

INTERNATIONAL FRANCHISE REGULATION

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INTERNATIONAL ASSOCIATIONS

European Franchise Association

The European Franchise Federation (“EFF”) was founded in 1972.¹ Today, the Association has seventeen national members, including Austria, Belgium, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Netherlands, Portugal, Slovenia, Sweden, Switzerland, and the United Kingdom.² The Federation’s goal is to promote and defend ethical and commercial franchising, as well as to explain the meaning of “ethical franchising” and its implications to all concerned audiences – such as European institutions, national authorities and the general public and consumers.³ To achieve its mission the Federation introduced a Code of Ethics in 1972, requiring that every national member and each member of the national franchise association commits itself, through its membership, to the principles established in the Code.⁴

The Code contains conditions of membership to the EFF – including acceptance without reservation of the Articles of the Federation and the rules and regulations drawn up in accordance with the Articles – as well as demanding that member Associations or Federations must require their member franchisors to accept and comply with the

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¹ European Franchise Federation, “A Word of Introduction,” online: European Franchise Federation - Self Regulation <<http://www.eff-franchise.com/selfregulation.html>> [EFF, “Self-Regulation”].

² European Franchise Federation, “Our Membership,” online: European Franchise Federation -Our Membership <<http://www.eff-franchise.com/membership.html>> [EFF, “Membership”].

³ European Franchise Federation, “Mission Statement of the Federation,” online: European Franchise Federation - EFF’s Mission <<http://www.eff-franchise.com/effmission.html>> [EFF, “Mission”].

⁴ EFF, “Self-Regulation,” *supra* note 1.

European Code of Ethics on Franchising.⁵ Part II of the Code, last amended on 5 December 2003, contains the Code's text. The text contains a definition of franchising, guiding principles, clauses regarding recruitment, advertising, disclosure, the selection of individual franchisees, the franchise agreement, and the Code's applicability to master franchise systems.⁶ Among other things, the Code requires: (i) franchisors to provide franchisees with initial training and continuing commercial and/or technical assistance during the entire life of the agreement;⁷ (ii) franchisees not to disclose to third parties the know-how provided by the franchisor, neither during nor after termination of the agreement;⁸ (iii) that all parties exercise fairness in their dealings with each other;⁹ and (iv) that franchisees be given a copy of the Code of Ethics as well as full and accurate written disclosure of all information material to the franchise relationship, within a reasonable time prior to the execution any binding documents.¹⁰

Franchises are further regulated at the European Union level under Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(2) of the Treaty to categories of vertical agreements and concerted practices. The details on franchising appear in the Regulation's *Guidelines on Vertical Restraints*.¹¹ According to the Guidelines, Article 81 applies to vertical agreements that affect trade between member states and those that prevent, restrict or distort competition.¹² Vertical agreements include those agreements or concerted practices entered into between two or more undertakings; each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and, relating to the conditions under which the parties may purchase, sell or resell certain goods or services.¹³ The Guidelines apply to franchises in the areas of vertical

⁵ European Franchise Federation, *Code of Ethics*, online: <<http://www.eff-franchise.com/EFF%20Code%20of%20Ethics%20for%20Franchising.pdf>> [EFF, "Code of Ethics"] at Part I – III(b).

⁶ *Ibid.* at Part II.

⁷ *Ibid.* at Part II, s. 2.2.

⁸ *Ibid.* at Part II, s. 2.3.

⁹ *Ibid.* at Part II, s. 2.4.

¹⁰ *Ibid.* at Part II, s. 3.3.

¹¹ European Franchise Federation, "Regulation at the European Union Level: exists in the context of EU Competition Law only," online: European Franchise Federation - Self Regulation and Regulation <<http://www.eff-franchise.com/regulationeulevel.html>> [EFF, "Regulation at the European Level"].

¹² European Franchise Federation, *Guidelines on Vertical Restraints*, online: <http://www.eff-franchise.com/eulevel_document2_guidelines_vertical_restraints.pdf> at Part I-2 [EFF, "Guidelines on Vertical Restraints"].

¹³ *Ibid.* at Part III-2.

agreements containing provisions on intellectual property rights (“IPR”) and know-how.

In dealing with IPR, the Guidelines state that the Block Exemption applies to vertical agreements containing IPR provisions when the following conditions are met: (i) the IPR provisions must be part of a vertical agreement; (ii) the IPR provisions must be assigned to or for use by the buyer; (iii) the IPR provisions must not constitute the primary object of the agreement; and (iv) the IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers. In the case of franchising, where marketing forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees. This is, for instance, the case in a franchise agreement where the franchisor sells to the franchisee goods for resale and in addition licenses the franchisee to use its trade-mark and know-how to market its goods.¹⁴

Moreover, licensing contained in franchise agreements is covered by the Block Exemption in so far as the license agreement or clauses contained therein do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the master franchisee or the franchisee.¹⁵ Some of the IPR related obligations considered necessary to protect the franchisor’s intellectual property rights are:

- An obligation on the franchisee not to engage, directly or indirectly, in any similar business;
- An obligation on the franchisee not to acquire financial interests in the capital of a competing undertaking, which would give the franchisee the power to influence the economic conduct of such undertaking;
- An obligation on the franchisee not to disclose to third parties the know-how provided by the franchisor as long as this know-how has not fallen into public domain;
- An obligation on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise and to grant it, and other

¹⁴ *Ibid.* at Part III-2(iv).

¹⁵ *Ibid.*

franchisees, a non-exclusive license for the know-how resulting from that experience; and

- An obligation on the franchisee not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise.¹⁶

Spanish-American Franchise Federation (“FIAF”)

The FIAF was created in 2006 with the goal of legitimizing the exchange of commercial and strategic information in Latin America. It is comprised of franchise associations from Argentina, Mexico, Peru, Brazil, Ecuador, Venezuela and Spain. The FIAF’s objectives include: (i) to promote and encourage the development of franchising in each of the member nations and those in Latin America; (ii) to promote and conduct studies and research in the area of franchising and its characteristics in Latin America; (iii) to promote and provide aid in the creation of franchise associations in Latin American countries that lack them; (iv) defend ethical principles in franchising; and (v) encourage the education, research and development on franchise systems.¹⁷ Although the FIAF’s official languages are Spanish and Portuguese, all statutes and subsequent amendments must be written in Spanish.¹⁸ At the moment, the FIAF has yet to incorporate a Code of Ethics or any regulations pertaining to franchisee-franchisor relationships.

World Franchise Council

The World Franchise Council (“WFC”) was formed in 1994 with the following founding National Franchise Associations: Argentina, Australia, Austria, Belgium, Brazil, Canada, Czech Republic, Denmark, France, Germany, Great Britain, Hong Kong, Hungary, Italy, Japan, Malaysia, Mexico, Netherlands, New Zealand, Portugal, Singapore, South Africa, Spain, Sweden, U.S.A. and the European Franchise Federation.¹⁹ Full membership of the WFC is open to all National Franchise Associations whose Constitution requires a subscribing membership and

¹⁶ *Ibid.*

¹⁷ Latin American Franchise Federation (FIAF), “Quienes Somos,” online: Quienes Somos <<http://www.fiafranquiadores.com/quienessomos.htm>> at Article 1 and 2.

¹⁸ *Ibid.* at Article 31.

¹⁹ World Franchise Council, “WFC History and Profile,” online: About WFC - History <http://www.worldfranchisecouncil.org/control/cpview?contentId=WFC_HISTOR Y>.

a governing body which is in the majority composed of franchising companies. However, the WFC will only recognize one national franchise association per member nation, with the exception of Hong Kong.²⁰

The purpose of the WFC is the encouragement of international understanding and co-operation in the protection and promotion of franchising worldwide. Its objectives are fourfold: (i) to provide a forum within which each properly constituted National Franchise Association in the world can take an equal seat in the confidence that its views and its sovereignty will be respected and in the expectation that their common interests and needs will be supported internationally; (ii) to determine those aspects of information on, and experience of, franchising which can be usually shared internationally and to provide mechanisms for the efficient communication of that “know-how;” (iii) to represent international information on franchising and the common views of National Franchise Associations to international bodies; and (iv) to encourage the development of properly constituted National Franchise Associations in all countries around the world, as recognized by the United Nations.²¹

The WFC adheres to a series of principles of ethics that apply to the relationship between franchisor and franchisee, as well as to the relationship between master-franchisee and sub-franchisee. The WFC requires that its franchisor members disclose to prospective franchisees all the information necessary for the franchisee to engage himself in the franchise relationship in full knowledge of his commitments and responsibilities. This information must be disclosed within a reasonable delay before signing the contract, delay which cannot be less than 7 days. Furthermore, during the negotiation phase, a franchisor may ask the prospective franchisee to sign a legally binding statement of confidentiality.²² The WFC also regulates duties of the franchisee and franchisor.

A franchisee cannot compete with the network, in particular by appropriating or diverting the know-how transmitted by the franchisor.

²⁰ *Ibid.*

²¹ World Franchise Council, “World Franchise Council Constitution,” online: About WFC – Constitution <http://www.worldfranchisecouncil.org/control/cpview?contentId=WFC_CONSTITUTION>.

²² World Franchise Council, “The World Franchise Council’s Principle of Ethics,” online: about WFC – Internal Rules <http://www.worldfranchisecouncil.org/control/cpview?contentId=WFC_RULES>.

Furthermore, the franchisee has a duty of confidentiality during and after the franchise contract. A franchisor must develop and maintain the commercial and technical know-how that supports the franchise network and favours a permanent and structured dialogue with the franchisees to aid the protection and development of the franchisor's know-how. In case of non-respect of the concept by the franchisee, the franchisor must allow the franchisee, when appropriate and following due notification, a reasonable delay to conform to his obligations. Moreover, the franchisor must ensure that each franchisee respects their obligations and commitments for the general interest of the network. The WFC also imposes obligations pertaining to the franchise contract itself, including termination, and outlines obligations that are common to the franchisor and franchisee.²³

COUNTRIES

North & South America

i. Argentina

The Argentinean Franchise Association ("AAF") was founded with the goal of educating franchisees in order to facilitate their involvement in the world of franchising.²⁴ The Association offers courses to its members and the community at large on topics addressing the advantages of franchising, how to expand a business, customer service, advertising, and trademarks and patents. Furthermore, it demands that all of its members adhere to a Code of Ethics. Among other things, the Code requires pre-contract disclosure of material facts pertaining to the franchise.²⁵ More importantly, the AAF presented a bill titled *Franchises Act* to the Senate in 2004 that is currently being considered.²⁶

The Bill's main goal is to protect franchisees by requiring pre-contract disclosure and good faith in the performance of the agreement. Once passed, the Bill will oblige a franchisor to disclose its prior history, its business plan (proposal), all investments required from the franchisee

²³ *Ibid.*

²⁴ Asociacion Argentina de Franquicias, "Nuestro Objetivo," online: Quienes Somos <http://www.franquiciasarg.com/nueva_web_2005/quienes_somos.htm>.

²⁵ Asociacion Argentina de Franquicias, "Codigo de Etica," online: Asociacion <http://www.aafanchising.com.ar/1_4.php>.

²⁶ Asociacion Argentina de Franquicias, "Que es y que hace la Asociacion Argentina de Franchising," online: Articulos <http://www.franquiciasarg.com/nueva_web_2005/articulos.htm#dos>.

and a summary of the operations manual 10 days prior to the signing of the franchise agreement. A clause shall be included nullifying any contract that violates these requirements. The Bill has been drafted to emulate franchise legislation in France, Italy, Spain and Canada (Alberta).²⁷

ii. Brazil

On 15 December 1994 a law relating to franchising contracts was adopted. The law applies to franchises operated on Brazilian national territory and to master franchises.²⁸ Under Brazilian Law No. 8955/94 (“Brazilian Law”), a disclosure document must be provided to a prospective franchisee at least ten days prior to the execution of the franchise agreement or “preliminary franchising agreement,” or the payment of any fee by the prospective franchisee to the franchisor or any company or individual related to the franchisor. A “preliminary franchising agreement” includes a letter of intent or option to purchase franchise rights in Brazil, or the payment of any fee in connection with such a letter of intent or option.²⁹

Under Brazilian Law No. 9279, the franchise agreement must be registered with the Brazilian Institute of Industrial Property to be enforceable as to third parties. Such filing must include a certified translation of the franchise agreement in Portuguese, a list of trademarks the franchisee is authorized to use under the franchise agreement, and a copy of the franchise agreement.³⁰

The Brazilian Franchise Association (“ABF”) was created in 1987 with the goal of promoting and defending the technical development of franchising as a business model. The ABF offers support services to allow franchisees to correctly investigate franchises and advises franchisors

²⁷ Asociacion Argentina de Franquicias, “El Contrato de Franquicia Comercial y el Proyecto de Ley a Consideracion del Congreso de la Nacion,” online: Articulos <http://www.franquiciasarg.com/nueva_web_2005/articulos.htm>.

²⁸ Frank Zaid and John Sotos, “Status Report on National Franchise Law Project,” (Paper Presented to the Uniform Law Conference of Canada Annual Meeting, August 2002), online: ULCC, Proceedings of Annual Meetings <<http://www.ulcc.ca/en/poam2/index.cfm?sec=2002&sub=2002ib>>.

²⁹ Frank Zaid and Kendal Tyre, “A World Tour of the Basics of International Franchising,” (Paper Presented at the International Franchise Association’s 38th Annual Legal Symposium, May 2005), online: Frank Zaid, Publications <<http://www.osler.com/uploadedFiles/Resources/A%20World%20Tour%20of%20the%20Basics%20of%20International%20Franchising.pdf>> at A-2.

³⁰ *Ibid.*

about all necessary steps involved in expanding their business.³¹ The ABF has incorporated a Code of Ethics that, unfortunately, is only available in Portuguese.³²

iii. Chile

Franchising is still in its early stages in Chile. Although the first franchise opened in 1985, franchises did not popularize until the 1990s, when the economy began a period of continuous growth. In 2006, out of the 113 registered franchises in Chile, 48 percent hailed from the United States of America, 29 percent from other nations and only 23 percent were of Chilean origin.³³

Although Chile has yet to adopt franchise legislation, franchising has emerged as a popular business model. Consequently, the Franchise Chamber of Chile (“CFC”) was created in April 2005 with the goal of developing and encouraging franchising by, *inter alia*, providing informational tools to potential franchisees.³⁴ The CFC has composed a Franchise Offer Circular (“COF”) comprised of a series of questions franchisees should consider asking prior to acquiring a franchise.³⁵

iv. Mexico

Franchising became regulated in Mexico in 1991³⁶ with the introduction of the *Law to Develop and Protect Industrial Property*.³⁷ Article 20(vii) of the Law states as its goal “to establish conditions of legal protection between parties to a franchise, such as guaranteeing a non-

³¹ Brazilian Franchise Association, “Acerca ABF,” online: Sobre ABF <http://www.portaldofranchising.com.br/esp/area.asp?A040_cod_area=1&A040_1_cod_conteudo=1>.

³² Brazilian Franchise Association, *Code of Ethics*, online: <http://www.portaldofranchising.com.br/area.asp?A040_cod_area=12&A041_cod_conteudo=1>.

³³ Tormo, “Chile Abre Sus Puertas a la Franquicia,” online: Actualidad – Artículos <<http://www.tormo.com.ve/actualidad/articulos/articulo.asp?id=24>>.

³⁴ Camara de Franquicias de Chile, “Nace la CFC,” online: Quienes Somos <<http://www.camaradefranquicias.cl/web.cgi?id=1>>.

³⁵ Camara de Franquicias de Chile, “Circular de Oferta de Franquicia,” online: Certificacion de Franquicias <<http://www.camaradefranquicias.cl/web.cgi?id=15>>.

³⁶ IMPI, “La Propiedad Industrial en Mexico,” online: Buscar, Franquicias <http://www.impi.gob.mx/impi/jsp/indice_all.jsp?OpenFile=docs/promocion/inf_94/3wanua941.html>.

³⁷ Camara de Diputados del H. Congreso de La Union (Centro de Documentacion, Informacion y Analisis), *Ley de la Propiedad Industrial*, online: <www.cddhcu.gob.mx/LeyesBiblio/pdf/50.pdf>.

discriminatory treaty for all franchisees of the same franchisor.” Article 142 of the Law focuses solely on franchising and begins by defining a franchise. Under the Article, a franchisor must provide a potential franchisee with information about the franchise as dictated by the Regulations 30 days prior to signing the Franchise Agreement. Failing to provide accurate information will grant the franchisee both the right to declare the contract null and void and the ability to sue for damages. A franchisee may claim damages within one year after signing the contract, while there is no limit on demanding that the contract be declared null and void.³⁸

Article 142 Bis requires that the franchise agreement must include the following information:

- The area in which the franchisee will conduct business;
- The size of the minimum investment required to set up the store;
- The policy with regards to inventory, suppliers and advertising fees;
- The necessary training required by the franchisee’s employees, such as the way in which the franchisor will provide technical assistance;
- Acceptable causes of termination of franchise agreement;
- The instances under which the franchise agreement may be altered;
- The franchisee shall not be under the obligation to sell corporate property to the franchisor unless it is specifically agreed; and
- At no moment shall the franchisee be obliged to sell or transfer business shares to the franchisor, or make him partner, unless specifically agreed.³⁹

Article 142, Bis 2 establishes that both during and after the duration of the franchise relationship, the franchisee must maintain all information about the franchise confidential. Lastly, neither the franchisor nor

³⁸ *Ibid.* at Article 142.

³⁹ *Ibid.* at Article 142 Bis.

franchisee may unilaterally terminate the franchise agreement unless the agreement is of indefinite duration or there is just cause to do so.⁴⁰

The Mexican Institute of Industrial Property (“IMPI”) is the regulatory authority responsible for administering franchise law.⁴¹ Following its conception in 1993, IMPI’s administrative powers were extended through the Industrial Property Law.⁴² In addition, Mexico’s franchise industry enjoys the support of the Mexican Association of Franchises (“AMF”). Founded in 1989, the AMF’s mission is to look after the interests of the franchise sector in Mexico, offering services and benefits to its members that elevate their standards of quality and reduce costs, by means of participation in diverse governmental and private forums, as well as the organization and development of events of interest for the sector.⁴³ The Association’s objectives include the establishment of norms that promote the professionalism of Franchisor Companies as well as developing a franchise sector statistics bank.⁴⁴ The AMF has yet to adopt a Code of Ethics.

v. United States of America

On 21 October 1979, the Federal Trade Commission (“FTC”) Trade Regulation Rule entitled *Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures* (the FTC Rule) came into effect. The Rule applies to all commercial relationships that meet the definition of a “Franchise,” unless an enumerated exclusion or exemption is available.⁴⁵ The main requirement of the FTC Rule – also a requirement in several states – is the production of a disclosure document to prospective franchisees. The document is intended to provide prospective franchisees with all the necessary information to make fully informed decisions about purchasing a franchise. Consequently, the FTC Rule provides basic regulations for the franchising industry throughout all 50 states. In addition, many states have increased the disclosure onus by adding their own requirements.⁴⁶

⁴⁰ *Ibid.* at Article 142, Bis 2.

⁴¹ Frank Zaid and Kendal Tyre, *supra* note 29 at A-9.

⁴² Mexican Institute of Industrial Property (IMPI), “¿Que es el IMPI?,” online: Organizacion del IMPI

<http://www.impi.gob.mx/impi/jsp/indice_all.jsp?OpenFile=docs/bienvenida/main_quees_impi.html>.

⁴³ Mexican Association of Franchises, “Objectives,” online: Association <<http://www.franquiciasdemexico.org/web=english/index-htm.htm>>.

⁴⁴ *Ibid.*

⁴⁵ Frank Zaid and John Sotos, *supra* note 28.

⁴⁶ Daniel F. So, *Canadian Franchise Law Handbook*, (Markham: LexisNexis Canada Inc., 2005) at 92.

The Uniform Franchise Offering Circular (“UFOC”), a new disclosure document, was introduced in 1986, providing franchisors an alternative means of disclosure to that established by the FTC.⁴⁷ The Commission has always permitted franchisors to comply with disclosure requirements either by following the provisions in the Franchise Rule itself, or by following the UFOC guidelines.⁴⁸ This is in part due to the UFOC and the FTC requiring similar disclosure items, including a description of (1) the franchisor and its business; (2) prior litigation and bankruptcies relating to the franchisor; (3) initial and ongoing fees; (4) obligations of the parties and other terms of the contract; (5) restrictions on sales; and (6) rights to renew and terminate the franchise.⁴⁹ However, following an amendment to the FTC Rule, franchisors will eventually no longer be permitted to use the UFOC. As of 1 July 2007, franchisors may follow the amended Rule, or they may continue their current practice of complying with the original Rule or individual state franchise disclosure laws that require a UFOC; but by 1 July 2008, they will be required to follow the amended Rule only.⁵⁰

The new franchise Rule requires franchisors to provide all potential franchisees with a disclosure document containing 23 specific items of information about the offered franchise, its officers, and other franchisees. Required disclosure topics include: the franchise’s litigation history, past and current franchisees and their contact information, any exclusive territory that comes with the franchise, assistance the franchisor provides franchisees, and the cost of purchasing and starting up a franchise. If a franchisor makes representations about the financial performance of the franchise, this topic also must be covered, as well as the material basis backing up those representations.⁵¹

Although the amended Rule closely tracks the UFOC guidelines, in some instances it requires more extensive disclosures, such as with regards to franchisee-franchisor relationships. For instance, the amended Rule requires more extensive disclosure on lawsuits the franchisor has filed against the franchisees; the franchisor’s use of so

⁴⁷ *Ibid.* at 95.

⁴⁸ Federal Trade Commission, “Frequently Asked Questions, Amended Franchise Rule,” online: <<http://www.ftc.gov/bcp/franchise/FAQs.pdf>>.

⁴⁹ Manitoba Law Reform Commission, “Consultation Paper on Franchise Legislation,” online: Current Projects <http://www.gov.mb.ca/justice/mlrc/reports/2007-05franchise_legislation.pdf> at 36.

⁵⁰ Federal Trade Commission, “FTC Issues Update Franchise Rule,” online: <<http://www.ftc.gov/opa/2007/01/franchiserule.shtm>>.

⁵¹ *Ibid.*

called “confidentiality clauses” in lawsuit settlements; a warning when there is no exclusive territory; an explanation of what the term “renewal” means for each franchise system; and trademark-specific franchisee associations. In a few instances, the amended Rule requires less than the UFOC guidelines. For instance, it does not require disclosure of so called “risk factors,” franchise broker information, or extensive information about every component of any computer system that a franchisee must purchase.⁵²

The International Franchise Association (“IFA”), founded in 1960, was established to build and maintain a favourable economic and regulatory climate for franchising.⁵³ It is important to note that although its name alludes to an international nature, 95 percent of its members are US companies.⁵⁴ Therefore, it may be regarded as an association similar to Mexico’s AMF while keeping in mind that, since many US companies have spread internationally, the association does indeed have an international scope. The IFA’s mission is to enhance and to safeguard the business environment for franchising worldwide.⁵⁵

The IFA upholds its mission through its Code of Ethics. The Code is intended to provide a set of core values that are the basis for the resolution of the challenges that may arise in franchise relationships. The IFA promotes the Code in hopes that its application will result in healthy, productive, and mutually beneficial franchise relationships. Through the Code, the IFA encourages members to act sincerely in word and character, exercising mutual respect as well as open and frequent communication between all parties to a franchise.⁵⁶

vi. Venezuela

Venezuela boasts a flourishing chain of franchises, making franchising the second fastest growing market in the country. In 2004, approximately 270 franchisors had established themselves in Venezuela, increasing the number of franchised locations to 1500. Venezuela has thus reached a level of importance in the world of Latin American

⁵² *Ibid.*

⁵³ International Franchise Association, “Frequently Asked Questions about Franchising,” online: About IFA – Franchise FAQ <<http://www.franchise.org/faq.aspx>> [IFA, “Frequently Asked Questions”].

⁵⁴ E-mail from Marcel Portmann (31 July 2007) on behalf of the International Franchise Association.

⁵⁵ IFA, “Frequently Asked Questions,” *supra* note 53.

⁵⁶ International Franchise Association, *Code of Ethics*, online: About IFA – Mission Statement and Values <www.franchise.org/code.aspx> [IFA, “Code of Ethics”].

franchising, becoming comparable to Brazil, Argentina, and Mexico and surpassing Chile. What distinguishes Venezuela from other Latin American countries is that the majority of its franchises are local, with only 40 percent deriving from the United States and other countries.⁵⁷ Moreover, due to the recent growth of franchising in Venezuela, two franchise bodies were created, the Venezuelan Franchise Chamber and the Venezuelan Franchise Association.⁵⁸

The Venezuelan Franchise Chamber, created in 1998, now boasts approximately 140 members. The Chamber's goal is to assist all parties to a franchise by providing informational resources and supporting the Venezuelan franchise community to foster its growth.⁵⁹ Every member of the Chamber must follow its Code of Ethics, incorporated in 1999. The Code establishes, *inter alia*, that upon a dispute, parties to a franchise must exhaust all means of dispute resolution in good faith. Furthermore, a franchisor must provide all franchisees with a Uniform Franchise Offer Circular prior to signing any contract related to the franchise containing information pertaining to the franchise and its operation.⁶⁰

On 7 January 2000, *Guidelines for the Evaluation of Franchise Agreements* were published in Special Official Gazette No. 5,431, under Resolution No. SPPLC-038-99, which establishes the criteria for evaluating the appropriateness of authorizing franchise agreements.⁶¹ The Guidelines contain important points to be considered when entering into franchise agreements. They establish restrictions to free competition and obligations on the franchisee for the protection of industrial or intellectual property rights of the franchisor, or to maintain the common identity and the reputation of the franchised network.⁶²

⁵⁷ Tormo, "El Mercado de la Franquicia en Venezuela," online: Actualidad – Artículos <<http://www.tormo.com.ve/actualidad/articulos/articulo.asp?id=22>>.

⁵⁸ *Ibid.*

⁵⁹ Camara Venezolana de Franquicias, "Quienes Somos," online: Quienes Somos <<http://www.profranquicias.com/index.php?page=quienes>>.

⁶⁰ Camara Venezolana de Franquicias, *Codigo de Etica*, online: Quienes Somos <<http://www.profranquicias.com/index.php?page=quienes&sec=codigo>>.

⁶¹ SICE – Foreign Trade Information System, "Venezuela Trade Policy Review," online:

<http://72.14.253.104/search?q=cache:vWJ233zuMZEJ:www.sice.oas.org/ctyindex/VEN/WTO/ENGLISH/WTPRS108_3_e.doc+%22SPPLC-038-99%22+%2B+Resolution&hl=es&ct=clnk&cd=1&gl=ve> at 77, ¶203.

⁶² Maria Isabel Ponce (BPMA & W Attorneys at Law), "Franchising in Venezuela," online: Reports – Franchises <<http://www.bpmaw.com/eng/franquicias.asp>>.

Europe

i. Belgium

Belgium adopted franchise legislation, titled *Law Relative to pre-contractual information in the framework of agreements of commercial partnership*, on 19 December 2005, modified on 27 December 2005 and coming into force as of 1 February 2006. The Law applies to agreements of commercial partnership concluded between two parties, whereby one of the parties concedes to the other party the right, in return for a fee of any nature, to use in view of the sale of products or the providing of services, a commercial formula which includes either a common brand, a common commercial name, the transfer of know-how, or the providing of commercial or technical assistance.⁶³

The franchisor must issue disclosure documents at least one month prior to the conclusion of the agreement of commercial partnership. The document must contain information falling under two categories: (1) important contractual provisions, in so far as they are foreseen in the agreement of commercial partnerships, and (2) facts contributing to the correct appreciation of the agreement of commercial partnership. Under the former, the franchisor must mention all obligations; the manner of calculating the fee owed by the receiving party, and its mode of revision during the course of the contract and at its renewal; the non-compete clauses with their term and conditions; the term of the agreement of commercial partnership and the conditions of its renewal; and the conditions of notice and of termination of the agreement, notably in relation to the expenses and investments. Under the latter, the franchisor must disclose the name or denomination of the party conceding the right as well as its contact references; in case the right is being conceded by a moral person, the identity and the status of the physical person acting in its name; the nature of the activities of the party conceding the right; the intellectual property rights whose use is being conceded; and for each of the last three years, as the case may be, the number of partners belonging to the Belgian and international network, as well as the expansion of perspective networks.⁶⁴

⁶³ European Franchise Federation, *Law relative to pre-contractual information in the framework of agreements of commercial partnership*, online: Self Regulation and Regulation – Regulation at National Level <http://www.eff-franchise.com/Belgium_Franchise%20Legislation%20on%20Precontractual%20information%2019%20December%202005_english.pdf> at Article 2 [EEF, “Regulation at the National Level”].

⁶⁴ *Ibid.* at Article 3 and 4.

The Law also requires that parties keep confidential all information that they obtain upon the conclusion of the agreement of commercial partnership, and may not use this information, directly or indirectly, outside of the agreement of commercial partnership to be concluded.⁶⁵ Moreover, the clauses of the agreement of commercial partnership and the elements provided in the disclosure document must be written in a clear and comprehensible manner. In case of doubt on the meaning of a clause or an element to be disclosed, the interpretation that will prevail is that which is in favour of the receiving party.⁶⁶

ii. Estonia

In Estonia, franchising agreements are very briefly regulated through Chapter 19 of the *Law of Obligations Act*, which came into force on 1 July 2002. The Chapter is comprised of four sections: defining a franchise contract, establishing the obligations of both franchisors and franchisees, and establishing a franchisor's right to check. Under Estonian law, a franchisor is required to provide the franchisee with instructions for the exercise of the rights thereof and to provide permanent assistance related thereto to the franchisee.⁶⁷ No mention of pre-contractual disclosure is made. Moreover, a franchisor has the right to check the quality of the goods manufactured or services provided on the basis of a franchise contract by the franchisee.⁶⁸

In contrast to other franchise legislation, the Law defines a franchisee's duty more thoroughly. A franchisee is required to, in the exercise of the franchise contract, use the commercial identifications of the franchisor; to ensure that the quality of the goods manufactured or services provided by the franchisee pursuant to the contract is the same as those manufactured or provided by the franchisor; to follow instructions of the franchisor which are directed at the exercise of rights on the same bases and in the same manner as the franchisor; and to provide with all additional services which they could expect upon acquiring goods or contracting for services from the franchisor.⁶⁹

In addition to Estonia's legislation, the Baltic Franchising Association ("BFA") requires that all of its members abide by the Association's Code of Ethics. The Code emulates the European Franchise

⁶⁵ *Ibid.* at Article 6.

⁶⁶ *Ibid.* at Article 7.

⁶⁷ Estonia, *Law of Obligations Act*, online:

<<http://www.legaltext.ee/text/en/X30085K2.htm>> at Chapter 19, §376.

⁶⁸ *Ibid.* at Chapter 19, §378.

⁶⁹ *Ibid.* at Chapter 19, §377.

Federation's Code, although Estonia itself is not listed as a member on the Federation's official site.

iii. France

France adopted the *Loi Doubin* (Law No. 89-1008) relating to the development of commercial enterprises and the improvement of their economic, legal and social environment on 31 December 1989. The first article is relevant to franchising. It is a disclosure law which covers franchising but is not franchise-specific. It applies to all franchise, trademark, distribution and license agreements. The details of the law are laid out in government decree No. 91-337 of 4 April 1991.⁷⁰ The Law requires that disclosure of necessary information must be provided at least twenty days before the execution of the franchise agreement or the payment of any money. A disclosure document must also be furnished to a prospective franchisee or master franchisee prior to their signing a letter of intent or option for franchise rights in France. Under the *Loi Doubin*, there are no exemptions, exclusions or exceptions with respect to franchises and other relationships that come within the scope of the law.⁷¹

The disclosure document must disclose the length of time the licensor has been in existence, the licensor's history, the current condition of the licensor and its prospects for developing the relevant market, the size of the network of franchisees, the field and scope of the agreement's exclusivity, the duration of the agreement and the conditions for termination, renewal, and assignment of the agreement.⁷²

iv. Germany

Franchising in Germany is not explicitly regulated. Instead, the franchise contract is regulated under various areas of law, such as legal protection of trade, trade law, debt law, and competition and cartel law. The most important rules and laws which are applicable for franchise relationships are the following: (i) limits against other types of marketing; (ii) pre-contractual briefing; (iii) general business terms; (iv) commercial legal protection; (v) know-how; (vi) duties performed by the franchisor;

⁷⁰ Frank Zaid and John Sotos, *supra* note 28.

⁷¹ Frank Zaid and Kendal Tyre, *supra* note 29 at A-6.

⁷² *Ibid.*

(vii) restriction of competition; (viii) prohibition of post contractual competition; and (ix) right of withdrawal of the franchisee.⁷³

Customary law (*culpa in contrahendo*) is applied to matters of pre-contractual disclosure. Already at the opening of contract negotiations, a pre-contractual relation of mutual trust occurs. In this context, both parties are in particular obliged to lay open all information relevant to the future cooperation. Since the franchiser and the franchisee are tying themselves for years by contract, all facts which are relevant to decision-making have to be explained in a timely, truthful, unmistakable and complete manner.⁷⁴ It is important to note that the duty of disclosure under customary law starts at the point where the franchisor and the potential franchisee meet for the first time and the franchisor presents his franchise system in detail.⁷⁵

The German Franchise Association (“DFV”), founded in 1978, aims to, among other things, increase the popularity and improve the image of franchising in Germany. To do so, the DFV adheres to the European Franchise Federation’s Code of Ethics.⁷⁶ Moreover, the DFV encourages its members to follow its Guiding Principles of Disclosure to ensure the protection of franchisees.⁷⁷ The Principles require, *inter alia*, that franchisors disclose the following information regarding the franchise concept: (i) company name and location of the franchisor; (ii) business occupation of the franchisor; (iii) date of foundation of the franchisor; (iv) excerpt from the commercial register or trade commission; (v) number of company-owned businesses; (vi) date of the beginning of franchising; (vii) number of franchise partners; (viii) the names, business addresses and business telephone numbers of the franchisor’s franchisees in Germany; (ix) number of newly won franchise partners within the last year; (x) information on whether in the last five years another franchisee in the franchisee candidate’s region has or has been terminated prior to the end of the contract; and (xi) international experience.⁷⁸

⁷³ German Franchise Association, “Framework and Limits for Franchise Contracts,” online: Downloads <http://www.dfv-franchise.de/index_e.htm> [DFV, “Frameworks and Limits”].

⁷⁴ *Ibid.* at 2.

⁷⁵ German Franchise Association, “DFV – Disclosure Guidelines,” online: Downloads <http://www.dfv-franchise.de/index_e.htm> [DFV, “Disclosure Guidelines”].

⁷⁶ German Franchise Association, “DFV – Devoted to Successful Franchising,” online: Home <http://www.dfv-franchise.de/index_e.htm> [DFV, “Devoted to Successful Franchising”].

⁷⁷ DFV, “Disclosure Guidelines,” *supra* note 75.

⁷⁸ *Ibid.*

v. Ireland

During 2003, Ireland experienced a low growth rate in franchise systems of only 2%, and counted only 201 franchise brands in the country. In 2004, only 11 percent of franchises originated in Ireland, while 39 percent hailed from the United States.⁷⁹ The last franchise sector survey, conducted in 2006, reveals that there are now more than 270 different franchises in operation employing in excess of 25,000 people in the sector. Moreover, indigenous Irish franchises now account for 14 percent of the franchise market.⁸⁰

Ireland has yet to incorporate franchise-specific legislation. Instead, the general law of contract and the Competition Authority's *Declaration in Respect of Vertical Agreement or Concerted Practices* preside over franchise agreements. The Declaration prohibits, *inter alia*, provisions restricting the franchisee from setting its own resale prices, provisions absolutely preventing a franchisee from supplying customers outside an exclusive territory granted to the franchisee, and any non-compete obligation imposed which extends beyond one year after termination of the Franchise Agreement.⁸¹

The Irish Franchise Association promotes the development of franchising in Ireland through exhibitions, seminars, newsletters, awards and networking. All members of the Association must abide by a Code of Ethics that emulates the Advertising Standards Authority for Ireland's Code of Ethics.⁸² The Code's purpose, as stated by the Association, is:

[...] to protect and further the interests of properly constructed franchising companies and by these means to establish and maintain a clear definition of ethical franchising standards to assist members of the public, press, potential investors and government bodies in differentiating

⁷⁹ Bank of Ireland, "Franchising in Ireland Survey 2004," online: Franchising <<http://www.irishfranchiseassociation.com/docs/franchise%20Survey.pdf>> at 5.

⁸⁰ Franchise Direct, "Franchising in Ireland Survey 2006: The Definitive Guide to the Irish Franchise Industry," online: Franchising in Ireland <http://www.irishfranchiseassociation.com/docs/Survey_Franchising06.pdf>.

⁸¹ AIB Bank, "A Guide to Franchising," online:

<<http://www.irishfranchiseassociation.com/docs/Franchising%202005.pdf>> at 6.

⁸² Irish Franchise Association, *Code of Ethics*, online: About <<http://www.irishfranchiseassociation.com/codeofethics.html>>.

between sound business opportunities and any suspect investment.⁸³

Among other things, the Code establishes that the franchise agreement shall clearly set forth the respective obligations and responsibilities of the parties and all other terms of the relationship and be free from ambiguity; fairness shall characterize all dealings between a franchisor and its franchisees; and a franchisor shall make every effort to resolve complaints, grievances and disputes with its franchisees with good faith and goodwill through fair and reasonable direct communication and negotiation.⁸⁴

vi. Italy

Italy first adopted franchise legislation on 21 April 2004, with the introduction of the *Law on Commercial Affiliation*. It is important to note that the European Franchise Federation translates “commercial affiliation” as the equivalent of “franchises.”⁸⁵ The Law requires that a franchise contract must be in writing or it shall be declared null and void. Furthermore, to set up a franchise network, the franchisor must have tested its commercial formula on the market.⁸⁶

Article 4 of the Law establishes a franchisor’s obligations, which focus primarily on disclosure. Under the Article, a franchisor must provide a prospective franchisee with a complete copy of the contract to be signed at least 30 days before the signing of the commercial affiliation contract. Together with this document, a franchisor must include a series of annexes, some of which include: main information concerning the franchisor, including corporate name and corporate assets; indication of the trademarks used in the system, including details relating to their registration or filing; a synthetic description of the elements characterizing the activity of the commercial affiliation; a list of the franchisees currently operating in the network as well as a list of the franchisor’s direct outlets; indication of the variation, year by year, of the number of franchisees, including their location during the last three

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ European Franchise Federation, “Italy: Law on Commercial Affiliation,” online: Self Regulation and Regulation – Self Regulation at National Level <<http://www.eff-franchise.com/italynationallevel.html>> [EFF, “Italy: Law on Commercial Affiliation”].

⁸⁶ European Franchise Federation, *Law on Commercial Affiliation*, online: Self Regulation and Regulation – Self Regulation at National Level <http://www.eff-franchise.com/Italy_%202004%2021%20April%20Commercial%20Affiliation_Franchise%20Law%20_english.pdf> at Article 3 [EFF, “Commercial Affiliation”].

years or from the date of the setting up the franchisor's business, if it is less than three years old; and a short description of any eventual judicial or arbitral proceeding raised in relation to the commercial affiliation system against the franchisor and concluded during the last three years, initiated both by franchisees and private parties or public authorities in compliance with privacy law in force. For the last three annexes, a franchisor may limit his information to his activities on the Italian market only.⁸⁷

A franchisee cannot transfer its registered office without the franchisor's prior consent. Furthermore, a franchisee undertakes to respect and have respected by its own collaborators and personnel, even after termination of the contract, the maximum confidentiality on the content of the activity which is the object of the commercial affiliation contract.⁸⁸ The Law also requires both parties to a commercial affiliation agreement to behave towards the other party with loyalty, fairness and good faith. In case of a dispute, the parties can agree that before addressing the case to the courts or to arbitration, they must try to conciliate through the Chamber of Commerce and Industry where the franchisee's registered office is located.⁸⁹

The Italian Association of Franchising, or "Assofranchising," was founded in Milan in 1971. Assofranchising represents, defends and promotes the economic, social and professional interests of the associated Franchising networks through their Franchisors, in a context of strict respect of the principles contained in the Ethical Code of the Association itself.⁹⁰ In addition, the Association abides by the European Franchise Association's Code of Ethics.

vii. Lithuania

The main legal acts regulating commercial activities in Lithuania are the *Civil Code of Lithuania* (enacted since 1 July 2001) and laws regulating different types of enterprises in Lithuania. In Section XXXVII of the Civil Code, there is Article XXXVII, which provides for and regulates the franchising agreement and sub-franchising agreement, as

⁸⁷ *Ibid.* at Article 4.

⁸⁸ *Ibid.* at Article 5.

⁸⁹ *Ibid.* at Article 6 and 7.

⁹⁰ Italian Association of Franchising, "About Franchising," online: About Assofranchising <http://www.assofranchising.it/english/about_franchising.htm>.

well as duties and rights of the franchisor and the franchisee.⁹¹ The Civil Code requires that a franchise contract be concluded in written form, or it shall be declared null and void.⁹² Furthermore, in dealing with a contract of sub-franchise, the Code establishes that the conditions of the contract shall have to be indicated in advance in the contract of franchise or agreed later with the franchisor.⁹³

The Code also establishes a series of duties for franchisors and franchisees. A franchisor's duties include the obligation to (i) transfer to the franchisee technical and commercial documentation and submit other information necessary to the franchisee in order to implement the rights granted to him under the contract of franchise, likewise train the franchisee and his employees with regard to the questions related with the implementation of the transferred rights, and (ii) issue to the franchisee licenses provided for by the contract and ensure their formalization in accordance with the established procedure. In addition, unless otherwise provided for by the franchise contract, the franchisor shall be obliged to (i) ensure the registration of the contract of franchise; (ii) render to the franchisee permanent technical and consultative assistance and assistance in training of the franchisee's employees; and (iii) execute control of the quality of goods produced by the franchisee, work performed or services rendered by him under the contract of franchise.⁹⁴

A franchisee's duties demand that he (i) use in his activity the franchisor's firm name, trade and service mark in the manner specified in the contract; (ii) ensure the quality of goods produced, work performed or services rendered under the contract of franchise; (iii) comply with the directions and instructions of the franchiser in respect of the use of the rights, external and internal designing of the business premises of the franchise, as well as to any other conditions of the activity specified in the contract; (iv) render to purchasers any additional services which they could reasonably expect in acquiring goods directly from the franchiser; (v) do not divulge to other persons any commercial secrets or any other confidential information received from the franchisor; (vi) conclude a contract of sub-franchise in the event of such duty thereof being provided for in the contract of franchise; and (vii) inform purchasers by

⁹¹ Baltic Franchise Association, "Legal Framework of Franchising Development in Lithuania," online: Franchising Legislation – Lithuania <http://www.franchising.lv/new_site/en/legislation_lithuania.shtml>.

⁹² Lithuania, *Civil Code*, number VIII-1864, online: Legal Acts – Document Search <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=245495> at c. XXXVII, Article 6.767.

⁹³ *Ibid.* at c. XXXVII, Article 6.768.

⁹⁴ *Ibid.* at c. XXXVII, Article 6.770.

the most obvious means for them that the franchisee is acting under a contract of franchise and is using the firm name, trade and service mark of the franchisor or any other symbols of individualization thereof.⁹⁵

The Code also allows parties to a contract to include certain limitations to their rights under the contract, so long as these are not in contravention of Lithuanian competition law. Thus, the franchise contract may limit a franchisor's rights by incorporating an obligation not to grant to other persons franchise locations encroaching upon the franchisee's exclusive territory, or refrain from its own analogous activity on the same territory. Furthermore, a franchisee may be contractually obliged not to compete with the franchisor in a certain territory as well as being banned from simultaneously entering into franchise contracts with competitors or potential competitors of the franchise system.⁹⁶

A unique feature of Lithuanian franchise legislation is that, under Article 6.773, a franchisor shall be subject to subsidiary liability for claims brought to the franchisee concerning the failure of the goods sold by the franchisee under the contract of franchise to conform to quality. Furthermore, the Code enforces a franchisee's right to renew the contract on the same conditions so long as the franchisee has duly performed his duties under the original contract. Conversely, a franchisor shall have the right to refuse formation of a new contract on the condition that, within three years from the date of expiry of the contract, he shall not conclude a similar contract with other persons which would extend over the same territory on which the terminated contract operated. If the franchisor wishes to grant the same rights to other franchisees prior to the expiry of the three-year time limit, he shall be obliged to propose formation of a new contract to the franchisee or compensate the damages incurred by him. Lastly, when concluding a new contract, its conditions may not be more onerous for the franchisee than before.⁹⁷

Another unique feature of Lithuania's franchise law pertains to the transfer of franchises. Article 6.777 establishes that in the event of death of the franchisor or franchisee, their rights and duties shall pass to the heir on condition that he is an entrepreneur and continues the business or starts the business within six months from the date of opening the inheritance. Otherwise, the contract shall be terminated.⁹⁸ Other provisions in the Code address the effects of change of the firm

⁹⁵ *Ibid.* at c. XXXVII, Article 6.771.

⁹⁶ *Ibid.* at c. XXXVII, Article 6.772.

⁹⁷ *Ibid.* at c. XXXVII, Article 6.774.

⁹⁸ *Ibid.* at c. XXXVII, Article 6.777.

name and trademark of the franchisor and the effects of the termination of the exclusive right.⁹⁹

The only national franchise association in Lithuania is the Baltic Franchising Association (“BFA”), founded in 2004 with the aim of protecting, enhancing, and promoting franchising in the territory of the Baltic States and Baltic States bordering regions.¹⁰⁰ The BFA adheres to the European Franchise Federation’s Code of Ethics, although it is not an official member of the EFF.¹⁰¹

viii. Romania

On 28 August 1997 the Romanian Government issued Ordinance 52/1997 pertaining to franchising. This Ordinance was both approved and modified by a Law enacted by the Romanian Parliament on 9 April 1998. Article 1 of the Ordinance provides a number of definitions, while Article 2 establishes a general disclosure obligation on the part of the franchisor.¹⁰² Under the Ordinance, a franchisor is required to disclose relevant information with respect to the franchised business prior to entering into a contract with a franchisee. A disclosure document must be furnished to a prospective franchisee or master franchisee prior to its signing of a letter of intent or option, or paying money under a letter of intent or option, for franchise rights in Romania.¹⁰³

The disclosure document must contain information regarding:

- The franchisor’s experience that can be transferred to the franchisee;
- The financial conditions of the arrangement (initial fees, royalties, advertising and service fees);
- Information allowing the prospective franchisee to calculate the financial viability of the franchisor;

⁹⁹ *Ibid.* at c. XXXVII, Articles 6.778 and 6.779.

¹⁰⁰ Baltic Franchising Association, “Baltic Franchising Association,” online: Franchising in the Baltic <http://www.franchising.lv/new_site/en/bfa.shtml>.

¹⁰¹ Baltic Franchising Association, “BFA Documents,” online: Franchising in the Baltic <http://www.franchising.lv/new_site/en/bfa_dok.shtml>.

¹⁰² Romanian Franchise Association, “Legislation and Regulations Relevant to Franchising, Romania,” online:

<<http://www.francizor.ro/LEGISLATION%20AND%20REGULATIONS%20RELEVANT%20TO%20FRANCHISING.html>>.

¹⁰³ Frank Zaid and Kendal Tyre, *supra* note 29 at A-10.

- The exclusive area provided to the franchisee; and
- The duration of the agreement and the conditions of renewal, termination, or transfer of the franchise agreement.¹⁰⁴

Romanian law also demands that certain elements be included in a Franchise Agreement. These can be summarized as follows:

- Object of the agreement;
- Parties' rights and obligations;
- Financial requirements;
- Duration of the agreement; and
- Conditions governing the amendment, extension and termination.¹⁰⁵

Although there are no governmental remedies available in Romania for a franchisor's failure to comply with disclosure requirements, a franchisee may seek remedies, including damages resulting from any infringement or failure to comply with any of the legal requirements for the pre-contractual phase.¹⁰⁶

Romania saw the inception of the Romanian Franchise Association ("ARF") in 2006. Its aim is to educate parties to a franchise by organizing various courses and to attract foreign franchisors. More importantly, the ARF adopted a Code of Ethics with hopes of promoting ethical franchising in Romania. Consequently, every member of the Association, upon becoming a member or renewing its membership, agrees to abide by the Code. Among other things, the Code establishes that all matters material to the franchise relationship should be contained in one or more written agreements, which should clearly set forth the terms of the relationship and the respective rights and obligations of the parties. Furthermore, the Code requires that fairness characterize all dealings between a franchisor and its franchisees.¹⁰⁷

¹⁰⁴ *Ibid.*

¹⁰⁵ Romanian Franchise Association, "Legislation and Regulations," *supra* note 102.

¹⁰⁶ Frank Zaid and Kendal Tyre, *supra* note 29 at A-11.

¹⁰⁷ Romanian Franchise Association, *Code of Ethics*, online: <<http://www.francizor.ro/ROMANIAN%20FRANCHISE%20ASSOCIATION.html>> at ss. 3 & 7.

ix. Russia

Chapter 54 (Commercial Concession) of the Civil Code of the Russian Federation, which came into effect in 1996, regulates the relationship between the parties but does not regulate disclosure. The Code refers to “commercial concessions” but clearly makes reference to franchising in describing aspects of the relationship.¹⁰⁸ According to Article 1208, unless the contract is in written form, it will be declared null and void. Furthermore, the Chapter enforces a registration scheme by requiring that all commercial concession contracts be registered by the agency to have performed the registration of the legal entity or individual entrepreneur acting under the contract as right-holder (franchisor). The contract of commercial concession for the use of an object protected in accordance with the patent legislation shall also be registered with the patent agency of the Russian Federation.¹⁰⁹

Under Article 1031, the franchisor is obligated to transfer to the user (franchisee) technical and commercial documentation, and provide other information necessary for the franchisee to exercise his rights under the contract; issue to the user licenses stipulated in the contract, having formalized them in accordance with the established procedure; render continuous technical and consulting assistance to the user; and supervise the quality of goods manufactured by the user in compliance with the contract of commercial concession. Under Article 1032, the franchisee is obligated to use the right-holder’s firm name and/or trademark as provided by the contract; ensure quality conformance with the manufactured goods, services rendered, work performed under the contract with the quality of similar goods, services and work, manufactured, rendered or performed directly by the right-holder; observe all the right-holder’s instructions and directions aimed at ensuring the conformance of the nature, ways and terms of the use of the complex of exclusive rights with the use thereof by the right-holder; not to disclose right-holder’s know-how or any other confidential commercial information received from him; to issue a specified number of subconcessions, should the contract stipulate this obligation; and to inform buyers in a way most obvious for them that he is using the firm name, commercial mark, trade mark, service mark or any other individualization mark by virtue of the contract of commercial concession. The Chapter also contains provisions dealing with a franchisee’s right of renewal as well as the amendment and termination

¹⁰⁸ Frank Zaid and John Sotos, *supra* note 28.

¹⁰⁹ Russian Franchise Association, *Chapter 54, Commercial Concession*, online: The Legislation <http://www.rarf.ru/eng/content/document_r_2FB7BB64-3B62-4EF3-B1E0-00A8D1DF9F04.html>.

of the contract of commercial concession.¹¹⁰ Either party has the right to recede from the contract at any time by notifying the other party six months in advance, unless the contract specifies an earlier date.¹¹¹

The Russian Franchise Association was formed in 1997 for support and protection of the interests of its members and to create a more favourable legal and business environment for the expansion of franchising in Russia.¹¹² The Association has incorporated a Code of Ethics that applies to the relationship between franchisor and franchisee as well as between master franchisee and franchisees. However, it does not apply to the relationship between the franchisor and its master franchisee.¹¹³

x. Spain

Franchising in Spain has experienced a steady incline in recent years. A study conducted by the Spanish Franchise Association (“AEF”) reveals that, by the end of 2005, there were 712 franchise brands in Spain, an increase of 63 brands from 2004. Furthermore, out of the 712 brands registered in 2005, 80 percent are Spanish, and the rest hail from other countries, including France, the United States and Italy.¹¹⁴ Franchise is governed in Spain by Article 62 of Spanish Act 7/1996 on the Regulation of Retail Trading (Article 62) and the Royal Decree 2485/1998 of 13 November which contain accompanying rules and regulations. The Ministry of Economy and Finance is the Spanish regulatory authority responsible for administering portions of, and enforcing, Spanish Franchise Law.¹¹⁵

Article 62 defines the franchise system. It states the principle that franchisors in Spain or wishing to enter the Spanish market must register in special franchise registers (federal register for foreigners,

¹¹⁰ *Ibid.*

¹¹¹ Frank Zaid and John Sotos, *supra* note 28.

¹¹² Russian Franchise Association, “About the RFA,” online: About the RFA <http://www.rarf.ru/Eng/content/document_r_A5778612-682E-4BDA-B637-5B258A14F8D3.html>.

¹¹³ Russian Franchise Association, *Code of Ethics*, online: Code of Ethics <http://www.rarf.ru/Eng/content/document_r_3B6658F4-C97F-40E7-9E29-81F97ED6FF68.html>.

¹¹⁴ Spanish Franchise Association (“AEF”), “El Sistema de La Franquicia Facturo 17.909 Millones de Euros en 2005, un 12% Mas,” online: Datos del Sector <http://www.franquiciadores.com/datos_sector.asp?mn=datos>.

¹¹⁵ Frank Zaid and Kendal Tyre, *supra* note 29 at A-11.

regional for national franchisors).¹¹⁶ The Article also establishes that a franchisor must disclose to a potential franchisee, in writing, at least 20 days prior to the signing of any franchise agreement or pre-agreement or prior to any payments related to the franchise, all necessary information to facilitate making a well-informed decision.¹¹⁷ The Royal Decree 2485/1998 complements Act 7/1996 by establishing, in greater detail, the conditions for establishing a franchise contract, and defining the National Register of Franchisors. The principle of the Register is vital because it establishes the rule that in order to function in Spain, a brand name has been recognized and validated on the Spanish market. It is impossible to allow a franchise system on the market on the basis of brands submitted to the Patents and Brands Office if the brand name has not been registered in the national or regional franchise register.¹¹⁸

Article 3 of the Royal Decree expands the disclosure requirements established in Act 7/1996. Under the Decree, upon issuing written disclosure, a franchisor must promise that all information is accurate and truthful. A franchisor or master franchisee must disclose information about the franchisor, such as the registration address under the Franchise Registry. Moreover, proof that the franchisor has all proprietary titles and licenses for the use of all of the franchise's trademarks and signs in Spain must be disclosed together with a general description of the market in which the franchise operates. The franchisor or master franchisee must also disclose all details pertaining to the development of the franchise, all technical and commercial assistance that the franchisee will receive, the characteristics of the know-how required, and an estimate of all expenses necessary to render the franchise operational. A franchisee must also be informed as to the size of the franchise system in Spain, including the number of locations operating in Spain, distinguishing between those directly operated by the franchisor and those run by franchisees, indicating the population size in which each franchise is located and the number of franchisees that have ceased to belong to the franchise system in the previous two years, explaining whether the contract was terminated upon completion of the agreement or for other causes. Lastly, a franchisor or master franchisee

¹¹⁶ European Franchise Federation, "Spain - Legislation Specific to Franchising," online: Self Regulation and Regulation - Regulation at National Level <<http://www.eff-franchise.com/spainnationallevel.html>> [EFF, "Spain Legislation"].

¹¹⁷ Spain, Act 7/1996, online: <http://www.eff-franchise.com/Spain_Ley%207_1996_spanish.pdf> at Article 62 [Spain, Act 7/1996].

¹¹⁸ EFF, "Spain Legislation," *supra* note 116.

must disclose all material facts about the franchise agreement, including, *inter alia*, its duration and renewal.¹¹⁹

Articles 5 and 6 of the Decree address the establishment of the Registry and its functions. Article 5 requires franchisors intending to sell franchises within the country to register with the Autonomous Government in the territory where they are headquartered. Moreover, franchisors intending to do business in more than one Autonomous Region must be included in the federal Register under the Directorate General for Domestic Trade of the Ministry of Economy and Finance.¹²⁰ Article 6 states that the Franchise Registry shall have the following functions, among others: register all franchisors with the Autonomous Government where the franchisor has its head office; register franchise cancellations as agreed upon by the Autonomous Government; administer information about the different franchises to those interested; and register franchisors without a head office in Spain, making all necessary changes to their application.¹²¹

The Decree was amended in 2006 by the *Royal Decree 419/2006* of 7 April in hopes of improving the registration system to allow potential franchisees to obtain reasonable information and help them make an informed decision to invest or not to invest. Furthermore, the amendments will allow the Registry to better foster transparency in franchising and act more efficiently as an informative body.¹²² The new Decree introduces a more extensive definition of “franchise,” and has included more detailed provisions for Articles 6, 7, 8, 9, 10 and 12. Thus, a franchisor coming to Spain ought to consider both the Royal Decree of 1998 and of 2006, as the latter complements the former.

¹¹⁹ Spain, *Royal Decree 2485/1998*, online: <http://www.eff-franchise.com/spain_real%20decreto%202485_1998%20de%2013%20de%20noviembre_spanish.pdf> at Article 3 [Spain, *Royal Decree 2485/1998*].

¹²⁰ Frank Zaid and Kendal Tyre, *supra* note 29 at A-12.

¹²¹ See Spain, *Royal Decree 2485/1998*, *supra* note 119 at Article 6.

¹²² Spanish Franchise Association, “La Legislación Española,” online: Legislación Nacional y Extranjera <http://www.franquiciadores.com/registro_franquiciadores.asp?mn=registro>.

xi. Sweden

Franchise legislation in Sweden was introduced in 2006, when Parliament passed the *Law on the Duty of a Franchisor to Provide Information* (Law No. 2006:484).¹²³ As indicated by its title, the Law focuses on disclosure, addressing issues pertaining to pre-contractual disclosure. The Law states that well before a franchise agreement is entered into, a franchisor shall in writing give the franchisee the information that is needed in consideration of the circumstances with respect to the implications of the agreement and other conditions. Moreover, the information shall be clear and understandable. It is important to note that the Law does not give any indication of how long before the conclusion of the contract disclosure must be made.¹²⁴

The disclosure document shall at least contain a description of the franchise activity that the franchise is to run; information on other franchisees with which the franchisor has concluded an agreement within the same franchise system and the volume of their activity; information on the compensation that the franchisee shall pay the franchisor and other economic conditions of the franchise activity; information on the intellectual property rights that will be granted to the franchisee, information on the goods or services that the franchisee is obliged to buy or rent; information on the prohibition to compete that will apply during or after the time for which the franchise agreement will last; information about the term of the agreement, conditions for modification, prolongation and termination of the franchise agreement, as well as the economic consequences of termination; and, finally, information on how a dispute as to the agreement shall be tried and what shall apply as to liability for the cost of such trial.¹²⁵ The Law avoids regulating franchise relationships by omitting to establish duties, other than disclosure-related duties, upon franchisors and franchisees.

The franchise industry in Sweden counts on the support of the Swedish Franchise Association (“SFF”). Founded in 1972, the association

¹²³CCH (Legal Information and Workflow Solutions), “Antitrust and Trade Regulation Update, October 2006,” online: <<http://www.business.cch.com/updates/antitrust/october2006.htm>>.

¹²⁴ Government Offices of Sweden, “Legislation and Regulations Relevant to Franchising,” online: Swedish Statutes in Translation – Business and Finance <<http://www.unidroit.org/english/guides/1998franchising/country/sweden.htm>>.

¹²⁵ Swedish Franchise Association, *Law on the Duty of a Franchisor to Provide Information (24 May 2006, Law No. 2006:484)*, online: New Franchise Law in Sweden <http://sff.chainformation.com/DownloadArea/Sweden%20-%20Franchise%20Law%20Lag%202006-484%20_2_.pdf> at §3.

provides support to its members and conducts research on this area of business. Moreover, the SFF adheres to the European Franchise Federation's Code of Ethics.¹²⁶

Pan-Asia

i. Australia

Australia's franchising sector has experienced tremendous growth and popularity, so much so that many often argue the number of franchise systems per capita in Australia is too high.¹²⁷ The total number of franchisors in Australia has increased from 693 in 1998 to 960 in 2006, out of which 93 percent are Australian-based franchise systems. Furthermore, it is estimated that there are 56,200 business format franchised business units operating together with some 5,660 company-owned units, producing a total of 61,860 units in business format franchise systems.¹²⁸

The *Franchising Code of Conduct* ("The Code") became law on 1 July 1998 and was fully operational on 1 October 1998. The Code is promulgated as the *Trade Practices (Industry Codes – Franchising) Regulations 1998*, made under the Commonwealth's *Trade Practices Act 1974*.¹²⁹ The Code applies to a franchise agreement entered into, renewed or extended on or after 1 October 1998.¹³⁰ Part II of Australia's Code enforces rather onerous disclosure requirements, commencing with a franchisor's obligation to create a new disclosure document before entering into a franchise agreement and within three months after the end of each financial year after entering into a franchise agreement.¹³¹ Moreover, the Code states that the purpose of a disclosure document is twofold: first, to give to a prospective franchisee, or a franchisee

¹²⁶ Swedish Franchise Association, "Franchising in Sweden," online: English <<http://www.franchiseforeningen.se/>>.

¹²⁷ Lorelle Frazer, Scott Weaven & Owen Wright (Service Industry Research Centre, Griffith University), "Franchising Australia 2006 Survey," online: FCA Franchise Survey 2006 <<http://www.franchise.org.au/content/?action=getfile&id=450>> at 9.

¹²⁸ *Ibid.* at 8-9.

¹²⁹ Report of the Franchising Policy Council, "Review of the Franchising Code of Conduct" (May 2000), online: <<http://www.industry.gov.au/assets/documents/itrinternet/ReviewofFCoC.pdf>> at 4.

¹³⁰ *Trade Practices (Industry Codes – Franchising) Regulations 1998*, SR 1998 No. 162 [Franchising Regulations], online: FCA - Franchising Code of Conduct <<http://www.franchise.org.au/content/?action=getfile&id=28>> at s. 5(1).

¹³¹ *Ibid.* at s. 6(1).

proposing to enter into, renew or extend a franchise agreement, information from the franchisor to help the franchisee to make a reasonably informed decision about the franchise; and, second, to give a franchisee current information from the franchisor that is material to the running of the franchised business.¹³²

Franchisors in Australia must adopt a prescribed layout for their disclosure document, following the form and order, and under the numbering, set out in Annexure 1 or 2 of the Code as the case requires; and under titles used in the relevant Annexure. In addition, a disclosure document must have a table of contents based on the items in the relevant Annexure, indicating the page number on which each item begins.¹³³ The franchisor must then give a copy of the disclosure document together with the Code in two instances. First, to a prospective franchisee at least 14 days before the prospective franchisee enters into a franchise agreement or an agreement to enter into a franchise agreement or makes a non-refundable payment to the franchisor or an associate of the franchisor in connection with the proposed franchise agreement. Second, he must give a copy to a franchisee at least 14 days before renewal or extension of the franchise agreement.¹³⁴ In addition, a franchisee is entitled to request a current disclosure document be issued by the franchisor once every 12 months. The franchisor must then deliver the document within 14 days.¹³⁵

As per Annexure 1, a franchisor must include the following information in a disclosure document: (i) the franchisor's name, address of registered office and principal place of business in Australia; (ii) a summary of the relevant business experience in the last 10 years of each director, secretary or partner of the franchisor who is likely to have management responsibilities for the franchisor's business operations in relation to the franchise, excluding the executive officer; (iii) details of litigation or arbitration relevant to the franchise alleging breach of a franchise agreement, contravention of trade practices law, contravention of Corporations Law, unconscionable conduct, misconduct, or an offence of dishonesty; (iv) number of existing franchises; (v) whether the franchise is for an exclusive or non-exclusive territory or limited to a particular site; (vi) details pertaining to the supply of goods or services to a franchisee; (vii) policy of the franchisor, or an associate of the franchisor, for the selection of sites or territories; (viii) summaries of the

¹³² *Ibid.* at ss. 6(A)(a) and (b).

¹³³ *Ibid.* at ss. 7(1) and (2).

¹³⁴ *Ibid.* at s. 10.

¹³⁵ *Ibid.* at s. 19.

franchisor and franchisee's obligations under the agreement; and (ix) other relevant disclosure information.¹³⁶

Two very unique features of Australia's Code are established in sections 11 and 13. Section 11 establishes that a franchisor must not enter into, renew, or extend a franchise agreement; or enter into an agreement to enter into, renew or extend an agreement; or receive a non-refundable payment under a franchise agreement or an agreement to enter into a franchise agreement unless the franchisor has received from the franchisee or prospective franchisee a written statement that the franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the Code. To fulfill this requirement, the franchisor must have received, prior to entering into a franchise agreement, the following materials from a franchisee: (i) signed statements that the prospective franchisee has been given advice about the proposed franchise agreement or franchised business by an independent legal adviser or an independent legal accountant. For each kind of statement not received, the franchisee should have a signed statement that he has been given that kind of advice about the proposed franchise agreement or franchised business, or has been told that that kind of advice should be sought but has decided not to seek it.¹³⁷

Part 3, Section 12 of the Code introduces a cooling-off period. Under the section, a franchisee may terminate an agreement, including both a franchise agreement and an agreement to enter into a franchise agreement, within 7 days after the earlier of entering into the agreement or making any payment under the agreement. This does not apply to the renewal, extension or transfer of an existing franchise agreement. Upon termination, a franchisor must, within 14 days, return all payments made by the franchisee to the franchisor under the agreement. However, the franchisor may deduct from the amount reimbursed to the franchisee the franchisor's reasonable expenses if the expenses or their method of calculation have been set out in the agreement.¹³⁸

The Code also contains a specific part that deals with resolving disputes between franchisors and franchisees by way of mandatory mediation. The aim of such a provision is to offer a prompt and less costly option to litigation in the courts.¹³⁹ The procedure the complainant must follow commences with an obligation to tell the respondent, in writing, the nature of the dispute, what outcome the complainant wants

¹³⁶ *Ibid.* at Annexure 1.

¹³⁷ *Ibid.* at s. 11.

¹³⁸ *Ibid.* at s. 13.

¹³⁹ Report of the Franchising Policy Council, *supra* note 129 at 43.

and what action the complainant thinks will settle the dispute. The parties should then try to agree about how to resolve the dispute.¹⁴⁰ If the parties fail to come to an agreement within three weeks, either party may refer the matter to a mediator. In addition, if the parties cannot agree about who should be the mediator, either party may ask the mediator adviser to appoint a mediator.¹⁴¹ Foreign franchisors must note that all mediation under The Code must be conducted in Australia.¹⁴²

If the parties fail to come to an agreement, mediation efforts will be terminated if at least 30 days have elapsed after the start of mediation. Moreover, if either party asks the mediator to terminate the mediation, the mediator must do so. However, a mediator may refuse to terminate the process if he is satisfied that a resolution of the dispute is imminent.¹⁴³ Parties will be held equally liable for the costs of mediation under the Code, unless they agree otherwise, and they must pay for their own costs of attending mediation.¹⁴⁴

The Franchise Council of Australia (“FCA”), created in 1983, represents franchisees, franchisors and service providers in the franchise industry. The FCA’s goals include establishing standards of international best practice in business format franchising for Australian franchise systems; providing information and education about franchising to existing and potential franchisees and franchisors; lobbying state and federal governments on issues relevant to the sector; developing a vital, strong and financially viable franchising sector; advancing the interests of members in Australia and in special interest markets such as the international franchise community, Franchisor Advisory Councils, Small Business Forums and property leasing organizations; continually fostering among customers, governments and the business community a broad-based understanding of the economic importance of having a strong franchising sector in Australia; and designing efficient, identified, value-added services to members and assist them to be more effective in franchising.¹⁴⁵

The FCA has incorporated member standards to promote excellence in franchising. Under these, all FCA members are expected to conduct their franchising activities professionally and in compliance with

¹⁴⁰ *Trade Practices (Industry Codes – Franchising) Regulations 1998*, *supra* note 130 at ss. 29(1) and (2).

¹⁴¹ *Ibid.* at s. 29(3).

¹⁴² *Ibid.* at s. 29(5A).

¹⁴³ *Ibid.* at s. 30A.

¹⁴⁴ *Ibid.* at s. 31.

¹⁴⁵ Franchise Council of Australia, “The FCA Overview,” online: <<http://www.franchise.org.au/content/?id=2>>.

Australian law. In addition, they are expected to comply with agreed minimum standards of conduct, which include: (i) no member shall imitate a trade mark, trade name, corporate name, slogan, or other mark of identification of another member of business in any matter or form that would have the tendency or capacity to mislead or deceive; (ii) members will become familiar with the content of these Member Standards and draw them to the attention of clients as appropriate from time to time; (iii) a member, be they franchisor, vendor franchisee, franchise broker, or representative of a franchise system should not sell a franchise if at the time the franchisor or vendor franchisee knew or ought to have known that a reasonably competent franchisee would be unlikely to be able to successfully operate the franchise; and (iv) members are to behave professionally and refrain from illegal, unethical or improper dealings or otherwise act contrary to the image of franchising or the FCA.¹⁴⁶ The Member Standards also incorporate provisions pertaining to a franchisor and franchisee as well as to a supplier member. With regards to franchisees and franchisors, the Standards state the following:

- A franchisor shall as part of its franchisee recruitment process make reasonable investigation to assess whether a prospective franchisee appears to possess the basic skills and resources to adequately perform and fulfill the needs and requirements of the franchise;
- The franchisor shall have training and support processes as applicable to the franchise system to help franchisees improve their abilities to conduct their franchises. Franchisees will endeavor to apply and adapt all learning to their operation; and
- Franchisors and franchisees should in their dealings with one another avoid the following conduct where such conduct would cause significant detriment to either party's business: (a) substantial and unreasonable overvaluation of fees and prices; and (b) unnecessary and unreasonable conduct beyond that desirable for the protection of legitimate business interests of the franchisor, franchisee or franchise system.¹⁴⁷

¹⁴⁶ Franchise Council of Australia, "Member Standards," online: <<http://www.franchise.org.au/content/?id=205>>.

¹⁴⁷ *Ibid.*

ii. China

The Ministry of Commerce promulgated the *Measures for the Regulation of Commercial Franchise* (“Franchise Measures”) on 31 December 2004. The Measures, which came into force on 1 February 2005, replace the 1997 Measures of the Administration of Commercial Franchise Operations, which only governed franchising involving domestic operators.¹⁴⁸ The Measures apply only if the franchise operations are conducted within the People’s Republic of China (“PRC”). Thus, Hong Kong and Macao are excluded from coverage.¹⁴⁹ In addition, the Measures apply only to “commercial franchises” engaged in China. Commercial franchises are defined as business activities governed by a franchise agreement, where the franchisor licenses use of its trademarks to a franchisee that pays royalties and conducts those activities under the franchisor’s uniform system.¹⁵⁰

One of the Measures’ most controversial sections requires that franchisors operate two company-owned units in China for more than one year before offering franchises for sale. This places an onerous burden on franchisors, especially from foreign markets, due to the high cost of compliance.¹⁵¹ Franchisors must also have the capacity to provide to the franchisee long term operational guidance and training services. Moreover, if the franchising requires the franchisor to supply goods, the franchisor must have a goods supply system, which is stable and capable of guaranteeing quality, and be capable of providing related services. Conversely, a franchisee must satisfy fewer conditions, such as: (i) that it has a lawfully established enterprise or other economic organization; and (ii) that it has financial resources, fixed premises and personnel.¹⁵²

The Measures establish that franchisors must disclose to the prospective franchisee true, accurate, and basic information about the franchise, and provide a copy of the franchise agreement twenty days prior to signing a franchise agreement. A franchisor must also disclose any information that the franchisee requests. This may prove quite onerous, as there is no limit on the type or quantity of information the franchisee can demand.¹⁵³ In addition, a franchisor must disclose:

¹⁴⁸ HG Org., Worldwide Legal Directories, “China: FIE Franchising Regulations,” online: <http://www.hg.org/articles/article_498.html>.

¹⁴⁹ Erik B. Wulff and Tao Xu, “Franchise Regulation in China,” *Franchise Law Journal* Vol. 25, No. 1 (Summer 2005)19 at 20.

¹⁵⁰ Frank Zaid and Kendal Tyre, *supra* note 29 at A-5.

¹⁵¹ Erick Wulff and Tao Xu, *supra* note 149 at 20 and 22.

¹⁵² HG Org., *supra* note 148.

¹⁵³ Frank Zaid and Kendal Tyre, *supra* note 29 at A-5.

- The amount of the initial investment by a franchisee;
- Details about all franchise fees, including the return of the deposit, if one was paid by the franchisee;
- Information about the trademarks, including registration, usage and litigation, or any other litigation the franchisor was involved in during the past five years must be provided;
- A list of the goods or services it can supply, as well as the restrictions on conditions of that supply;
- The franchisor's capabilities to provide training and guidance;
- What training and guidance the existing franchisees receive; and
- The franchisor's principal officers, their criminal history, and whether they have ever been personally liable for a company's bankruptcy.¹⁵⁴

Although the Measures are primarily concerned with disclosure, they also address certain relationship issues. For instance, franchisees must not transfer their business without a franchisor's approval and the term of the franchise cannot be less than three years. Furthermore, a franchisor must guarantee the quality of the products sold by its designated suppliers. Finally, the Measures impose an obligation that franchise operations be conducted in accordance with the principles of fair dealing, honesty and trustworthiness.¹⁵⁵

The China Chain Store and Franchise Association ("CCFA"), founded in 1997, is the leading advocate, representative and resource for entrepreneurs with regular chain, franchise chain, voluntary chain and licensing formats in China. CCFA is dedicated in leading a healthy and harmonious development of modern distribution models in China.¹⁵⁶ The CCFA, as a quasi-government organization, is responsible for mandating

¹⁵⁴ *Ibid.*

¹⁵⁵ Erick Wulff and Tao Xu, *supra* note 149 at 21.

¹⁵⁶ China Chain Store and Franchise Association, "About Us," online: <http://www.cdfa.org.cn/english/about_us.jsp>.

rules and codes of conduct for franchise operations and promoting franchise development.¹⁵⁷

iii. Indonesia

On 18 June 1997, the Indonesian Government issued Government Regulation No. 16/1997, which relates specifically to franchising. This Regulation requires disclosure and the registration of both the franchise agreement and the disclosed information within the Ministry of Industry and Trade. *The Decree of the Minister of Industry and Trade No. 259/MPP/Kep/7/1997*, implementing franchise regulations, was adopted in July that same year.¹⁵⁸

Under Articles 2(1) and (2) of the Decree, Franchise Agreements must be in writing and in Indonesian. In addition, franchisors and franchisees must give priority to the use of local products or raw materials and the franchisor must provide guidance and training to the franchisee. The Decree also establishes the procedure for the franchisee's registration of the franchise agreement and the issuing on the part of the Government of a trade license under Articles 11 to 16.¹⁵⁹ The franchisee must file, within thirty business days after the execution of the Franchise Agreement, the disclosure document with the Indonesian Ministry of Industry and Trade in the Indonesian province where the franchised business will be operated, along with the translated Franchise Agreement and certain other application materials, to obtain the franchised business registration certificate.¹⁶⁰

The disclosure document must include: information about the franchisor, including (i) the name and place of business, and the franchisor's financial condition; (ii) information about intellectual property rights and special characteristics of the franchised business; (iii) terms and conditions to be fulfilled by the franchisee; (iv) assistance or facility offered by the franchisor to the franchisee; (v) rights and obligations of the franchisor and the franchisee; and (vi) conditions for the expiration, termination, and extension of the Franchise Agreement

¹⁵⁷ Franchisebusiness.com (The Official Directory of the Franchise Council of Australia), "China - The New Franchise Frontier," online: <http://www.franchisebusiness.com.au/articles/China-The-New-Franchise-Frontier_z48883.htm>.

¹⁵⁸ UNIDROIT, "Legislation and Regulations Relevant to Franchising - Indonesia," online: <<http://www.unidroit.org/english/guides/1998franchising/country/indonesia.htm>>.

¹⁵⁹ *Ibid.*

¹⁶⁰ Frank Zaid and Kendal Tyre, *supra* note 29 at A-7

and other matters necessary for the performance of the Franchise Agreement.¹⁶¹

iv. Japan

Franchise is regulated in Japan by the *Medium-Small Business Promotion Act* (“The Act”) and the *Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade* (“The Guidelines”). The Act requires a general duty of disclosure, having been designed to protect “mom and pop” businesses. The Guidelines require that a franchisor make full disclosure of information regarding the franchise system prior to execution of a franchise agreement.¹⁶² Such information should include:

- The supply of goods to the franchisee;
- The details of the assistance to be offered to the franchisee;
- The nature, amount and conditions of repayment, if any, of the fee to be paid at the time of entering into a franchise agreement;
- The amount, method of calculation, as well as the timing and manner of payment of royalties;
- The description of any settlement arrangement between the franchisor and the franchisee, as well as the interest rate offered by the franchisor;
- Whether the franchisor is prepared to indemnify the franchisee for its deficit or to render assistance to the operation of a franchised unit that is not doing well; and
- Whether the franchisor in the franchise agreement reserves the right to operate a unit on its own or to grant another franchise close to the franchisee and whether the franchisor plans to do so.¹⁶³

Under the Act, disclosure must be provided to a prospective franchisee prior to signing of a franchise agreement. The Act does not explicitly state a specified time period within which the disclosure document must be delivered. Although the Act does not explicitly state that it applies to non-Japanese franchisors, the purpose of the Act is to protect Japanese

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* at A-8.

¹⁶³ *Ibid.*

medium and small-sized businesses and thus would apply to non-Japanese franchisors.¹⁶⁴

Japan's Ministry of International Trade and Industry (now the Ministry of Economy, Trade and Industry) authorized the creation of the Japan Franchise Association (JFA) in 1972. The Association was created with the purpose of nurturing the Franchising Industry to ensure its healthy development.¹⁶⁵ All members of the JFA must abide by its Code of Ethics. The Code was introduced, *inter alia*, to maintain sound, mutually beneficial business relationships between parties to a franchise, and to improve credibility and business performance. Among other things, the Code includes the following requirements: (i) the franchisor shall provide accurate information and shall avoid excessive advertising or misleading information; (ii) the franchise agreement shall clearly stipulate in writing detailed rights and obligations of the franchisor and the franchisee, and shall be executed on the basis of comprehensive understanding of and substantive agreement on the contractual contents by both parties; (iii) the franchisor shall commit to comply with relevant laws and regulations, shall not infringe the logos of others or perform an act which constitutes unfair competition, and shall endeavor to prevent the franchisee from engaging in such unlawful activities; and (iv) the franchisor shall endeavor to provide the franchisee with necessary guidance that facilitates the franchisee's performance of contractual obligations and to maintain enough communication that prevent occurrence of conflict with the franchisee. Should the franchisee breach the contract, the franchisor shall not terminate the contract before making an effort to remedy the breach by way of sufficient notice to the franchisee.¹⁶⁶

¹⁶⁴ *Ibid.*

¹⁶⁵ Japan Franchise Association, "About JFA," online: <http://jfa.jfa-fc.or.jp/about_jfa_English.html>.

¹⁶⁶ Japan Franchise Association, "JFA's Code of Ethics," online: <http://jfa.jfa-fc.or.jp/jfas_Code_of_Ethics_English.html>.

v. Republic of the Philippines

Before the turn of the century, there were approximately 500 franchises already in operation in the Republic of the Philippines. Of these, 40% were homegrown, while the remaining 60% were foreign owned.¹⁶⁷ Currently, franchising in the Philippines is thriving, with over 900 franchisers in the country.¹⁶⁸ Overall, franchising in the Philippines has helped improve productivity of small and medium enterprises through the use of standards, modern technology and better management systems.¹⁶⁹ Franchise industry sales have increased from PhP 20 billion in 1997 to PhP 105 billion in 2001.¹⁷⁰ Regardless of enjoying such a surge in the franchise market, the Philippines has yet to enact franchise-specific legislation.

Instead, the Philippine Franchise Association (“PFA”) imposes a series of rules upon its members. Formed in February 1995, the PFA’s aim is to promote and sustain the growth of franchising as a tool for national development. It is the PFA’s goal to professionalize and bring the franchising sector in the Republic of the Philippines to a world-class level, and provide a forum for Filipino franchisors, franchisees and suppliers to network, exchange ideas and explore areas of growth and expansion.¹⁷¹

The PFA regulates the franchise industry through its *Fair Franchising Standards*, introduced on 21 March 2003 and adopted on 24 February 2005.¹⁷² The Standards require that before any Franchise Agreement is signed, the Franchisor must give the franchise applicant at least thirty days to review the disclosure document (Franchise Offering

¹⁶⁷ Philippine Franchise Association, “A Guide to Franchising in the Philippines,” online: Guide to Franchising Handbook

<<http://www.philippinefranchiseassociation.com/content/view/34/31/>> [Philippine Franchise Association, “Franchising Guide”].

¹⁶⁸ Gov.Ph News, “PGMA Presents Awards to Outstanding Achievers in the Franchising Sector,” (6 March 2007) online: News <<http://www.gov.ph/news/?i=17328>>.

¹⁶⁹ Gov.Ph News, “PGMA Cites Franchising Industry for Helping Boost the Economy,” (11 July 2007) online: News <<http://www.gov.ph/news/?i=18131>>.

¹⁷⁰ Philippine Franchise Association, “Association Profile: History,” online: <<http://www.philippinefranchiseassociation.com/content/view/6/7/>> [“Philippine Franchise Association, “Association Profile”].

¹⁷¹ Philippine Franchise Association, “Franchising Guide,” *supra* note 167.

¹⁷² Philippine Franchise Association, “The *Fair Franchising Standards* of the Philippine Franchise Association,” online: About the PFA – Milestones <http://www.philippinefranchiseassociation.com/images/stories/booklet_pfa_revised_090406.pdf> [Philippine Franchise Association, “Fair Franchising Standards”].

Circular, the FOC). The FOC must shall include the following information: (i) history of the franchise system being offered, including the number of outlets opened, in operation, company owned and franchisee-operated, and franchised outlets closed over the last five years; (ii) a description of the business concept and how it differentiates itself from the competition; (iii) the key terms of the franchise agreement; (iv) full disclosure of the financial requirements of the franchise business; (v) a listing of the franchisor's key officials and a brief description of their qualifications and background; (vi) a summary of past and present litigation involving the franchise system being offered over the last five years; and (vii) a provision that requires the franchise applicant to seek adequate legal and financial counsel before signing the Franchise Agreement.¹⁷³ In addition, a franchisor must give the franchise applicant at least fourteen days to review the proposed Franchise Agreement.¹⁷⁴

The Standards impose several obligations franchisors must fulfill, in addition to providing disclosure, once the Franchise Agreement is signed. For instance, a franchisor must provide the franchisee with the operating manual before the opening of the franchised outlet as well as adequate start-up and ongoing training to the franchise and its personnel to ensure that the franchisee operates the business according to the operating standards of the franchisor.¹⁷⁵ The Standards also address the issue of dispute resolution by encouraging franchisors to exhaust all measures of resolving disputes with its franchisee. As far as practicable, the franchisor shall endeavor to resort to non-judicial remedies as a way of settling disputes with its franchisee and provide for such mechanism in its Franchise Agreement.¹⁷⁶

In addition to the Standards, franchisors in the Republic of the Philippines must abide by the *Intellectual Property Code*, which prohibits provisions that adversely affect competition.¹⁷⁷

vi. South Korea

Korea introduced franchise legislation in 2002, when the *Act on Fairness in Franchise Transactions*, together with the *Presidential Decree to Implement the Act on Fairness in Franchise Transactions* (collectively, "The Act") became effective on 1 November. The Act requires that a

¹⁷³ *Ibid.* at s. V(1).

¹⁷⁴ *Ibid.* at s. V(2).

¹⁷⁵ *Ibid.* at ss. VII(2) and (3).

¹⁷⁶ *Ibid.* at s. VIII.

¹⁷⁷ Joseph Adler, "A Summary of International Franchise Specific Laws – January 2004," online: <<http://davis.merged.ca/publication/Summary-of-International-Franchise-Specific-Laws.pdf>>.

disclosure document be provided at the earlier of five days before the date that the prospect (a) pays any type of fee; or (b) signs a franchise agreement.¹⁷⁸

The disclosure document must be a single document in book form and may be provided in any one of three ways: (i) the prospective franchisee may inspect it at the franchisor's offices; (ii) the franchisor may give it directly to the prospective franchisee; or (iii) the franchisor may make it available for the applicant to download from the Internet. Since an applicant must apply in writing to receive a disclosure document, the disclosure document should not be placed on the franchisor's website for access by the general public.¹⁷⁹

The disclosure document must contain information on: (i) details on the franchisor's financial information and ownership; (ii) the franchisor's records of criminal or administrative sanctions; (iii) franchisee costs in startup and operation of the business; (iv) conditions or limitations on the franchisee's business; (v) numbers of franchisees and franchisor-owned businesses in operation; (vi) the procedures and timetable for matters necessary to start a business; and (vii) the franchisee training and education requirements. In addition, the regulations implemented under the Presidential Decree to Implement the Act on Fairness in Franchise Transactions require that franchisors (i) provide necessary information about the franchise business to prospective franchisees, (ii) not unreasonably require franchisees to purchase equipment or commodities from the franchisor or an approved source, (iii) not unfairly restrict a franchisee's dealings in commodities, services, or business activities, (iv) provide commodities, services, or assistance, unless they have rightful cause not to do so, and (v) to obtain the franchisee's prior consent prior to imposing monetary burdens on the franchisee.¹⁸⁰

Currently, the Korea Fair Trade Commission ("KFTC") is seeking to amend fair franchise transactions law to protect franchisees by making provisions of an Information Disclosure Statement mandatory and limiting unfair denial of franchise contracts renewals.¹⁸¹

¹⁷⁸ Frank Zaid and Kendal Tyre, *supra* note 29 at A-11.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Korea.net, "Enhancing Fairness in Franchise Transactions and Distribution Market," online: News - Government Press Releases <http://www.korea.net/News/News/NewsView.asp?serial_no=20060605027#III>

**Chart A:
Franchise Associations Around the World**

Country	Association Name	Home Page	Code of Ethics
International Associations			
	European Franchise Federation (EFF)	http://www.eff-franchise.com/	http://www.eff-franchise.com/EFF%20Code%20of%20Ethics%20for%20Franchising.pdf
	Federacion Iberoamericana de Franquicias (FIAF)	http://www.fiaffranquiciadores.com/home.htm	N/A
	World Franchise Council (WFC)	http://www.worldfranchisecouncil.org/control/cpview?contentId=WFC_HOME	http://www.worldfranchisecouncil.org/control/cpview?contentId=WFC_RULES
North America			
1. Canada	Canadian Franchise Association (CFA)	http://www.cfa.ca/CFA_HTM/Home.html	http://www.cfa.ca/page.aspx?url=CodeOfEthics.html
2. Mexico	Asociacion Mexicana de Franquicias (AMF)	http://www.franquiciasdemexico.org/index-htm.htm	N/A
3. United States of America	International Franchise Association (IFA)	http://www.franchise.org/aboutifa.aspx	http://www.franchise.org/code.aspx
Latin America			
1. Argentina	Argentine Association	www.aafranchising.com.ar	http://www.aafranchising.com.ar/1_4.php

	of Franchising (AAF)	www.franquiciasarg.com	
2. Brazil	Associação Brasileira de Franchising (ABF)	http://www.portaldofranchising.com.br/	http://www.portaldofranchising.com.br/area.asp?A040_cod_area=12&A041_cod_conteudo=11
3. Chile	Camara de Franquicias de Chile	http://www.camara defranquicias.cl/web.cgi?id=1	N/A
4. Venezuela	Camara Venezolana de Franquicias (AVF)	http://www.profranquicias.com/	http://www.profranquicias.com/index.php?page=quienes&sec=codigo
Europe			
1. Belgium	Belgian Franchise Association (FBF)	http://www.fbf-bff.be/index.php?lang=fr	The FBF adheres to the EFF's Code of Ethics
3. France	Federation Francaise de la Franchise (FFF)	http://www.franchise-fff.com/	The FFF adheres to the EFF's Code of Ethics:
4. Germany	German Franchise Association (DFV)	http://www.dfv-franchise.de/index_e.htm	DFV follows a revised version of the EFF's Code of Ethics: http://www.dfv-franchise.com/wcms/Clients/138200320121715/Documents/146/Code%20of%20ethics%202004.pdf
5. Greece	The Franchise Association of Greece	http://www.franchising.gr/	The Association followed the EFF's Code of Ethics, using it as a foundation:

			http://www.franchising.gr/en/franchise_code_en.pdf
5. Ireland	Irish Franchise Association	http://www.irishfranchiseassociation.com/index.html	http://www.irishfranchiseassociation.com/codeofethics.html
6. Italy	Italian Association of Franchising (Assofranchising)	http://www.assofranchising.it/english/indexeng.htm	http://www.assofranchising.it/english/pacodeofethicalconduct.htm
7. Lithuania Latvia & Estonia	Baltic Franchise Association (BFA)	www.franchising.lv/new_site/en/legislation_lithuania.shtml	The FBA has adopted the EFF's Code of Ethics: www.franchising.lv/new_site/en/bfa_dok.shtml
8. Romania	Romanian Franchise Association (ARF)	http://www.francizor.ro/	http://www.francizor.ro/ROMANIAN%20FRANCHISE%20ASSOCIATION.html
9. Russia	Russian Franchise Association (RFA)	http://www.rarf.ru/eng/	http://www.rarf.ru/Eng/content/document_r_3B6658F4-C97F-40E7-9E29-81F97ED6FF68.html
10. Spain	Asociacion Española de Franquiciadores (AEF)	http://www.franquiciadores.com/	The AEF follows the EFF's Code of Ethics.
11. Sweden	Swedish Franchise Association (SFF)	http://www.franchiseforeningen.se	The SFF adheres to the EFF's Code of Ethics.
Pan-Asia			
1. Australia	Franchise Council of Australia (FCA)	http://www.franchise.org.au/	http://www.franchise.org.au/content/?id=21

2. China	China Chain Store and Franchise Association (CCFA)	http://www.ccfa.org.cn/english/index.jsp	http://www.ccfa.org.cn/english/reg.jsp
3. Indonesia	Franchise Association of Indonesia (AFI)	N/A	N/A
4. Japan	Japan Franchise Association (JFA)	http://jfa.jfa-fc.or.jp/about_jfa_English.html	http://jfa.jfa-fc.or.jp/jfas_Code_of_Ethics_English.html
5. Republic of the Philippines	Philippine Franchise Association (PFA)	http://www.philippinefranchiseassociation.com/content/view/1/2/	http://www.philippinefranchiseassociation.com/images/stories/booklet_pfa_revised_090406.pdf
6. South Korea	N/A	N/A	N/A
Africa			
	Franchise Association of West Africa (FAWA)	http://www.franchisewestafrica.org/home.html	N/A
1. Morocco	Moroccan Franchise Association	http://www.fmf.ma	http://www.fmf.ma/code.pdf
2. Nigeria	Nigeria International Franchise Association (NIFA)	http://nigerianfranchise.org/	N/A
3. South Africa	South Africa Franchise Association (FASA)	http://www.fasa.co.za/	http://www.fasa.co.za/aboutus/Code.pdf

**Chart B:
Summary of Franchise Legislation Around the World**

Country	Franchise Legislation	Coming into Force	Description
North America			
1. Canada	<u>Alberta:</u> <i>Franchises Act</i> <u>Ontario:</u> <i>Arthur Wishart Act (Franchise Disclosure), 2000</i> <u>PEI:</u> <i>Franchises Act</i>	<u>Alberta:</u> 1975 (revised in 1995) <u>Ontario:</u> 2000 <u>PEI:</u> 2006	Disclosure and Relationship
2. Mexico	<i>The Law to Develop and Protect Industrial Property, Article 142</i>	1991	Disclosure
3. United States of America	<i>Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures</i>	1979	Disclosure (note that by 1 July 2008, all franchisors must follow FTC disclosure guidelines)
South America			
1. Argentina	N/A		
2. Brazil	Law No. 8955/94 and Law No. 9279	1994	Disclosure & Registration

3. Chile	N/A		
4. Venezuela	<i>Guidelines for the Evaluation of Franchise Agreements</i>	2000	Restrict Competition and impose obligations on franchisee for the protection of industrial or intellectual property rights of the franchisor (The Guidelines are published in Special Official Gazette No. 5431, under Resolution No. SPPLC-038-99).
Europe			
1. Belgium	<i>Law Relative to pre-contractual information in the framework of agreements of commercial partnership</i>	2006	Disclosure & Relationship
2. Estonia	<i>Law of Obligations Act, Chapter 19</i>	2002	Relationship
3. France	<i>Loi Doubin (Law No. 89-1008), the details of which are in decree No. 91-337</i>	1989 and 1991	Disclosure
4. Germany	N/A		
5. Ireland	N/A		
6. Italy	<i>Law on Commercial Affiliation</i>	2004	Disclosure and Relationship
7. Lithuania	<i>Civil Code, Chapter XXXVII</i>	2001	Relationship

8. Romania	<i>Ordinance 52/1997</i>	1998	Disclosure
9. Russia	<i>Civil Code, Chapter 54 (Commercial Concessions)</i>	1996	Relationship & Registration
10. Spain	<i>Act 7/1996, Article 62 and the Royal Decree 2485/1998. The Decree has been amended by the Royal Decree 419/2006</i>	1996 1998 2006	Disclosure and Registration
11. Sweden	<i>Law on the Duty of a Franchisor to Provide Information (Law No. 2006:484)</i>	2006	Disclosure
Pan-Asia			
1. Australia	<i>Trade Practices (Industry Codes – Franchising) Regulations 1998</i>	1998	Disclosure and Relationship. The Code contains mandatory mediation provisions and a cooling off period for franchisees.
2. China	<i>Measures for the Administration of Commercial Franchise (Franchise Measures)</i>	2005	The Measures focus primarily on disclosure requirements, while including a few relationship provisions. The Measures replace the 1997 Measures of the Administration of Commercial Franchise Operations, which only governed franchising involving domestic operators.

3. Indonesia	Government Regulation No. 16/1997	1997	Disclosure and Registration.
4. Japan	<i>Medium-Small Business Promotion Act and the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade</i>	1983 (amended in 2002)	Disclosure
5. Republic of the Philippines	N/A		
6. South Korea	<i>Act on Fairness in Franchise Transactions and the Presidential Decree to Implement the Act on Fairness in Franchise Transactions</i>	2002	Disclosure