it will be void and unenforceable. Please note that to register the trademark license

²⁸⁴ Thai Trademark Act §13.

agreement must contain the following:

- a. The mark(s) to be licensed (with the registration number);
- b. The goods or services for which the licensed mark is used;
- c. Quality control clauses by the licensor;
- d. Whether the licensed trademark is exclusive or non-exclusive; and
- e. Other particulars, such as the specific term or duration of the agreement (if it is not indicated, the agreement shall be enforced until the licensed trademark is expired).

A franchise agreement not only includes a licensing clause of licensing but it may also contain other confidential information such as a business model, financial data, or sales technique. Therefore, the parties to a franchise agreement may consider executing a separate trademark license agreement with the required terms and conditions and register it with the DIP. Alternatively, the parties may choose to conceal the confidential part. In the latter case, the parties should ensure that the required terms and conditions under the Trademark Act remain to disclose.

F. Competition Laws

1. Prohibition on Common Franchisor Practice

Thailand has just enacted the new Trade Competition Act B.E. 2560 (2017) (the “Competition Act”) in 2017. Although the Competition Act prohibits trade practices that leads to a monopoly, reduction or restriction of competition in a market, it clearly states that an agreement between business operators in the different levels for the supply chain (e.g., distributor and retailer) including contracts between rights grantor and grantee, is not a defense of the Act. If the franchise agreement neither imposes unnecessary limitation, causes monopoly power, nor substantially lessens competition, a franchisor can freely enter into a franchise agreement with a Thai franchisee.

Notwithstanding the above exception, the Competition Act regulates the unfair trade practice of business operators. Regardless of the market power, any business operator including a franchisor that imposes unjustifiable tie-in product sales to its business partner would be deemed as conduct damaging other business operators which violates the Competition Act.

2. Restrictive Covenants

In Thailand, restrictive covenants such as non-compete and confidentiality clauses are enforceable. However, the restrictions imposed by such clauses must be reasonable and must not create an unreasonable burden on another party to a contract i.e., the franchisor. In general, a competent court would have its discretion on how long such a clause can enforce after the contract termination.

G. Employment Laws

1. Applicable Employment Laws

The main legislation governing employment in Thailand is the Labour Protection Act B.E.

2541 (1998) as amended (the “LPA”). The main characters of the employer and employee relationship are:

- a. The employer employs the employee;
- b. The employer pays the wage to the employee; and
- c. The employer has controlling power over the assigned work.

Although a franchise agreement may allow a franchisor to impose obligations and guidelines as to how the franchisee should operate the business, the franchisee still manages the business. Moreover, the franchisee does not receive any monetary benefit from the franchisor that could be considered wage. Because franchisee is not an employee, the LPA does not protect the franchisee.

Additionally, a franchisee supervises its own employees, while a franchisor does not have the power to directly regulate the performance of an employee. Further, the franchisor does not contribute to the wages of a franchisee employee, rather a franchisee alone is responsible for its employees’ wages. Therefore, the franchisor is not a “joint employer” of workers in the franchisee’s unit.

2. Effect on Franchising

Pursuant to the criteria of the employer-employee relationship in part G 1, the franchisee is not considered as an employee of the franchisor.

H. Privacy Law

1. Applicable Privacy Law

The primary legislation relating to privacy is the Personal Data Protection Act B.E. 2562 (2019) (the “PDPA”) which has partially come into force on 28 May 2019. The entire law will take effect on 28 May 2020.

Personal Data, in the context of the PDPA, is a broad term covering any data from which an individual can be identified and extending to any data held by a company in the course of its business.

Considering that the client is in the position of “data controller” and/or “data processor”, the most significant restrictions on the collection and use of such data under the PDPA are;

- a. a requirement for data controllers to obtain consent from data subjects (in writing or online) before they can process their personal data (subject to certain exceptions);
- b. more stringent requirements for sensitive personal data;
- c. a requirement to arrange sufficient security measures for storing personal data and sensitive personal data;
- d. restrictions on the transfer of personal data to other countries;

- e. data breach notification requirements; and
- f. a requirement for data controllers outside Thailand to appoint a representative within the jurisdiction, who will have certain rights and obligations.

2. Effect on Franchising

Franchisor and franchisee must notify the data to be collected, objectives of the data collection, use or disclosure, data retention period, types of persons to whom the collected data may be disclosed, and must obtain the data subject's consent. Collected data may only be used for the purpose for which it is collected and steps must be taken to ensure that appropriate security measures prevent unauthorized or unlawful act to personal data.

I. Governing Law and Dispute Resolution

1. Governing Law

Consistent with Thailand's freedom to contract principle, parties may choose an agreement's governing law. Foreign law is also permissible under the Conflict of Laws Act.²⁸⁵ However, the choice of foreign law is enforceable only if its existence is proven to the satisfaction of the Thai court, and it is not considered to be contrary to the public order and good morals. Please note that a choice of forum clause is not enforceable in Thailand.

2. Arbitration

In Thailand arbitration has been used as both an in-court and out-of-court procedure. The in-court procedure, which is frequently utilized in Thailand, refers to arbitration which is conducted while a case is pending consideration by the Court of First Instance. The parties may agree to submit all or any issue in dispute to one or more arbitrators for settlement. In-court arbitration is explicitly provided for in the Thai Civil Procedure Code.

The more commonly utilized modern out-of-court arbitration in Thailand is based on the Arbitration Act B.E. 2545 (2002), which recently been amended on 29 January 2019, a comprehensive legislative enactment which addresses not only the enforcement of arbitration award but also the procedural aspects of arbitration within Thai legal system.

The main organizations which facilitate arbitration in Thailand are the Thai Arbitration Institute, Thailand Arbitration Centre, the Office of Insurance Commission, the Office of the Securities and Exchange Commission, and the Department of Intellectual Property. Apart from mediation supervised by Thai courts, the Thailand Arbitration Centre and the Department of Intellectual Property also provide mediation services.

3. Foreign Judgements

At present, Thai law does not specifically provide for the direct enforcement or recognition of a foreign judgment in Thailand. Moreover, Thailand is not a party to any treaty or agreement by which a foreign court judgment may be entitled to recognition and enforcement in Thailand. Consequently, a new trial based on the merits must be initiated in Thailand. However, foreign

²⁸⁵ The Conflict of Laws Act, B.E. 2481 (1938) (Thai.).

judgments and documentary evidence generated during a foreign litigation procedure, including settlement negotiations, may be admissible as evidence in Thailand.

4. Injunction Relief

According to Thai law, interim remedies are available for the parties upon request at any time before the court renders its judgment, subject to the conditions as specified by law.²⁸⁶ These interim remedies include orders for security for costs, seizure or attachment orders, temporary prohibitive orders (or injunctions), orders requiring government authorities to suspend or revoke any registration, orders for provisional arrest or detention, etc. The parties can also request Anton Piller Order²⁸⁷ prior to filing a lawsuit with the Court.

If a plaintiff is not situated in Thailand and no enforceable property rights in Thailand, or, if the court is convinced that if a plaintiff will lose the case or may not be able to pay the court's fee and expenses, the defendant may request that the court order the plaintiff to deposit money or provide other security for the court's fee and expenses. Failure to comply with this order may result in a temporary suspension of the case.

XIII. VIETNAM

A. Regulation of Offers and Sales of Franchises

1. Franchise Laws

In Vietnam, the offer and sale of franchises is governed by the Commercial Law of Vietnam, which regulates franchise contracts. The Government of Vietnam has also framed certain regulations in the form of decrees and circulars to specifically regulate franchise business. These decrees and circular are:

- a. Decree No. 35/2006/ND-CP ("Decree 35") framed under the Commercial Law to regulate commercial franchising in Vietnam;
- b. Circular No. 09/2006/TT-BTM ("Circular 09") providing guidelines on the registration of franchise systems;
- c. Circular No. 04/2016/TT-BCT ("Circular 04") amending, *intra alia*, Circular 09;
- d. Decree 185/2013/ND-CP ("Decree 185"), prescribing penalties for violations of the prevailing franchise regulations;
- e. Decree No.120/2011/ND-CP ("Decree 120") amending, *Intra alia*, Decree No. 35; and
- f. Decree No. 08/2018/ND-CP (Decree 08) amending, *Intra alia*,

²⁸⁶ Act on the Establishment of and Procedure for Intellectual, § 27 (Thai.).

²⁸⁷ An Anton Piller order is a court order that gives law enforcement officers the right to search premises and seize evidence without prior warning so that evidence cannot be destroyed. An Anton Piller order is equivalent to a search warrant but it is for civil cases. The lawyer, not the police, must request it from the court.

Decree No. 35.

Commercial Law defines the term “commercial franchise,” as a commercial activity whereby the franchisors permit and require the franchisees to purchase or sell goods or provide services, on the following conditions²⁸⁸:

- a. such activities should be conducted by the franchisees in accordance with methods of business organization prescribed by the franchisor;
- b. such activities should be associated with the franchisor’s trademarks, trade names, business knows-how, business slogans, business logos and advertisements; and
- c. the franchisor shall be entitled to supervise and assist franchisees in conducting their business activities.

As per Decree 35, all models of franchising, including direct franchising, master franchising, and multi-unit franchising are permitted in Vietnam.

2. Government Agency Regulation

The Ministry of Industry and Trade (“MOIT”) is the primary authority, which regulates franchising activities in the country. MOIT is responsible for nationwide management of commercial franchising, providing guidance for realization of policies on commercial franchising, and most importantly, organizing the registration of commercial franchising.²⁸⁹

3. Pre-conditions for carrying out franchise business in Vietnam

Decree 35 requires that a foreign franchisor can offer franchise systems subject to the following conditions²⁹⁰:

- a. the business system intended to be licensed under a franchise arrangement should have been operational for at-least one year in the home country of the foreign franchisor; and
- b. the foreign franchisor should have registered the franchise with MOIT.

4. Registration Process

A foreign franchisor as well as the master franchisee of a foreign franchisor are required to register a commercial franchise with MOIT by submitting a “dossier of registration of commercial

²⁸⁸ Commercial Law, No. 36/2005/QH11, art. 284, (Jun 14, 2005) (Viet.).

²⁸⁹ Id. at art. 4.

²⁹⁰ Id. at art. 5.

franchising” (“Franchise Dossier”).²⁹¹The Franchise Dossier includes the following²⁹²:

- a. an application for commercial franchise registration in the form prescribed by MOIT;
- b. a written and notarized description of commercial franchise in the format prescribed by MOIT;
- c. a notarized and legalized copy of the audited financial statements of the franchisor for the most recent year;
- d. a notarized copy of the ‘industrial property right protection title’ granted in Vietnam or in a foreign country where the franchise business involves licensing of any industrial property for which protection title has been granted;
- e. a notarized business registration certificate of the franchisor; and
- f. in case of registration of a master franchisee, a copy of the registration certificate granted by MOIT to the foreign franchisor.

MOIT processes the application and registers a franchise within five working days from the date of receipt of accurate and complete Franchise Dossier.²⁹³

5. Disclosure requirements

At least 15 working days prior to signing the agreement, a franchisor is required to provide a prospective franchisee with a copy of the franchise agreement along with an introductory write-up on the franchise business. The introductory document should include (i) details of the franchisor (such as name, address and other incorporation details); (ii) cost to be paid by franchisees; and (ii) a description of the franchise system.²⁹⁴

A master franchisee is additionally required to provide a prospective sub-franchisees appropriate information about the foreign franchisor, including the content of the master franchise agreement. The Master Franchisee is also required to provide details on the manner in which sub-franchisees will be dealt with upon termination of the master franchise agreement.

The franchisor is also responsible to promptly notify all franchisees about all important changes to be made in the commercial franchise system which could affect the business.

6. Franchise Agreement

Commercial Law requires that the franchise agreement should be made in writing in Vietnamese language. However, parties are free to decide the commercial terms and conditions

²⁹¹ Id. at art. 17.

²⁹² Id. at art. 19.

²⁹³ Id. at art. 20.

²⁹⁴ Id. at art. 8.

for a franchise business.²⁹⁵ The Commercial Law and the franchise regulations do not prescribe any mandatory format for the franchise agreement.

Decree 35 only clarifies that where the parties have agreed to apply Vietnamese law as the governing law of a franchise agreement, the franchise agreement may contain the following provisions²⁹⁶:

- a. content of the franchised commercial right;
- b. rights and obligations of the franchisor;
- c. rights and obligations of the franchisee
- d. price, periodical franchise fee and mode of payment;
- e. valid term of the contract; and
- f. renewal and termination of the contract and provisions relating to settlement of disputes.

7. Violations of franchise regulations

Decree 85 provides different penalties for violations of different provisions of the Franchisee Regulations, namely²⁹⁷:

- a. a fine between VND 6,000,000 and VND 10,000,000 (equivalent to USD261 and USD435) for offences relating to (i) dishonest declaration made in the Franchise Dossier, or in the introduction write-up that are provided to franchisees; or (ii) failure to provide complete or accurate information to the authorities;
- b. a fine of VND 10,000,000 and VND 20,000,000 (equivalent to USD435 and USD869) for failure by a foreign franchisor (or by a master franchisee of a foreign franchisor) to register with MOIT, or commencement of franchise business in Vietnam without complying with the pre-conditions for grant of franchise, shall attract; and
- c. A fine of between VND 60,000,000 and VND 100,000,000 (equivalent to USD2,609 and USD4,350) granting franchise for goods and services that are banned from trading in Vietnam.

Although penalties prescribed for violations of the Franchise Regulations are nominal, the franchisor should ensure compliance with the Franchise Regulations, because in addition to penalties, a franchisor may be forced to pay the entire benefits that it gained from violation of the

²⁹⁵ Id. at art. 12.

²⁹⁶ Id. at art.11.

²⁹⁷ Providing the Penalties on Administrative Violations in Commercial Activities, Production of, Trading in Counterfeit or Banned Goods and Protection of Consumer Rights, Decree No. 185/2013/ND-CP (Nov. 15, 2013); Art. 95, Art. 4(2) (Viet.).

Franchise Regulations.²⁹⁸

B. Foreign Exchange Controls

1. Limits on Currency Conversion

The Ordinance on Foreign Exchange (“Ordinance”) regulates foreign exchange transactions between Vietnamese residents and non-residents. The Ordinance provides that current-account transactions between a Vietnamese residents and non-residents are freely permitted.²⁹⁹ The Ordinance also lists out certain current account transactions for which payments can be freely remitted outside Vietnam to non-residents. It permits Vietnamese residents to make overseas remittances for import of goods and services, which cover payment for royalty and franchise fees.³⁰⁰

Presently, the Ordinance does not prescribe any ceiling on the maximum amount of royalty, license fee, franchise fee and other similar fees that could be remitted by a franchisee to foreign franchisor.

It is mandatory that local currency should be used for all local transactions within Vietnam.³⁰¹

C. Taxes

1. Royalties

Foreign residents who have entered into any contractual arrangement with Vietnamese companies and individuals are required to pay foreign contributor tax (“FCT”) on the income arising out of Vietnam. FCT includes both the value added tax and the corporate income tax (or personal income tax for income of foreign individuals).³⁰²

A foreign franchisor which does not have any establishment in Vietnam will be deemed a foreign contractor and will have to pay FCT on royalties.

2. Service Fees

A foreign franchisor which does not have any establishment in Vietnam will have to pay FCT on advertisement fee, management fee and other similar fees that are generally payable under a franchise agreement.³⁰³

3. Withholding of taxes

Prior to remittance of payments to foreign franchisors which do not have any permanent

²⁹⁸ Id. at art. 95(6).

²⁹⁹ Ordinance on Foreign Exchange, 28/2005/PL-UBTVQH11, art. 6 (Dec. 13, 2005) (Viet.).

³⁰⁰ Id. at art. 7.

³⁰¹ Id. at art.3.

³⁰² *Vietnam Corporate – Withholding Taxes*, PwC, <http://taxsummaries.pwc.com/ID/Vietnam-Corporate-Withholding-taxes> (last updated July 8, 2019).

³⁰³ Id.

establishment in Vietnam, Vietnamese franchisees are required to withhold FCT on royalty, franchise fee and other similar fees at the prevailing tax rate.³⁰⁴

4. Double Taxation Treaties

Vietnam has signed DTAA's with over 80 countries.³⁰⁵ A DTAA determines the tax implications arising on commercial transactions between residents of Vietnam and resident of such countries. The relevant DTAA may impact the withholding tax rates for corporate income tax (or personal income tax for income of foreign individuals). A foreign franchisor is entitled to avail the benefit of DTAA and seek deduction of withholding taxes at a lesser rate.³⁰⁶

Foreign franchisors which do not have a permanent establishment in Vietnam are not required to obtain any VAT registration or file any corporate income tax returns (or personal income tax for income of foreign individuals).

5. Gross-Up Provisions

Franchisees may contractually agree with foreign franchisors to increase payments to offset withholding taxes that are to be deducted by the franchisees on royalties, technical fees, advertisement fees, management fees and other similar fees.

D. Franchise Relationship Laws

1. Defaults, Termination, and Nonrenewal

Although parties to a franchise arrangement are free to decide the effective tenure of a franchise contract, Decree 35 provides a list of events when the parties can unilaterally terminate the franchise agreement.

A franchisor has the statutory right to unilaterally terminate a franchise agreement where³⁰⁷:

- a. The franchisee does not hold a proper license to carry out the business operations;
- b. The franchisee is declared bankrupt or is dissolved pursuant to the Vietnamese laws; or
- c. The franchisee commits a material breach of the franchise agreement and such breach is not remedied within a reasonable time.

Likewise, a franchisee has the right to unilaterally terminate the franchise agreement if the

³⁰⁴ Id.

³⁰⁵ Id.

³⁰⁶ Id.

³⁰⁷ Detailing the Provisions of The Commercial Law on Commercial Franchising, Decree No. 35/2006/ND-CP, art. 16(1) (Mar. 31, 2006) (Viet.).

franchisor³⁰⁸:

- a. fails to supply relevant documents to guide the franchise regarding the franchise system;
- b. fails to provide training for managing the franchise business in accordance with the franchise system;
- c. fails to guarantee the intellectual property rights as specified in the franchise contract; and
- d. fails to accord to equal treatment to franchisees.

The Commercial Law and franchise regulations do not provide any statutory right to the franchisees to seek renewal of franchise agreements. Therefore, it is for the parties to decide on the terms and conditions for renewal of a franchise agreement.

A franchisee that is not granted renewal or extension (in pursuance to the terms and conditions of the agreement) can seek compensation for breach of the franchise agreement.

Parties to a franchise agreement are entitled to seek (i) specific performance of contracts; (ii) fines for breaches; (iii) payment of damages; (iv) suspension of performance of contracts; (v) cancellation of contracts. Parties may contractually agree to seek any other remedies for breach of contract, provided they are not contrary to the fundamental principles of Vietnamese law, or treaties to which the Socialist Republic of Vietnam is a contracting party and international commercial practices.³⁰⁹

2. Laws Regulating Unfair Contract Terms

The Commercial Law requires that the parties should act on their own free will, and neither party should impose its own will on, to force, intimidate or obstruct, the other party.³¹⁰ It is also a statutory requirement that parties should act in goodwill and honesty and that neither party should deceive the other party.³¹¹

E. Trademark Requirements and Licensing Considerations

1. Trademark Registration

Trademark law in Vietnam is governed by primarily by the Law on Intellectual Property No. 51/2001/QH10 and is administered by the National Office of Intellectual Property.

Foreign individuals and organization can file applications for registration of trademarks through their lawful representatives in Vietnam.³¹²

³⁰⁸ Id. at art.16(2).

³⁰⁹ Commercial Law, No. 36/2005/QH11, (Jun 14, 2005), art. 284 (Viet.).

³¹⁰ Id. at art.11.

³¹¹ Civil Code, No. 91/2015/QH13, art. 3.3 (Nov 24, 2015) (Viet.).

³¹² Law on Intellectual Property, Resolution, No. 51/2001/QH10, art.87.1 (Nov. 29, 2005) (Viet.).

On registration of a trademark, the NOIP will issue a certificate of registration with a validity of 10 years from the date of grant of the certificate. The certificate of registration may be renewed for multiple terms of 10 years each.³¹³

2. Trademark License Registration

It is not mandatory to register a trademark license agreement with NOIP.

F. Competition Laws

1. Prohibition on Common Franchisor Practices

The Competition Law No. 23/2018/QH14 (**Competition Law**) is the prevailing anti-trust legislation of Vietnam. It regulates unfair competition and restrictive competition acts. The Competition Law does not explicitly reference the franchisor-franchisee relationship but, it contains certain provisions that may impact franchise arrangements. As per the Competition Law, the following agreements between parties involved in different stages of production shall be deemed anti-competitive if they could cause a significant restraint on competition³¹⁴:

- a. fixing prices of goods or services;
- b. restricting distribution outlets, sources of supply of goods, and provision of services;
- c. restricting technical and technological development, and investments; and
- d. imposing pre-conditions to purchase certain goods or services prior to signing of the agreement and where the pre-conditions have no direct nexus with the subject matter of the agreement;

The National Competition Commission will determine anti-competitive effects of an agreement based on the following factors:³¹⁵

- a. market share of enterprises entering into such agreement;
- b. barriers to market entry and expansion;
- c. limitations to technological research and development; and
- d. increase in customers' cost and time for buying goods and services from parties entering into such agreements.

A typical franchise agreement may contain certain elements of prohibited anti-competitive provisions. Franchisors should evaluate the reasonableness of various restrictions that may be contained in the franchise agreement in the context of their objectives to ensure that the franchise

³¹³ Id. at art. 93.6.

³¹⁴ Law on Competition Law, No. 23/2018/QH14, arts. 11-12 (Jun 12, 2018) (Viet.).

³¹⁵ Id. at art. 13.

agreement is not deemed anti-competitive.

2. Restrictive Covenants

There is no express law that invalidates non-compete and non-solicitation restrictive covenants which require a franchisee (and its owners) not to undertake any competitive business, or solicit any business from the franchisor or other franchisees for a definite term after the termination of the franchise agreement. There are hardly instances where a party to a franchise agreement have sought remedy or injunctive relief for enforcement of non-compete covenants. The jurisprudence on this subject is yet to evolve.

G. Employment Laws

The Labour Code of 2012 (“Labour Code”) regulates labor standards, and rights, obligations and responsibilities of employers and employees. It is a comprehensive legislation that covers most aspects of industrial and employment relationships, such as social security; occupational safety and health; trade unions; employment conditions; and resolution of labor disputes. In addition to the Labour Code, Decree No.11/2016/ND-CP (“Decree 11”) regulates issuance of work permits to foreign citizen to work in Vietnam.

The Labour Code defines an employer as any enterprise, organization, cooperative, household or individual, which employs a worker on the basis of employment contract.³¹⁶ It is mandatory that all employment contracts, except for temporary work contracts of less than three months, are concluded in writing.³¹⁷ An employer may require its employees to sign a written agreement for protection of any business and technological secret. Such agreement could specify the nature and the duration of protection, and the compensation which an employee may have to pay on a breach of his obligation to protection the business and technological secret.³¹⁸

The Labour Code and Decree 11 do not apply in the context of franchisor-franchisee relationships. There is nothing contained in the Labour Code or Decree 11 which may deem a franchisee as an employee of its franchisor.

H. Privacy Laws

1. Applicable Privacy Laws

Currently, there are number of regulations that regulate data privacy in Vietnam, which includes the Civil Code No 91/2015/QH13, the Law on Consumer Protection No 59/2010/QH12, the Law on E-Transactions No 51/2005/QH11, the Law on Information Technology No 67/2006/QH11, the Law on Telecommunications No 41/2009/QH12, the Law on Network Information Security, Decree No. 72/2013/ND-CP on the management, provision and use of Internet services and online information as amended by Decree no 27/2018/ND-CP, Decree No 52/2013/ND-CP on e-commerce, and the Penal Code No 100/2015/QH13.

Most data privacy regulations have a common underlying principal that (i) an entity should collect, process and use personal information only with prior consent of the owner of the information, (ii) the use of such information must be restricted to the purpose for which the

³¹⁶ Labour Code, No. 10/2012/QH13, art. 3.2 (Jun 18, 2012) (Viet.).

³¹⁷ Id. at art. 16.1.

³¹⁸ Id. at art. 23.2.

personal information was collected, (iii) consent from an owner of personal information should be obtained before transfer of any personal information to a third party; and (iv) an owner of a personal information has the right to check, modify and delete the personal information.³¹⁹

The term “personal information” has been very broadly defined in various privacy legislation to include any information which may contribute to identify a particular individual.³²⁰

In addition to the foregoing legislation on privacy of personal information, the Vietnamese Government has also enacted the Law on Cybersecurity (Cybersecurity Law) in June 2018, which was implemented from January 1, 2019. Cybersecurity Law is intended to regulate cyberspace, which includes connected network of information technology, telecom networks, the internet, computer networks and information systems, information processing and control systems, and databases with the intention to protect national security, social order and lawful interest of agencies, organizations and individuals.

Cybersecurity Law imposes certain responsibilities on domestic as well as foreign enterprises providing services on a telecommunication network, the Internet and value-added services in cyberspace in Vietnam.

As per Article 26 (2) of Cybersecurity Law, domestic and foreign service providers on telecom networks and on the Internet and other value-added services in cyberspace in Vietnam carrying out activities of collecting, exploiting, using, analyzing and personal information, data about service users’ relationships and data generated by service users in Vietnam are, among other things, responsible for:

- a. authenticating of information when a user registers a digital account and maintain confidentiality of information and accounts of users;
- b. storing such data in Vietnam for a period to be specified by the Government; and
- c. setting-up of branches or representative offices in Vietnam if such services are provided by a foreign enterprise.

2. Effect on Franchising

Although the existing regulations on the privacy of information do not elaborate responsibilities and liability of a franchisor regarding personal information collected pursuant to the franchise business, the regulations may cover a franchise business and regulate collection, processing, storage of personal information, including transfer of such information by a franchisee to its franchisor.

It is crucial for a foreign franchisor to understand its responsibilities and liabilities with regard to collection, use, processing of personal information of Vietnamese users in the context of the franchise business.

³¹⁹ Law on Network Information Security, 86/2015/QH13, arts. 16-19 (Viet.).

³²⁰ Id. at art. 3.15.

I. Governing Law and Dispute Resolution

1. Governing Laws

The Civil Code 2015 contains rules regarding choice of laws in a civil contract. The Civil Code 2015 permits parties to a contract to choose a foreign governing law where at least one party is a foreign individual, or where the contract has a foreign element. However, foreign governing laws cannot be applied in the following circumstances: (i) where consequence of application of the foreign governing laws would be against the fundamental principles of Vietnamese law; (ii) where the subject matter of the contract deals with an immovable property situated in Vietnam; (iii) in respect of employment contracts or consumer contracts where the application of foreign laws would affect the rights of employees or consumers; and (iv) where the application of foreign law affects the rights of a third party and such third party has not consented to the application of the foreign law.³²¹

2. Foreign Judgements

The Civil Procedure Code No. 92/2015/QH13 provides rules on the enforcement of judgements passed by foreign courts. As per the Civil Procedure Code, judgements passed by foreign courts will be enforced in the following events³²²:

- a. Under an international treaty in accordance with the terms and conditions of the treaty. Presently Vietnam has bi-lateral agreement with about 15 countries;
- b. In cases where the foreign judgements are specifically recognized under a Vietnamese Laws, such as 2014 Law on Marriage and Family No. 52/2014/QH13; and
- c. On the basis of the principal of reciprocity.

As per Civil Procedure Code, generally, a foreign judgement cannot be enforced if:

- a. it deals with an immovable property situated in Vietnam;
- d. it has not taken final legal effect under the law of the home country of the foreign court;
- e. the foreign court did not follow the due-procedures while deciding the matter;
- f. the foreign court did not have the jurisdiction to hear the subject matter of the foreign judgement;
- g. the subject matter of a foreign judgement falls under an exclusive jurisdiction of a court in Vietnam;
- h. the subject matter of the foreign judgement has already been

³²¹ Civil Code, No. 91/2015/QH13, art. 679 (Nov 24, 2015) (Viet.).

³²² Code of Civil Procedure, No. 92/2015/QH13, art. 423.1 (Nov. 25, 2015) (Viet.).

- settled by a legally effective civil judgement;
- i. it conflicts with third country's judgement which has been recognized and enforced in Vietnam;
 - j. the time limit for enforcement of the foreign judgement in the home country or as per the laws of Vietnam, has expired;
 - k. if the foreign judgement has been cancelled or terminated in home country; and
 - l. if recognition and enforcement of the foreign court will be contrary to basic principles of law of Vietnam³²³.

Enforcement of foreign judgements in Vietnam is a time consuming and complex process. Therefore, a foreign franchisor should seek expert advice from local counsel to evaluate the merits and disadvantages of referring disputes to a foreign court.

3. Arbitration

Commercial arbitrations in Vietnam are governed by the Law on Commercial Arbitration, No. 54-2010-QH12 ("LCA"); Resolution Guiding the Implementation of Certain Provisions of Law on Commercial Arbitration, No. 01/2014/NQ-HDTP; the Civil Procedure Code, No. 92/2015/QH13; Decree No. 63/2011/ND-CP; and the Resolution No. 1/2014/NQ-HDTP.

The LCA provides comprehensive provisions on all aspects of commercial arbitration to be held in Vietnam, namely, rights of the parties with regard to appointment of arbitrators, the seat of arbitration, governing laws of the agreement; requirements of a valid arbitration agreement; manner for conduct of arbitration proceedings, time limit for seeking relief, including time frame for conclusion of arbitration proceedings; qualification for arbitrators, right of courts and arbitrator to award interim relief; conditions and procedures for establishment of arbitration institutes.

The parties to a contract are free to choose their arbitrators and agree on procedures, language, and the seat of arbitration under a valid arbitration agreement. The arbitration agreement may be executed separately or may be provided in the main agreement. If an agreement involves a foreign element (i.e., where a party to an agreement is a foreign party, or where the subject matter of the agreement has a foreign nexus), the parties may incorporate foreign law as the substantive law of the agreement. However, if an agreement has no foreign element, the substantive law for the agreement should be Vietnamese Law.³²⁴

The arbitration agreement should meet all conditions that are prescribed in the LCA for a valid agreement. Therefore, parties to a franchise agreement desiring to opt for arbitration must ensure that the agreement is valid as per the laws of Vietnam.³²⁵

Parties to an international commercial transaction may choose for resolution of disputes by arbitration with a seat outside Vietnam. However, prior to enforcement of awards by a foreign

³²³ Id. at art. 439.

³²⁴ Law on Commercial Arbitration, No: 54-2010-QH12, art. 45 (Jun. 17, 2010).

³²⁵ Id. at art. 6.

seated arbitrator, institutional or commercial, the foreign arbitral award should be recognized as fit for enforcement by the competent court in Vietnam.

Only a final arbitration award passed by a foreign arbitrator passing the following tests will be recognized:

- a. if the foreign country in which the award is passed is a signatory to the New York Convention and recognized by Vietnam; and
- b. on the basis of the principle of reciprocity.³²⁶

Furthermore, a foreign arbitral award will not be recognized and enforceable in Vietnam if:

- a. the award has been cancelled or suspended by the competent bodies of the countries where the awards were passed;
- c. the parties fail to apply for recognition and enforcement of arbitration award within the limitation period; and
- d. the award is against the fundamental principles of Vietnam law. The reports suggest that although the number of cases where foreign awards have been enforced and recognized in Vietnam are increasing, enforcement is low when compared to other jurisdictions.³²⁷

4. Injunctions and temporary relief

An injunction granted by a foreign court pursuant to a final and effective order can be enforced in Vietnam as long as all other conditions for enforcement of a foreign judgement are satisfied. However, the Civil Procedure Code does not clarify if an interlocutory order or temporary injunction granted by a foreign court or foreign seated arbitration can be recognized and enforced in Vietnam.

XIV. CONCLUSION

Franchising in Asia Pacific can present great opportunities for franchisors and their business partners. But, when deciding to embark on expansion into one or more Asia Pacific countries, a great deal of initial (and continued) diligence about the legal frameworks affecting franchising must be conducted. And, given constant global forces affecting franchising (from trade tariffs, to privacy laws, to franchise-specific legislation), even an experienced international franchise practitioner should routinely revisit the ever-changing and evolving franchise requirements in the Asia Pacific.

³²⁶ Id. at art. 424.

³²⁷ Id. at art. 459.

BIOGRAPHIES

Srijoy Das is a partner and Head of Franchising, Distribution & Licensing in the New Delhi, India office of Archer & Angel (an Indian law firm with offices in New Delhi, Bangalore, Mumbai, Pune and Hyderabad). He has represented numerous U.S. and non-U.S. companies in franchising, licensing and distribution matters in India and worked with many of those clients internationally as well, including in other parts of South and South East Asia. He also advises companies on foreign investment regulations and foreign exchange law while undertaking business in India. He has been recognized for many years as one of the top franchise lawyers in India and internationally in *Who's Who Legal, including Who's Who Legal: Thought Leaders*. Srijoy has served on the American Bar Association's Forum on Franchising International Division Committee for the past 3 years. He has authored several publications on franchising in India, including a *Primer on Franchising in India in the Franchise Law Journal (Volume 38, Number 4, Spring 2019)*. Srijoy has a law degree from the University of Delhi, India and a Masters degree in International Economic Laws from the University of Warwick, United Kingdom.

Abhishek Dube is an associate in the Reston, Virginia office of DLA Piper LLP. He is a member of the firm's global Franchise practice and assists clients with franchise, license and distribution transactions, especially international transactions. He has worked with experienced and start-up businesses in the food and beverage, hotel and lodging, automobile manufacturing, alcohol, retail, fitness and other industries. Abhi has a B.S. in Finance from Carnegie Mellon University, and a J.D. and LL.M. in International Business Law from Indiana University School of Law.

Andrew Loewinger is a partner in the Washington, D.C. office of Nixon Peabody LLP (an international law firm of 700 attorneys with offices throughout the United States, and in Beijing, Hong Kong, Shanghai, and Singapore). He has represented numerous U.S. and non-U.S. companies in franchising and distribution matters in the United States and internationally on international franchising, licensing and distribution matters. Andrew is a past Chair of the International Franchising Committee of the International Bar Association and a former member of the Governing Committee of the American Bar Association's Forum on Franchising. Andrew is the co-editor and co-author of *International Franchise Sales Laws*, most recently published by the American Bar Association in 2015. He was appointed in 2004 as the first Director of the International Franchise and Distribution Division of the ABA's Forum on Franchising. He has been recognized for many years as one of the top franchise lawyers in the United States and internationally in *Who's Who Legal, The International Who's Who of Business Franchise Lawyers; Chambers USA: America's Leading Lawyers for Business; and Best Lawyers in America* (in franchise law). Andrew has a B.A. from The Colorado College (Phi Beta Kappa, magna cum laude), a Masters in International Affairs from Columbia University; and a J.D. from Georgetown University Law Center.